



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 70/100 (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: 17 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]: 1 mark

Choose the **correct** statement:

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

(a) a business rescue cost.

(b) post-commencement finance.

(c) a preferent claim.

(d) a secured claim.

(e) an unsecured claim.

(f) a damages claim.

Question 1.8

Commented [M10]: 0 marks

Choose the **correct** statement:

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

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

Question 1.9

Commented [M11]: 1 mark

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

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]: 0 marks

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. x

(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. x

(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. x

(e) none of the above.

Question 1.19

Commented [M21]: 1 mark

Choose the **correct** statement:

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

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

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

Question 1.20

Commented [M22]: 1 mark

Choose the **incorrect** statement:

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

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

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

CASE STUDY

Khusela Entertainment Proprietary Limited

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 2

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

These legal proceedings would not be able to be pursued (or continued with) while the company is in business rescue as a result of the statutory moratorium created by section 133(1) of the Companies Act. The moratorium provides that no legal proceedings may be commenced or proceeded with against the company or in relation to any property belonging to the company, or lawfully in the possession of the company unless the written consent of the business rescue practitioner has been obtained or with the leave of the court. The moratorium provides the company in financial distress with breathing space to restructure its affairs, this is achieved by placing a stay or prohibition on all legal proceedings against the company (whether the legal proceedings have already commenced or are new) in business rescue. The SCA in *Murray v FRB* held that the moratorium is of cardinal importance.

Chapter 6 does not define legal proceedings or enforcement action, but these terms are given a wide meaning as per *Blue Star Holdings v West Coast Oyster growers CC* which held that the intention of s133 is clear and is to cast the net as wide as possible in order to include any conceivable type of action against the company such as liquidation proceedings. It also includes, any matter referred to court, or tribunal or any other formal proceeding which is intended to adjudicate the matter and includes an application or proceeding to perfect security (as per *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd*).

The enforcement action does not, however, include the act of cancellation of agreements such as a lease or instalment agreements (as per *Cloete Murray v FRB t/a Wesbank*, where the SCA held that "enforcement" refers to a species of legal proceedings such as court or arbitration proceedings).

Commented [M23]: 1 mark out of 2. The conclusion is incomplete as the legal proceedings may be pursued if the BRP consents or the leave of the court is obtained.

The claims will though not prescribe as the time that the moratorium applies is not counted for purposes of prescription.

The moratorium does not affect criminal proceedings against the company or its directors (though it seems from the facts criminal proceedings are not in issue) nor if a claim amounts to set-off in terms of section 133(1)(c) of the Companies Act.

Question 3

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

In order for the plan to be adopted, the requirements of section 152 of the Companies Act must be met - this requires the support of more than 75% of the creditors' voting interest that were voted and the votes must include at least 50% of the independent creditors' voting interests that were voted. A creditor is independent if he or she is a creditor in terms of section 144(2) of the Companies Act and is not related to the company, a director or the business rescue practitioner (subject to s128(2)).

The creditors' claims which have been approved by the business rescue practitioner will be allowed to vote and the number of votes is measured according to the creditor's claims as per the company's records. Creditors with disputed claims are generally not permitted to vote, save for the portion of their claim which is not in dispute. Both concurrent and secured creditors get to vote in terms of the value of the debt owed to it and secured creditors are not provided a weighted vote as a result of being secured.

The BRP should note also that following the controversial Wescoal decision, the pcf will not be entitled to vote (that is until that decision is set aside on Appeal).

The shareholders must also be considered if the proposed plan alters the rights of the holders of any class of the company's securities (being the rights attached to their shares) and in such event the shareholders must also vote to approve or to reject the proposed plan (in terms of s146 read with s152(3)(c)). The simple majority of shareholders voting rights must support the adoption of the plan.

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)

Regardless as to whether a creditor votes in favour of the plan, if the plan is approved then the plan is binding on all creditors as a result of the cram-down principle in terms of which the plan will be crammed-down on all creditors and the creditors will be bound by the plan once it is adopted.

Commented [M24]: 3 out of 3 marks.

Commented [M25]: 2 marks out of 3. Legal principles were wonderfully set out but there was no application of the principles to the facts - address the position of Opera Sound Engineering specifically.

