



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 61/100 (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]: 1 mark

Choose the **correct** statement:

The general moratorium is one of the critical components of business rescue because:

- (a) it affords the company in business rescue sufficient time to avoid paying its creditors for the benefit of its shareholders who own the company in business rescue as provided for in section 133 of the Companies Act of 2008.
- (b) it gives the company in business rescue sufficient breathing space to restructure its affairs by staying or prohibiting all legal proceedings against the company in business rescue in terms of section 130 of the Companies Act of 2008.
- (c) it gives the company in business rescue a period of respite to allow the company in business rescue to restructure its affairs by staying or prohibiting legal proceedings

against the company in question in terms of section 133(1) of the Companies Act of 1973.

- (d) it gives the company in financial distress a period of respite to restructure its affairs by suspending or precluding legal proceedings against the company while in business rescue as stipulated in section 133(1) of the Companies Act of 2008.
- (e) All of the above.

Question 1.5

Commented [M7]: 1 mark

Choose the **correct** statement:

Company X files for business rescue. Its only source of revenue is the proceeds of sales to its clients on credit. These debtors are ceded to X Bank as security for its loan to the company.

The company simply cannot survive if it does not have access to the proceeds of the payments by these clients from time to time. Under these circumstances, the business rescue practitioner may:

- (a) continue to utilise the proceeds of the debtors to operate the company as these debtors are not "property" as defined in the Companies Act.
- (b) approach the Court for an order to compel X Bank to consent to the company utilising the proceeds of these debtors in order to save the Company.
- (c) ensure that the total debtors' book does not decrease, by replacing every debtor receipt with at least an equal new sale to ensure that X Bank is not prejudiced by the continued use of the proceeds of the debtors to fund the ongoing operations of the company in business rescue.
- (d) approach X Bank for their consent to utilise the proceeds of these debtors for the ongoing operations of the company.

Question 1.6

Commented [M8]: 1 mark

Choose the **correct** statement:

As at the commencement of the business rescue process, X Bank holds security by way of a registered general notarial bond over of all of the assets of a company in business rescue.

X Bank may:

- (a) take possession of the assets subject to its security and sell it in order to reduce the company's indebtedness to X Bank.

(b) insist that the business rescue practitioner obtain their consent before selling any of the assets subject to the general notarial bond, as provided for in section 134 of the Companies Act.

(c) not prevent the business rescue practitioner from disposing of the assets subject to the general notarial bond in the normal course of business by the company during business rescue proceedings

(d) seek an order of Court to perfect their security, without the consent of the business rescue practitioner, in order to protect their rights.

Question 1.7

Commented [M9]: 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]: 1 mark

Choose the **correct** statement:

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

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

Question 1.9

Commented [M11]: 0 marks

Choose the **correct** statement:

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

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

Question 1.10

Commented [M12]: 1 mark

Choose the **correct** statement:

You are a member of SARIPA and were certified by CIPC for the first-time last year to practice as a junior business rescue practitioner after you completed the INSOL SARIPA Programme in South African Business Rescue. Since then, you have accepted appointment as the business rescue practitioner of one small company and are busy implementing the business rescue plan that was adopted by creditors in that matter. You have been

approached by your brother-in-law to accept appointment as the business rescue practitioner of a large company that he is a director and shareholder of. Which of the below are appropriate?

- (i) You should not accept appointment as you have a conflict of interest.
- (ii) You can accept appointment.
- (iii) You should not accept the appointment as the company's business rescue practitioner as you are not independent.
- (iv) You should not accept appointment as you lack the necessary skills and do not meet the legislated criteria.

Your answer is:

- (a) (i).
- (b) (ii).
- (c) (iii).
- (d) Both (i) and (iii).
- (e) Both (iii) and (iv).

Question 1.11

Commented [M13]: 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]: 0 marks

Choose the **correct** statement:

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

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

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

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

Question 1.14

Commented [M16]: 0 marks

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)

The general moratorium provided for in the Companies Act 2008 affords a company in business rescue with breathing space to restructure its affairs and in doing so, support the company's efforts to become viable as a going concern. Specifically, section 133(1) of Companies Act 2008 states that for a company currently in business rescue, "...no legal proceeding including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum...".

However, s133(1)(a) to (e) of the Companies Act 2008 also provides for exceptions under which a creditor may take legal action against a company in business rescue, these exceptions include, inter alia, with the written consent of the business rescue practitioner, or with leave of the court.

