



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 73/100

Summative Assessment (Examination)

Date: 16 - 17 November 2023

Time limit: 24 hours (from 13:00 SAST on 16 November 2023 to 13:00 SAST on 17 November 2023)

Mr M Mpolokeng Dr E Levenstein Professor A Loubser Mr T Jordaan Ms R Webster
Mr B Duma Mr D van der Merwe Mr C Rey Ms L Kahn Mr J Evans Ms J de Hutton
Ms N Mabaso Mr P van den Steen Ms A Cohen Mr D Lake Ms J Mitchell-Marais
Ms A Timme Mr S Smyth Mr C Strime

MODERATORS

Ms R Bekker Ms B Bennett Dr D Burdette Mr Z Cassim

It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) SAST on Thursday 16 November 2023** and must be returned / submitted by **13:00 (1 pm) SAST on Friday 17 November 2023**. Please note that assessments returned late will not be accepted.
2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.
4. You must save this document using the following format: **studentID.SummativeAssessment**. An example would be something along the following lines: 202223-336.SummativeAssessment. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to david.burdette@insol.org.**
6. Due to the high incidence of load shedding currently taking place across South Africa, candidates are required to determine whether any load shedding is scheduled during the examination period and, if so, to make alternative arrangements to write elsewhere if at all possible.
7. Enquiries during the time that the assessment is written must be directed to David Burdette at **david.burdette@insol.org** or by WhatsApp on +44 7545 773890 or to Brenda Bennett at **brenda.bennett@insol.org** or by WhatsApp on +27 66 228 2010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).

8. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate's own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of this will forfeit the assessment and disciplinary charges will follow.** When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.
9. Once a candidate's assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.
10. If a candidate is unable to complete this summative assessment (examination), please note that a re-sit assessment will only be given if there are exceptional circumstances that prevent the candidate from completing or submitting it (such as illness). Feedback on the final assessment will be provided within four weeks of the paper having been written - please do not enquire about your marks before four weeks have elapsed. Please note that the model answers to this assessment will NOT be provided to candidates on the course after the assessment has been written.
11. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.
12. Since you have 24 hours within which to answer the assessment, it is suggested that you take the time to read through the assessment in its entirety before attempting to answer the questions.

ANSWER ALL THE QUESTIONS

QUESTION 1

Questions 1.1 - 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow.** Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

Commented [M2]: Total for Q1: 16 marks.

Question 1.1

Choose the **correct** statement:

Sensational Cycles Proprietary Limited rents bicycles to tourists at the Cape Town promenade. Due to a decrease in tourism and cold, wet winter months, business is slow and the loans taken out by the Sensation Cycles from its bankers are now to falling due. You have been approached for advice to determine whether the company is a candidate for business rescue. Which of the following statements correctly describes the test for financial distress?

Commented [M3]: 1 mark

- (a) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due within the immediately ensuing six months.
- (b) It appears to be reasonably unlikely that the company will be able to pay the overwhelming majority of its debts as they become due within the immediately ensuing six months.
- (c) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.
- (d) Both (a) and (c) are correct.

Question 1.2

Choose the **correct** statement:

Unlike in some other jurisdictions which have debtor-in-possession regimes, in South Africa an independent person is appointed as the business rescue practitioner who supervises the company during its business rescue proceedings. Which of the following statements is correct?

Commented [M4]: 1 mark

- (a) During a company's business rescue proceedings, the business rescue practitioner consults with the board of directors and external advisors in preparing and implementing a business rescue plan to return the company to profitability.
- (b) During a company's business rescue proceedings, the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management.
- (c) During a company's business rescue proceedings, the business rescue practitioner is statutorily obliged to supervise the company together with the pre-existing management and the board of directors.
- (d) During a company's business rescue proceedings, the business rescue practitioner is not empowered to remove any of the company's pre-existing management.

Question 1.3

Commented [M5]: 1 mark

Choose the **correct** statement:

An application to court for the commencement of business rescue in respect of a company that is already in liquidation:

- (a) is not allowed by the Companies Act 2008.
- (b) may only be made before a final liquidation order has been issued.
- (c) may only be made before a provisional liquidation order has been issued.
- (d) may be made before the company is dissolved.

Question 1.4

Commented [M6]: 1 mark

Choose the **correct** statement:

The general moratorium is one of the critical components of business rescue because:

- (a) it affords the company in business rescue sufficient time to avoid paying its creditors for the benefit of its shareholders who own the company in business rescue as provided for in section 133 of the Companies Act of 2008.
- (b) it gives the company in business rescue sufficient breathing space to restructure its affairs by staying or prohibiting all legal proceedings against the company in business rescue in terms of section 130 of the Companies Act of 2008.
- (c) it gives the company in business rescue a period of respite to allow the company in business rescue to restructure its affairs by staying or prohibiting legal proceedings

against the company in question in terms of section 133(1) of the Companies Act of 1973.

- (d) it gives the company in financial distress a period of respite to restructure its affairs by suspending or precluding legal proceedings against the company while in business rescue as stipulated in section 133(1) of the Companies Act of 2008.
- (e) All of the above.

Question 1.5

Commented [M7]: 1 mark

Choose the **correct** statement:

Company X files for business rescue. Its only source of revenue is the proceeds of sales to its clients on credit. These debtors are ceded to X Bank as security for its loan to the company.

The company simply cannot survive if it does not have access to the proceeds of the payments by these clients from time to time. Under these circumstances, the business rescue practitioner may:

- (a) continue to utilise the proceeds of the debtors to operate the company as these debtors are not "property" as defined in the Companies Act.
- (b) approach the Court for an order to compel X Bank to consent to the company utilising the proceeds of these debtors in order to save the Company.
- (c) ensure that the total debtors' book does not decrease, by replacing every debtor receipt with at least an equal new sale to ensure that X Bank is not prejudiced by the continued use of the proceeds of the debtors to fund the ongoing operations of the company in business rescue.
- (d) approach X Bank for their consent to utilise the proceeds of these debtors for the ongoing operations of the company.

Question 1.6

Commented [M8]: 1 mark

Choose the **correct** statement:

As at the commencement of the business rescue process, X Bank holds security by way of a registered general notarial bond over of all of the assets of a company in business rescue.

X Bank may:

- (a) take possession of the assets subject to its security and sell it in order to reduce the company's indebtedness to X Bank.

- (b) insist that the business rescue practitioner obtain their consent before selling any of the assets subject to the general notarial bond, as provided for in section 134 of the Companies Act.
- (c) not prevent the business rescue practitioner from disposing of the assets subject to the general notarial bond in the normal course of business by the company during business rescue proceedings
- (d) seek an order of Court to perfect their security, without the consent of the business rescue practitioner, in order to protect their rights.

Question 1.7

Commented [M9]: 1 mark

Choose the **correct** statement:

A company is leasing the property from which it is conducting its business. The company is placed in business rescue and continues to conduct its business from the property. The landlord has a claim for arrear rentals that have been incurred whilst the Company is in business rescue. This claim ought to be classified as:

- (a) a business rescue cost.
- (b) post-commencement finance.
- (c) a preferent claim.
- (d) a secured claim.
- (e) an unsecured claim.
- (f) a damages claim.

Question 1.8

Commented [M10]: 0 marks

Choose the **correct** statement:

You are appointed as business rescue practitioner in a large manufacturing business and within the first few weeks of your appointment an employee approaches you and advises you that they have been unsuccessful in obtaining authorisation for certain medical costs from the group medical scheme of the company since the filing for business rescue has taken place. The employee informs you that the medical scheme has indicated that due to non-payment of the deductions relating to the medical scheme by the company, that all of the benefits to employees under the scheme have been suspended. What would your advice to the employee be in relation to this issue?