This is in terms of section 152(4) of the Companies Act and confirmed in *DH Brothers Industries v Gribnitz NO* which held that the voting interests of the non-assenting creditors as well as the absent parties (those that did not attend the meeting to vote on the plan) are bound by the adopted plan and crammed-down.

The cram-down principle has been held to be indispensable to the successful implementation of a BR plan (see *African Banking Corp of Botswana v Kariba Furniture manufactures* which held that regardless as to whether a creditor voted against the plan, the plan is binding on those dissenting creditors).

This is an important tool for business rescue and enables a fresh start to the company and also discourages creditors from refusing or holding out for better treatment or holding up the BR process. The creditors (whether they approved or dissented) are in terms of section 154(2) of the Companies Act precluded from enforcing their debts against the company, save to the extent provided for in the BR plan. The SCA in *Van Zyl v Auto Commodities* held that the debts of dissenting creditors are not discharged under s154(1) but that s154(2) operates against a creditor even if they dissented and voted against the plan - this is relevant as the dissenting creditor can then still pursue the balance of the claim against the surety (if there is a surety of course). The debt owed to the dissenting shareholder continues to exist but is enforceable only to the extent provided in the BR plan (as per the SCA in *Van Zyl*) and with the result that the BR plan is binding on all creditors.

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)

“Financially distressed” means that in terms of Khusela the company, it appears to be reasonably unlikely that the company will be able to pay all of its debts in as they become due and payable in the immediately ensuing 6 months or that it appears to be reasonably likely that the company will become insolvent within the immediately ensuing 6 months.

The test is forward looking.

It is only if the company is financially distressed that it can be placed in BR and not if the company is insolvent.

The Court in *Anthonie Welman v Marcelle Props* held that business rescue is not for the terminally ill corporations, but are rather for ailing entities which, if given time, may be rescued and become solvent.

There must be a reasoned and factual basis for the belief that the company can be rescued (see *Kovacs Investments 571 v Investec*). If the company is considered as being “hopelessly insolvent” it would be manifestly wrong to place such a company into business rescue (the company should then rather have been placed in liquidation immediately).

The test for “financial distress” contemplates both a cash-flow and a balance sheet test to determine whether the company is financially distressed. The directors must consider

Commented [M26]: 1 mark out of 5. Needed to discuss the financially distressed requirement with reference to applicable case law.

whether the company is factually solvent (its liabilities exceed its assets) or whether it is commercially insolvent in that it is unable to pay its debts in the ensuing 6 month period.

The facts show that the company could not pay its debts as they became due and payable in the ordinary course and that its liabilities exceeded its assets. On these two facts the company met the requirements for "financially distressed". The facts also show that the BRP was of the view that the company was capable of being rescued, but that ultimately it could not be and was placed in liquidation. The facts do not show the financials of the company and I cannot therefore accurately determine whether the company was financially distressed or terminally ill. From the facts though it appears that the company was more than just financially distressed and was actually commercially insolvent, terminally ill and should rather have been placed in liquidation. The fact that the company could not pay the debts at the time it went into business rescue does not mean that it was not financially distressed, it was and could not pay its debts in the ensuing 6 months and met this requirement. However, from the facts it seems that the company managed to stay afloat for a short while as a result of the additional loans it received (which is really only additional debt) and not from increased revenue or profits. The loans funded the debts for a short while only, what the company needed was increased revenue and profits to meet its financial obligations and from the facts the revenue and profits do not seem to have increased, but instead the company seems to have only loaned funds to stay afloat a little longer which to me indicates that it is insolvent and more than financially distressed. If the BR Plan had reduced the company's debts and importantly its wage bill then perhaps the company could have been returned to solvency if the debts could be reduced to lower than its revenue - this appears from the facts not to have been possible.

It was not too late for business rescue as the company needed to reduce its debts, reduce its overheads and monthly expenses and align same closer to its income in order to be solvent. This could have been achieved in the BR by reducing the wage bill and reducing other expenses such as the vehicles, compromising the debts and then starting with a fresh start at the end of BR.

