



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 65/100 (mark 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: 13 marks.

Question 1.1

Choose the **correct** statement:

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

Commented [M3]: 1 mark

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

Question 1.2

Choose the **correct** statement:

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

Commented [M4]: 1 mark

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

Question 1.3

Commented [M5]: 1 mark

Choose the **correct** statement:

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

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

Question 1.4

Commented [M6]: 0 marks

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]: 0 marks

Choose the **correct** statement:

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

(a) a business rescue cost.

(b) post-commencement finance.

(c) a preferent claim.

(d) a secured claim.

(e) an unsecured claim.

(f) a damages claim.

Question 1.8

Commented [M10]: 0 marks

Choose the **correct** statement:

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

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

Question 1.9

Commented [M11]: 0 marks

Choose the **correct** statement:

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

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

Question 1.10

Commented [M12]: 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]: 0 marks

Choose the **incorrect** statement:

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

Question 1.12

Commented [M14]: 1 mark

Choose the **correct** statement:

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

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

Question 1.13

Commented [M15]: 1 mark

Choose the **correct** statement:

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

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

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

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

Question 1.14

Commented [M16]: 1 mark

Choose the **correct** statement:

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

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

Question 1.15

Commented [M17]: 1 mark

Choose the **correct** statement:

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

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

Question 1.16

Commented [M18]: 1 mark

Choose the **correct** statement:

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

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

Question 1.17

Commented [M19]: 1 mark

Choose the **correct** statement:

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

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

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

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

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

(d) All of the above.

Question 1.18

Commented [M20]: 0 marks

Choose the **correct** statement:

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

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

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

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

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

(e) none of the above.

Question 1.19

Commented [M21]: 1 mark

Choose the **correct** statement:

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

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

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

Question 1.20

Commented [M22]: 0 marks

Choose the **incorrect** statement:

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

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

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

CASE STUDY

Khusela Entertainment Proprietary Limited

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 2

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

Section 133(1) of the Companies Act 2008 provides a moratorium on legal proceedings and enforcement action against the company in business rescue proceedings without the consent of the practitioner or leave of the court. Accordingly, and aside from cancellation of the instalment sale agreements by Fast Cars (Pty) Ltd, the creditors are prohibited from taking legal action for recovery whilst Khusela is in business rescue proceedings.

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) requires a majority of creditors of more than 75% of creditors' voting interests that voted, of which at least 50% should be independent creditors' voting interests that voted in support of a proposed business rescue plan for a business rescue plan, which does not alter the rights of shareholders, to be adopted.

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)

Commented [M23]: 2 marks out of 2.

Commented [M24]: 3 out of 3 marks.

Commented [M25]: 2 out of 3 marks. Legal principles to be applied to the facts.

The cram-down principle provided for in Section 152(4) of the Companies Act 2008 dictates that if a BR plan is duly adopted in accordance with Sections 152(2) and (3), the BR plan will be binding upon all creditors of the company including those creditors that voted against the plan or was absent from the meeting or failed to prove a claim. This principle was confirmed in *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* to the extent that the dissenting creditors and absent parties being bound should not exceed more than 25% of the voting interest.

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)

One of the key requirements for commencement of business rescue proceedings, be it compulsory or voluntarily, is that the company should be "financially distressed". Section 128(1)(f) of the Companies Act 2008 defines financial distress as a predicament wherein a company appears to be reasonably unlikely to settle its debts as they become due and payable within the ensuing six months, or that that the company will become insolvent within the ensuing six months. Essentially, whether it seems that the company will become either commercially insolvent within the next six months or factually insolvent within the next six months.

This does lead to the question as to what if the company is already factually or commercially insolvent, as in the instance of Khusela. This question was considered by the court *a quo* in the matter of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd* wherein the court concluded that commercial insolvency at the date of application meets the requirements of financial distress as defined in Section 128(1)(f).