- (a) Unfortunately, the employee would need to make payment of the outstanding amounts due to the medical scheme in order for the employee to enjoy further benefits from the group medical scheme.
- (b) As the benefits under the group medical scheme have been suspended, an alternative medical scheme would need to be sought by each employee, for the period of business rescue.
- (c) The group medical scheme, which exists for the benefit of both past or present employees of the company, would have an unsecured claim in the business rescue proceedings for the amounts that were not paid to the group medical scheme immediately prior to the commencement of business rescue proceedings and as such the medical scheme would not be entitled to suspend the benefits to such employees as the group medical scheme, as it is a creditor of the company in business rescue.
- (d) The group medical scheme would have a secured claim in the business rescue proceedings.
- (e) None of the above.

Question 1.9

Commented [M11]: 0 marks

Choose the **correct** statement:

The business rescue practitioner has an obligation to consult with creditors, other affected persons and the management of the company:

- (a) during the process of preparing a business rescue plan for consideration and adoption.
- (b) after preparing a business rescue plan for consideration and adoption.
- (c) before preparing a business rescue plan for consideration and adoption.
- (d) Both (a) and (c) are correct.

Question 1.10

Commented [M12]: 0 marks

Choose the **correct** statement:

You are a member of SARIPA and were certified by CIPC for the first-time last year to practice as a junior business rescue practitioner after you completed the INSOL SARIPA Programme in South African Business Rescue. Since then, you have accepted appointment as the business rescue practitioner of one small company and are busy implementing the business rescue plan that was adopted by creditors in that matter. You have been

approached by your brother-in-law to accept appointment as the business rescue practitioner of a large company that he is a director and shareholder of. Which of the below are appropriate?

- (i) You should not accept appointment as you have a conflict of interest.
- (ii) You can accept appointment.
- (iii) You should not accept the appointment as the company's business rescue practitioner as you are not independent.
- (iv) You should not accept appointment as you lack the necessary skills and do not meet the legislated criteria.

Your answer is:

- (a) (i).
- (b) (ii).
- (c) (iii).
- (d) Both (i) and (iii).
- (e) Both (iii) and (iv).

Question 1.11

Commented [M13]: 1 mark

Choose the **incorrect** statement:

- (a) The board of directors of the company can commence business rescue voluntarily by passing a board resolution, provided that it has reasonable grounds to believe that the company is financially distressed and there is a reasonable prospect of rescuing the company.
- (b) A creditor of a company can approach the High Court to place the company in business rescue, as long as the board of the company has not already adopted a resolution to begin business rescue proceedings.
- (c) As an affected person, an employee, an employee representative, a registered trade union, a shareholder or a director of a company can approach the High Court to place the company in business rescue, as long as the board of the company has not already adopted a resolution to begin business rescue proceedings.
- (d) Notwithstanding any financial distress, an affected person of a company may approach the High Court to place the company into business rescue provided that it is just and equitable to do so for financial reasons and there remains a reasonable prospect of rescuing the company.

Question 1.12

Commented [M14]: 1 mark

Choose the **correct** statement:

A foreign-domiciled unsecured creditor is owed money by a company in business rescue for services that it supplied to the company outside of South Africa before the company entered business rescue. The creditor is refusing to recognise the approved business rescue plan, refused to vote on the plan when called to do so, and is arguing that their claim is not compromised by the moratorium because their debt was established and is owed outside of South Africa. How should the business rescue practitioner treat this creditor and their claim?

- (a) Because the creditor is a foreign business, it is not bound by the approved business rescue plan and its claim is not affected by the moratorium. The business rescue practitioner must settle the creditor's claim in full in the normal course.
- (b) The creditor's claim is preferent to the claims of other South African unsecured creditors and will rank ahead of them in terms of the payment waterfall.
- (c) The creditor's claim is treated the same as all other unsecured creditors, whether the creditor is foreign or South African, and whether it chose to vote on the business rescue plan or not.
- (d) Business rescue is a South African legal process aimed at trying to save financially distressed South African businesses and, as such, the claims of any foreign creditors are automatically fully expunged upon the commencement of business rescue proceedings.
- (e) If there are foreign-domiciled creditors, the business rescue practitioner must produce two business rescue plans - one to deal with local South African creditors and the other to deal with foreign creditors.

Question 1.13

Commented [M15]: 1 mark

Choose the **correct** statement:

The company in business rescue's body of creditors includes the following claims (which have been accepted):

- Bank A: owed R60m and a fully secured creditor;
- 20 separate trade creditors: collectively owed R5m and unsecured;
- SARS: owed R5m in relation to income tax owing pre-business rescue and unsecured;
- Related / Inter-company X: owed R15m and unsecured;
- Party Y: owed R15m and which claim is subordinated in favour of all other creditors (an independent liquidation calculation valued this claim at R0);

All the above creditors attend the section 151 meeting to vote on the business rescue plan. However, only Bank A and Party Y vote in favour of the plan, with all other creditors (trade creditors, SARS and company X) voting against the plan. Has the plan been validly voted in / approved?

- (a) No: SARS's claim should be considered to be preferent and hence any vote is incorrect because of this obvious classification error.
- (b) Yes: The plan is voted in by virtue of 75% of all creditors voting in favour thereof (of which at least 50% of the independent creditors' voting interests were voted).
- (c) No: The plan is not voted in due to less than 75% of all creditors voting in favour thereof (despite the fact that more than 50% of the independent creditors' voting interests were voted).
- (d) No: 24 individual creditors in number (not value) voted and there were only 2 parties who voted in favour, therefore those voting against the plan far outweigh those voting in favour.

Question 1.14

Commented [M16]: 1 mark

Choose the **correct** statement:

Whilst section 150(c)(iv) does not require a cash flow statement or cash flow projections, best practice suggests that a cash flow should be presented. If presented, such a cash flow statement could explain to the reader:

- (a) The expected revenue (income) and expenses of the company, including depreciation and amortisation.
- (b) How expected cash receipts and payments are forecast to be received and paid respectively, that is, the liquidity of the company.
- (c) The financial position of the company as at the date of publication of the rescue plan.
- (d) All of the above.
- (e) Both (a) and (b) are correct.

Question 1.15

Commented [M17]: 1 mark

Choose the **correct** statement:

Per the Companies Act 2008, for what duration should the projections (statement of income and expenses and balance sheet) be prepared for in the business rescue plan?

- (a) Three years from the commencement of business rescue proceedings.
- (b) One year from around the date of publication of the business rescue plan.
- (c) Three years from around the date of publication of the business rescue plan.
- (d) Any amount of time - this is at the discretion of the business rescue practitioner.
- (e) Only for the duration of the proceedings until substantial implementation has been achieved.

Question 1.16

Commented [M18]: 1 mark

Choose the **correct** statement:

The business rescue plan can, once adopted, be “crammed down” on:

- (a) The secured and unsecured creditors.
- (b) Only those creditors and shareholders who voted in favour of its adoption.
- (c) The creditors and shareholders who were present at the meeting in which the plan was adopted.
- (d) The creditors and shareholders who were not present at the meeting in which the plan was adopted.
- (e) The company, its shareholders, and the secured and unsecured creditors, regardless of whether or not they were present, or voted in favour of adopting the plan.

Question 1.17

Commented [M19]: 1 mark

Choose the **correct** statement:

A motor-vehicle of a company in business rescue is valued at R100,000.00. The same vehicle is the subject of the security of X Bank, who are still owed R50,000.00 for financing the vehicle.

The business rescue practitioner wishes to sell the vehicle in the normal course of business as it is no longer required for the operation of the business. What is the correct course of action for the business rescue practitioner?

- (a) Always obtain the consent of X bank before selling any asset.