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)

From the use of the word "filed" at court above, I assume that the liquidation application had been (1) issued at court, then (2) served on the company and (3) filed in court as that is the process for filing. I assume that "filed" does not simply mean issued at court and not served on the company (if only issued and not yet served on the company then it would not be considered as being "initiated" as in *Tjeka v KPPM* the Court held that the liquidation must have been issued and also served on the company and not merely issued and filed at court). The *Pan African Shopping v Edcon* judgment also held that *Tjeka* was correct and that it is only once the liquidation application is issued and also served on the company are

Commented [M27]: 3 out of 5 marks.

they initiated, further that until service of the liquidation application the company remains unaffected in law until the service of the liquidation application.

If though the liquidation application was pending (meaning it had been issued, served on the company and filed in court), in terms of ABSA v Summer Lodge the application or liquidation will not be suspended. However, STD Bank v A-Team Trading CC the court held the opposite. The Summer Lodge decision has been applied in STD Bank v Gas 2 Liquids in the Johannesburg High Court.

The SCA in Lutchman NO v African Global then made it clear that the service and notification requirements of s131(2) are not merely procedural steps but are substantive requirements, with the result that a business rescue application will not have been made for the purpose of s131(6) and the liquidation application not suspended until the BR application has been both issued and served on the company and the CIPC as well as the affected persons having been notified.

The Court as per SARS v Louis Pasteur Investments has an inherent right to hear a liquidation application even after the BR plan has been approved.

But as per Blue Star Holdings v West Coast Oyster Growers cc the intention of s133 is to cast the net as wide as possible and would include liquidation applications being included in the moratorium and stayed.

The High Court order in favor of Universal Properties placing the company in business rescue would therefore have the result of staying the liquidation application and the liquidation proceedings.

As a note, I do not agree with this, I think the liquidation application should in practice be consolidated with the BR application and so that should the BR application be refused, the Judge can then immediately hear the liquidation application and grant the liquidation application and put the company in winding-up. Otherwise, if the liquidation application is stayed, you would hear the BR application and if this is dismissed, then the liquidation application may continue but it may take up to a year for the liquidation application to be heard which would mean that the company would be able to continue to trade with the BR application dismissed and the liquidation application not yet heard for possibly a year, though at least the liquidation application (the court stamp) would have established the concursus.

Question 7

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

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

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

Question 7.1

Commented [M28]: 2 marks.

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

The general notarial bond provides neither a title interest nor a security interest to Crypto Bank. The holder of the general notarial bond (GNB) must have taken assets of the GNB by consent of the company or by court order prior to the commencement of BR. Crypto Bank the holder of the GNB cannot seek the perfection of the GNB post the commencement of business rescue without the express consent of the BR practitioner as this would be an enforcement action.

The GNB provides for only a preference in the event of liquidation and as such the assets which are subject to the GNB remain unsecured and the business rescue practitioner will be able to utilize the assets in the normal course without Crypto Bank's consent.

Question 7.2

Commented [M29]: 3 marks out of 4. Needed to discuss section 134 and what it provides for in relation to the disposal of assets.

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

The property can only be sold in the ordinary course of the company's business, or in a bona fide transaction at arm's length for fair value approved in advance and in writing by the practitioner or in a transaction contemplated within and undertaken as part of the implementation of a BR plan that has been approved (in terms of section 152).

Considering the business of the company, the sale of these redundant assets does not seem to be part of the ordinary course of the company's business.

The second scenario would apply, and this allows for the sale of non-core assets being available for disposal in order to reduce operational expenses or to fund the ongoing operations. Notably this cannot be a simulated transaction and there should be no questionable relationship between the company and the purchaser.

The purchase price must be the fair market value of the property and the price between a willing seller and a willing buyer. I would have the goods valued independently so as to ensure that the fair value is achieved (if it will not cost too much to have the goods valued). The company is still represented by the board and the directors are responsible for the conclusion of the sale and not Sarah van Zyl (though the sale is under her instruction and authorization).

The Companies Act does not expressly empower the BRP to sell the property, but rather empowers the company to sell and the company is still represented by the directors.

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)

The material distribution agreements is subject to cession to Crypto Bank.