Therefore, given the facts of the case study, creditors may not initiate or proceed with (if they have already begun proceedings) any legal action to recover amounts owed to them, unless any of the exceptions listed in s133(1)(a) to (e) have been satisfied.

Question 3

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

Commented [M23]: 2 marks out of 2.
Excellent answer.

Commented [M24]: 3 out of 3 marks.

In terms of s152(2) of the Companies Act 2008, a proposed business rescue plan will be approved on a preliminary basis if it receives support from more than 75% of the creditors' voting interest that were voted, and support from at least 50% of the independent creditors' voting interest that were voted. According to s152(3)(b), if the proposed business plan does not alter the rights of holders of the debtor company's securities, the approved preliminary business plan is then deemed to be the final adopted business rescue plan.

However, in terms of s152(3)(c), if the proposed business rescue plan does alter the rights of holders of the debtor company's securities, the preliminarily approved business plan will only be deemed a final approved business plan if a majority of the voting rights of holders of the company's securities support the adoption of the preliminary business 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)

Section 152(4) clearly states that an approved business plan that complies with the procedure for final approval prescribed in s152 is "binding on the company, and on each of the creditors of the company and every holder of the company's securities" regardless of whether they voted for the proposed business plan. Therefore, as a minority shareholder, Opera Sound Engineering is bound by the approved business plan.

Question 5

Considering the fact that Khusela was already unable to pay its debts at the time of the application to place it in business rescue, explain whether the requirement of financial distress as defined in the Companies Act 2008 was met, or whether it was too late for a business rescue order to be issued. (5)

The Companies Act 2008 defines a financially distressed company in s128(1)(f) as one that is reasonably unlikely to pay all its debts as they fall due and payable within the immediately ensuing six months; or if it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months. In other words, a financially distressed company is one that is likely to become commercially or factually insolvent in the ensuing six months. Moreover, section 131(4) contemplates the conditions under which a company may be placed in business rescue. Firstly, a company may be placed in business rescue if it is financially distressed as defined above (s128(1)(f)). Secondly, the court may place a company in business rescue if it has failed to pay any employee related amount associated with employment matters in terms of a public regulation or contract. Thirdly, the court may order the debtor company to commence business rescue proceedings if it is just and equitable to do so.

Commented [M25]: 2.5 marks out of 3. Opera is not a minority shareholder. Mention the fact that Opera is bound regardless of the fact that it voted against the plan.

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

Based on the facts of the case study, prior to the commencement of business rescue proceedings, Khusela's board of directors was of the opinion that the company was reasonably unlikely to honour its debts as they became due and payable (commercially insolvent) and that the draft financials indicated that the liabilities exceeded its assets (factually insolvent). Furthermore, Khusela failed to pay employees salaries. Thus, it can be determined that Khusela satisfies at least two requirements for being financially distressed, that is, the company is financially distressed in terms of s128(1)(f), s131(4)(a)(i) and 131(4)(a)(ii) as discussed above.

Question 6

What effect - if any - would the application for Khusela to be placed in business rescue have on the application by World of Music for the company to be placed in liquidation had this application (for liquidation) already been filed at the High Court at the time? (5)

In terms of section 131(6) of the Companies Act 2008, if liquidation proceedings have already been commenced by or against the company at the time an application for business rescue is made in terms of s131(1), the application for business rescue will suspend liquidation proceedings until the court has adjudicated upon the application; or the business rescue proceedings end, if the court makes the order to place the distressed company in business rescue as applied for.

There has been some debate by the courts as to the meaning of "liquidation proceedings" as this term is not clearly defined within the Companies Act 2008. However, in *Richter v ABSA Bank Ltd*, the Supreme Court of Appeal held that an application to commence business rescue in terms of s131 of the Companies Act 2008, can be made at "any time" even after the final liquidation order has been granted. This it can be interpreted that an application to place the debtor company in liquidation constitutes "liquidation proceedings" and thus an application to place the distressed company in business rescue would suspend an application for liquidation.

Based on the discussion of the relevant authority above, the effect of an application to place Khusela in business rescue would suspend the liquidation application by World of Music filed at the High Court until such time the court has adjudicated on the application for business rescue.

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.