(b) If the business rescue practitioner is sure that the proceeds of the sale will be sufficient to settle the claim of X Bank, then he can sell the vehicle without their consent and simply pay what is owed to X Bank when he receives the sale proceeds for the vehicle.

(c) Simply sell the vehicle at the best possible price to his brother.

(d) All of the above.

Question 1.18

Commented [M20]: 1 mark

Choose the **correct** statement:

During the business rescue proceedings of any company the business rescue practitioner has to consider a vast number of statutory obligations that the company must comply with. With regard to employees' statutory rights as contained in the Labour Relations Act, which of the following statements is correct:

(a) The Companies Act 2008 supersedes the Labour Relations Act and therefore the only rights of employees during business rescue proceedings are contained in the Companies Act 2008.

(b) The business rescue practitioner must have regard to section 5 of the Companies Act 2008 in the general interpretation of the Companies Act 2008. The provisions of the Companies Act 2008 and the Labour Relations Act apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions of the two Acts, without contravening the second. However, to the extent that it is impossible to apply or comply with one of the inconsistent provisions of the two Acts, without contravening the second, then the Labour Relations Act will prevail in the case of any inconsistencies.

(c) The business rescue practitioner must discount the provisions of the Companies Act 2008 and only rely on the provisions of the Labour Relations Act.

(d) The business rescue practitioner may elect to consider either the Labour Relations Act or the Companies Act 2008, however both cannot be interpreted concurrently.

(e) none of the above.

Question 1.19

Commented [M21]: 1 mark

Choose the **correct** statement:

If determined necessary, commencing a section 189 retrenchment process (in accordance with the provisions set forth in the Labour Relations Act), would be of significant benefit to most companies that have commenced business rescue, as this process is one of the

primary ways in which a financially distressed company can reduce overhead costs and operating expenditure. In this regard, when should a business rescue practitioner commence a section 189 process?

- (a) As soon as possible after the commencement of business rescue and the business rescue practitioner's appointment as practitioner. It is often a vital process in business rescue and should thus be prioritised as a critical procedure to be undertaken as soon after the commencement of business rescue as possible.
- (b) The business rescue practitioner is required to call for a vote on their intention to commence a section 189 process and this vote should be called at the first meeting of creditors convened in terms of section 147 of the Companies Act 2008. If the vote is passed by the requisite majority of creditors of the company, the business rescue practitioner should commence a section 189 process immediately after the vote has been passed in the section 147 first meeting of creditors.
- (c) The business rescue practitioner is required to include provisions regarding their intention to commence a section 189 process in the business rescue plan that they publish. The business rescue practitioner can only commence a section 189 retrenchment process if the business rescue plan contemplates the company commencing the process and only if it is duly approved and adopted by the requisite majority of creditors. Thus, the business rescue practitioner should only commence a section 189 process after publication of the plan and subsequent to the business rescue plan being voted on, approved and adopted by creditors.
- (d) The business rescue practitioner is legally permitted to commence a section 189 process at any time from the date of commencement of business rescue, but it must be initiated, and the requisite section 189 consulting period must be concluded, prior to the substantial implementation of the business rescue plan.

Question 1.20

Commented [M22]: 0 marks

Choose the **incorrect** statement:

If a business rescue practitioner is not appointed within five (5) business days after commencement of a company's voluntary business rescue:

- (a) The business rescue proceedings immediately end.
- (b) The business rescue resolution lapses and is a nullity.
- (c) The business rescue proceedings are not affected unless a court sets aside the resolution.
- (d) Approval of the business rescue plan will automatically cure this procedural error.

Where appropriate, refer to the case study below when answering the questions that follow.

CASE STUDY

Khusela Entertainment Proprietary Limited

Khusela Entertainment Proprietary Limited (**Khusela**) is a private company duly incorporated and registered as such under the applicable company laws of the Republic of South Africa (**South Africa**). Khusela has been operating as one of the largest record companies in South Africa for almost 30 years and has enjoyed great success and profitability through innovative branding, creative marketing and its management's ability to identify the latest trends in South African music and sign the greatest local talent. Leveraging off the influence and popularity of distinctively South African genres such as "Kwaito", "Gqom" and "Amapiano", Khusela has amassed a valuable catalogue comprising a multitude of well-known hits. Whilst Khusela's head office is located in Johannesburg, it operates recording studios in all major South African cities, including Polokwane, Durban, Pretoria, Mbombela, Bloemfontein, Gqeberha and Cape Town. For this purpose, Khusela has entered into various commercial lease agreements with Universal Properties Limited (**Universal Properties**), in terms of which studio space and recording equipment are leased from Universal Properties on a long-term basis. In order to facilitate artists' travel between the various recording studios, Khusela acquired a fleet of brand-new luxury mini-buses from Fast Cars Proprietary Limited under instalment sale agreements.

Over the past five years, Khusela has expanded rapidly in order to provide a complete service offering to its artists, music producers and promoters and consequently established a publishing division, an events management division as well as a record label called Soweto Music. As a result of this rapid expansion, Khusela incurred large amounts of high-interest debt by way of various financing arrangements with local banks and private equity firms. In addition to this, Khusela hired large amounts of employees in anticipation of increased demand resulting from its new service offerings. From having approximately 500 employees in 2015, Khusela's workforce (and its associated wage bill) quadrupled and comprised approximately 2,000 employees by the end of 2021. Khusela's employees are represented by the South African Entertainers Union (**SAEU**), a South African registered trade union that aims to safeguard the interests of musicians and entertainers, by advocating for fair labour practices and favourable working conditions for artists.

During the 2022 financial year, Khusela began to experience a substantial decrease in its operating revenue as a result of the following factors: (i) increased competition from new players in the South African music industry, (ii) the introduction of online platforms that allow artists to publish and distribute their music without the need to sign with a record label, and (iii) the increased tendency for up and coming artists to promote their music via social media platforms, as opposed to traditional means of marketing and promotion.

Due to the poor financial performance of Khusela during the 2022 financial year, Khusela's management went into panic mode and their immediate reaction was to pump additional capital into the business, in order to expand its service offering even further. As part of this capital-raising strategy, Khusela (i) entered into a revolving credit facility agreement with Crypto Bank Limited, in terms of which Khusela acquired a revolving credit facility in an aggregate amount equal to R100,000,000 against security in the form of a cession of book debts and a cession of all of Khusela's rights under its material distribution agreements, (ii) refinanced its existing debt (on more onerous and somewhat prejudicial terms) with Old Money Investment Corporation, a South African private equity firm, against the provision of additional security in the form of a mortgage bond registered over Khusela's head office and a deed of hypothecation over Khusela's registered trademarks, and (iii) initiated a rights offer in terms of which Khusela's existing shareholders acquired additional shares in the ordinary share capital of Khusela, and pursuant to which approximately R30,000,000 in additional equity was raised.

After acquiring additional capital to fund its business, Khusela's outlook in the short term seemed positive. However, it quickly became apparent to Khusela's Chief Financial Officer, Mr Kabelo Mogale and its Chief Executive Officer, Mr Themba Sithole, that whilst there was a noticeable increase in profits (as reflected in the latest management accounts), the likelihood of Khusela becoming overindebted in the long-term remained. For this reason, Kabelo and Themba set out to obtain legal advice from Best Law Inc on the options available to companies experiencing financial distress, as a precautionary measure. In particular, they wished to understand the entry routes into the South African business rescue process and the prescribed statutory requirements for each route.

