Tutorial Letter 201/2/2018

ENTREPRENEURIAL LAW

MRL2601

Second semester

Department of Mercantile Law

This tutorial letter contains important information about your module.

BARCODE

Define tomorrow.

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Dear Student,

You should have received:

- Tutorial Letter MRL2601/101/3/2018, which contains among other things details concerning Assignment 01 and 02 for this module.
- Tutorial Letter MRL2601/102/3/2018, which contains the contact details of the lecturers involved in the module, information regarding the format of the examination, and a concept examination paper for revision purposes.

1 FEEDBACK ON ASSIGNMENTS

ASSIGNMENT 01 ANSWERS

Question 1

Answer: (2)

Reason: Chapter 15 par 3 in the textbook, and study unit 15 sub-unit 6.4 in the study guide.

(1) is INCORRECT. There is no Partnership Act, and partnerships are formed by means of the conclusion of a partnership agreement.

(2) is **CORRECT.** A partnership is formed through the conclusion of a valid partnership agreement.

(3) is INCORRECT. A partnership does not have a founding statement (this is the registration document for a close corporation) and it is not registered to be formed.

(4) is INCORRECT. Companies, and not partnerships, are formed by means of registration in terms of the Companies Act 71 of 2008.

Question 2

Answer: (3)

Reason: Chapter 15 par 2, 3, 4.1-4.4 and 5 in the textbook, and Study unit 15 sub-unit 8.1 in the study guide

(1) is INCORRECT. Thabo and Pamela's partnership agreement explicitly provides that ll share the losses according to the size of their respective contributions.

(2) is INCORRECT. It is not an *essentialia* of the partnership agreement that Thabo and Pamela must both share in the net losses of the partnership.

(3) is **CORRECT.** Thabo and Pamela's partnership agreement explicitly provides that the profits must be shared equally. Therefore, the net losses must be divided equally will not share in the losses equally.

(4) is INCORRECT. The partnership agreement remains valid despite the fact that it does not regulate how the net losses must be shared between the partners.

Question 3

Answer: (2)

Reason: Chapter 15 pars 8.11.1 and 10.3 in the textbook, and Study unit 15 sub-unit 9 in the study guide.

(1) is INCORRECT. Ratification of an unauthorised action is possible if the partners agreed, which is not the case here.

(2) is **CORRECT.** Estoppel can apply in these circumstances.

(3) is INCORRECT. Mutual mandate applies only in respect of partners, not outsiders like Cindy.

(4) is INCORRECT. The *Turquand* rule applies in companies when there is an internal requirement that must be met for the person acting on behalf of the company to have authority.

Question 4

Answer: (1)

Reason: Chapter 15 par 4.1 in the textbook. Study Unit 15 sub-unit 6.1 in the study guide

(1) is the **CORRECT** option. Maya's contributes R10 000 that must be paid back unconditionally does not meet the requirement. In order for a contribution to be valid, it must be exposed to the risk of the business.

(2) is an INCORRECT option. Patrick may contribute his knowledge as a civil engineer when it is required. This meets the requirement that a contribution must have a money value.

(3) is an INCORRECT option. Even though the trust that Sara contributes to the business will remain her own property, the use of her truck does have a monetary value.

(4) is an INCORRECT option. Despite the fact that Connie will be paid for her services from the profits, her contribution does have a monetary value and it is exposed to the risk of failure of the business, so it does meet the requirements for a valid contribution.

Question 5:

Answer: (2)

Reason: Chapter 15 pars 8-9 in the textbook. Study unit 15 sub-unit 8.2 in the study guide

(1) is an INCORRECT statement. The *actio communi dividundo*, and not the *actio pro socio*, is the action with which co-partners can affect the physical division of partnership assets that are held in co-ownership after the dissolution of the partnership.

(2) is the **CORRECT** statement. The actio pro socio is a general personal action that a partner can utilise in order to enforce his or her rights against co-partners.

(3) is an INCORRECT statement. The actio pro socio can be instituted by a partner, and not a third party even after the partnership is terminated and it does not have to be instituted against all of the partners.

(4) is an INCORRECT statement. The actio pro socio is a personal action, not a derivative action. It is instituted by a partner to protect his or her own rights, and not on behalf of the partnership.

Question 6:

Answer: (4)

Reason: Chapter 14 pars 2.1-2.3 and 3.2.1 in the textbook. Study Unit 14 sub-units 3 and 10 in the study guide.

