



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 78/100

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: 19 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?

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- (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]: 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]: 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

Commented [M23]: 2 marks out of 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)

Upon commencement of business rescue proceedings and for the duration thereof, a general moratorium is put in place in terms of section 133(1) of the Companies Act 71 of 2008 (hereinafter referred to as "**the Companies Act of 2008**" in all answers provided). One of the effects of the moratorium is a temporary stay on all current/pending legal proceedings against the company in business rescue. As such, any current/pending legal proceedings brought by the creditors of Khusela against Khusela would be stayed for the duration of the business rescue proceedings.

Chapter 6 of the Companies Act 2008 does not provide a definition for legal proceedings (or enforcement actions), however it was held by the court in *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC*¹ that the general moratorium contained in section 133 of the Companies Act 2008 is wide-ranging and includes any conceivable type of action against the company. In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd*², the court found that legal proceedings under section 133 of the Companies Act 2008 should be defined in terms of its ordinary meaning and thus encompasses any matter which is to be referred to court, a tribunal or any other formal proceedings intended to adjudicate a matter (including proceedings brought with the aim of perfecting security). The general moratorium also covers arbitration (as held in *Chetty t/a Nationwide Electrical v Hart NO and Another*³).

¹ 2013 (6) SA 540 (WCC).

² 13/12406, 10 May 2013 (GSJ).

³ [2015] 4 ALL SA 401 (SCA).

In light of a balancing of rights, any time limits prescribed for the enforcement of any claim is suspended for the duration of the business rescue proceedings.

In addition, the moratorium is not absolute and a few exceptions exist. In this case, the creditors could either request written consent from the business rescue practitioner to proceed with the legal proceedings (in terms of section 133(1)(a) of the Companies Act 2008) or, failing which, apply to court for leave to continue with / institute proceedings (in terms of section 133(1)(b) of the Companies Act 2008).

Furthermore, and as stipulated under section 133(1) of the Companies Act 2008, the general moratorium does not apply in circumstances such as legal proceedings related to property unlawfully possessed by the company, proceedings related to the business rescue plan, criminal proceedings against the company or its directors, proceedings over property in terms of which the company is a trustee and proceedings brought by regulatory authorities when exercising their duties.

Question 3

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

In terms of section 152(2) of the Companies Act 2008, in order to approve and adopt a business rescue plan, it must be supported by the holders of more than 75% of the creditors' voting interests who voted at a meeting convened in terms of section 151 of the Companies Act 2008, and at least 50% of said 75% of creditor's voting interests in favour of the plan must be independent creditors.

However, if the business rescue plan has the effect of altering the rights of shareholders then a meeting of shareholders must be held after the creditors' meeting whereby the business rescue plan will be proved and adopted if supported by a simple majority of the voting interests of shareholders present and voting at the meeting.

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)

In terms of section 152(4) of the Companies Act 2008, an approved and adopted business rescue plan is binding on all creditors of the company regardless of whether or not they voted in favour of the business rescue plan, were present or not at the meeting or had proven claims. This concept is known as "cram-down". The importance of this cram-down provision on dissenting creditors was stated by the court in *African Banking Corporation of*

Commented [M24]: 3 out of 3 marks.

Commented [M25]: 3 marks out of 3.

*Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others*⁴. The binding nature of the approved business rescue plan on every creditor was confirmed by the court in *Stalcor (Pty) Limited v Kritzinger NO and Others*⁵.

Section 154(2) of the Companies Act 2008, regarding the discharge of debts, supports the binding nature of the approved business rescue plan on all creditors as stipulated under section 152(4) of the Companies Act 2008.

In *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others*⁶, the court held that when cramming down the business rescue plan, the voting interests of dissenting creditors must not be more than 25%.

Therefore the approved business rescue plan is binding on the dissenting minority creditor Opera Sound Engineering, regardless of the fact that it voted against the 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)

Financial distress, as defined under section 128(1)(f) of the Companies Act 2008, exists in respect of a company where: the company appears to be reasonably unlikely to pay its debts as they fall due and payable within the immediately ensuing six months (commercial insolvency); or where it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months (factual insolvency).

