



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 62/100 (marked adjusted upwards)

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]: 0 marks

- (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]: 1 mark

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

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]: 0 marks

- (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]: 1 mark

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)

When the BR process started, a general moratorium came into effect.

In terms of Section 133(1) of the Companies Act, no creditor can proceed with legal proceedings, including enforcement actions against Khusela, in respect of any of the assets belonging to the company or assets which are lawfully in their possession, therefore the creditors cannot proceed with any legal action against Khusela, except with the written permission of the BRP Ms S van Zyl, or with the permission of the court.

Question 3

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

Section 152(2)(a) & (b) are applicable.

In terms of Section 152(2)(a) - 75% of the holders of the creditor's voting interest, present at the meeting, must vote in favour of the plan.

In terms of Section 152(2)(b) - 50% of the voting interest must be from independent creditors.

Question 4

Commented [M23]: 2 out of 2 marks.

Commented [M24]: 2 marks out of 3. Reference must be made to voting by holders of securities in the event that their interests are affected.

Commented [M25]: 2 out of 3 marks. Legal principle to be applied to the facts - Opera Sound Engineering.

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)

Section 152(4) is applicable and in terms of this section the adopted business rescue plan is binding on the company, all the creditors and shareholders whether they were present at the meeting or not, voted on the business rescue plan or not or proved a claim or not. This is also referred to as the "cram-down" on creditors.

The court noted in **African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others** that the cram-down principal is "indispensable to the successful implementation of a business rescue plan."

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)

The definition of financially distressed as defined in Section 128(1)(f) is: (i) "it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become 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".

This business rescue application was brought in terms of Section 131 of the Companies Act with an application to the High Court of South Africa Gauteng Local Division, Johannesburg and the applicant had to prove the company is in financial distress.

Section 131(4) however makes provision that the court can grant an order for business rescue if they are satisfied with the following: "(i) the company is financially distressed; (ii) that the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; and (iii) it is otherwise just and equitable to do so for financial reasons".

Khusela's draft balance sheet showed that the company was commercially and factually insolvent due to the fact that the company could not pay its debts and the company's liabilities exceeded its assets.

I am however of the opinion that it was not too late for a business rescue order to be granted because the Supreme Court of Appeal explained in the **Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami)(Pty) Ltd** case that a commercially insolvent company still met the requirements of financially distressed and could therefore still be placed in

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

business rescue, but at the same time the company met all the requirements to be placed in liquidation as it was unable to pay its debts.

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)

The application to place Khusela in business rescue would suspend the application for liquidation filed by World of Music.

Section 131(6) of the Companies Act is applicable. In terms of Section 131(6), any liquidation proceedings that were started against the company will be suspended once an application for business rescue is made. Section 131(6) makes provision for the suspension of the liquidation until "(a) the court has adjudicated upon the application; or (b) the business proceedings end if the court makes the order applied for."

In terms of Section 131(2)(a) & (b) the applicant must serve the application on the company, the CIPC and all affected persons in the prescribed manner.

In **Lutchman NO v African Global Holdings (Pty) Ltd** the Supreme Court of Appeal made it clear that the requirements of Section 131(2) to serve the application and notify the affected persons are not just procedural it is "substantive requirements" that form part of the business rescue application.

In the **Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Others** the court was of the view that that without a company being aware of the application for liquidation against it the liquidation proceedings could not have been initiated. The court held that the application must be served on the company and not just filed.

In **Pan African Shopfitters (Pty) Limited v Edcon Limited and Others** the court found that the conclusion in the Tjeka Training Matters was correct and that a liquidation application is initiated once the application is issued and served on the company.

In conclusion: As the application of liquidation by World of Music against Khusela was only filed Khusela was not formally made aware of this application. Although the **Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Others** and the **Pan African Shopfitters (Pty) Limited v Edcon Limited and Others** deal with the adoption of a resolution for voluntary business rescue after liquidation proceedings were initiated these matters are applicable, although it is in a different context dealing with a different section, the main issue in all the mentioned matters is that a person or company cannot be affected by any legal proceedings if the person/company was not formally made aware thereof, i.e. the application was served on the company and CIPC.

Commented [M27]: 2 marks out of 5. Needed to discuss the relevant principles set out in 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.