Commented [M27]: 2 marks out of 5. Needed to discuss relevant case law ie. *Lutchman NO v African Global Holdings*, *ABSA Bank Limited v Summer Lodge*, *Standard Bank of South Africa Limited v Gas2Liquids (Pty) Ltd* and *Standard Bank of South Africa v A-Team Trading CC*. Also needed to mention that the issue for consideration is whether a pending liquidation application should be regarded as part of liquidation proceedings.

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

Question 7.1

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

In terms of section 134(3) of the Companies Act 2008, a company may not dispose of an asset over which a third-party creditor has a security interest or property interest without that creditor's consent. Thus, Sarah van Zyl is not entitled to dispose of assets over which Crypto Bank holds security without Crypto Bank's express consent.

Question 7.2

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

According to section 134(3) of the Companies Act 2008, a Khusela (in business rescue) may dispose of assets in its ordinary course of its business; or in a bona fide transaction at arm's length for fair value approved in advance and in writing by the Sarah van Zyl; or in a transaction as included in the approved business rescue plan. However, in terms of s134(3), Sarah van Zyl may not dispose of assets that are held as security by a third-party creditor unless she receives the express consent from the creditor to do so.

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)

Section 134(3) contemplates the circumstances and requirements related to the disposal of property over which another person holds a security or property interest. In terms of this section, during business rescue proceedings, the debtor company may only dispose of

Commented [M28]: 0 marks out of 2. See page 75 of the Course Notes.

Commented [M29]: 3 marks out of 4. Incorrect section was referenced.

Commented [M30]: 5 marks. Excellent answer.

property over which another person holds a security or property interest with the prior consent of that person, unless the proceeds from the sale of that property is sufficient to fully settle the debt protected by the security or property interest. Furthermore, the proceeds must be promptly paid to the creditor in question. Alternatively, the company may provide security for the value of the security it wishes to dispose to satisfaction of the creditor in question.

The provisions in s134(3) are reinforced by several cases. In *Kritzinger and Another v Standard Bank of South Africa Ltd*, the court held that a company in business rescue cannot dispose of and use the proceeds from property over which a creditor has security without the express consent of the secure creditor in question even if the debtor company is in business rescue. In *Van den Heever NO and Others v Van Tonder*, the court reached the same conclusion, that is, security held by a creditor may not be disposed of by the company without the consent of the creditor that holds the security interest.

Given the facts of the case study and the questioned posed above, legal authority in terms of section 134(3) and the relevant case law discussed above, Sarah van Zyl may only dispose of Cyrpto Bank's security interest with the express consent of Cyrpto Bank. Alternatively, Khusela could provide security for the value of the security (proceeds from Khusela's distribution rights) it wishes to dispose to Easy Access to satisfaction of the Crypto Bank.

Question 9

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

Commented [M31]: 2 marks out of 7. Needed to state that the status and rights of employees in a business rescue process are entrenched in chapter 6 of the Companies Act, subject to the provisions of applicable labour laws. Needed to discuss the fact that the BRP may commence with a section 189 process, in the absence of a collective agreement that allows for a reduction in salaries and benefits. Needed to describe what the section 189 process entails. Needed to specifically state that a section 189 notice may be issued only 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.

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

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

In light of the rights of employees and the current case law on this subject, discuss whether the business rescue practitioner followed the correct process and procedure in this case. (7)

Section 136 of the Companies Act 2008 outlines the rights of employees during business rescue, including rights related to retrenchment of employees. Section s136(1)(b) requires retrenchments contemplated during business rescue proceedings need to be dealt with in the business rescue plan and is subject to sections 189 and 189A of the Labour Relations Act, 1995, and other applicable employment related legislation.

In *South African Airways SOC Ltd and Others v National Union of Metalworkers of South Africa obo members and Others*, the court held that Chapter 6 of the Companies Act 2008 does not confer upon the business rescue practitioner the power to retrench employees in the absence of an adopted business rescue plan. Furthermore, while potentially problematic, the business rescue practitioner may not begin the 189 and 189A consultative process of the Labour Relations Act before the publication of a proposed business plan.

Therefore, given the facts of the case above, specifically that Sarah van Zyl began the sections 189 and 189A consultative process of the Labour Relations Act before the publication of a proposed business plan, it can be concluded that she did not follow the correct procedure as discussed above.