However, whether the facts of the matter over-or undershoot the requirements of "financial distress" is only the first hurdle to overcome in commencing business rescue proceedings. Sections 129(1)(b) and 131(4) goes on to prescribe that there should be a "reasonable prospect for rescuing the company". The Supreme Court of Appeal considers this requirement in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd* (on appeal) and without trying to set the bar to high goes on to state that "reasonable prospect" requires more than *prima facie* grounds and speculative suggestions.

The judgement in *Welman v Marcelle Props 193 CC & Another* explains quite eloquently viable candidates for business rescues proceedings as ailing corporation instead of chronically and terminally ill corporations.

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*.

In light of the above, Khusela was rightly placed into business rescue proceedings.

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 accordance with Section 131(6) of the Companies Act 2008, once application is made to court to place a company in business rescue liquidation proceedings immediately suspend until the court has (a) adjudicated upon the BR application, (b) until the BR proceedings end.

The interpretation, practicalities and abuse of this provision has led to widespread litigation since the promulgation of the business rescue mechanism in South African legislation. The latest position in the instance where Section 131(6) comes into play is that; in accordance with Lutchman NO v African Global Holdings (Pty) Ltd business rescue application is only "made" once the service requirements of Section 131(2) have been met (i.e. have been served on the company and CIPC and notified every affected person); and, according to GCC Engineering (Pty) Ltd & Other v Maroos & Others, if provisional liquidators have been appointed, they remain vested with the duty to preserve the assets without the powers to realize.

The question on whether a pending business rescue application will suspend a pending liquidation application is still a case of some uncertainty, with conflicting judgements in different divisions relating to this aspect. In practice (in the Western Cape Division at least), it seems that the two applications will be heard together with the parties to the application having the opportunity to make their respective cases as to whether the company should be placed into business rescue or liquidation.

Question 7

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

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

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

Question 7.1

Commented [M27]: 3 marks out of 5. Needed to discuss the relevant principles 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.

Commented [M28]: 2 marks.

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

It is trite that the holder of the general notarial bond over immovable assets who has not taken possession of the asset by way of perfection prior to insolvency proceeding is not a secured creditor as envisaged in the insolvency law. However, Section 134(3) of the Companies Act 2008 refers to the holder of "security or title interest" over a particular asset to consent to the disposal thereof.

Henochsberg's commentary on Section 134(3) takes into account the close ties between the 2008 and 1973 Companies Acts along with the 1936 Insolvency Act and seems to suggest that an unperfected general notarial bond over movable assets does not constitute "security or title interest" over the movable assets. It seems that this position is taken as a departure point in the matter of ABSA Bank Ltd v Go On Supermarket (Pty) Ltd.

Accordingly, I would advise the BRP to proceed to realize the assets whether or not she obtained the creditor's consent.

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)

The BRP would have to comply with the provisions of Section 134(1)(a) by, agreeing to dispose of property only; (i) in the ordinary course of business, (ii) in a *bona fide* transaction at arm's length for fair value approved in advance and in writing by the BRP; or in a transaction included in the approved business rescue plan.

Question 8

Commented [M30]: 5 marks.

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

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

I would advise the BRP to investigate the agreement of cession and determine whether the cession of the material distribution agreements is a cession made *in securitatem debiti* or an out-and-out cession. In the former instance, the *dominium* remains with Khusela, whilst in the latter instance the *dominium* passes to Crypto Bank and therefore the argument can be made that the BRP cannot deal with these agreements as they are not an asset belonging to Khusela until Crypto Bank is settled.

Assuming that the cession of the agreements satisfies the BRP that Crypto Bank holds security or title interest over the distribution agreements and that she is entitled to deal with the agreements, Section 134(3)(1) of the Companies Act 2008 dictates that the BRP shall obtain the prior consent of the creditor prior to disposing of the property over which he holds security. Alternatively, if the BRP is satisfied that the realization of the security would be sufficient to discharge the indebtedness towards Crypto Bank, she may proceed to dispose the security and promptly pay the proceeds or provide security to the satisfaction of Crypto Bank.

