

MRL 2601

NOV/OCTOBER 2017

SECTION A

QUESTION 1

1.1 A profit company's main objective is financial gain for its shareholders, a profit company may be incorporated by one or more persons and under Companies Act of 2008 there is no limit to the number of shareholders it can have. Four different types of company fall under this category namely; state owned companies, public companies, personal liability companies and private company.

On the other hand a non-profit company is a company whose main object must relate to social activities, public benefit, cultural activities or group interests.

1.2 The doctrine of constructive notice provides that third parties dealing with a company are deemed to be fully acquainted with the contents of the public documents of the company. However section 19(4) partially abolishes this doctrine. The exception is that a person is deemed to have knowledge of any provision of a company's MOI in terms of section 15(2) relating to any restrictive or procedural requirement impeding the amendment of a specific provision of the MOI prohibiting its amendment. This is subject to the condition that the company's name includes the letters "RF" and the Notice of Incorporation contains a prominent statement drawing attention to such a provision.

1.3 A company's MOI can be amended if 10% of the holders of voting shares can propose a resolution to amend the MOI. The amendments may be made formal or informal special resolutions, a notice of amendment must be filed

and takes effect once acceptance of notice by CIPC, or in the case of a name change it can be done on the issue of amended registration certificate.

- 1.4 The Memorandum of Incorporation is the founding document of the company. It sets out the relationship between the company and its shareholders, the company and its directors, the company and other parties as well as the company by other third parties. The MOI should comply with the provisions of the Companies Act. Any rules or procedure contravening the Companies Act are void to the extent of the inconsistency. Thus rules and procedure inconsistent with the Act are thus void and of no force.
- 1.5 A private company is prohibited by the companies Act from offering its securities to the public and the transferability of its securities is restricted. The capital is provided by private individuals who decides how and who should run the company. On the other hand a public company is not a state owned company but a private company with shares listed and traded on the stock market. Its major advantage is being able to source capital from the public and any other investor.
- 1.6 Section 1 of the Companies Act describes a pre-incorporation contract as a written agreement entered into before the incorporation of a company by a person who purports to act in the name of, or on behalf of the company with the intention or understanding that the company will be incorporated, and will thereafter be bound by the agreement. A person who enters into such a contract is held jointly and severally liable with any such other person for liabilities emanating from the pre-incorporation contract if the incorporation does not take place, or the company does not ratify any party of the agreement after incorporation. The advantage of pre-incorporation under common law is that the promoter concludes the contract under his name but after the company is registered can cede the debt without concurrence of the debtor. Under section 21 the a written agreement is a requirement and the promoter is bound by the contract for liability in case the company is not incorporated.

- 1.7 Since the coming into effect of the Companies Act 2008 and in particular section 13 of the Act CC's can no-longer be incorporated in South Africa.

QUESTION 2

2.1

- 2.2 The company is bound by the contract concluded by Ugochukwu because of the operation of section 20(7) of the Companies Act 2008. The section provides that a person dealing with a company in good faith is entitled to assume that the company has complied with all of the internal procedures requirements in terms of its MOI and any rules unless the person knew or reasonably ought to have known of any failure by the company with its formal or procedural requirements. There is no indication from the that Wiseman knew or reasonably ought to have known that Ugochukwu failed to comply with procedures and that he had acted in bad faith.

2.3.1 A company may issue the following shares;

- Preference shares
- Ordinary shares and
- Deferred shares

2.3.2 Shares can confer the following rights to its holders;

- The right to vote
- The right to information
- The right to receive a dividend that has been declared
- The right to share in the assets that are left on the winding up of a company after the company's creditor's creditors have been paid up.

2.3.3 Busy Rite Ltd can provide debt instruments to the public provided three principles used to determine whether there must be disclosure are present. The principles are;

- There must be an offer
- The offer is of securities
- The offer is made to the public

2.4 The test applied to determine what a reasonable director would have done in a particular situation is an objective test. In Fisheries Development Corporation of SA v Jorgensen it was stated that the extent of the duty of care and skill depends to a considerable degree on the nature of the company's business and on any particular obligations assumed by or assigned to them.

QUESTION 3

3.1.1 Section 94(2) of the Companies Act 2008 requires is required to that at each annual general meeting public companies, state owned companies and any other company is required to have an audit committee must appoint an audit committee for each financial year. The audit committee must have three members and consist of non-executive directors who are not involved in the day to day running of the company.

3.1.2 An auditor is appointed by the directors within 40 business days after in incorporation

3.2 Members of CC owe their fiduciary duties to the CC as a legal persona. In terms section 42(2) members must act honestly and in good faith and must exercise their powers to manage and represent the CC in its interests and for its benefit. A member must avoid a conflict of interest between his interests and those of the CC, in particular a member may not derive unwarranted personal economic benefit from the CC nor compete with it in its business activities.