Initially, the view espoused by courts was that a company which was already insolvent could not commence business rescue proceedings as it did not meet the requirements for financial distress (with an emphasis placed on future insolvency as opposed to current insolvency)⁷.

The court in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein*⁸ held that a commercially insolvent company still adhered to the financial distress requirement and could commence business rescue proceedings.

In this case, Khusela's inability to pay its debts amounts to commercial insolvency.

⁴ 2013 (6) SA 471 (GNP).

⁵ [2017] JOL 37785 (FB).

⁶ 2014 (1) SA 103 (KZP).

⁷ *Merchant West Capital Solutions(Pty) Ltd v Advanced Technologies and Engineering Company Ltd* 13/12406, 10 May 2013 (GSJ).

⁸ 2013 (4) SA 539 (SCA).

Commented [M26]: 4 marks out of 5. Needed to refer to *Gormley v West City Precinct Properties (Pty) Ltd* and *FirstRand Bank v Lodhi 5 Properties Investment*.

In *Tyre Corporation Cape Town (Pty) Ltd v GT Logistics (Pty) Ltd (Esterhuizen intervening)*⁹, the court held that current commercial or factual insolvency does not preclude a company from being placed in business rescue. In addition, this view is supported when considering the implications of section 131(6) of the Companies Act 2008 which allows for business rescue proceedings in respect of a company in liquidation (i.e, a company that is already insolvent).

I submit that the view held in *Tyre Corporation Cape Town (Pty) Ltd v GT Logistics (Pty) Ltd (Esterhuizen intervening)*¹⁰ is correct and therefore in this case the financial distress requirement was met.

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)

In terms of section 131(6) of the Companies Act 2008, if liquidation proceedings have already commenced against the company at the time of an application for business rescue proceedings in terms of section 131(1) of the Companies Act 2008, then the business rescue application will suspend the liquidation proceedings until the court has adjudicated upon the business rescue application or until such time as the business rescue proceedings so ordered by the court are terminated.

The SCA in *Richter v Absa Bank Limited*¹¹ held that an application to commence business rescue proceedings can be made at any time, even after the the issuing of a final liquidation order. Therefore, the filing of a liquidation application by World of Music does not preclude an affected party from bringing an application to place Khusela in business rescue.

In terms of section 136(4) of the Companies Act 2008, the liquidator is considered a creditor of the company in circumstances where the liquidation is converted into a business rescue process.

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.

⁹ 2017 (3) SA 74 (WCC).

¹⁰ Ibid.

¹¹ 2015 (5) SA 57 (SCA).

Commented [M27]: 1 mark out of 5. 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.

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 out of 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)

Ordinarily, consent to dispose of assets subject to a title or security interest would need to be obtained from a secured creditor before disposing of such assets, unless the proceeds of such disposal discharge the company's indebtedness to the secured creditor.

However, a general notarial bond does not confer a title or security interest to the beneficiary thereof. To become a secured creditor, said beneficiary would need to have taken possession of the assets (either by consent of the company or through an granted via application to court), which are subject to the general notarial bond, prior to the commencement of business rescue proceedings.

Any attempt by a creditor to perfect its general notarial bond during business rescue proceedings is prohibited as such an application would be considered an enforcement action covered by the general moratorium stipulated in section 133(1) of the Companies Act 2008 (unless consent is obtained from the business rescue practitioner or leave from the court is sought and granted).

In this case, Crypto Bank did not take possession of the movable assets, over which it holds a general notarial bond, prior to commencement of Khusela's business rescue proceedings and are thus not a secured creditor in respect thereof.

Therefore, Sarah van Zyl, as the business rescue practitioner, is entitled to sell the assets in question without Crypto Bank's consent as Crypto Bank is not a secured creditor in respect of the movable assets over which it holds a general notarial bond. Although it should be noted that, regardless of the outcome of the consent requirement, section 134 of the Companies Act 2008 refers to the company's rights to dispose of property which may imply that, ultimately, disposals should be concluded by the board of directors (subject to approval by the business rescue practitioner).