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)

Sarah van Zyl can sell the assets over which Crypto Bank think they hold security. To be in a position to prevent Sarah van Zyl from selling the assets in question, Crypto Bank should have perfected (registered) their general notarial bond before the company went into business rescue. Crypto Bank does not have any property interest nor a security interest over any of the assets.

Question 7.2

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

Section 134 regulates the circumstances under which a BRP may not realize/dispose of the assets, but in Section 134(a) three alternative requirements are given for the sale/disposal of any property belonging to the company, being-

- “(i) in the ordinary course of business; or
- (ii) in a *bona fide* transaction at arm's length for fair value; or
- (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”

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

Commented [M28]: 1 mark. See page 75 of the Course Notes.

Commented [M29]: 4 marks.

Commented [M30]: 4.5 marks. Needed to state with reference to the facts that "security to the reasonable satisfaction of Crypto Bank could be provided for the amount of the proceeds".

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)

The material distribution rights were ceded by Khusela to Crypto Bank Limited as security for the revolving credit facility Khusela acquired in 2022.

In terms of Section 134(3)(a) a business rescue practitioner must obtain the prior consent of the other person, in this matter Crypto Bank Limited, to dispose of the property over which they had the security unless the disposal would be sufficient to fully discharge the indebtedness protected by the security.

There is no definition for the word property in the Companies Act, and therefore the ordinary meaning of property in the normal course of business must be taken into account. Property can be described as all of the assets of a company/person whether it is movable property, immovable property or immaterial property. The material distribution rights would fall in the description of immaterial property.

Section 136(2)(a) provides that a business rescue practitioner may suspend an agreement entirely, partially or conditionally for the duration of the business rescue period. The creditor will then have a concurrent claim for damages against the company in business rescue.

Conclusion: If Ms van Zyl wants to agree to the requirements of Easy Access in respect of the material distribution rights of Khusela, she will either have to suspend the agreement between Khusela and Crypto Bank, she will have to get their permission to dispose of their asset alternatively she will have to fully discharge the debt for which Crypto Bank holds the security.

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

Commented [M31]: 1 mark 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. Needed to conclude that the section 189 process and retrenchments carried out by Sarah were both unlawful and unenforceable.

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)

Section 136 of the Companies Act deals with the effect of business rescue on employees and contracts.

In terms of Section 136(1)(a) makes provision that the employees who were employed by a company prior to business rescue will remain in the service of the company on the same terms and conditions unless "(i) the changes occurred in the normal course of arbitration; or (ii) the employees and the company, in accordance with the applicable labour laws, agree to different terms and conditions."

Section 136(1)(b) provides that "the retrenchment of the employees must be contemplated in the business rescue plan subject to Section 189 & Section 189A of the Labour Relations Act, 1995 (Act No. 66 of 1995), and other applicable employment-related legislation."

Section 144(3) deals with the Rights of employees. In terms of this section the employees, registered trade unions and any other employee who is not represented have the right that "(a) notice which must be given in the manner prescribed in the Companies Regulations, Annexure 3, Table CR3 of each meeting, court proceeding, decision or relevant event concerning the business rescue proceedings;- (c) form a committee of employees' representatives; (d) be consulted by the practitioner during the development of the business rescue plan and are allowed to review such plan and make a submission as contemplated in Section 152(1)(c); (f) vote with creditors on a motion to approve a proposed business plan to the extent that the employee is a creditor, as contemplated in subsection (2)".

Section 148 deals with the First meeting of employees' representatives.

Section 148(1) makes provision that a business rescue practitioner must within 10 days from being appointed convene and preside over a first meeting of employees' representatives at which; "(a) the practitioner must inform the employees' representatives that he believes

that there is a reasonable prospect of rescuing the company; and (b) the employee's representatives may determine whether or not an employees' committee should be appointed, and if so, may appoint the members of the committee.

In the **South African Airways (SOC) Ltd (in Business Rescue) and others v National Union of Metalworkers of South Africa obo Members and others**, the court held that in terms of Section 136(1)(b) any retrenchments contemplated during the business rescue proceeding must be dealt with in the business rescue plan. The court further found that nowhere in Chapter 6 was any provision that empowers the business rescue practitioner to retrench employees in the absence of an adopted business rescue plan.