In the midst of their financial uncertainty, and just as Khusela began to recover from its financial decline, a group of Khusela's biggest artists (and largest contributors of revenue), announced that they wished to leave Khusela's record label, reclaim their master rights, and go independent. This decision resulted in significant cash shortfalls given that Khusela experienced a substantial and unexpected reduction in its revenue streams. This "liquidity crisis" culminated in Khusela being unable to service its debt obligations and pay its overheads at the beginning of the year 2023. It then became clear to Khusela's board of directors that it appeared to be reasonably unlikely that the company would be able to pay its debts as they became due and payable in the ordinary course, and at this point, Khusela's draft financial statements indicated that the company's liabilities exceeded its assets.

Whilst Khusela's board of directors were contemplating the options available to them, the company was not able to pay its critical suppliers, landlords and its employees' salaries. As a result, certain creditors began taking legal action to recover the amounts owing to them, and in this regard:

- (i) Opera Sound Engineering Services Proprietary Limited (**Opera Sound Engineering**) issued a money judgment application in the High Court of South Africa KwaZulu-Natal Division, Durban against Khusela, in terms of which it claimed certain amounts owing by Khusela pursuant to repairs carried out by it at one of Khusela's studios;
- (ii) World of Music Proprietary Limited had begun preparing a liquidation application, on the basis that Khusela ought to be deemed to be unable to pay its debts;
- (iii) Fast Cars Proprietary Limited threatened to cancel the instalment sale agreements entered into with Khusela, as a result of Khusela's failure to pay instalments under the relevant instalment sale agreements; and
- (iv) In addition to the abovementioned legal steps, Universal Properties, one of Khusela's landlords and a creditor that was owed in excess of R20,000,000 in arrear rentals, sought legal advice and subsequently brought an application in the High Court of South Africa Gauteng Local Division, Johannesburg as an "affected person" to place the company under supervision and commence business rescue proceedings. In its business rescue application, Universal Properties nominated Ms Sarah van Zyl (a senior practitioner) for appointment as the business rescue practitioner of Khusela. After considering the business rescue application brought by Universal Properties, the High Court granted an order placing Khusela into business rescue and made a further order appointing Ms Sarah van Zyl as interim business rescue practitioner.

In light of the fact that salaries remained unpaid for a substantial period of time, and given that Khusela was subsequently placed into business rescue, the employees of Khusela were uncertain about what they could expect and wished to obtain the following legal advice:

- (i) whether their position in business rescue was more advantageous than if Khusela was put into liquidation;
- (ii) whether they (as employees) have any statutory rights to participate in the business rescue proceedings;
- (iii) a breakdown of the status of their claims in respect of unpaid salaries (both pre-business rescue and post-business rescue), in terms of the provisions of the Companies Act 2008 (**Companies Act 2008**);
- (iv) whether the business rescue practitioner may unilaterally amend and vary their employment terms and conditions; and
- (v) whether they may be validly retrenched in terms of the applicable labour laws of South Africa read with the Companies Act 2008.

The employees of Khusela obtained a detailed legal opinion from insolvency and restructuring law experts on the aforementioned issues.

Following her appointment, Ms Sarah van Zyl immediately assumed full management control of Khusela and scheduled a first meeting of creditors. At the first meeting of creditors, Ms Sarah van Zyl's appointment was ratified in the manner prescribed by the Companies Act 2008 and thereafter she began to investigate the affairs of Khusela, with the view of developing a business rescue plan.

During the course of Sarah's investigations, she was approached by Themba Sithole (the CEO of Khusela) who informed her that he had previously bound himself as surety for the debts of Khusela under the initial funding transaction entered into with Old Money Investment Corporation in the year 2019. Themba was curious to know whether his obligations under the deed of suretyship had been extinguished by virtue of the fact that Khusela was placed into business rescue proceedings. Sarah addressed a letter to Themba setting out the status of Themba's obligations under the deed of suretyship in light of relevant case law.

In relation to the various contracts concluded by Khusela with its various suppliers and landlords (prior to the commencement of business rescue proceedings), Sarah was uncertain as to whether she was able to suspend and / or cancel prejudicial contracts. She recalls from legal advice that she obtained previously that the Companies Act 2008 gives business rescue practitioners the ability to suspend or cancel prejudicial contracts, but she is uncertain as to how this may be done practically. Consequently, Sarah reached out to Best Law Inc and requested them to prepare a brief legal opinion dealing with the suspension or cancellation of prejudicial contracts in the business rescue context.

Following her investigations into the business and affairs of Khusela, Sarah was of the view that Khusela was capable of being rescued, particularly in view of Khusela's established brand and goodwill that it has in the South African music industry. She immediately sets out to secure post-commencement financing to keep the company afloat, whilst Khusela's business rescue plan was being prepared and drafted for consideration by creditors.

The business rescue plan of Khusela was eventually published a year after Sarah was appointed as the business rescue practitioner. The business rescue plan was subsequently put to a vote at a meeting of creditors held in terms of section 151 of the Companies Act. The business rescue plan of Khusela was supported by the requisite majority of creditors and was finally adopted.

Opera Sound Engineering, a minority creditor, voted against the adoption of the business rescue plan, as its board of directors was of the view that there were no reasonable prospects of Khusela being rescued. The board of Opera Sound Engineering was further of the view that the approved business rescue plan was not binding on Opera Sound Engineering at all, given that it had voted against the adoption of the business rescue plan.

Sarah proceeded to implement Khusela's approved business rescue plan. The business rescue proceedings of Khusela continued over a prolonged period of time and eventually it became clear that the business rescue plan was not capable of being implemented in its initial form. Sarah consequently amended Khusela's business rescue plan unilaterally and circulated a notice to creditors informing them of such amendments. The provisions of the amended business rescue plan were prejudicial to the interests of Crypto Bank Limited and Old Money Investment Corporation. Accordingly, both Crypto Bank Limited and Old Money Investment Corporation initiated joint legal proceedings to have Sarah removed as the business rescue practitioner. The application to remove Sarah as the business rescue practitioner was unsuccessful.

Ultimately, despite the best efforts of Ms Sarah van Zyl and Khusela's board of directors, it was determined that Khusela was not capable of being rescued. Accordingly, Ms Sarah van Zyl proceeded to take the necessary steps to place Khusela into liquidation.

Question 2

It is recorded in the case study that "certain creditors began taking legal action to recover the amounts owing to them". Briefly discuss the enforceability of legal proceedings in light of Khusela's ongoing business rescue proceedings. (2)

A key objective of business rescue proceedings is to give a financially distressed company time or breathing space so to facilitate a restructuring of its affairs so that it can continue to operate as a going concern. This is achieved via a general moratorium on claims and this is covered by sec 133 of the Companies Act 2008 - "General Moratorium on legal proceedings against company. Sec 133 states that during business rescue proceedings no legal proceeding, including enforcement action, against the company, or in relation to any property owned by the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with the written consent of the practitioner or with the leave of the court and in accordance with any terms the court considers suitable....."

Chapter 6 does not define Legal proceedings or enforcement action but in the case *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers (Pty) Ltd* the court held that the intention of Sec 133 is clear - "that is to cast the net as wide as possible to include any conceivable type of action against the company" In the case *Merchant West Working Capital Solutions v Advance Technology Engineering* the court held that legal proceedings in the context of sec 133 could only be its ordinary meaning - court, tribunal or other formal proceedings which are intended to judge a matter.

Therefore, in the light of Khusela's ongoing BR proceedings, the certain creditors would be bound by the Moratorium and would NOT be entitled to enforce their claims or legal proceedings against Khusela

Question 3

Commented [M23]: 1 mark out of 2.

Conclusion: the legal proceedings would be unenforceable only to the extent that the consent of the BRP is not obtained, or leave of the court is not granted.

Commented [M24]: 3 out of 3 marks.