Question 7.2

Commented [M29]: 4 marks.

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

Section 134(1)(a) of the Companies Act 2008 sets out three alternative requirements to be met for the disposal of assets of a company in business rescue, namely:

1) in the ordinary course of business - the Companies Act 2008 does not provide a definition for ordinary course of business, but one may consider the definition contained in the Insolvency Act 24 of 1936¹² and thus take into account circumstances such as the type of business, typical customs and practices and whether such a disposal would have taken place between solvent businesses¹³; or

2) in a *bona fide* transaction at arms length, for fair value and approved in advance in writing by the practitioner - this occurs in instances such as the sale of non core assets to decrease expenses or fund operations; or

3) in a transaction contained in and part of the implementation of an approved business rescue plan.

It must also be borne in mind that section 134 of the Companies Act 2008 refers to the company's rights to dispose of property which may imply that, ultimately, disposals should be concluded by the board of directors (subject to approval by the business rescue practitioner).

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 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)

¹² Henochsberg on the Companies Act 71 of 2008, 526 (16).

¹³ Ibid.

Commented [M30]: 4 marks. Needed to apply the legal principles to the facts.

In terms of section 134(3) of the Companies Act 2008, consent to dispose of assets subject to a title or security interest would need to be obtained from a secured creditor before disposing of such assets, unless the proceeds from the disposal of the assets fully discharge the indebtedness of the secured creditor.

Upon said disposal, the practitioner must promptly pay the sale proceeds to the secured creditor up to the amount of the company's indebtedness to the secured creditor. In *Louis Pasteur Holding (Pty) Ltd and Others v Absa Bank Ltd and Others*¹⁴, the court held, in accordance with the concept of prompt payment, that periodic payments to discharge the debt over time were not sufficient.

Alternatively, the practitioner must provide security to the secured creditor for the amount of the sale proceeds to the extent that the secured creditor is reasonably satisfied in respect thereof.

Question 9

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

Commented [M31]: 2 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 section 189 notices may only be issued once the BR plan has been published. Needed to state that the BRP could issue voluntary severance offers to all affected employees, subject to any collective agreements.

¹⁴ 2019 (3) SA 97 (SCA).

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(1)(a) of the Companies Act 2008 provides that employees of the company in business rescue continue to be so employed under the same terms and conditions of their employment contract existing immediately prior to commencement of business rescue proceedings, unless changed in the ordinary course of attrition or as agreed to with employees subject to relevant labour legislation.

Although the terms and conditions of employment contracts cannot usually be unilaterally varied by the business rescue practitioner, that does not preclude the practitioner from following a retrenchment process, as contemplated in a business rescue plan, and subject to section 189 of the Labour Relations Act 1995 and the Basic Conditions of Employment Act 1997.

In *South African Airways SOC Ltd and Others v National Union of metalworkers of South Africa obo members and Other¹⁵s*, the court held that section 136(1)(b) of the Companies Act 2008 requires contemplated retrenchments to be dealt with in the business rescue plan and no provision exists that empowers the business rescue practitioner to retrench employees before the adoption of a business rescue plan.

In this case, the business rescue practitioner completed the section 189 retrenchments prior to the publication of the business rescue plan. In light of the above case law and the provisions of section 136 of the Companies Act 2008, the business rescue plan should have been published and adopted prior to such retrenchments (and the retrenchment process should have been contained in the adopted business rescue plan). Therefore the business rescue practitioner did not follow the correct process and procedure.

In terms of section 189 of the Labour Relations Act No 66 of 1995, where an employer contemplates dismissing any employees as a result of operational requirements, the employer must consult with anyone related to a relative collective agreement and absent this agreement, a workplace forum or a registered trade union whose employees are

¹⁵ [2021] 6 BLLR 627 (LC).

effected by proposed dismissals (or consult employees or representatives directly if there is no such trade union). No mention in this case is made to a consultation with the South African Entertainers Union, being the registered trade union of employees affected by the retrenchments. This is therefore a contravention of section 189 of the Labour Relations Act No 66 of 1995.