Section 135(2)(a) states that post-commencement financing obtained may be secured by the lender over assets that are not otherwise encumbered. The courts have held that the preference attributed to post commencement finance may not dilute the security of the secured creditors.

In light of the above framework, I would advise the BRP to do an expert independent valuation on the distribution agreements in relation to the value that can be ascribed to this security. Should the value of the security exceed the indebtedness of Khusela to Crypto Bank, more than the PCF of R 1,000,000.00, the BRP may consult and negotiate with Crypto Bank to compromise their security to such an extent that Easy Access will be satisfied with the remainder of the security. If the parties are satisfied with the aforementioned solution, the BRP should include this agreement in the BR plan.

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]: 1 mark. 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 a section 189 notice to start the consultation processes may only be issued once a 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. Needed to conclude that the section 189 process and retrenchments carried out by Sarah were both unlawful and unenforceable.

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)

More retrenchments than necessary

Section 189(2) of the Labour Relations Act requires that meaningful joint consensus-seeking process be undertaken between the employer and employees in order to reach consensus on *inter alia* the measures taken by the employer to minimize the number of retrenchments based on operational requirements.

In casu, the BRP identified that more than 50% of the employees should be retrenched, however, she proceeded to retrench 75% of the employees. This can be argued as a procedural misstep by parties seeking relief in the Labour Courts.

Consultation period longer than 60 days

The fact that the consultation period extended beyond 60 days can be argued as procedural non-compliance with Section 189 of the Labour Relations Act, the aforementioned process has very strict time-periods wherein these consultations should be conducted.

Retrenchment prior to business rescue plan

Section 136(1)(a) of the 2008 Companies Act dictates that employees of a company under BR continue to be employed on the same terms and conditions as they were prior to BR, except in instances where (i) the changes occur in ordinary attrition, or (ii) the employees and the company agree on different terms in accordance with the applicable labour legislation. 131(1)(b) goes on to state that any retrenchment in envisaged in the company's BR plan is subject to Sections 189 and 189A of the Labour Relations Act and any other employment related legislation. Section 136 in general distinguishes quite notably a contract of employment and any other contact.

Considering that employees of a company is specifically mentioned in the definition of "affected persons", Section 150(2) states that a BR plan should contain all the information required for an affected person to decide whether or not to adopt said plan and Section 150(2)(c)(ii) goes further in stating that the plan should include the effect of the plan on the employees and their conditions of employment.

In light of the above legal framework, the Labour Appeal Court in the matter of South African Airways (SOC) Limited (In Business Rescue) and Others v National Union of Metalworkers of South Africa obo Members and Others upheld the court a *quo's* judgement in that conducting Section 189 retrenchment process in prior to adoption of a business plan is unlawful.

Question 10

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

The rights of the employees during BR proceedings are entrenched in Section 144 of the Companies Act 2008, which affords employees the right to participate in the BR proceedings as any other creditor and shareholder. The employees are *inter alia* entitled, either through their trade union, employee representatives or directly, to receive notice of and participate in court proceedings, be meaningfully consulted during preparation of the BR plan, make submission during creditors meetings, vote on adoption of BR plans and propose amendments.

Furthermore, if employees remuneration and reimbursements are in arrears prior to commencement of BR proceedings, these claims will be considered as preferred unsecured creditors.

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)

Section 142 of the Companies Act 2008 placed obligation on the board of directors of a company in BR proceedings to provide the BRP with all the books and records of the company including particulars relating to material transactions, legal proceedings, assets and liabilities, employees, debtors and creditors.

Whilst the BRP may exercise full management control over the company in substitution of the board, the BRP may delegate her powers and functions to the board and existing management in accordance with Section 140(1)(b). The directors are obligated in terms of Section 137(2) subject to the authority and instructions of the BRP to exercise his

Commented [M32]: 3 marks.