(1) is a CORRECT statement. A trust is defined as a juristic person in terms of the Companies Act 71 of 2008.

(2) is a CORRECT statement. More than one trustee may be appointed to take control of the trust assets for purposes of the administration of the trust.

(3) is a CORRECT statement. A trustee must prevent mixing of his or her personal assets with the trust assets.

(4) is the **INCORRECT** statement. A trustee cannot be exempted from personal liability for failure to comply with his or her duties.

Question 7

Answer: (1)

Reason: Chapter 14 par 4 in the textbook. Study unit 14 sub-unit 9 in the study guide

(1) is the **CORRECT** option. An agreement concluded by a trustee who has not yet been issued with a letter of authority by the Master of High Court is void.

Options (2), (3) and (4) are INCORRECT. Such an agreement would be void and unenforceable.

Question 8:

Answer: (3)

Reason: Chapter 14 pars 3.1, 3.2. Study unit 14 sub-units 10 and 11 and in the study guide

(1) is CORRECT. A legal person may be a founder of a trust.

(2) is CORRECT. A business trust enjoys the benefit of limited liability.

(3) is **INCORRECT**. A trustee may expose the trust assets to risk.

(4) is CORRECT. A legal person may be a beneficiary of a trust.

Question 9:

Answer: (2)

Reason: Chapter 14 pars 2.1-2.3. Study unit 14 sub-units 2 and 3 in the study guide.

(1) is CORRECT. A trustee can sometimes only administer the trust while the trust beneficiary owns the assets.

(2) is **INCORRECT.** The trustee is generally held personally liable for debts incurred by the trust.

(3) is CORRECT. An *inter vivos* trust is usually created in a contract.

(4) is CORRECT. A *mortis causa* trust is created by the inclusion of a clause in a will.

Question 10:

Answer: (4)

Reason: Chapter 14 pars 3.1-3.2 in the textbook. Study unit 14 sub-units 2, 3 and 4 in the study guide

(1) is CORRECT. The trust deed must be lodged with the Master of the High Court.

(2) is CORRECT. The founder must have the serious intention to create a trust.

(3) is CORRECT. The trust must be founded for a legal purpose.

(4) is **INCORRECT**. Legally, the founder cannot also be a trustee of the trust.

ASSIGNMENT 02 ANSWERS

Question 1

Chapter 4 par 2 in the textbook. Study unit 8 sub-unit 9 in the study guide

In order to determine whether a transaction qualifies as financial assistance and whether the requirements that are set out in section 44 of the Companies Act must be adhered to, the test as laid down by the court must be applied. Take careful note of *Lipschitz v UDC Bank Ltd*, and of the 'impoverishment test' as laid down in *Gradwell (Pty) Ltd v Rostra Printers Ltd*. In *Lipschitz v UDC Bank Ltd*, it was held that the transaction must be assessed in two phases: Firstly, it must be ascertained whether there was financial assistance. In *Gradwell (Pty) Ltd v Rostra Printers Ltd*, the 'impoverishment test' was formulated to assist in determining whether financial assistance was provided. In terms of the impoverishment test, one considers whether a transaction will have the effect of leaving the company poorer. If so, financial assistance will have been provided. In *Lipschitz*, the court held that this is not the only measure of financial assistance, but that exposing the company to risk will also qualify as financial assistance for purposes of the Act. For example, if the person obtained a loan to purchase shares in the company, and the company stood surety for that loan, this will count as financial assistance. If the company buys an asset from the person in order to enable that person to purchase shares in the company, it will depend on the facts whether there was financial assistance. Factors that have emerged from case law to assist in this regard are whether the company needs the asset in its normal business and whether the company paid a fair price for it. Secondly, it must be determined whether that assistance was for the purpose of acquiring shares in the company. Suppose Company A is a major creditor of Company B. Company A acquires most of the shares in Company B. After the acquisition, Company A causes Company B to grant security over its movable assets to secure the loans. This will be financial assistance in terms of the first test, but it is not in connection with the purchase of shares. The assistance is to secure a loan. When a transaction passes these two phases, it will have to comply with section 44 of the Companies Act in order to be valid. Keep in mind that exposure to risk also qualifies as impoverishment and that the purpose of the transaction must be the acquisition of shares in the company. In the facts provided, we know that Mmabatho wants to subscribe for shares in Bethal

Brooks (Pty) Ltd and that this is the reason why she obtains the loan. That Bethal Brooks (Pty) Ltd agrees to stand surety for the loan, at the least exposes the company to risk of financial loss. It appears as if the loan transaction does qualify as financial assistance.