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)

Rights of employees of a company in business rescue are catered for in sections, 135, 136 and 144 of the Companies Act 2008.

In terms of section 144, Khusela's employees' rights include, to receive notice of any legal proceedings, decision or meeting related to the business rescue proceedings. They have the right to participate in court proceedings related to business rescue proceedings. Employees also have the right to be consulted by the Sarah van Zyl in the development of

the business rescue plan and be given sufficient time to review and provide input on the proposed business rescue plan.

Any remuneration or expenses or reimburses that become due and payable to Khusela's employees during business rescue but is not paid by the company is considered as post commencement finance as per s135(1) and are considered preferent claims over secured and unsecured creditors.

In terms of section 136 of the Companies Act 2008, Khusela's employees that were employed immediately before the commencement of business rescue proceedings will remain employed as such according to their employment contracts, subject to certain exceptions outline in the section.

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)**

In terms of section 150 of the Companies Act 2008, the Sarah van Zyl must consult with the management of Khusela which would include the CEO and CFO in preparing the business rescue plan for consideration for adoption. Furthermore, in terms of s140(1)(b), if Sarah van Zyl delegates any power or function to the management of Khusela, in this case the CEO and CFO would be empowered to act in the capacity as delegated and must perform such duties accordingly.

Section 137 of the Companies Act 2008, outlines the duties of directors of a company undergoing business rescue proceedings. Directors must continue to perform their functions and statutory duties as per the Company Act 2008 subject to the authority of the business rescue practitioner.

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)**

In *Hlumisa Investments Holdings (Pty) Ltd (RF) and Another v Van der Merwe NO and Other*, the court in distinguishing between the interpretation of "informing" versus "consulting", explained that "consultation" should not merely be regarded as a procedural or step or formality in business rescue proceedings. Consultation between the business rescue practitioner and affected persons should be substantive in nature with the intention to gather legitimate input and advice from all parties to develop a proposed business plan.

Commented [M33]: 1 mark. Need to expand on section 137(2) and apply the legal principles to the facts.

Commented [M34]: 4 marks. Needed to refer to the Scalabrini judgment.

Moreover, the court clarified that “informing” affected persons through notices related to updates on business rescue proceedings did not constitute “consulting”. Thus, Sarah van Zyl should consider the court’s explanation in this case when consulting with affected persons and ensure that the consultation process is a substantive dialogue or engagement with affected persons and not merely informing affected persons on updates related to the business rescue meetings through notices, meetings or other forums.

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)**

Section 143(2) of the Companies Act 2008 provides that a business rescue practitioner may propose an additional fee/ remuneration over and above the prescribed tariffs based on a contingency of which must be included in the business plan. Importantly, the proposed contingency/additional fee must be included in the proposed business plan and approved by the majority of creditors and the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement.

Question 14

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

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 Companies Regulations 2011, specifically regulations 127(2) and 26(2) prescribe the scoring system to be applied to determine the size of a company as small, medium or large. Applying these regulations, Khusela would be classified as a large company as they achieve a score greater than 500 based on the number of employees employed by the company and third-party debt alone.

Thus, as per the tariffs prescribed in regulation 128 of the Company Regulations 2011, Ms Sarah may charge the tariff related to a large company, that is R2000 per hour limited to maximum of R25 000 per day.

Question 15

Commented [M37]: 3 marks.

The case study includes the following statements:

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

and

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

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

In terms of section 147(1)(a)(i) of the Companies Act 2008, an appointed business rescue practitioner must within ten days of appointment convene a first meeting of creditors at which the practitioner must opine as to whether there is a reasonable prospect of rescuing the company. Ms Sarah van Zyl did not inform the creditors as to whether she believed the company had a reasonable prospect of rescue at the first meeting of creditors and thus did not comply with the s147(a)(i) requirement. Ms Sarah van Zyl should have performed her investigation to determine if there was a reasonable prospect of rescuing the company prior to the first meeting of creditors and presented her findings at the first meeting of creditors as to whether the company had a reasonable prospect of being rescued.

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)**

Section 150(5) of the Companies Act 2008, requires that a business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed. The duties of the business rescue practitioner having delayed the publication of the business rescue plan would have triggered the following duties:

1. In terms of s150(5)(a) of the Companies Act 2008, the practitioner would have to get the permission of the court for an extension by applying to court for such an extension.
2. Alternatively, in terms of s150(5)(b), the practitioner would have to get permission from the holders of a majority of the creditors’ voting interests.
3. In terms of s147, the practitioner would/could have requested an extension for the publication of business rescue plan in terms of s150(5)(b) at the first meeting of creditors within 10 business days of appointment.