In terms of section 189A of the Labour Relations Act No 6 of 1995, if the employer contemplates dismissing more than 50 employees, where over 500 employees are currently employed, and it is sought as a result of operational requirements, then certain requirements or rights arise such as the practitioner giving notice of termination of termination of employment, the appointment of a facilitator and rights to strike.

Question 10

Commented [M32]: 3 marks.

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

Chapter 6 of the Companies Act 2008 contains the rights of employees during the business rescue process (and, *inter alia*, their elevated status when regard is had to the importance of balancing rights as stipulated under section 7(k) of the Companies Act 2008).

The rights of an employee during business rescue, as an affected person, are set out in section 144 of the Companies Act 2008, which rights may be exercised through a trade union, directly or through a proxy as stipulated in section 144(1) of the Companies Act 2008.

In terms of section 144(3) of the Companies Act 2008, employees have the right to: notice of court proceedings, decisions, meetings or other events concerning business rescue; participate in court proceedings that arise during business rescue proceedings; form an employee committee; be consulted regarding the development of a business rescue plan; make submissions regarding the business rescue plan at a meeting to vote on the plan's approval; vote on the business rescue plan insofar as the employee is a creditor; propose the development of an alternative plan if the initial business rescue plan is rejected; and present an offer to acquire the interests of affected persons who voted against approval of the business rescue plan.

Under section 135(1) of the Companies Act 2008, remuneration, reimbursement for expenses and other amounts of money related to employment that become due and payable during business rescue proceedings are considered post-commencement financing. In this regard, employees' claims are elevated to that of post-commencement finance and are paid before all other post-commencement finance claims. The aforementioned amounts, if incurred prior to business rescue are considered as preferent unsecured claims, according to section 144(2) of the Companies Act 2008.

Section 136(1)(a) of the Companies Act 2008 provides that employees of the company in business rescue continue to be so employed under the same terms and conditions of their employment contract existing immediately prior to commencement of business rescue proceedings, unless changed in the ordinary course of attrition or as agreed to with employees subject to relevant labour legislation.

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 Themba Sithole and Mr Kabelo Mogale (in their capacity as pre-existing management of the company and possibly, although not mentioned in the case study, as directors of the company) and the board of directors would indeed have had a role to play during the business rescue process.

In terms of section 140(1)(a) and (b) of the Companies Act 2008, during business rescue proceedings, the business rescue practitioner takes full management control of the company in substitution for its board of directors and pre-existing management, and the practitioner may then delegate any powers or functions to a director or pre-existing management.

During business rescue proceedings, directors are obliged to continue to exercise their functions as directors, subject to the authority of the business rescue practitioner.

The directors still owe a duty to the company to fulfill management functions subject to the business rescue practitioner's instructions. The directors are also still bound by section 75 of the Companies Act 2008.

In terms of section 142 of the Companies Act 2008, directors still have statutory duties to assist the business rescue practitioner, including attending to reasonable requests, providing information on company affairs and delivering all company books and records in their possession to the practitioner.

The business rescue will have a higher likelihood of success if the pre-existing management and board of directors play an active and co-operative role.

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)

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. Need to apply the law to the facts.

Commented [M34]: 5 marks.

The obligation on the business rescue practitioner to consult with affected parties is stipulated under section 150(1) of the Companies Act 2008.

In *Hlumisa Investments Holdings (RF Limited and Another) v Van der Merwe NO and Others*¹⁶, the court held that there is a clear distinction between informing and consulting. The court referred to the case of *Scalabrini Center Cape Town and Others v Minister of Home Affairs and Others*¹⁷ in which it was stated that consultation entails a genuine invitation to give advice and a genuine receipt of that advice and true consultation is not present where the practitioner has already reached a fixed conclusion¹⁸ on any matter to be discussed. It has further been held that consultation is not a mere formality and that it must occur in a substantive sense¹⁹.