Question 2

Chapter 16 par 11 in the textbook. Study unit 16 sub-unit 13 in the study guide

Certain close corporations are in terms of the Companies Act 71 of 2008 and section 30(2)(b)(i) of the Companies Regulations, 2011 required to have their annual financial statements audited. You could have mentioned any five of the following factors that must be taken into account in determining whether a close corporation must appoint an auditor:

- Whether it is desirable in the public interest,
- having regard to its economic or social significance,
- as indicated by any relevant factors, including its annual turnover,
- the size of its workforce,
- the nature and extent of its activities.
- If in any financial year it, in the ordinary course of its primary activities, holds assets in a fiduciary capacity for persons who are not related to the close corporation, and the aggregate value of such assets held at any time during the financial year exceeds R5 million.
- If its public interest score in a financial year is 350 or more, or is at least 100, if its annual financial statements were internally compiled.
- If the founding statement so requires.
- A close corporation can also subject itself to audits by choice (voluntarily).

2 FEEDBACK ON THE CONCEPT EXAMINATION PAPER

SECTION A

QUESTION 1

1.1 Chapter 2 par 1.6 in the textbook, and Study unit 2 sub-unit 4 in the study guide

In certain cases, the courts have disregarded the separate legal personality of a company in order to recognize the substance or practical realities of a situation rather than the form.

Innes CJ in *Dadoo Ltd and others v Krugersdorp Municipal Council* held:

> …This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; … cases may arise concerning the existence or attributes which in the nature of things cannot be associated with a purely legal persona. And

then it may be necessary to look behind the company and pay regard to the personality of the shareholders, who compose it.

Before the codification of the principle of disregard of a company's separate existence by the Companies Act of 2008, this matter was regulated by the common law and referred to as "lifting" or "piercing" the corporate veil. The courts used it to place limitations on the principle of separate legal personality in order to avoid abuse

"Piercing the corporate veil" refers to those exceptional circumstances where the court ignores the separate legal existence of the company and treats the shareholders as if they were the owners of the assets and had conducted the business of the company in their personal capacities OR attributes certain rights or obligations of the shareholders to the company. There are no hard and fast rules regarding the lifting of the corporate veil.

Botha v Van Niekerk & another:

- The seller must have suffered an "unconscionable injustice" before the court could lift the veil.

Cape Pacific v Lubner Controlling Investments (Pty) Ltd & others:

- The court confirmed that it has no general discretion simply to disregard a company's separate legal personality.
- The separate legal personality of a company should not be easily ignored.
- However, circumstances do exist for example fraud, dishonesty or other improper conduct where it would be justifiable to pierce the corporate veil.
- *Botha v Van Niekerk* was too rigid.
- The court indicated that it would adopt a more flexible approach namely of taking all the facts of each case into consideration when determining if the veil should be pierced.
- A balance should also be struck between the need to persevere the separate legal identity of the company against policy considerations in favour of piercing the corporate veil. The veil could also be pierced in relation to a specific transaction.

Hülse-Reutter v Gödde:

- Agreed that court has no general discretion simply to disregard a company's separate legal personality.
- The corporate veil would only be lifted if there was evidence of misuse or abuse of the distinction between the company and those who control it and this has enabled those who control the company to gain an unfair advantage
- Therefore a dual test was introduced: by adding the element of unfair advantage.
- The court further confirmed that much depended on a close analysis of the facts of each case and considerations of policy.

Die Dros (Pty) Ltd and another v Telefon Beverages CC and others:

- Where fraud, dishonesty and other improper conduct is present, the need to preserve the separate legal personality of a company must be balanced against policy considerations favouring piercing the corporate veil.

Le'Bergo Fashions CC v Lee and another:

- The court will pierce the corporate veil where a natural person, who is subject to a restraint of trade uses a close corporation or a company to front to engage in the activity that is prohibited by the agreement

Ex Parte: Gore NO:

- These common law principles are still used as a guide to interpretation of the statutory provision in section 20(9) of the Companies Act.