What is the requisite majority of creditors' support that is required for a business rescue plan to be adopted? (3)

This is covered in Sec 152 of the Companies Act 2008- Consideration of the Business Rescue Plan. Sec 152 (2) says that "In a vote called in terms of subsection (1) (e) the BR plan will be approved on a preliminary basis if-

- (a) it was supported by more than 75% of the creditors voting interests that were voted; and
- (b) The votes in support of the proposed plan included at least 50% of the independent voting interests

If the plan does not alter the rights of the holders of any class of the company's securities or shares, then the approval of the plan on a preliminary basis will constitute the adoption of the plan.

The definition of independent creditor in terms of sec 128 (1) (g) means a person who -

- (i) Is a creditor of the company, including an employee of the company who is a creditor in terms of sec 144 (2)
- (ii) Is not related to the company, a director, or the practitioner -these are typically 3rd party trade creditors,

Question 4

It is mentioned that Opera Sound Engineering voted against the business rescue plan. Is the approved business rescue plan binding on Opera Sound Engineering? Substantiate your answer with authority. (3)

This is covered in Sec 152 of the Companies Act 2008. Sec 152 (4) states "A BR plan that has been adopted is binding on the company, on each of the creditors and every holder of the company's securities, whether or not such a person-

- (a) Was present in the meeting
- (b) Voted in favour of adoption of the plan; or
- (c) In the case of creditors, had proven their claims against the company

The principle of imposing the BR plan on dissenting creditors (in this case Opera Sound Engineering) as well as absent creditors is known as the "cram down principle."

However, court in DH Brothers Industries (Pty) Ltd v Gribnitz NO and others confirmed that the voting interests on the dissenting creditors and absent parties upon which the business plan is "crammed down" must not be more than 25%. This makes sense as the plan needs at least 75% of creditors (and 50% independent) to vote in favour of a plan for it to be adopted.

In African Banking Corporation of Botswana Ltd vs Kariba Furniture Manufacturers (Pty) Ltd court commented that the cram down principle is "indispensable to the successful implantation of a BR plan" because it is binding on dissenting voters (creditors and shareholders). Court also explained that the principle discourages creditors from holding out for better treatment and it allows the BRP to proceed with the execution of his plan.

Commented [M25]: Copy and paste??

Commented [M26]: 3 out of 3 marks.

Question 5

Considering the fact that Khusela was already unable to pay its debts at the time of the application to place it in business rescue, explain whether the requirement of financial distress as defined in the Companies Act 2008 was met, or whether it was too late for a business rescue order to be issued. (5)

Sec 128 (1) (f) of the Companies Act 2008 defines financially distressed in reference to a particular company at a particular time, means that –

- (i) It appears reasonably unlikely that the company will be able to pay all its debts as they become due and payable within the immediately ensuing 6 months; or
- (j) It appears reasonably likely that the company will become insolvent within the immediately ensuing 6 months.

Khusela was placed into Business Rescue via court order and thus is a compulsory commencement and is covered by Sec 131 of the Companies Act “Court order to begin Business Rescue proceedings. In Terms of Sec 131 (4) a court may make an order placing a company in Business Rescue on application by an affected person (Universal properties) if it is satisfied that requirements have been met – namely

- (i) The company is financially distressed
- (ii) The company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract wrt employment related matters; OR
- (iii) It is otherwise just and equitable to do so for financial reasons.

There is no doubt the Khusela was under financial stress and beyond the definition in Sec 128 - the facts in the case study suggest that at the time of the court order, Khusela was both technically and commercially insolvent and it could be an argument that the court should instead have placed the company into liquidation. However, in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) Pty Ltd* the SCA explained that a commercially insolvent company still met the requirement for financial stress and could thus be placed in business rescue, but also met the requirement for liquidation because it was unable to pay its debts. Therefore depending on the circumstances concerning each case, there will be situations/ cases where liquidation has an advantage over Business Rescue and vice-versa.

Based on the facts in the case study, the court should be satisfied that (ii) above is met. In terms of (iii) the Companies Act of 2008 does not define or explain what is meant by “just and equitable” but importantly in *Tyre Corporation Cape Town (Pty) Ltd v GT Logistics (Pty) Ltd (Estehuizen Intervening)*, the court held that should it be incorrect in its opinion that an insolvent company can be considered to be financially distressed, the alternative (iii) just an equitable to do so could be relied on.

Commented [M27]: 4 marks out of 5. Good answer - just needed to mention *Gormley v West City Precinct Properties (Pty) Ltd* and *FirstRand Bank v Lodhi 5 Properties Investment*.

Therefore I would argue that based on the above that the requirements of sec 131 (4) were met and supported by the case law, and therefore it was NOT too late for a BR order to be issued.

Question 6

What effect - if any - would the application for Khusela to be placed in business rescue have on the application by World of Music for the company to be placed in liquidation had this application (for liquidation) already been filed at the High Court at the time? (5)

Sec 129 (2) of the Companies Act 2008 says that a resolution to commence BR may not be adopted if Liquidation proceedings have already been "initiated by or against the company" -. The Companies Act does not define the meaning of initiated. As a consequence there have been conflicting opinions on what it means as evidenced by court judgements.

In *FirstRand Bank Ltd vs Imperial Crown Trading 143 (Pty) Ltd* the court said that the word "initiate" to mean the same as "commence" and therefore that the resolution may not be adopted. In *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Others* the court considered the circumstances where an application for liquidation had been issued and filed but had not been served on the company. Court was of the view that "initiated" must have the meaning of "by or against the company". In summary, the issuing and filing of an application to court WITHOUT the company being aware of its existence cannot be construed as proceedings "initiated" against the company. Therefore the court held that the liquidation application must be served on the company. Conversely in *Mouton v Park 2000 Development 11 (Pty Ltd and Others* the court disagreed with the Tjeka ruling and held that the meaning of the word "initiate" is to cause a process or action to begin. The court held therefore that the meaning of initiated is intended to refer to a preceding act or conduct by which liquidation proceedings are set in motion. The court concluded by saying that it will be the adoption of the resolution by the creditor to launch liquidation proceedings. In *Pan African Shop Fitters (Pty) Ltd v Edcon and Others* the Court considered both the Tjeka and Mouton matters and concluded that Tjeka matter was correct and that liquidation proceedings are considered to be initiated once the application is issued and served on the company.

There has however been no SCA ruling on the correct meaning of initiated as in the context of sec 129 (2). However in the judgement of *Lutchman NO v African Global Holdings (Pty) Ltd* (admittedly in a different context and dealing with a different section of the Companies Act which dealt with the serving of BR application on the Company, the Commission and Affected persons), the view is that when the meaning of initiated in the context of Sec 129 (2) is considered by the SCA the court will agree with the view taken in the Lutchman case that a litigant remains unaffected in law until steps are formally taken against him (application is issued and served of the company

Commented [M28]: 0 marks out of 5. Section 131(6) and the associated case law had to be discussed. The section 129 process is not applicable here.

Therefore according to the facts provided in the question, the application for liquidation had not been issued or served on the company and therefore I submit that the application to the court to place Khusela in Business Rescue by Universal would have been unaffected.

Question 7

In addition to the cession of books debts in favour of Crypto Bank, it also insisted and thereafter registered a general notarial bond over the movable assets of Khusela.

Ms Sarah van Zyl identified a large amount of redundant equipment and even a few unroadworthy old vehicles that could be sold urgently in order to fund the ongoing operation cost of Khusela during business rescue.

Crypto Bank came to hear of Sarah van Zyl's intention to sell these assets and addressed a letter to her via their attorneys threatening to launch an urgent Court application to interdict her from selling the assets subject to their security, without their consent.