Conclusion: The business rescue practitioner was correct in having the Section 189 consultations with the employees and the trade unions, but these consultations were premature as no business rescue plan was available in which the retrenchments were contemplated. The business rescue practitioner was also wrong in so far as that she did not convene an employees' representatives, and she did not give notice to the employees as prescribed by Section 144(3)(a).

Question 10

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

In terms of Section 144 deals with the rights of employees. In the business rescue process of Khusela, the employees were not recognized as creditors in this matter as the retrenchment process was finalized before the voting on the business rescue plan. The employees were not afforded the chance to vote on the plan or give any submissions for changes to the plan. The employees therefore have the general right to apply to court to set the retrenchments aside as the procedure followed by the business rescue practitioner was incorrect.

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)

Mr Temba Sithole the Chief Executive Officer is an employee of the company and in terms of Section 136(1)(a) employees of the company employed immediately before business rescue will be employed in business rescue on the same terms and conditions. He will have to fulfil his duties as per his employment agreement before business rescue.

Mr Kabelo Mogale the Chief Financial Officer is the person who will have the books and records of the company. Mr Mogale must as soon as possible after the commencement

Commented [M32]: 0 marks. This question required a discussion of the general rights held by the employees. See section 144(3), 135(1), 136(1), etc.

Commented [M33]: 1 mark. 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. Needed to apply the legal principles to the facts.

of the business rescue deliver all the books and records in his possession to the business rescue practitioner.

The directors of the company must during business rescue continue to exercise their functions as directors, subject to the authority of the business rescue practitioner and the directors must adhere to all reasonable requests of the business rescue practitioner. The directors have mandatory statutory duties to co-operate and assist the business rescue practitioner and they must attend to all reasonable requests of the business rescue practitioner, provide information relating to the company's affairs and provide all books and records in their possession to the business rescue practitioner.

Question 12

Commented [M34]: 5 marks.

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)

In the matter *Hlumisa Investment Holdings (RF Limited and Another) v Van der Merwe NO and Others*, the court found there is a definite distinction between consulting and informing. The court in this matter quoted with approval Rogers J what he emphasized from various cases he dealt with in the matter *Scalabrini Center Cape Town and Others v Minister of Home Affairs and Others*, the following: "... at a substantive level, communication entails a genuine invitation to give advice and a genuine receipt of advice; consultation is not to be treated perfunctorily or as a mere formality. This means inter alia that engagement after the decision-maker has already reached his decision or once his mind has already become "unduly fixed", is not compatible with true consultation; and that while at a procedural level consultation may be conducted in any appropriate manner determined by the decision-maker, the procedure must enable consultation in the substantive sense to occur.."

In *Hlumasa* the court found that informing is the process that happens on the Stock Exchange News Service.

Conclusion: Consultation in the context of Khulesa would entail that Ms van Zyl consult with all affected parties, creditors, employees, trade unions and employees not represented by trade unions, or their representatives and management not only before the preparing of a business rescue plan but also during the preparation of the plan to make sure that the majority of the creditors would vote in favour of the plan at the meeting to be convened for the voting of the plan.

Question 13

Commented [M35]: 2 marks.

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)**

Ms van Zyl can propose an agreement with Khusela for the payment of a further remuneration (success fee) in addition to the remuneration permitted by the government-regulated tariff, as this tariff has not been updated since the Act was promulgated and this tariff is very low in relation to fees paid to other similar qualified professionals. This arrangement must be endorsed by a simple majority of the creditors and shareholders in terms of Section 143(3) of the Companies Act, or by adoption of the business rescue plan which includes this additional fee.

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)**

Regulation 128 of the Companies Regulations 2011 determines the basic remuneration of the business rescue practitioner. The basic remuneration in respect of a large company is R2 000.00 per hour (maximum of R25 000.00 per day) (VAT inclusive).

The size of the company is determined in Regulation 127(2) and 26(2) and is determined by a score calculated by using various components provided by the regulation.

1 point is given for each employee in the financial year; in the case of Khusela had 2000 employees = 2000 points

The score for a large company is anything above 500 points.

Conclusion: Khusela is a large company as determined by the score calculated and Ms van Zyl is a senior business rescue practitioner, and only a senior business rescue practitioner can be appointed in a large company.

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

Commented [M36]: 3 marks.