1.2 Chapter 2 pars 2.3 and 2.4 in the textbook, and Study unit 3 sub-unit 4 in the study guide

A foreign company must register as an "external company" with the Companies and Intellectual Property Commission within 20 days after it begins conducting business or non-profit activities in South Africa. Kangaroo Breweries Ltd must lodge a form CoR 20.1 with the Commission. The board of directors must also note that certain activities will not only be regarded as conducting business. For example, opening a South African bank account or acquiring an interest in property. Foreign companies can transfer their registration to South Africa. It will then be deemed as if the company was originally incorporated in the Republic. The company will then be known as a "domesticated company". Kangaroo Breweries Ltd is a company based in Australia. It is contemplating extending its business operations in South Africa. The company's board of directors is uncertain about the requirements that it needs to comply with in terms of the Companies Act 71 of 2008 in order to conduct its business in South Africa.

1.3.1 Chapter 2 pars 7.1 and 7.2 in the textbook, and Study unit 5 in the study guide

A preincorporation contract in terms of section 21 of the Companies Act must be (1) Concluded by a person in the name of, or purporting to act in the name of or on behalf of a company yet to be incorporated; (2) The contract must be concluded in writing; and (3) The board of directors of that company must ratify the transaction or must not reject the contract within the stipulated 3 month period after its incorporation. In other words, if the first two formal requirements are complied with and after the company's incorporation the board 'does nothing' about the transaction (i.e. neither ratifies nor rejects it), the contract will become binding on the company.

1.3.2 If nothing is done (company neither rejects the pre-incorporation contract nor adopts it) it will be deemed to be adopted after 3 months. However personal liability ensues:

- If the contract is partly rejected: person who contracted will be liable for rejected part
- If the contract is totally rejected: person who contracted will be liable for the entire contract

1.3.3 The common-law alternatives (except for agency which is impossible) are: the contract for the benefit of a third party (*stipulatio alteri*), option, nomination or cession and delegation.

QUESTION 2

2.1. Chapter 6 par 2 of the textbook, and Study unit 9 sub-unit 6 in the study guide

Yes, resolutions of shareholders can be passed without holding a general meeting of shareholders. In terms of the common law, unanimous assent is possible. In terms of this rule certain decisions can be passed without convening a meeting. The requirements are that all the members must be fully aware of

the facts and must have assented thereto. Refer to: *Gohlke and Schneider v Westies Minerals (Pty) Ltd* and *In re Duomatic Ltd*-cases.

In terms of section 60 of the Companies Act 71 of 2008 a resolution may be submitted ti shareholders in writing, and if it is adopted in writing by the required majority to pass that particular type of resolution it will have the same effect as if it was adopted at a duly convened meeting. Note that it is impossible to decide on any business that a company must decide on at its annual general meeting by using the section 60 method.

2.2 Chapter 12 par 6.1-6.4 in the textbook, and study unit 13 sub-unit 3.2 in the study guide

Mention any three of the following triggering actions:

- The company has adopted a special resolution to amend its Memorandum of Incorporation to alter preferences, rights or terms of any class of its shares in a manner which affects the rights or interests of the holders of those shares adversely/ negatively;

- The company is contemplating adoption of a resolution concerning disposal of the greater part of the assets of the company;
- The company is considering merging or amalgamating with another corporation;
- The company is considering entering into a scheme of arrangement.

2.3.1 Chapter 3 par 1.4 in the textbook, and Study unit 8 sub-unit 5 in the study guide

Right of pre-emption or pro-rata offer clause. The purpose is to prevent dilution of the value of current shareholding.

2.3.2 Chapter 7 par 2 of the textbook, and Study unit 10 sub-unit 9 of the study guide

Yes, Philemon can be dismissed as a director by either the shareholders or the board of directors by means of an ordinary resolution. No, he cannot invoke the provisions in the Memorandum of Incorporation to prevent his removal. He can claim damages for the premature removal as a removal in terms of section 71 does not detract from rights that a director has to claim compensation as a result of loss of office.

2.4.1 Chapter 5 pars 1 and 3 in the textbook, and Study unit 7 sub-units 2, 3 and 6.2 in the study guide

<u>Regarding the capacity of the company (ie that the contract for the purchase of timber has nothing to do with tiling</u>:

Section 19(1)(b) of the Companies Act of 2008 states that a company has all the legal capacity and the powers of an individual except to the extent that a juristic person is incapable of exercising any such power, for instance the capacity to enter into a marriage. The company's Memorandum may impose additional restrictions on the company's capacity. The capacity of a company is therefore no longer limited by its main or ancillary objects or business and these need not even be stated in the Memorandum of Incorporation.
Section 20 of the Companies Act 71 of 2008 determines that no transaction is invalid solely because it exceeds the company's capacity.

