



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 65/100

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]: 1 mark

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]: 0 marks

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

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

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?

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Commented [M17]: 1 mark

- (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)

Answer:

The legal action taking by the creditors is not enforceable while the company is in business rescue due to the general moratorium which came into effect when the company went into business rescue.

Section 133(1) of the Companies Act 2008 (or the Act") makes provision for a stay/prohibition on legal proceedings and enforcement action against a company that is in business rescue. The Act states that "no legal proceedings, including enforcement action may be commenced or proceeded with against a company in business rescue or in relation to any property belonging to the company, or lawfully in its possession unless with written consent of the business rescue practitioner or the leave of court".

Question 3

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

Answer:

The requisite majority of creditors' support for adoption of a business rescue plan is 75% of creditors' voting interests and at least 50% of the votes in support of the plan must be independent creditors' voting interest.

Commented [M23]: 1 mark out of 2. The conclusion is incomplete. The legal proceedings are unenforceable only to the extent that the consent of the BRP is not obtained or the leave of the court is not granted.

Commented [M24]: 3 out of 3 marks.

This is dealt with in section 152(2)(a) and (b) of the Companies Act 2008 and with the majority stated above, the business rescue plan is considered to be approved on a preliminary basis.

A further consideration is whether the plan alters the rights of holders of any class of securities in the company. According to section 152(3)(b), if the plan does not alter the rights of the company's securities holders, the preliminary approval is then considered to be final adoption of the plan subject to any conditions contained in the plan. If the business rescue plan contemplates an alteration of the company's securities holders' rights, the Act (section 152(3)(c)) requires that the business rescue practitioner convene a meeting with the holders of the affect class of securities for them to vote on the plan. The plan in this instance is considered to be adopted if the majority (50%) of the affect class of securities holders vote in its support.

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)

Answer:

Yes, the approved business rescue plan is binding on Opera Sound Engineering even though they voted against it.

Section 152(4) of the Companies Act 2008 is clear in that once the business rescue plan is adopted it becomes binding on the company and all affected persons whether they attended the meeting to vote, voted in favour of the plan's adoption or proved a claim against the company that is in business rescue.

In the case of *Stalcor (Pty) Limited v Kritzinger NO and others [2017] JOL 37785 (FB)* the creditor applied to court to have an adopted business rescue plan varied in order to amend their claim to a higher amount that includes interest and other costs. The court held that once approved the business rescue plan is binding on all the creditors in accordance with Section 152(4).

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

Commented [M25]: 3 out of 3 marks.

Commented [M26]: 2 marks out of 5. Needed to refer to *Gormley v West City Precinct Properties (Pty) Ltd*, *FirstRand Bank v Lodhi 5 Properties Investment* and *Oakdene Square Properties v Farm Bothasfontein (Kyalami)*. Needed to discuss the 'just and equitable' ground for a BR order. See *Tyre Corporation Cape Town v GT Logistics*.

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)

Answer:

The definition of “financially distressed”: as contemplated in section 128(f) of the Companies Act is forward looking and means:

“(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months, or
(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months”.

At the time of filing for business rescue Khusela was already factually insolvent, i.e., liabilities exceeded its assets and commercially insolvent as they were unable to pay debts as they become due. The company was already not able to pay all its debts when they fell due and defaulting on contractual arrangements. Commencement of business rescue only delayed the inevitable and the company should have gone into liquidation instead of business rescue.

Unfortunately, in practice there are cases where companies are placed in business rescue instead of filing for liquidation in the first instance. This as the determination of reasonable prospects of rescue is subjective. There is however a court judgement that deals with this.

The matter of *Welman v Marcelle Props 193 CC and Another (33958/2011) [2012] ZAGPJHC 32 (24 February 2012)* - in this case a creditor of the company filed for it to be liquidated. The liquidation application was opposed by the company and they launched an application for business rescue which was granted. The company had already defaulted on monthly installments and could not demonstrate that they would have sufficient liquidity in the ensuing six months to meet all debts as they become due. After considering the financial state of the company and the evidence provided, the court held that business rescue proceedings are not for “terminally ill” companies, as such the liquidation was viewed to be in the best interests of all parties. The business rescue application was dismissed.

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)

Answer:

The business rescue application would have had the effect of terminating the liquidation proceedings. Section 131(6) of the Act provides for liquidation proceedings to be suspended if a business rescue application is made. The court would have then decided

Commented [M27]: 1 mark out of 5. Section 131(6) results in the suspension of the 'liquidation proceedings' and not its termination. Needed to discuss relevant case law ie. Lutchman NO v African Global Holdings, ABSA Bank Limited v Summer Lodge, Standard Bank of South Africa Limited v Gas2Liquids (Pty) Ltd and Standard Bank of South Africa v A-Team Trading CC. Also needed to mention that the issue for consideration is whether a pending liquidation application should be regarded as part of liquidation proceedings prior to the application being heard in court.

whether the business rescue order is granted which then terminates the liquidation or if not granted, the liquidation would have resumed.