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.

management functions as director and in terms of Section 137(3) to attend to the requests of the BRP and provide the BRP with any information about the company's affairs as may be required.

In the *court a quo* in the matter of *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others*, the court stated that the directors retain their functions in company governance as a neutral function removed from management control, but went further on to state that "noting of significance can be done by the directors during BR proceedings without the authorisation of the BRP".

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)

Section 150(1) of the Companies Act specifically states that the BRP shall prepare a BR plan after consulting with the creditors, other affected persons and management of the company. Rogers J in the matters of *Scalabrini Center of Cape Town & Others v Minister of Home Affairs & Other*, as applied to Chapter 6 of the Companies Act in *Hlumisa Investments Holdings RF Ltd & Another v Van der Merwe & Others* elaborated on what should be considered a consultation process.

Applying Rogers J explanation of a consultation process within the context of Chapter 6, means that the consultation process should be a genuine invitation by the BRP to affected parties to give advice to the BRP at a substantive level prior to the BRP making a decision and that the BRP will receive and consider such advise upon making a decision. This process should not be treated a formality whereby the BRP merely informs the affected party of a decision already reached.

Failure to consult with affected parties prior to publishing a BR plan and calling a meeting to vote, would be breach of Section 150(1) which will enable any affected party to obtain urgent relief from a court.

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)

The BRP is entitled to propose additional contingency remuneration in terms of Section 143(2) of the Act. However, such a contingency fee would have to be approved at a meeting

specifically called for this purpose by a simple majority of creditors voting interest and a simple majority of shareholder's interest who would be entitled to any residue after settlement of the creditors.

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)**

In terms of Regulation 26(2) each employee employed is attributed one point. At commencement of BR proceedings Khusela had 2000 employees and therefore have a PI score of over 500, which makes Khusela a large company. The BRP can therefore levy R 2,000.00 per hour, limited to R 25,000.00 per day (ex VAT).

Question 15

The case study includes the following statements:

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

and

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

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

Section 141(1) of the Companies Act 2008 places an obligation on the BRP to investigate the company's affairs, business, property and financial situation as soon as practicable after being appointed to assess whether there is reasonable prospect of rescue.

Section 141(2) places a further obligation on the BRP in that she is required to continuously evaluate the affairs of the company at any time in the BR proceedings to determine whether there is still reasonable prospect of rescue.

In light of the above provisions the BRP did not comply with the Act as she only started her investigation after ratification and only thereafter satisfied herself that the company has

Commented [M36]: 2 marks. The tariff amounts are inclusive of VAT.

Commented [M37]: 2 marks. Needed to refer to section 147(1)(b).

reasonable prospect of rescue. Since Khusela was placed into compulsory BR, the BRP would in all likelihood not have had the opportunity to do a pre-assessment of the company. However, she should have engaged with the directors and prioritized investigation into the affairs immediately 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)

If the BR proceedings have not ended within three months after commencement, the BRP should prepare and deliver a report on the progress of the proceedings with monthly updates thereon to every affected person and the court or CIPC commissioner (whichever applicable) until the end of proceedings.

Section 150(5) places an obligation on the BRP to publish a BR plan after 25 days of appointment. The BRP may extend this period either by a simple majority vote by the creditors or by application to the relevant the court.

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)

Section 128(1)(g) defines an "independent creditor" as a person who (i) is a creditor of the company, including an employee of the company who is a creditor of in terms of Section 144(2), and (ii) is not related to the company, a director, or the practitioner, subject to subsection (2).

Section 1, read with Section 2 (1)(a) of the Companies Act defines "related" in respect of persons as separated by no more than two degrees of natural or adopted consanguinity or affinity.

Commented [M38]: 2 marks. Needed to refer to section 132(3) - publish monthly progress reports after month 3 as the BR proceedings did not end within 3 months.