In respect of the fact that Johannes only has authority to conclude contracts not exceeding R500 000 in value on behalf of the company, and required prior consent from the board of directors which he did not get:

Here you could apply the common-law *Turquand* rule and/or the statutory rule in section 20(7) of the Companies Act. Because the question states that you must refer to the relevant section in the Companies Act, your answer should be limited to section 20(7).

Section 20(7) of the Companies Act 71 of 2008 now contains a provision that in some respects resembles the *Turquand* rule. It provides that a person dealing with a company in good faith is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all the formal and procedural requirements in terms of the Companies Act, the company's Memorandum of Incorporation and any rules of the company, unless the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement. As it does not appear from the facts that one of these exceptions apply (Xander did not suspect any irregularities and therefore it appears that he did not know that prior consent was required from the board of directors) the contract will be binding.

2.4.2 Chapter 9 par 2.1.1 in the textbook and Study unit 12 sub-unit 2 in the study guide

Gangnam's Tile (Pty) Ltd is a private company. Every public company or state-owned enterprise must appoint a company secretary who is knowledgeable about, or experienced in, the relevant laws. A private company, like Gangnam's Tile (Pty) Ltd, a personal liability company or a non-profit company may voluntarily appoint a company secretary.

QUESTION 3

3.1.1 Chapter 12 pars 5.1-5.6 of the textbook, and Study unit 13 sub-unit 2.2 in the study guide

The following can send the demand to the company:

- a shareholder/ person entitled to be registered as a shareholder
- a director;
- a prescribed officer;
- a registered trade union that represents employees, or another representative of the employees; or
- any person who is granted leave by the court to do so

3.1.2 Study unit 13 sub-unit 2.2.1 in the study guide

The person who made the demand may apply to the court for leave to continue with proceedings in the name of or on behalf of the company if:

- The company failed to take steps as required;

- The company appointed a person or committee who is not independent;
- The company accepted an inadequate report;
- The company acted in a way inconsistent with the reasonable report of an independent, impartial investigator; or
- The company has served a refusal notice.

3.2 Chapter 9 par 2.3 in the textbook, and Study unit 11 sub-unit 8 in the study guide

The audit committee must, for the year it is appointed, perform the following functions (mention any five of the following):

- nominate and appoint a registered, independent auditor
- determine the fees to be paid to the auditor and the auditor's terms of engagement
- ensure that the appointment of the auditor complies with the Companies Act and other legislation
- determine the nature and extent of non-audit services that the auditor may provide or must not provide
- pre-approve any proposed agreement with the auditor for the provision of non-audit services
- prepare a report to be included in the annual financial statements
- receive and deal with complaints pertaining to the accounting practices and internal audit of the company or related matters
- make submissions to the board on accounting policies, financial control, records and reporting
- perform other functions as determined by the board, including the development of policy in order to improve governance
- consider whether the auditor's independence may have been prejudiced
- consider compliance with other criteria relating to independence or conflict of interest as prescribed by the IRBA

3.3 Chapter 16 par 7.1-7.2, and Study unit 16 sub-unit 10 in the study guide

- Members of close corporations act as agents for the close corporation.
- The doctrine of constructive notice does not apply to close corporations. Therefore, third parties or outsiders are not deemed to have knowledge regarding the content of close corporations' registered documents.
- Close corporations are in general bound to any contract concluded with an outsider by a member, regardless of whether or not the transaction falls within the scope of the enterprise's main business.
- A close corporation could however escape liability if the third party or an outsider knew or reasonably ought to have been aware of the fact that the member who concluded the contract on behalf of the close corporation lacked the necessary authority to do so.

- *J&K Timbers (Pty) Ltd v GL&S Furniture Enterprises CC*: a member is an agent, even though no authority, express or implied, has been conferred upon him by the close corporation and the corporation is bound by the related act, unless the third party knew or reasonably ought to have known of the absence of such power.

In this instance there is nothing in the facts indicating that Speak Easy (Pty) Ltd knew or ought to have known that prior consent was required or that Mike lacked the required authority to conclude the contract. Therefore, Lehutjo CC is bound by the contract.