Section 131(7) empowers the court to convert a liquidation into business rescue at any time during the liquidation proceedings. It would have to be proven that business rescue would attract far better economic value as opposed to liquidation (like in *Koen & Another v Wedgewood Village Golf & Country Estate (Pty) Ltd & Others*).

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

Commented [M28]: 2 marks.

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)

Answer:

Sarah van Zyl can sell the assets without the Crypto Bank's consent. The general notarial bond, if not perfected prior to commencement of business rescue, does not give Crypto Bank any ownership or security interest. Title of the assets still lies with the company, therefore the business rescue practitioner can sell the assets without Crypto Bank's consent.

In order to have a title interest over the assets the bank would have had to be in possession of the assets in agreement with the company ahead of commencement of business rescue pursuant to perfection of the security. Perfection of the general notarial bond during business rescue proceedings is enforcement action and is therefore prohibited in terms of Section 133(1) of the Companies Act 2008. Crypto Bank will have a concurrent claim in respect of the debt secured by the general notarial bond and will be subject to the concurrent dividend that is approved in the business rescue plan.

Question 7.2

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

Answer:

Sarah van Zyl would have to comply with requirements of section 134(a) of the Companies Act 2008 in respect of disposals which are:

(i) "in the ordinary course of business";

Ordinary course of business is not defined in the Companies Act 2008 but direction can be taken from the definition contained in the Insolvency Act 24 of 1936. It can be considered in the context of whether or not the transaction constitutes a voidable disposition (section 29 of the Insolvency Act). In determining whether a disposal is in the ordinary course of business there are aspects to consider that are specific to the business and the circumstances at hand. One of the overarching considerations is whether a reasonable person, in the same circumstances would have made the same decision.

(ii) "in a *bona fide* transaction at arm's length for fair value approved in advance and in writing by the practitioner"; or

The disposal must be done using normal business practices in respect of things like it has to be between a willing buyer and a willing seller, who contract in a manner that is unquestionable for transactions done in similar circumstances, for fair value and it requires the prior written approval of the business rescue practitioner.

(iii) "in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152".

If the approved business rescue plan contemplates a disposal process, the disposals can be concluded within the ambit of the plan. Often disposals of non-core assets are contemplated in order to generate proceeds for debt repayment or disposals in business rescue are done to achieve a better dividend for creditors than would be the case if the business is immediately placed in liquidation.

Question 8

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

Commented [M29]: 4 marks.

Commented [M30]: 0 marks. Needed to discuss section 134(3) in detail and apply the legal principles to the facts. Consent is not required in order to extend the security, instead consent will be required for the disposal by the company of property over which Crypto Bank has security.

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)

Answer:

Given that the rights to the agreements are ceded to Crypto Bank, the bank has a security right to the agreement and the proceeds thereof. Sarah would thus require Crypto Bank's consent in order to extend this security to Easy Access PCF.

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.

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)

Commented [M31]: 3 marks out of 7. 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.

Answer:

The business rescue is prohibited by section 136 of the Companies Act 2008 from unilaterally changing the terms of employees employment.

In the instance of Khusela, the business rescue practitioner followed the correct process in instituting a consultation process when she realized that the employment terms of the employees may be affected by the proposed plan. The section 189 consultation process (according to the Labour Relations Act 1995) may commence at any time during business rescue proceedings even before adoption of the plan.

If, however, the business rescue plan contemplates retrenchments of the employees or other variations to their terms of employment, need to be in line with section 189 of the Labour Relations Act and other labour laws, must be dealt with in the business rescue plan, but should be implemented once the business rescue plan has been adopted.

The judgement in the matter of *South African Airways SOC Ltd and Others v National Union of Metalworkers of South Africa obo Members and Others* deals with this. The judgement states that proposed retrenchments must be dealt with in the business rescue plan and that the business rescue practitioner is not empowered to implement the retrenchments in the absence of an approved business rescue plan.

The business rescue practitioner in the Khusela case fell short of these requirements as the business rescue plan had not been drafted or approved at the time of implementing retrenchments. This is in spite of the Labour Relations Act 189 consultation process that was concluded. The business rescue practitioner is not empowered in section 136 of the Companies Act or anywhere in Chapter 6 to implement retrenchments without an approved plan, therefore she acted outside the scope of her authority.