Question 7.1

Sarah Van Zyl approaches her lawyers at Best Law Inc for advice on what the legal position of Crypto Bank with regard to the general notarial bond, and her prospects of success in opposing the threatened urgent application. As an experienced lawyer at Best Law Inc advise Sarah van Zyl on whether or not she is entitled to sell the assets in question without Crypto Bank's consent. (2)

A General Notarial Bond confers neither a title interest nor a security interest to the holder or (beneficiary). In order for the rights of the holder of a GNB to be improved to that of a secured creditor, the creditor must have taken possession of the assets subject to the GNB with the consent of the company or via a court order PRIOR TO THE COMMENCEMENT OF BUSINESS RESCUE. In terms of Sec 133 (1) of the Companies Act 2008, during BR proceedings, no legal proceeding incl enforcement action against the company or in relation to any property belonging to the Company, or lawfully in its possession may not be commenced or preceded with in any forum except (a) with the written consent of the practitioner. Therefore Crypto Bank (as holder of the GNB) would be prohibited from seeking the perfection of the GNB post the adoption of BR WITHOUT the consent of the BRP as such application is considered an enforcement action.

I would therefore argue that Sarah is in a position to sell the assets without Cryptos consent and therefore submit that the prospects of success in opposing Cryptos urgent application to interdict are good.

Question 7.2

If Sarah van Zyl is in a position to sell the assets, what would the requirements for such disposal be? (4)

Commented [M29]: 2 out of 2 marks.

Commented [M30]: 4 marks.

This is covered in Sec 134 of the Companies Act 2008. (1) Subject to Subsections (2) and (3), during a company's BR proceedings -

- (a) The company may dispose or agree to dispose of property only
 - (i) In the ordinary course of business
 - (ii) In a bona fide transaction at arms length for fair value approved by the practitioner
 - (iii) A transaction contemplated within and undertaken as part of the implementation of a BR plan that has been approved in terms of Sec 152.

In the context of the question and referencing sec 134 above, it is clear that the disposal of these assets are NOT in the ordinary course of business as the equipment is redundant and the vehicles are unroadworthy.

It is also clear that Sarah is not disposing of these assets as part of a Business rescue plan in (iii) above

This disposal therefore is not in the ordinary course of business and therefore the disposal must be of a bona fide transaction at arm's length and at fair value (ii) above. Sarah must consent to the transaction in writing prior to the disposal.

Question 8

Commented [M31]: 5 marks.

Sarah Van Zyl approaches Easy Access PCF, a well-known provider of funding to distressed businesses, for a loan to fund the expected operational losses during business rescue. After a short due diligence, Easy Access PCF indicate that they are willing to provide post commencement funding of R1,000,000 subject to Sarah agreeing to sell to them the proceeds of Khusela's existing material distribution agreements and the proceeds being paid to them directly until such time as the post commencement finance is repaid in full.

Advise Sarah van Zyl under which circumstances she can agree to Easy Access's requirements considering that the rights to these agreements have already been ceded to Crypto Bank. (5)

Sec 134 (3) of the Companies Act - If during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must-

- (a) Obtain the prior consent of that person unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness....
- (b) Promptly -
 - (i) Pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person

- (ii) Provide security for the amount of those proceeds to the reasonable satisfaction of that other person.

For the purposes of this question the material distribution agreements are a current asset and have similar characteristics of a debtor. If Khusela sell the distribution rights this should be considered a disposal and therefore Sec 134 (3) would apply. Khusela would have to obtain the prior consent of Crypto Bank UNLESS Khusela discharges the debt of Crypto Bank or provides security. The case law is clear on this *Kritzinger and Another vs Standard Bank and Van Den Heever v Van Tonder* confirmed that for the purposes of sec 134, a cession of book debts ceded as security may not be disposed of without the cessionary's consent. The Court found that book debts constitute property and that disposal in the context of sec 134 means "to deal with or settle" "to give" "sell" or transfer to another.

In terms of Sec 135 (Post Commencement Finance). Courts have held that security attached to an asset prior to BR is not affected by PCF provisions and can only apply to security given after the commencement of BR, *National Union of Metal Workers of SA v VR Laser Services (Pty) Ltd* court said that BRPs do NOT have the authority to elevate PCF finance claims above those of creditors WITHOUT AN EXPRESS WAIVER of the security by the creditor in question.

Therefore in conclusion, the only circumstances she can agree to Easy Access requirements is with the express consent of Crypto Bank. I would submit that it is unlikely that consent would be given unlikely given the amounts owing and secondly it is unlikely that the disposal of the asset would be sufficient to discharge the amount owing to Crypto. As an alternative, Crypto may consider allowing Easy Access a reversionary cession of the proceeds of material distribution agreements

Question 9

The business rescue practitioner of Khusela Entertainment (Pty) Ltd was faced with a work force of over 2,000 employees at the commencement of the business rescue proceedings. Within the first week of business rescue proceedings having commenced, the business rescue practitioner identified the need to embark on a retrenchment process with more than fifty percent (50%) of the employees of Khusela Entertainment (Pty) Ltd, for operational considerations. The business rescue practitioner, being a prudent and careful business rescue practitioner, immediately embarked on a section 189 consultative process with the affected employees of Khusela Entertainment (Pty) Ltd, in terms of the relevant provisions of the Labour Relations Act. The first consultation took place two weeks after the commencement of business rescue proceedings, with the various consultative meetings taking more than 60 days to complete and, eventually, more than 1,500 employees of Khusela Entertainment (Pty) Ltd were retrenched for operational considerations during the business rescue proceedings.

Commented [M32]: 3 marks. Needed to state that the status and rights of employees in a business rescue process are entrenched in chapter 6 of the Companies Act, subject to the provisions of applicable labour laws. Needed to discuss the fact that the BRP may commence with a section 189 process, in the absence of a collective agreement that allows for a reduction in salaries and benefits. Needed to describe what the section 189 process entails. Needed to state that the BRP could issue voluntary severance offers to all affected employees, subject to any collective agreements.

Despite the negative impact this had on the employees who were retrenched, the business rescue practitioner ensured that the cash flow for the business was restored to a manageable level for the business, the employees were paid their severance packages, and the business rescue practitioner felt that the correct decisions were made pursuant to the consultative process with the employees.

This retrenchment process and the resultant cash flow relief paved the way for the business rescue practitioner to draft the proposed business rescue plan, which was published after the section 189 process was finalised.

In light of the rights of employees and the current case law on this subject, discuss whether the business rescue practitioner followed the correct process and procedure in this case.

(7)

Sec 136 of the Companies Act 2008- Effect of Business Rescue on Employees and Contracts. Sec 136 (1) Despite any provision of an agreement to the contrary -

- (a) During a company's BR proceedings, employees of the company immediately before the beginings of those proceedings continue to be so employed on the same terms and conditions, except to the extent that –
 - (i) Changes occur in the ordinary course of attrition: or
 - (ii) The employees and the company in accordance with applicable labour laws, agree different terms and conditions
- (b) Any retrenchment of any such employees contemplated in the BR plan is subject to sec 189 and 189 A of the Labour Relations Act and other applicable employment related legislation

In *South African Airways SOC Ltd and Others vs National Union of Metal Workers of South Africa obo members and Others* the court found that in terms of section 136 (1) (b) that any retrenchments contemplated during BR proceedings need to be part of BR plan and, possibly more importantly, there is no in the section or the Companies Act that empowers the BR to retrench employees in the absence of an adopted business rescue plan. Court further found that sec 136 is aligned with the constitution of South Africa especially sec 32. What this effectively means is that no Section 189 consultations can commence until the BR plan has been duly approved and adopted.

It is therefore quite clear that the BRP of Khusela has not followed the correct process in terms of Sec 136 because she has commenced Sec 189 consultations before the publication and adoption of the Business Rescue Plan. In order for the BRP to have complied with Sec 136 (1)(b) she would have had to wait until the Business Rescue Plan has been adopted.