It is not clear whether the cession is out-and-out or a cession in securitatem debiti (for which the bare dominium of the right remains vested with the company).

However, in *Kritzinger v Std bank* the court found that when a creditor holds security over a debtor's property the BR practitioner cannot dispose of such property or use such encumbered property without the secured creditor's consent, unless the BR practitioner first discharges the entire secured debt in favour of the creditor as envisaged in s143(3) which from the facts does not appear to be the case.

The commencement of the BR does not demote the holder of the cession and the cession holder remains a secured creditor.

In *Van Heerden v Van Tonder* the court confirmed that the cession of book debts ceded as security constitutes "property" that may not be disposed of without the cessionary's consent.

The court per Vally J in *VR Laser* also held that the BR practitioner does not have the authority to elevate post commencement finance claims above those of secured creditors without the express consent or waiver of the security by the creditor (with such security).

If the BR practitioner or company in BR wishes to dispose of property or in this case encumber property which is already subject to a security interest the company and the BRP must first obtain the written consent of the holder of the security interest (in this case Crypto Bank) unless the disposal will be sufficient to fully discharge the indebtedness protected by the security interest (which from the facts does not seem to be the case here).

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

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

Commented [M31]: 4 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 describe what the section 189 process entails. Needed to specifically state that it is only once a proposed BR plan has been published that a section 189 notice to start the consultation process may be issued.

affected employees of Khusela Entertainment (Pty) Ltd, in terms of the relevant provisions of the Labour Relations Act. The first consultation took place two weeks after the commencement of business rescue proceedings, with the various consultative meetings taking more than 60 days to complete and, eventually, more than 1,500 employees of Khusela Entertainment (Pty) Ltd were retrenched for operational considerations during the business rescue proceedings.

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

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

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

(7)

Any retrenchment of the employees is subject to and must meet the requirements of section 189 and 189A of the LRA in order to be procedurally and substantively fair.

In *SAA SOC v National Union of Metal Workers* the court found that section 136(1)(b) requires the retrenchments to be undertaken only in terms of the approved BR plan and that the BRP is not empowered to retrench employees in the absence of an adopted BR plan.

From the facts above it is clear that the retrenchments took place before the BR plan was drafted and before being adopted.

The retrenchments were therefore and as a result in breach of the *SAA SOC* judgment.

The judgment will likely not stand the test of time.

The interpretation of section 136(1)(b) which provides for a reasonable and constitutionally correct limitation of the employees' rights to fair labour practice. The BR practitioner once appointed has full managerial control of the company in terms of s140(1)(a).

The BR practitioner in place of the company's board (in terms of s140(1)(a)) could and should be able to commence retrenchment proceedings during BR and before the plan has been adopted.

The moratorium should not be interpreted so broadly to as cover a restriction on the BR practitioner to undertake management functions and to take steps necessary to reduce the company's operational costs so as to ensure the survival and rescue of the company, this would include retrenchments.

The BR practitioner can of course also still offer voluntary retrenchment packages and if there is a collective agreement providing for short time then this could be implemented in the alternative.

Considering the preference given to employee salaries which accrue after the commencement of BR, this may in future result in a PCF refusing to provide PFC as a result of the high debt which will accrue with a preference to employees.

The labour court simply went too far in trying to protect the employees and will result most likely in the company not being able to be saved and all employees losing their jobs as opposed to only certain employees losing their jobs and being retrenched and the company being able to be rescued, the business continuing (the business not necessarily the corporate entity) and with the employees keeping their jobs or being transferred in terms of s197 of the LRA if the restructured business is transferred to another entity.

It must be noted that even if the retrenchments are undertaken prior to the plan, the employees are still protected by the vast protections afforded in the retrenchment processes set out in the LRA which require consultation, fair procedure and fair retrenchments.

I would say that the correct procedure was followed and that the LRA was wrong and went too far, however the SAA judgment has not yet been set aside and as such in terms of current law, the retrenchments were unfair and unlawful and may result in a substantive claim being filed against the company by the retrenched employees who may be entitled and possibly granted either reinstatement or re-employment or compensation (which may be up to 12 months salary per employee which may be an incredible amount and may well result in liquidation of the company).