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.

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)

The Companies Act 2008 in section 128 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 in terms of section 144(2); and (ii) is not related to the company, a director, or the practitioner,..."

In s128(2)(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person...". Therefore, Mr Siwisa cannot be considered an independent creditor as he is a shareholder with control over the company.

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 Companies Act 2008, specifically s152(d) and (e), prescribes the procedure that a business rescue practitioner must follow to amend a proposed business rescue plan introduced and discussed at the meeting of first creditors. This section does not refer to any powers to unilaterally amend a proposed business plan, rather the business rescue practitioner is to amend the plan (if necessary) in consultation with creditors in the prescribed manner provided for in s152. Further, the courts have confirmed that business rescue practitioners may not unilaterally amend a proposed business rescue plan in the case of *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another*. Further the court stated that the practitioner is not empowered "to impose on creditors a plan which they had not voted on and discussed in the manner contemplated by s152. Thus, based on the legal authority discussed above, it can be concluded that Ms Sarah van Zyl does not have the "ability" to unilaterally amend the business rescue plan.

As mentioned above, the procedure to amend a proposed business plan prescribed by s152 of the Companies Act 2008. The procedure involves the participation of the business rescue practitioner, creditors, shareholders. The procedure is described below.

Commented [M39]: 1 mark. Needed to discuss the definition of "related" and the provisions of section 2(1)(a) to (c) of the Companies Act. Needed to demonstrate why Mr Siwisa is not an independent creditor with reference to the Companies Act, and on the basis that Mr Siwisa together with a related person (Mrs Phillips) is able to exercise a majority of the voting rights by virtue of a combined shareholding of 51%.

Commented [M40]: 4 marks. Needed to discuss the process of amending a BR plan that has already been amended. Needed to set out the steps that Sarah needed to follow in order to validly amend the BR plan, publishing, voting requirements etc.

Section 152(1)(d)(i) provides that creditors and other holders of voting rights may make a motion to amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner at a s151(1) meeting. Alternatively, in terms of s152(1)(d)(ii), direct the practitioner to adjourn the meeting to revise the plan for further consideration. The practitioner must then, as per s 152(1)(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with.

Once the amended plan is developed the practitioner needs to re-run the process of approving a preliminary business rescue plan. Creditors and shareholders must vote on the amended business rescue plan in meetings convened for that purpose as prescribed.

Thereafter, if creditors vote in favour of the proposed business plan, but shareholders require further amendment and the business rescue practitioner agrees with the proposed amendment, the practitioner must amend the business rescue plan accordingly and then re-run the voting process with creditors and shareholders to vote on the approval of the amended plan.

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)

As a creditor I would expect to see at minimum the statutory requirements related to financial information to be included in the published business rescue plan. In terms of s150(2)(iv), one would expect to see a projected balance sheet and projected income statement for the ensuing three years. Furthermore, one would expect to see the material assumptions informing the financial statements prepared, as well as alternative projections based on different scenarios, assumptions, and contingencies.

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)

While the Companies Act 2008 does specifically mention a requirement to prepare a cash flow statement, it is considered best practice by practitioners to include a cash flow statement in the published business rescue plan. Cash flow statements provide a view on the cash flow or liquidity of the company and provide affected persons with a view of the viability of the company and hence vote on the plan.

Question 21

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

Commented [M42]: 2 marks.

Commented [M43]: 3 marks.

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

Firstly, during business rescue employees remain employed by the company and may remain employed if the company successfully implements its business rescue plan and becomes viable as a going concern, employees may in this case retain employment at the company. However, in liquidation, the company is dissolved, and employment contracts are terminated.

Secondly, in terms of s135 of the Companies Act 2008, amounts due and payable to employees related to employment related costs during business rescues are considered as post commencement finance and as such these claims are preferential claims. Whereas in liquidation claims related to employment amounts due to employees are regarded as concurrent claims and no longer preferential.

Thirdly, in business rescue, employees are entitled to participate in developing a business rescue plan, however which is not the case in liquidation.

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

TOTAL MARKS: [100]