Importantly, and as held in *Hayes and Another v Minister of Housing, Planning and Administration, Western Cape and Others*²⁰: sufficient information and time to provide advice must be afforded to the consulted party and there must be sufficient time for the practitioner to consider advice received.

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 may propose a contingency agreement for a success fee. Such an agreement must be approved by:

- 1) the holders of a majority of the creditors' voting interests (present and voting at a meeting to consider the contingency agreement); and
- 2) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up (present and voting at a meeting to consider the contingency agreement).

Question 14

Commented [M36]: 3 marks.

¹⁶ [2016] JOL 34326 (GP).

¹⁷ 2013 (3) SA 531 (WCC).

¹⁸ *Sinfield and Others v London Transport Executive* [1970] 2 All ER 264 (CA).

¹⁹ *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 (PC).

²⁰ 1999 (4) SA 1229 (WC).

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)**

Khusela Entertainment is a large company (having a company score above 500 when considering number of employees (2000 - and one point given per employee), third party liability, turnover and number of persons with beneficial interest in the company's issued securities).

Ms Sarah van Zyl's tariff rate per hour is R2,000 per hour (including VAT) and a maximum of R25,000 per day as allowed for under section 143 of the Companies Act 2008 and set out in regulation 128 of the Companies Regulations 2011.

Question 15

Commented [M37]: 3 marks.

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)**

In terms of section 147(1) of the Companies Act 2008, the business rescue practitioner is required to convene and preside over a first meeting of creditors and, at the meeting, confirm whether or not they believe there is a reasonable prospect of rescuing the company.

In this case, Ms van Zyl only begun an investigation of company affairs after the first creditors meeting and only came to the view that the company was capable of being rescued at this point.

She is thus in contravention of section 147(1) of the Companies Act 2008 as she did not, at the first meeting of creditors, confirm whether or not she believes the company is capable fo being rescued.

Ms van Zyl should have begun her investigation as soon as practicable after her appointment (as required under section 144(1) of the Companies Act 2008) and prior to the first meeting of creditors, which would have put her in a position to confirm at such meeting whether or not she believes the company is capable of being rescued.

Question 16

Commented [M38]: 4 marks.

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)

In terms of section 150(5) of the Companies Act 2008, the business rescue plan must be published within 25 days after the appointment of the business rescue practitioner, or after an extended period of time if such extension has been applied for and ordered by court or agreed to by a majority of the creditors' voting interests.

In this case, the business rescue plan was not published within the prescribed timeframe, no request for an extension of the publication due date is mentioned, and as such the business rescue practitioner is in contravention of section 150 of the Companies Act 2008. This contravention could have been avoided if an extension was initially requested and granted.

In addition, in terms of section 132(3) of the Companies Act 2008, if business rescue proceedings take longer than three months to conclude (or such longer period as granted by court order), as is the scenario in this case study, the business rescue practitioner must prepare a monthly updated progress report on the business rescue proceedings and provide same to all affected persons and the court (or CIPC depending on the case).

Question 17

Commented [M39]: 4 marks out of 5. Needed to explain why Mr Siwisa and Mrs Phillips are related persons.

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)

Section 128(1)(g) of the Companies Act 2008 defines an independent creditor as a person who is: a creditor of the company (including an employee in terms of section 144(2) of the Companies Act 2008) and is not related to the company, a director or the business rescue practitioner, subject to section 128(2) of the Companies Act 2008 which states that an employee is not related to a company simply by being a member of a trade union that holds securities in said company.

The term "related" is defined in the Companies Act 2008. Section 2(1)(b) of the Companies Act 2008 states that an individual is related to a juristic person (company) if the individual directly or indirectly controls the juristic person. Section 2(2)(a)(ii) of the Companies Act 2008 states that an individual is able to exercise control over a company where such person, together with any related or inter-related person, holds the majority of voting rights attached to the company's issued securities allowing them to exercise control over the company or where such person, together with related or inter-related persons, has the right to elect and control directors who control the majority of votes at a board meeting.