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)

The contractual rights of the employees remain enforceable.

The employee is also entitled and encouraged to participate in the BR.

They remain entitled to payment of their salary (and if cannot be paid are provided a preference over all other post commencement finance claims whether secured or not). This preference prevails in the event of liquidation which is very good for employees.

The BRP may not suspend the employee's contract nor cancel it.

The employee gets to vote in favour or against the plan (if owed money by the company).

They are entitled to notice of each court proceeding (but not necessarily to be joined), the decisions, meetings and other relevant events. They are entitled to participate in court proceedings arising during BR.

The employees have the right to be consulted by the BR practitioner during the development of the plan, and afforded sufficient opportunity to review the plan and prepare a submission in terms of s152(1)(c).

The employees can also form a committee of employee's representatives.

They may also make submissions at meetings.

If the plan is rejected they can propose the development of an alternative plan in terms of s153.

They may also if the plan is rejected offer to acquire the interests of the other affected persons in terms of s153 or propose the development of an alternative plan (in terms of s153).

These rights are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order.

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)

The business and affairs of the company are still managed by the or under the direction of the board with power and authority to perform the functions of the company, but once in BR the BRP assumes full management and control in the company and may delegate such power or function to a director or a pre-existing manager of the company. See s66(1).

The directors during BR must continue to exercise their functions as directors but subject to the authority of the BRP and they owe a duty to the company to exercise management functions in accordance with the instructions of the BRP. Any action taken is void unless approved by the BRP.

The directors must co-operate with the BRP and assist with the rescue. They need to attend to the reasonable requests of the BRP, provide information about the company's affairs, deliver to the BRP all of the company's books records and accounts and also a statement of affairs containing material transactions involving the company or its assets for the past 12 months, any legal proceedings as well as assets and liabilities.

The directors are still involved in the company subject to the authority of the BRP and are essential in the ability of the BRP to know what is happening with the company and its business and how to rescue the company. If they stay involved there is a better prospect of rescue.

Ragavan v Optimum Coal held that the BRP has full management control of the company and that nothing of significance can be done by the directors without the authorization of the BRP.

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)

Consultation means more than to simply inform. In Scalabrini v Minister home affairs the court held that consultation entails a genuine invitation to give advice and a genuine receipt of that advice. Consultation is not to be treated perfunctorily or as a mere formality. The decision maker must not have already made his decision and the decision must not be a *fait accompli*. At a procedural level consultation may (as per Scalabrini) be conducted in

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 legal principles to the facts.

Commented [M34]: 5 marks.

any appropriate manner determined by the decision maker, the procedure must be one which enables consultation in the substantive sense to occur.

In Hlumisa the court held that informing creditors by SENS accouchements not amount to consultation.

If a proper consultation is not held then as per Hlumisa an interdict may be granted to interdict the meeting convened to vote on the proposed BR plan from proceeding which is a powerful tool for unions and employees and other parties which are required to be "consulted" with and not merely informed. These judgments show that the BR practitioner as well as the plan must be a product of input from the affected parties and creditors and not simply a document forced upon those persons without having received and properly considered their input as to the content of the plan and the rescue of the company.

Question 13

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

The BRP may propose a contingency fee or success fee (the same just alternative names). The success fee must be approved by the holders of the majority voting interest present and voting at a meeting called to consider the agreement and the holder of the majority voting rights attached to any shares that entitle such shareholder to a portion of the residual value of the company on winding-up present and voting at a meeting called for the purpose of considering the success fee.

The success fee may however result in a possible conflict and the BRP should be cautious to avoid such conflict. The SCA in *Caratco v Independent Advisory* held that such a success fee is not illegal or in contravention of the companies Act.

The success fee can also be adopted in the BR plan which includes such a success fee (if the plan is adopted).

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)**

The size is determined in section 127(2) and 26(2) of the Companies Act which is calculated according to the average number of employees during the financial year (1 point per employee), 1 point for every R1million or portion thereof in third party liability, 1 point for every R1million in turnover, 1 point per individual with a direct indirect beneficial interest in the company's issued securities (as a profit company).