Question 10

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

Answer:

Unlike in liquidation, employees continue under the employ of a company that is in business rescue. One of the key features of business rescue is the preservation of jobs and employees' rights. Employees' terms of employment remain unchanged, unless variations to employment terms are done in compliance with the relevant labour laws (section 136(1)(a) and 136(1)(b) of the Companies Act 2008).

According to section 135(1) of the Act, employees' claims in respect to amounts of money relating to their employment that are due and payable while the company is in business

Commented [M32]: 2 marks out of 3. Need to elaborate on what types of rights may be exercised under section 144. In this regard, reference may be made to the rights set out in section 144(3).

rescue are classified as preferent post commencement finance claims. They enjoy preference even to secured post commencement claims.

Employees may exercise their rights collectively through their registered trade union or individually in cases where they are not a member of a union or by proxy through an employee representative (section 144 of the Companies Act 2008).

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)

Answer:

The directors of the company, including the Mr Themba Sithole and Mr Kabelo Mogale as executive directors would have continued to perform their duties subject to the authority of the business rescue practitioner (section 137(2) of the Companies Act 2008).

In addition to this the exercise of directors management duties would also continue subject to the authority of the business rescue practitioner.

The directors would have also ran with asset disposal processes at the instance of the business rescue practitioner and with the practitioner's approval.

It is often beneficial for the business rescue practitioner to have the directors and executive teams who have the institutional knowledge and understanding of historical events.

Question 12

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)

Answer:

The business rescue plan is developed in consultation with all affected persons to have it ultimately approved by them. The meaning of consulting/ consultation is dealt with in the case of *Hlumisa Investment Holdings (RF Limited and Another) v Van de Merwe NO and Others* where the court clarified that there is distinction between "informing" and "consulting".

Commented [M33]: 2 marks. Needed to discuss the fact that directors are relieved of certain of their fiduciary duties to the extent that they act according to the BRP's instructions and subject to his/her instructions.

Commented [M34]: 4 out of 5 marks.

Consulting involves rigorous interaction and exchange of discussions between the business rescue practitioner and affected persons. Posting of information or notices made in meetings or on electronic platforms is not considered consultation and falls under processes of informing affected persons.

The Hlumisa case makes reference to various cases in the matter of *Scalabrini Center Cape Town and Others v Minister of Home Affairs and Others* where it is determined that consultation should entail meaningful exchange of advice and should not be done just a mere step in fulfillment of a requirement but instead should assist the parties involved in their decision making.

In the Hlumisa judgement it was found that the shareholders were not consulted in accordance with the genuine meaning of the word and requirements of the Act, therefore the interdict was granted, stopping the meeting to vote in the business rescue plan.

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)

Answer:

Ms Sarah Van Zyl could propose an agreement with Khusela for further remuneration in addition to what is permitted by the prescribed tariff per regulation 128 of the Companies Regulations 2011. Section 143(2) of the Companies Act makes provision for this. Further remuneration is permitted and can be in the form of a contingency arrangement wherein it is linked to the achievement of certain results like adoption of the business rescue plan, attainment of certain outcomes, etc.

The agreement for further remuneration becomes binding on the company once approved by creditors who hold majority voting rights in accordance with section 145 and shareholders who hold majority rights in shares that are eligible for residual value of the company.

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)

Answer:

Commented [M35]: 2 marks.

Commented [M36]: 2 marks. Need to set out the basis upon which it is determined that Khusela has a public interest score of more than 500.

Khusela is a large company. Its score in accordance with regulations 127(2) and 26(2) is higher than 500.

Sarah can charge a tariff of R2 000 per hour (maximum R25 000 per day)(including VAT).

Question 15

The case study includes the following statements:

"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)

Answer:

The section of the Act that deals with the first meeting of creditors does not deal with ratification of the appointed interim business rescue practitioners. The power of appointment resides with the board of directors, therefore the final appointment of Sarah Van Zyl was for the board to sign off (*Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others*).

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)

Answer:

The business rescue practitioner would have had to publish monthly progress reports on the business rescue proceedings (section 132(3) of the Companies Act 2008). This since the business rescue proceedings lasted for more than three months.

Commented [M37]: 0 marks. Needed to discuss section 147(1)(b) and the duty of the BRP to investigate the affairs of the company immediately on appointment with a view to determining whether there is a reasonable prospect of rescuing the company.

Commented [M38]: 4 marks.

The business rescue practitioner would have had to seek approval to extend the date for publishing the plan from holders of the majority of the creditors voting rights or through a court application in accordance with section 150(5).

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)**

Answer:

Mr Siwisa is not an independent creditor of Khusela by virtue of also being a shareholder.

An independent creditor:

- according to section 144(2) of the Companies Act 2008 is a person who is a creditor of the company, including employees of the company; and
- must not be related to the company (including directors and business rescue practitioners) and subject to section 128(2).