Question 10

Commented [M33]: 3 marks

Discuss the general rights held, if any, by the employees of Khusela during the business rescue process of Khusela. **(3)**

Rights of employees during BR proceedings are very important and the Companies Act of 2008 has reinforced these rights during Business Rescue proceedings. This in stark contrast to employees rights in the case of the company being in liquidation. Sec 136 (1) (a) and 136 (1) (b) covers the status of employees with the contracts of employment and confirms that despite any agreement to contrary, the terms and condition of employment during Business Rescue are the same as they were pre the commencement of Business Rescue.

A BRP may not unilaterally amend or vary the terms of an employment contract. Should the BRP do so, employees could approach the Labour Courts for relief.

Sec 135(1) of the Companies Act 2008 covers remuneration, reimbursement of expenses etc. These amounts are regarded as PCF and are paid out in accordance of Sec 135 (3) (a) - employees have a preference ahead of all other PCF claims against the Company

Sec 144 of the Companies Act 2008 provides that during a BR process every trade union representing employees and non-union employee is entitled to notices for court proceedings, events concerning BR proceedings, participating in court proceedings

Employees are entitled to form an employee representative committee in terms of Sec 148 To the extent that they are considered creditors they have the right to vote on the adoption of a BR plan.

Question 11

Discuss whether Mr Themba Sithole (the Chief Executive Officer), (ii) Mr Kabelo Mogale (the Chief Financial Officer) and (iii) the board of directors would have had any role during the business rescue process of Khusela. **(3)**

I assume that the CEO and the CFO are also directors of the Company.

Sec 137 of the Companies Act 2008 Effect on Shareholders and Directors. Sec 137 (2) During a company's Business Rescue Proceedings each director of the company must

- (a) Must continue to exercise the functions of director subject to the authority of the practitioner
- (b) Has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so. *
- (c) Remains bound by the requirements of section 75 concerning personal financial interests of the director or related person
- (d) To the extent that the director acts in accordance with (b) and (c) is relieved from the duties of a director

(3) During a company's BR proceedings, each director must to the requests of the BR at all times and provide the practitioner with any information about the company's affairs

Commented [M34]: 2 marks out of 3. Needed to apply the relevant legal principles to the facts.

(4) if during the BR proceedings the board or one or more directors purports to take any action on behalf of the company that requires the practitioner approval, that action is void unless approved by the practitioner

* Sec 142 Directors of Company to Cooperate and assist the Practitioner

Directors have mandatory and statutory duties to assist the BRP

-must attend to reasonable requests of BRP

- provide information on company's affairs

- as soon as possible after the commencement of BR proceedings deliver the BRP all the books and records that may be in their possession

- within 5 days of the commencement of BR provide the BRP with statement of affairs concerning material transactions involving the company or assets in the last 12 months,

- any legal proceedings, assets, liabilities, income and disbursements

It goes without saying that the prospects of a Business Rescue being successful of significantly improved if the directors and existing management take an active role in supporting the BRP and developing the Business plan

Question 12

Commented [M35]: 4 marks out of 5.

Ms Sarah Van Zyl would have had an obligation to consult with creditors, other affected persons, and the management of Khusela before preparing a business rescue plan for consideration. With reference to case law, what should the term "consultation" entail in this context? (5)

The BRP has an obligation to consult with creditors, other affected persons and the management of the company before preparing a business rescue plan for consideration an adoption Sec 150 (1) Companies Act. The definition of consult has been tested in the courts - *Hlumisa Investment Holdings (RF Limited and Another) v van der Merwe NO and Others* found that there is a clear distinction between "informing" and "consulting"

In respect of Consulting Rogers J taking various cases he considered- in the matter of *Scalabrini Center Cape Town and Others v Min of Home Affairs and Others* and concluded " at a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of advice." He goes on to say that consultation should not be done without care or interest or as a formality or done after the decision has already made his decision rendering the consultation meaningless.

In the Hlumisa case, the court found that informing creditors and shareholders of goings on at the company via the Stock Exchange News Service did not amount to consultation and granted an interim interdict to prevent the proposed Business Rescue plan from proceeding. Therefore the judgment confirms that consultation provides Affected persons a powerful tool to have their views heard.

Question 13

Discuss whether Ms Sarah Van Zyl could propose an agreement with Khusela providing for further remuneration in addition to what is permitted by the government-regulated tariff, and who would have to approve such proposal? **(2)**

Sec 143 of Companies Act 2008 – Remuneration of Practitioner

If the Business Rescue Practitioner's fees exceed the government regulated tariff, a remuneration (contingency) agreement needs to be agreed into between the company and Business Rescue Practitioner Sec 143 (2).

The agreement however has to be voted on and approved by creditors and shareholders ahead of the publication of the Business plan.

Sec 143 (3)

The agreement will only be binding if it is approved by

- (a) The holders of the majority of the creditors voting interests
- (b) The holders of a majority of the voting rights attached to any shares of the company....IMPORTANT – only those shareholders who are entitled to a residual value of the company on winding up.

Question 14

Is Khusela Entertainment a small, medium or large company, and what is the tariff rate per hour that Ms Sarah van Zyl can charge for her services as business rescue practitioner? Base your answer on the information provided and assume no significant changes between the dates set out in the case study and the date of commencement of business rescue. **(3)**

For the purposes of calculating the BRP's tariff, the Company is considered a large company. Not all the measurements to test are available in the case study (Turnover and no of shareholders not available) however by virtue of the fact that there are 2000 employees and the 3rd party debt is at least R100 000 000 the company scores well in excess of 500 points which classifies it as a large company.

The statutory Tariff Rate per hour for a large company is R2000 per hour (inclusive of VAT) subject to maximum of R25 000 per day

Question 15

The case study includes the following statements:

Commented [M36]: 2 marks.

Commented [M37]: 3 marks.

Commented [M38]: 3 marks.

“At the first meeting of creditors, Ms Sarah van Zyl’s appointment was ratified in the manner prescribed by the Companies Act and thereafter she began to investigate the affairs of Khusela.”

and

“Following her investigations into the business and affairs of Khusela, Sarah was of the view that Khusela was capable of being rescued.”

Read together these statements indicate that Sarah may not have complied with the Companies Act 2008 in performing her duties as the business rescue practitioner of Khusela Entertainment. Identify the section of the Act that may not have been complied with and explain why and what should have been done differently. **(3)**

There appears to be an issue with the sequencing (chronological order) of Sarah’s actions which may have caused her not to comply with the Companies Act

Sec 141 Investigation into the Affairs of the Company (1) says as soon as practicable after being appointed, a practitioner must investigate the Company’s affairs, business, properties etc.

Sec 147 First meeting of Creditors (1) within 10 business days after being appointed the practitioner must convene and preside over a first meeting of creditors at which

- (a) the practitioner
 - (i) must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company
 - (ii) May receive proof of claims from creditors
- (b) Creditors may determine whether or not a committee of creditors should be appointed.

Therefore based on the Companies Act Sec 141 (1) and Sec 147 (1) Sarah should have first started to investigate the affairs of the company. This would have allowed her to at least formulate an initial view of whether or not the Company could be rescued which information/decision she could share at the first meeting of Creditors the timing of which comes after she has supposed to investigate the affairs of the company.

Question 16

The business rescue plan was published almost a year after the commencement of business rescue proceedings. The delay would have triggered a number of duties or obligations on the business rescue practitioner. List these and identify the relevant section of the Act that creates the obligation or duty. **(4)**

Commented [M39]: 3 marks. Needed to mention section 150(5).

The answer to this question is largely covered by Sec 132 of the Companies Act 2008 Duration of Business Rescue Proceedings.