A large company has a score above 500.

Commented [M35]: 2 marks.

Commented [M36]: 2 marks. Needed to provide Sarah's tariff rate per hour.

The company has substantial third party debt and a large workforce of over 2000 employees at the end of 2021 and is therefore a large company with a score above 500. Even on only the employees of 1 point per employee it is a large company.

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)**

The confirmation of her as a BRP should have been carried by a simple majority of the independent creditors’ voting interest voted at the meeting.

As soon practicable after being appointed, the BRP has a duty to investigate the company’s affairs, business, property and financial situation (s141(1)).

It is at the first meeting of creditors that the BRP should have informed the creditors whether she believes there is a reasonable prospect of rescuing the company. In terms of s147(1). She could not have done this without having investigated before the meeting.

At the first meeting she should also have received proof of claims.

The BRP must also in terms of s141(2) continually assess whether there is a reasonable prospect of rescuing the company.

She should not have only started to investigate following the first meeting of creditors as she should have done this already in order to inform at the first meeting that she is of the view that the company is capable of being rescued.

Question 16

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.

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

The BR Plan was meant to have been published within 25 days of the date of the appointment of the BR practitioner in terms of s150(5). If that was not possible then the time

could have been extended by the court on application of the company, or the holders of a majority of the creditors' voting interest in terms of s150(5).

This has quite dire consequences as in terms of *DH Brothers industries v Gribnitz* the court held that if the plan is not published in the time period provided by the Companies Act then and if the period is not extended then the BR proceedings lapse by operation of law. Though the *Shoprite v Berryplum Retailers* held that the failure to publish a plan within the prescribed period did not itself put an end to the BR proceedings (which is in my view the correct approach as the BR process is not terminated).

The BR practitioner could file a notice of termination of business rescue in terms of s132(2)(b).

ABSA v Golden dividend held that the Companies Act does not expressly require a meeting to be held to extend the time periods of the publication of the BR plan, though in my view a meeting should be held and this extension voted on. A simple majority of votes is required at a meeting.

Taking into account that BR proceedings are meant to be expeditious, this should not have happened.

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)

In terms of s128(1)(g) an independent creditor is a person who (i) is a creditor of the company, including an employee of the company who is a creditor in terms of s144(2) and is not related to the company, a director, or the practitioner.

An employee is not related solely as a result of being a member of a trade union that holds securities of the company.

"related" is defined as "when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2 (1)(a) to (c)" which includes if persons "are separated by no more than two degrees of natural or adopted consanguinity or affinity".

Mr Siwisa is a cousin and is related to the fourth degree and is an independent creditor. But he also holds shares, which may mean that he is related to the company in terms of s128(1)(g) (ii). S2 provides that a person is related to the juristic person if he directly or indirectly controls the juristic person. There is no indication that he on his own with only 25% of the shares controls the company so he would be independent.

Commented [M39]: 3 marks out of 5. Need to relook at the conclusion. The facts state that one share carries one vote. The fact that Mr Siwisa (together with Mrs Phillips) has a 51% shareholding means that he is able to exercise or control the exercise of a majority of the voting rights. Need to look at what constitutes control section 2(2)(a)(ii).

BUT together with his half sister they control a total 51% of the shares of the company and he would be considered as being related and therefore not independent if he materially influences the company.

There are no facts to show that he controls the company or materially influences the company.

He is therefore an independent creditor.

Question 18

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

The BRP has no right to unilaterally amend the BR plan.

In *Booyesen v Jonkheer* the court held that the BRP has no right to unilaterally amend the BR plan and cannot circumvent the procedures of the Companies Act. The BRP does not have the right and cannot impose on creditors a plan which they did not vote on as required by s152.

Section 152(1)(d)(ii) of the Act only allows BRPS the right to amend a business rescue plan before it has been adopted by the creditors.

S 151(4) states that a business rescue plan that had been adopted is binding on the company and on each of the creditors of the company and every holder of the company's securities. It is much like a contract between the company and its creditors and binding on the parties and as such the BRP cannot vary this contract unilaterally.

The BRP in terms of s155(5)(b) is required to take all steps to implement the plan, no other plan may be implemented and the plan once approved and adopted cannot be amended and must be implemented by the BRP.