Section 128(2) deals with the independence of employees in cases where they are members of trade unions that have securities holdings in the company that is in business rescue. It states that the employees are not related to the company by virtue of the union's shareholding.

Mr Siwisa as a shareholder is a related party to the company which precludes him from the definition of an independent creditor.

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)**

Answer:

Commented [M39]: 1 mark. 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 Companies Act, and on the basis of Mr Siwisa (together with a related person - Mrs Phillips) being able to control Khusela by being directly able to exercise a majority of the voting rights associated with the securities of Khusela.

Commented [M40]: 5 marks out of 8. Needed to specifically set out the steps that the BRP had to follow in order to align with the processes contemplated in section 151 and 152.

The business rescue practitioner does not have a unilateral ability to amend the business rescue plan after it is voted in by the required majority of affected persons. Section 152(1)(d)(ii) of the Companies Act 2008 only affords business rescue practitioners the right to amend a business rescue plan before it has been adopted.

The court dealt with this in *Booyesen v Jonkheer Boerewynmakery and Another [2014] 1 All SA862 (WCC) (10999/16) [2016] ZAWCHC 192 (15 December 2016)* where it was held that the business rescue practitioner has no rights to unilaterally amend a plan and impose such amended plan to affected parties who were not given the opportunity to vote on it as required under section 152 of the Companies Act.

In order to effect an amendment to the business rescue plan, the business rescue practitioner needs to call a vote on the amendments at the section 151 meeting or the meeting can be adjourned for be reconvened at a later date.

The business rescue plan can include provision for minor amendments to it after its adoption but although the Act is silent on this matter, guidance in case law on this matter is that (i) the business rescue practitioner should not be granted unilateral rights to effect the amendments and (ii) should still be aligned with processes contemplated in sections 152, 145 and 146 of the Companies Act 2008.

The Supreme Court of Appeal in *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd 2017 JDR 1577 (SCA)* ruled that a business rescue practitioner cannot impose a business rescue plan that the affected persons have not voted on. Not even the court can alter the approved business plan.

In *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another [2017 (4) SA 51 (WCC)* it was further ruled that there is no room for business rescue practitioners to afford themselves rights to unilaterally amend the business rescue plan once it has been adopted, even if such rights are contained in the approved plan.

Question 19

Commented [M41]: 3 marks.

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)

Answer:

Section 150(2)(c)(iv) of the Act prescribes the financial projections that need to be included in the business rescue plan but only in relation to the income statement and the balance sheet. The plan should also include cash flow statements which are important to affected persons' determination of their support for the plan. For purposes of Opera Sound Engineering, three key items in these projections would be:

The financial projections should reflect whether there is any debt compromise where the company is expected to be released from payment of certain debts. Additionally, the financial forecasts should show projections of additional debt that the company expects to incur. This is important for Opera Sound Engineering as the additional debt may rank ahead of their unsecured claim.

The financial projections should also include cash flow projections so we can determine if the business is expected to have sufficient liquidity to continue trading.

The financial projections should also include key risks/ downside assumptions, especially where these may impact plans in relation to dividend payment.

Question 20

Commented [M42]: 2 marks.

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)**

Answer:

Yes, a cash flow statement should be included in the business rescue plan even though it is not specifically required in the Act.

Cash flow projections are important for affected persons who are entitled to vote on the business rescue plan as they give a view as to whether the business is expected to have sufficient liquidity for successful implementation of the plan. It also gives affected persons a view of how the calculated dividend will be paid and can provide a view of any potential liquidity challenges. Therefore due to its importance, it is best practice to include a cashflow statement in the business rescue plan. The cash flow projections should cover a period of three years (to align with requirements for income statement and balance sheet in section 150(2)(c)(iv)), with the first year being monthly and annualized thereafter.

Question 21

Commented [M43]: 3 marks.

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

Answer:

In business the employees will remain employed. The status of the employees is not negatively affected and they retain all their contractual and statutory rights. Preservation of jobs is one of the key features of chapter 6 of the Companies Act. In contrast, in a liquidation employment contracts are terminated unless the liquidator agrees to continued employment of some employees for a specific reason (section 38 of the Insolvency Act 24 of 1936).

Employees are affected persons in a business rescue and this affords them rights to participate in the business rescue proceedings, including being engaged by the business rescue practitioner on the business rescue plan and eventually being able to vote on the plan.

The Companies Act 2008 caters for employees claims for pre business rescue amounts and amounts owed during business rescue to be preferent. Employees in business rescue enjoy super preference for claims for amounts that fall due during the business rescue proceedings and claims for pre-business rescue amounts are preferent. Employees' preferent claim in a liquidation is limited and is only up to a prescribed amount.

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

TOTAL MARKS: [100]