Sec 132 (3) If the Company's business rescue proceedings have not ended within 3 months of the start of those proceedings or such longer time as the court, on application by the practitioner may allow, the practitioner must-

- (a) Prepare a report on the progress of the Business Rescue proceedings and update it at the end of each subsequent month until the end of those proceedings; and
- (b) Deliver the report and each update in the prescribed manner to each affected person, and to the-
 - (i) The court if the proceedings have been subject to a Court order
 - (ii) Commission in any other case.

In terms of extending the publication date of the Business Rescue Plan, it is common practice to seek the extension at the first meeting of Creditors to 5-6 months after the commencement of the Business Rescue process. If further extensions are required a creditors meeting will be called to vote/ approve the extension.

Question 17

Mr Sandiso Siwisa, who is the cousin of the one of the directors of Khusela, owns 25% of the issued share capital of Khusela. Mr Siwisa's half-sister, Mrs Lungi Phillips, owns 26% of the issued share capital of Khusela. There is only one class of shares and each share affords a shareholder one vote.

Mr Siwisa is also a creditor of Khusela by virtue of a R500,000 loan made to Khusela when it urgently needed cash during 2022.

Is Mr Siwisa an independent creditor of Khusela? Provide full reasons for your answer. (5)

Sec 128 Application and Definitions Applicable to this Chapter of the Companies Act 2008 deals with the definition of Independent Creditor. Sec 128 (1) (g) 'Independent Creditor' means a person who -

- (i) Is a creditor of the company, including an employee of a company who is a creditor in terms of sec 144(2); and
- (ii) Is not related to the company, a director or the practitioner, subject to subsection(2)

Mr Siwisa cannot be classified as an Independent creditor for 2 reasons

1. He is a shareholder of Khusela and therefore is considered to be related to the Company Sec 128 (1) (g) (ii)
2. He is related to a Director of Khusela- cousin - Sec 128 (1) (g) (ii)

Commented [M40]: 0 marks. Needed to discuss the definition of "related" and the provisions of section 2(1)(a) to (c) of the Companies Act. Needed to demonstrate why Mr Siwisa is not an independent creditor with reference to the fact that he able to control Khusela together with a related person (Mrs Phillips) by virtue of their combined 51% shareholding.

Question 18

Comment on the validity of the business rescue practitioner, Sarah van Zyl, having the "ability" to unilaterally amend the business rescue plan. Also discuss the requirements of implementing an amendment to the business rescue plan with reference to the Companies Act 2008 and appropriate case law. (8)

Concerning the validity of the business rescue practitioner having the ability to amend the business rescue plan there is case law which deals with this issue of where a Business Rescue plan is amended after it has been adopted. In *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Others*, the court held that there is no space for a business rescue practitioner to reserve the right to unilaterally amend the business rescue plan and thereby avoid procedures set out in the Companies Act. The court held that the Business Rescue Practitioner did not have the power to impose on creditors a plan on which they had not voted and discussed as contemplated in Sec 152.

According to the case study, Creditors of Khusela had adopted the plan via a vote and Sarah amended the plan whilst the plan being implemented. The Companies Act of 2008 appears not to deal with Amendments to Business Plans post adoption. Amendments to Business Rescue plans is covered by Sec 152 of the Companies Act 2008 Consideration of business rescue plan – but clearly only deals with amendments immediately prior to adoption after discussions have taken place Sec 252(1)(d)(i) and then the plan is voted on Sec 152(1)(d)

It however follows that if a Practitioner wants to Amend the plan post adoption, he will need the approval of Creditors and given that the Companies Act does not appear to deal with Amendments post adoption he should follow the Sec 153(1) where a practitioner must seek a vote of approval from the holders of the voting interests to prepare a revised plan.

Alternatively, it is advised that he hold a meeting of creditors (as per sec151) 10 days after publishing the amended plan and ask creditors to vote on it as per Sec 52.

It is also recommended that at the Business Rescue Practitioner includes some methodology to make SMALL amendments to the plan which could be displayed at the meeting.

Commented [M41]: 6 marks. Needed to state that the shareholders are required to approve the amendments to the plan to the extent that their rights are affected. Need to state that the amended plan would be adopted if the majority votes in favour of the plan in terms of section 152.

Question 19

Commented [M42]: 1 mark out of 3.

Placing yourself in the shoes of Opera Sound Engineering, explain three key items you would expect to see in the financial projections of the business rescue plan to assist you to vote in the business rescue of Khusela. **(3)**

Opera Sound Engineering was a dissenting creditor in the vote for the adoption of the BR plan. Clearly they were not satisfied that the financial projections were achievable and the case suggests they were of the view that there was reasonable prospect of Khusela being rescued.

Clearly the landscape of the Music industry globally and in South Africa has changed with the advent of social media platforms like You Tube and Music streaming services such as Apple Music and Spotify which have significantly disrupted Khusela's market resulting in significantly reduced market share. The current infrastructure and overhead structure appears high given the loss of market share and revenue opportunity. Accordingly the debt levels and cost of debt appear unsustainable.

Therefore, wearing Opera Sound Engineering shoes, I would like to see the following in the financial projections:

1. The sustainable cost savings achieved as a result of downsizing the overhead to align with the reduced revenue opportunity.
2. Khusela has too much debt and on onerous terms which is clearly not sustainable. Clearly the debt providers need to convert a portion of their debt to equity. As Opera Sound Engineering, we would like to see the conversion of debt embedded in the financial forecasts
3. Notwithstanding the requirement of conversion of debt to equity, would like to see financial projections based on different macro-economic scenarios (interest rates, inflation)

Question 20

Ms Sarah van Zyl has asked you whether she should include a cash flow statement in her business rescue plan, as technically it is not required. What would your response be? **(2)**

Although not technically required, I would strongly recommend that a cash flow is included. Most companies enter into Business Rescue because of liquidity constraints and a cash flow statement is probably the best measure of liquidity (inflows and outflows) in the company. By preparing a cash flow statement, Sarah will be able to get a good feel of how the liquidity constraints have been addressed.

On the other hand, and Income statement, whilst it measures profitability - it is not necessarily a measure of liquidity in the business and will not necessarily identify liquidity issues.

Commented [M43]: 2 marks.

Question 21**Commented [M44]:** 3 marks. Great answer.

From the perspective of the employees, what are three advantages of Khusela being placed in business rescue rather than being liquidated? **(3)**

1. When a company is liquidated it ceases to exist and therefore by definition a contract of employment ultimately terminates (initially suspended). This means loss of employment and therefore loss of salary. To the extent that salaries remain unpaid, in a liquidation scenario, unpaid salaries rank aside other company's concurrent creditors
2. However, in terms of Chapter 6 of The Companies Act 2008, employees are afforded statutory protection in 3 ways:
 - (i) During business Rescue, their employment contracts prior to Business Rescue are recognized and the Powers of the Business Rescue Practitioner (or court) to encroach on these rights is limited- sec 136 (1). Whilst the practitioner ordinarily has the right to cancel or suspend contractual obligation due by the company for the duration of Business Rescue, employment contracts are expressly excluded. (Compare to liquidation- contracts are suspended – no pay)
 - (ii) The Companies Act expressly incorporates Labour Law protection and requires that any redundancies or retrenchments which are part of the Business Rescue Plan are subject to sec 189 and 189 A of the Labour Relations Act (liquidation- contracts suspended- no retrenchment or redundancy provisions)
 - (iii) Where employees continue to work for the company while in business rescue, they are considered to be Post Commencement Finance Creditors in so far as their remuneration is concerned -sec 135 (1) (liquidation – employee lodges claim against the liquidated company- as a concurrent creditor)

***** END OF ASSESSMENT *****

TOTAL MARKS: [100]