3.4 Chapter 16 par 3.3 in the textbook, and Study unit 16 sub-unit 7.3.2 in the study guide

In terms of section 36 of the Close Corporations Act, a member(s) may apply for the termination of another member's membership by order of court. In order to do so the member(s) will have to prove:

- That the member is unable to perform his/ her part in carrying out the business.
- That the member's conduct is likely to have a prejudicial effect on the carrying on

  of the business of the close corporation.
- That the member's conduct has made it reasonably impossible for the other member(s)

  to associate with him/ her in the carrying on of the business of the close corporation.
- That In the circumstances it is just and equitable that such a person should

  cease to be a member of the close corporation.

Relevant information relating to how the members' interests in the close corporation should be adjusted once the person's membership of the close corporation ceases should be presented.

The court may then order cessation of a member's membership and make any order it deems necessary regarding the disposal of the member's interest.

Section 49 of the Close Corporations Act is available to a member whose rights are unfairly prejudicially affected, or aware of other members so affected by the close corporation's conduct or the conduct of one or more of the other members. The court may make any order that it deems fit to remedy the situation.

In *Feni v Gxothiwe & another* 2014 (1) SA 5 (ECG), the court felt that section 49 is more appropriate on the facts.

3.5 True or false questions

3.5.1 False.

Refer to Chapter 2 pars 4.2-4.3, Chapter 5 par 2 in the textbook, and Study unit 7 sub-unit 5 in the study guide

The doctrine of constructive notice has not been abolished completely in terms of the Companies Act 71 of 2008. The doctrine is still applicable to Ring-fenced companies and Personal Liability Companies.

3.5.2 False.

Refer to Study unit 16 sub-unit 14 in the study guide

Members of a close corporation, as a general rule, are not held jointly and severally liable for all debts of the corporation. They enjoy limited liability due to the fact that a close corporation is recognised as a separate juristic person.

3.5.3 False.

Refer to Chapter 16 par 3.1 in the textbook, and Study unit 16 sub-unit 4 in the study guide

Although a restriction is placed on the number of members of a close corporation (ie no more than ten members) no restriction is placed on the number of shareholders in a private company.

3.5.4 False

Refer to Chapter 16 par 3.4 in the textbook, and Study unit 16 sub-unit 5.1 in the study guide

Capital is raised by close corporations through the issue of members interest or from loans, not from the issue of shares.

3.5.5 False.

Not all close corporations are required to audit their financial statements.Only some close corporations, in the same circumstances as for private companies, are required to audit their financial statements.

SECTION B

QUESTION 1

Answer: (1)

Reason: Please refer to the five cases that you are required to know for purposes of the examination

(1) is **CORRECT**. In *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) distinguished, in particular, between estoppel and ostensible authority.

(2) is INCORRECT *Feni v Gxothiwe & another* 2014 (1) SA 594 (ECG) concerned the application of section 49 and 36 of the Close Corporations Act 69 of 1984.

(3) is INCORRECT. *Grancy Property (Pty) Ltd v Manala & others* 2015 (3) SA 313 (SCA) concerned the application of section 163 of the Companies Act 71 of 2008 and the court's discretion to grant relief from oppressive or prejudicial or abusive conduct

(4) is INCORRECT. *Venalex (Pty) Ltd v Vigraha Property CC & others* 2015 (2) All SA 645 (KZD) concerned the application of section 21 of the Companies Act (pre-incorporation contracts).

QUESTION 2

Answer: (4)

Reason: Chapter 2 pars 7.1 and 7.2 in the textbook, and Study unit 5 in the study guide

(1) is CORRECT. It is possible to conclude a contract on behalf of a company that is not yet registered in terms of section 21 of the Companies Act 71 of 2008.

(2) is CORRECT. The intention of the person concluding the contract is to hold the company liable once the company comes into existence.
(3) is CORRECT. It is possible to conclude a pre-incorporation contract in different ways.
(4) Is **INCORRECT**. It is impossible to conclude a pre-incorporation contract on behalf of the company by means of common law agency, because it is a requirement that the principal must exist at the time of conclusion of the contract.

QUESTION 3

Answer: (4)

Reason: Chapter 2 par 2.1 in the textbook, and Study unit 3 sub-unit 2 in the study guide

The Memorandum of Incorporation of a certain company prohibits the offer of its shares to the public and restricts the transferability of its shares. This is a private company.