In this case Mr Siwisa, together with his relation Mrs Lungi Phillips, hold the majority (being 51%) of the company's issued securities (and consequently the majority voting rights) giving them the ability to exercise control over the company as envisioned in section 2(2)(a)(ii) of the Companies Act 2008 and therefore Mr Siwisa is deemed as related to Khusela in terms of section 2(1)(b) of the Companies Act 2008. As a result thereof, he is not an independent creditor of Khusela.

In addition, Mr Siwisa is related to a director of the company (his cousin), as defined in terms of section 2(a)(ii) of the Companies Act as they are separated by no more than two degrees of natural affinity, and so in this sense too he is not an independent creditor of Khusela.

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)**

The business rescue practitioner does not have the ability/right to unilaterally amend the approved business rescue plan and by doing so she has circumvented the procedures contained in the Companies Act 2008. This view is confirmed by the court in the case of *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and Another*²¹ which further states that a business rescue practitioner cannot impose a plan on creditors which they have not voted on as required under section 152 of the Companies Act 2008.

In terms of section 152 of the Companies Act 2008, if during a section 152 meeting, proposals are made for amendments to the proposed business rescue plan then the

²¹ [2014] 1 ALL SA 862 (WCC).

Commented [M40]: 4 marks. Need to distinguish between the process to be followed for an amendment of a BR Plan prior to its adoption and the process to be followed in respect of an amendment post the adoption of a plan.

practitioner is required to either: hold a vote regarding proposals to amend the plan which was seconded by holders of creditors' voting interests and satisfactory to the practitioner (whereby a simple majority is required to approve the proposed amendments); or, if the amendment is not acceptable to the practitioner or sufficient creditors, the practitioner may adjourn the creditors' meeting in order to consider and possibly revise the business rescue plan in terms of section 153 of the Companies Act 2008. Section 153(3) of the Companies Act requires that, should the practitioner or an affected person hold a vote for the practitioner to prepare and publish a revised/amended business rescue plan, then the practitioner must conclude the meeting after said vote and prepare and publish a new/amended business rescue plan within 10 days thereafter.

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)

- 1) There must be an income statement provided which accurately indicates how different products have performed and if the company is making sufficient margin from the proceeds of its goods/services.
- 2) There should be a cash flow statement that shows the financial health of the company and allows Opera Sound Engineering to assess any liquidity risk factors.
- 3) There must be a balance sheet provided which contains sufficient details to ascertain whether the company is technically solvent or insolvent.

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, Ms van Zyl should include a cash flow statement in her business rescue plan. It is an important indicator of the financial health of the company, its stability and potential short-term risks. The cash flow statement shows the liquidity position of the company and the possible lack of such liquidity either currently or in the short-term which would show possible financial distress due to commercial insolvency and shed light on the viability of a proposed business rescue plan.

Question 21

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

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]: 2 marks.

Commented [M43]: 3 marks.

Three advantages for employees under business rescue as opposed to liquidation are as follows:

1) In terms of section 136(1)(a) of the Companies Act 2008, employees' contracts are recognised and employees continue to be employed by the company during business rescue on the same terms and conditions of their contracts of employment which were entered into prior to business rescue proceedings. Furthermore, the business rescue practitioner has limited powers to interfere with an employee's contractual rights which remain enforceable by the employee. This differs from liquidation proceedings where contracts of employment may be suspended under section 38(1) of the Insolvency Act 24 of 1936.

2) The Companies Act 2008 provides labour law protection for employees during business rescue, including the applicability of section 189 and 189A of the Labour Relations Act 1995 when the business rescue practitioner considers a retrenchment process. Under liquidation, an employment contract may simply be terminated under section 38(5) and (7) of the Insolvency Act 24 of 1936 (and such termination is a natural consequence of liquidation).

3) Under business rescue proceedings, employee's claims are treated as either: post-commencement finance claims with preference over all other post-commencement finance claims; or preferent unsecured claims. Therefore, the ranking of employees' status and claims are elevated above the position they would hold in liquidation (being that of mere concurrent creditors with unsecured claims).

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

TOTAL MARKS: [100]