Commented [M37]: 2 marks. Needed to discuss the requirements under section 147(1)(b). Needed to state that a determination had to be made by Sarah as to whether she believed that there was a reasonable prospect of rescuing the company at the first meeting of creditors.

"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)

Section 141(1) makes provision that "as soon as practicable after being appointed, a practitioner must investigate the company's affairs, business, property, and financial situation ..."

Conclusion: Ms van Zyl did not comply with Section 141(1) of the Companies Act as she only after her appointment was ratified by creditors at a meeting started to investigate the affairs of the company. Ms van Zyl should have started with her investigation into the affairs of the company as soon as it was "practicable after her appointment".

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)

The business rescue practitioner will be required to lodge monthly progress reports on the business rescue proceedings if the rescue is not finalized within 3 months after commencement - Section 132(3)

The business rescue practitioner will have to ensure the company protects the interest of the creditors that hold a title or security interest over any property of the company - Section 134(3)

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)

Commented [M38]: 2 marks. Needed to mention section 150(5) - securing an extension of time to publish the BR plan.

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 that Mr Siwisa together with a related person (Mrs Phillips) is able to exercise a majority of the voting rights by virtue of a combined shareholding of 51%.

The definition of an “independent creditor” is set out in Section 128(1)(g) as “independent creditor” means a person who- (i) is a creditor of the company; and (ii) is not related to the company, a director, or the practitioner”.

When a shareholder makes a loan to the company, he is deemed to be a creditor, but when he votes he will not be seen as 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)

Section 151(1) requires that a meeting must be held to consider the business rescue plan and to vote on the plan should no amendments need to be made. This meeting must be held within 10 days after the business rescue plan was published by the business rescue practitioner.

Section 152(1) requires that at this meeting the business rescue practitioner presides over the meeting, produces the business rescue plan, informs all creditors that he still believes there is a reasonable prospect that the company can be rescued, must give the employee representatives a chance to address the meeting, and then he must invite a discussion of the business rescue plan.

Should no proposals to amend the business rescue plan come out of this meeting, the business rescue practitioner must call for a vote on the plan. If the plan is adopted the business rescue practitioner must implement the plan.

In the matter **Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (In Business Rescue) and Another**, the court dealt with the issue of a business rescue practitioner who unilaterally made amendments to an already adopted business rescue plan. The court held that the business rescue practitioner did not have the right to unilaterally amend the already adopted plan. The court further held that the business rescue practitioner was not authorized to override the procedures as set out in the Companies Act of 2008, and the court held that the business rescue practitioner did not have the power to impose a plan on creditors on which they did not vote in terms of Section 152(2).

Conclusion: Ms van Zyl had no right to unilaterally make any decision to amend the already adopted business rescue plan, and she had no right to force this plan which was not adopted by creditors onto them. The only way Ms van Zyl could make amendments to the adopted business rescue plan was if she had the majority vote of creditors on a new meeting convened for the adoption of the amended business rescue plan.

Commented [M40]: 6 marks out of 8. Needed to discuss the requirement to publish the amended plan and for shareholders to vote on the amendments to the extent that the shareholders interests are affected.

Question 19

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)

A balance sheet, as the balance sheet reflects on the overall position of the company at a specific point in time.

An income statement will provide me with an indication as to what the profitability of the company will be in the ensuing three years as it shows the revenue income less the expenses

The cash flow statement will show the cash income less the expenses settled out of the cash income.

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)

Yes, it is necessary and good practice as the cash flow statement is required in any audited financial statement.

Question 21

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

Section 136(1)(a) provides that any employee in the employment of a company immediately before the company goes into business rescue will continue to be employed by the company on the same terms and conditions as they were employed with before the business rescue.

The Companies Act incorporates labour law protection and requires that any retrenchments contemplated in the business rescue plan must be subject to Sections 189 & 189A of the Labour Relations Act.

Any employee that renders a service during the business rescue period to the company will become a post-commencement creditor with relation to their claims for remuneration which arises during the business rescue period.

Commented [M41]: 0 marks. The question required you to list items that you would expect to see as part of the financial projections of the BR plan and not what must be included in the BR plan.

Commented [M42]: 0 marks. Answer requires further elaboration.

Commented [M43]: 3 marks.

*** END OF ASSESSMENT ***

TOTAL MARKS: [100]