QUESTION 4

Answer: (1)

Reason: Chapter 2 par 2.1 in the textbook, and Study unit 3 sub-unit 2 in the study guide

(1) is **CORRECT**. Companies may no longer be converted into close corporations and new close corporations cannot be registered.
(2) is INCORRECT. No limit is placed on the number of shareholders in a private company.
(3) is INCORRECT. It is not a legal requirement for all private companies to appoint audit committees.
(4) is INCORRECT. Private companies are not permitted to offer their shares for sale to the public and their shares cannot be listed on the Johannesburg Stock Exchange Ltd.

QUESTION 5

Answer: (3)

Reason: Chapter 16 pars 3.1, 3.6 and 9.1 in the textbook, and Study unit 16 sub-units 4, 8 and 11in the study guide

(1) is INCORRECT. Only one member can hold a single member's interest in a close corporation.
(2) is INCORRECT. Only if a loan or payment is made to a member of a close corporation in his or her capacity as a member (and not as a creditor) the requirements and formalities in section 51 of the Close Corporations Act 69 of 1984 must be adhered to.
(3) is **CORRECT**. A member's interest in a close corporation can be acquired by making a contribution to the close corporation.

(4) is INCORRECT. A close corporation has members, not shareholders. They have members' interest and not shares and a share capital.

QUESTION 6

Answer: (1)

Reason: Chapter 3 par 4 in the textbook, and Study unit 8 sub-unit 6 in the study guide

(1) is **CORRECT**. Debenture holders are creditors of a company by virtue of having made loans to the company.
(2) is INCORRECT. It is not necessary for a dividend to be declared before they have a right. They are entitled to be paid once the debt becomes due and payable.
(3) is INCORRECT. The solvency and liquidity test is not applicable to payments made to debenture holders. They are entitled to payment when repayment of the debt becomes due and payable.
(4) is INCORRECT. Debenture holders may under certain circumstances be allowed to vote, but this is not an automatic right.

QUESTION 7

Answer: (1)

Reason: Study unit 16 sub-units 4, 6.2, 6.3

(1) is **INCORRECT**. If a member is declared insolvent or his/her member's interest is attached, the close corporation does not dissolve automatically. Close corporations have separate legal personality and they enjoy the benefit of perpetual succession.
(2) is CORRECT. Generally, only natural persons may become members of a close corporation.
(3) is CORRECT. If a member of a close corporation fails to make his/her contribution as agreed, he/she may incur personal liability for the debts of the corporation.
(4) is CORRECT. Close corporations are not exempted from financial reporting duties.

QUESTION 8

Answer: (2)

Reason: Chapter 16 pars 5.1-5.3 in the textbook, and Study unit 16 sub-unit 9 in the study guide

The procedures applicable to close corporations for meetings, voting at meetings and proxy votes may be regulated in the association agreement. The Memorandum of Incorporation and Notice of Incorporation are registration documents in companies, not close corporations. The founding statement is the sole registration document of a close corporation, but does not regulate these internal affairs of the close corporation.

QUESTION 9

Answer: (3)

Reason: Chapter 2 par 2 in the textbook, and Study unit 10 sub-unit 9 in the study guide

(1) is INCORRECT. Philani can be removed despite any provision in the Memorandum of Incorporation.
(2) is INCORRECT. Philani can be removed by ordinary resolution by either the board of directors or by the shareholders.
(3) is **CORRECT**. Philani can be removed by an ordinary resolution adopted by the shareholders.
(4) is INCORRECT. Philani can be removed by the shareholders or by the board of directors despite his employment contract with the company.

QUESTION 10

Answer: (2)

Reason: Chapter 7 pars 3.2, 33 in the textbook, and Study unit 10 sub-unit 6.2 in the study guide

Any one of the following may apply for a delinquency order:

- Company
- Shareholder
- Director
- Company secretary or prescribed officer
- Registered trade union or other employee representative

END OF PAPER

Please note that the questions in the exam will cover only the study units dealing with **transformative constitutionalism, corporate social responsibility and globalisation; companies;** and **close corporations (**Study units **1- 13** and study unit **16)**. For purposes of revision for the exam, we also suggest that you access the activities and questions for the various learning units on *my*Unisa under *Additional Resources*.

Good luck with your studies!

YOUR LECTURERS