The BR plan must be approved by holders of more than 75% of the creditors voting interest who voted and include 50% of the independent creditors.

The BR plan should include provisions for the amendment of the BR plan. While the Companies Act is silent on the amendment of a BR plan after its adoption, the courts have held that the plan cannot provide for unilateral amendments by the BRP nor any provision which allows for the circumvention of the procedures set out in sections 152, 145, 146 of the Companies Act.

The SCA in *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* 2017 JDR 1577 (SCA) the court held that it cannot foist on creditors a plan which the creditors have not discussed and voted on at a meeting in terms of s152.

Even if the plan is not yet approved and the creditors at a meeting require an amendment, the amendment must be made and then the vote of creditors must be re-run which shows that the plan can only be approved by creditors and also that any amendment to the plan can only be approved and given effect by creditors.

The amendment may be put to the meeting by a seconder and thereafter the BRP can call a vote on the amended business rescue plan, or if not acceptable the BRP may adjourn the meeting and reconsider the business rescue plan in terms of section 153.

Commented [M40]: 4 marks. Need to distinguish between amendments prior to the adoption of the BR plan and amendments post adoption of the plan. Needed to set out the steps that Sarah needed to follow to adopt the plan. Needed to discuss specific voting requirements i.e. shareholders if their interests are affected and majority of voting interests in terms of section 152.

The SCA in Vantage Goldfields SA (Pty) Ltd and Others v Arqomanzi (Pty) Ltd held that a unilateral amendment to a BR plan by the BRP is not permissible and that a clause in a BR plan which authorizes unilateral amendments is against the scheme of the Companies Act. At the very most a clause in an adopted plan would only allow for amendments of an administrative nature that do not affect the substance of the plan could be permissible.

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)

The financial projections are important as they guide the vote on the BR plan.

They should include:

Material assumptions on which the projections have been based as contained within the published BR plan and as if it has been adopted, these include the exchange rate used in the financial projections, the collection rate of the debtors book and the collection cycle, the number of employees, the inflation rate over the forecast period.

Revenue projections from sales.

Revenue split from the different locations or different divisions.

Employee information such as retrenchment costs, ongoing wage bill.

The input costs such as rental costs, lease of vehicle costs or costs to terminate the leases.

The alternative projections based on varying assumptions and contingencies.

The certificate by the BRP stating that the projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.

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)

The Companies Act does not refer to a cash flow statement, but this is critical for the BR plan and hence the BRP should include a cash flow statement in the published plan. The cash flow statement should show information in respect of cash inflows and outflows over a period of time broken up into cash flows from operations, investing activities and financing activities.

Question 21

Commented [M41]: 1 out of 3 marks. Your answer speaks to only one aspect of the financial projections being the way in which the business will be restored to solvency and trade profitably.

Commented [M42]: 0 marks. The answer requires further detail - i.e reasons why a cash flow statement is critical for the BR plan.

Commented [M43]: 3 marks.

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

First, the employees keep their jobs as the employment contracts are not terminated at the commencement of BR as BR is intended to prevent job losses. Whereas in liquidation the employment would terminate.

The employees remain employed on the same terms and conditions in terms of s136(1)(b). Second, employees' claims are catered for both pre BR and post BR. The employees' salaries and amounts due post commencement are regarded as being post-commencement finance and are paid in the order of preference over all other post commencement finance claims. This ranking also applies if the company is placed into liquidation post termination of BR.

The employee in BR ranks higher for payment in terms of s135(1) after payment of the BR remuneration but get paid before the unsecured post commencement financiers.

The salary due prior to commencement of BR is a preferred unsecured creditor claim and salary due after commencement of BR will result in the employee being ranked as a post commencement financier.

The BR practitioner can also secure funds and include in the Plan that the salaries of the employees will continue to be paid. This is important in for example a manufacturing business which requires the employees to continue working, the employees will be able to continue to be paid their salary and production continue while the BRP is able to restructure the business.

Third the employees are entitled to participate in the BR process and if owed money to also vote in favour of the plan..

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

TOTAL MARKS: [100]