Commented [M39]: 3 marks out of 5. Need to conclude with reference to the Companies Act that Mr Siwisa has control over Khusela by virtue of the fact that he (together with a related person - Mrs Phillips) has the ability to exercise a majority of the voting rights by virtue of a combined shareholding of 51%. See section 2(1)(b). Need to also set out the applicable legal provisions.

Mr. Siwisa is not an independent creditor as he is related to Ms. Phillips within two of natural affinity. Additionally, he holds substantial shares in Khusela and along with his Ms. Philips will hold simple majority sway in matters requiring shareholders' vote.

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)

Whether a BRP can unilaterally amend the adopted BR plan was considered in *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & Another* as well as *Arqomanzi Proprietary Limited v Vantage Goldfields (Pty) Limited and Other*, wherein the court ruled in both instances that a BRP may not unilaterally amend a BR plan, or reserve the right to unilaterally amend a BR plan, as it would circumvent the correct procedure set out hereunder.

Section 150(1) of the Companies Act 2008 states that a BRP shall prepare a business rescue plan for consideration after consultation with creditors, affected persons and management. The BR plan should then be published by the company within 25 days of the BRP's appointment.

The proposed business rescue plan should then be considered at a meeting convened in terms of Section 151 for the purpose of considering the plan that was published at least 10 days before the meeting. At the meeting, the BR plan should be considered and the BRP should in terms of Section 152(1)(d)(i) entertain votes on motions to amend the proposed plan or direct the BRP to adjourn the meeting in order to revise the plan in accordance with Section 152(1)(d)(ii).

If the BR plan was rejected, the BRP may at her motion seek a vote in terms of Section 153(1)(a)(i) for approval to prepare and publish a revised plan. If the BRP fails to do so, any affected person may call for a vote in terms of Section 153(1)(b)(i)(aa) to instruct the BRP to prepare and publish a new plan. Section 153(3)(a) dictates that the BRP should prepare and publish a new plan within 10 days, whereafter the plan will be reconsidered afresh in accordance with the provisions of Part D of the Act (i.e. consideration at meeting, voting on amended plan, entertaining motions etc.).

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)

Commented [M40]: 3 marks. Needed to set out the steps that would need to be followed by Sarah to validly amend the plan. Need to distinguish between the process to amend a BR plan prior to its adoption and after its adoption.

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.

In order to consider the business rescue plan, I would expect to see a projected balance sheet for the company in business rescue, a projected income and expenses statement for the ensuing three years and well as a projected cashflow statement along with the assumptions and provisions made to in preparing the aforementioned. These financial statements should be sufficiently detailed.

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)**

As the adage goes "cash is king" and therefore I would advise the BRP to include a current and projected cashflow statement in her BR plan as the creditors need be able to consider the current and projected liquidity position of the business, the tranches wherein creditors will be settled and refinanced debts serviced and whether sufficient liquidity remains to during implementation to cope with unforeseen operational expenditures.

Question 21

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

Employees in a liquidation scenario are immediately suspended upon the granting of a liquidation order, whereafter they will not be required to render any services, will also not receive any remuneration and will be entitled to UIF. Their contracts of employment will usually be terminated upon the appointment of a final liquidator, whereafter their preferent claim for arrear salary and leave, severance, notice pay is limited to R 32,000.00 with the shortfall being a concurrent claim.

In BR proceedings on the other hand, the employees will remain employed on the same terms as they were prior to BR and their remuneration during BR will be considered a post-commencement funding and will therefore enjoy the preference attributed to PFC funders. In addition their arrear salary and expenses due prior to BR proceedings will be considered as an unlimited unsecured preferent claim.

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

TOTAL MARKS: [100]

Commented [M42]: 2 marks.

Commented [M43]: 2 marks out of 3.
Employees are protected by labour law in context of business rescue / the Labour Relations Act is applicable to any dismissals for operational requirements.