3.3 In terms of the Close Corporations Act certain matters require the written consent of each member. These matters include;

-the acquisition of a member's interests

-financial assistance in respect of acquisition of a member's interest

-the granting of loans and furnishing of security

- the ratification of pre-incorporation contracts and many more

The Close Corporation Act creates personal liability on members for the debts of the CC in the event of a contravention of important provisions of the Act. The consequences may be joint and several liability for the debts of the CC in the event of specific contraventions. Liability in cases of reckless and fraudulent trading and abuse of corporate juristic persons

3.4.1 The business judgment rule makes director may escape liability where he or she had a rational basis for believing and actually believed that the decision was in the best interest of the company. TRUE

3.4.2 TRUE

3.4.3 TRUE

3.4.4 FALSE BUT ESSENTIAL

3.4.5 FALSE

SECTION B

1. 3

2. 1

3. 2

4. 3

5. 3

6. 1

7. 2

8. 2

9. 1

10.1

MAY/JUNE 2017

SECTION A

QUESTION 1

1.1A non-profit company is a company incorporated for a public benefit or other object such as cultural, social or communal or group interests. An Non Profit Company

- must apply all of its assets and income however derived, to advance its stated objects as set out in its MOI and
- or subject to to the above point may acquire and hold securities issued by a non-profit company; or directly , alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects. Since Annalize wants to raise funds for wildlife conservation these objects fall within the ambit of a Non-Profit Company.

1.3.1 In terms of the Companies Act of 1973 , every company was compelled to convene an annual general meeting at the times prescribed by the Act. In terms of the Companies Act of 2008, only public companies have a statutory obligation to convene annual general meetings. CBT Pty Limited as a private company is not obliged to convene an annual general meeting in terms of the Companies Act.

1.3.2 A shareholders meeting may validly postponed or adjourned;

- if either the vote or the person quorum is not satisfied one hour after the pointed time at which the meeting is supposed to begin.
- If the quorum for a particular matter is not satisfied, but there is other business on the agenda , that non quorate matter maybe postponed to a later time in the meeting without motion or vote.
- If there is no other business on the agenda the meeting may be postponed or adjourned for a week without a motion or vote.

1.3.3 Matters to be discussed at the annual general meeting in terms of the Companies Act of 2008 are;

- Presentation of the director's report
- Presentation of an audit committee report
- Election of directors to the extent required by the Act or the company's MOI
- Appointment of an auditor for the following financial year
- Appointment of an audit committee
- Presentation of audited financial statements for the immediately preceding financial year
- Any matters raised by the shareholders

QUESTION 2

2.1 In terms of section 21 of the Companies Act a person may enter into a written agreement in the name of, or purport to or act in the name of, or on behalf of an entity that is contemplated or proposed to be incorporated but does not yet exist at the time of agreement.

Within three months after date of incorporation the board of the company must completely, partially or conditionally ratify or reject any pre-incorporation contract an entity that is contemplated t

- If the board neither ratifies nor rejects the pre-incorporation contract purported to have been done in the name of the company within three months after incorporation the company will be regarded as having ratified that agreement.
- This will mean the pre-incorporation contract or agreement is enforceable against the company and that the liability of the promoter is discharged.

2.2

2.3 The Companies Act 2008 introduced the Business Judgment Rule in section 76(4) of the Act. The provision states that a director will be regarded as having acted in the best interest of the company and with required degree of care, skill and diligence if the director;

- 1 Took reasonable steps to become informed about a matter
- 2 Had no material or personal financial interest in the subject matter of the decision or knew of anybody else was having a financial interest in the matter
- 3 Made or supported a decision in the belief that it was in the best interest of the company

Thus a director will escape liability where he or she had a rational basis for believing and actually believed that the decision was in the best interest of the company.

2.4.1 A shareholder, or person entitled to be registered as a shareholder of the company or related company, or a director or prescribed officer of the company, or a registered trade union that represents employees or any other person granted leave by court may bring the action

2.4.2 To protect the ***legal interests*** of the company

2.5 Duties of an Audit Committee are to;

- To nominate for appointment as auditor of the company a registered auditor who in the opinion of the committee is independent of the company
- 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 provisions of the Act and any other legislation relating to the appointment of auditors
- Determine the nature and extent of any non-audit services that the auditor may provide to the company
- Receive and deal appropriately with any complaints whether from within or outside the company relating to either accounting practices and internal audit of the company
- Pre-approve any proposed contract with the auditor for the provision of non-audit services to the company
- Perform other functions determined by the board

QUESTION 3

In terms of the Close Corporations Act certain matters require the written consent of each member. These matters include;

- the acquisition of a member's interests
- financial assistance in respect of acquisition of a member's interest
- the granting of loans and furnishing of security
- the ratification of pre-incorporation contracts and many more

The first three are critical since they require previously obtained written consent of each member. This is critical in the maintenance of capital, and personal liability which may follow if financial assistance jeopardizes the solvency and liquidity of the CC.

- 3.1.1 The Close Corporation Act creates personal liability on members for the debts of the CC in the event of a contravention of important provisions of the Act. The consequences may be joint and several liability for the debts of the CC in the event of specific contraventions. Liability in cases of reckless and fraudulent trading and abuse of corporate juristic persons
- 3.1.2 Provided Excell CC followed the laid down requirements such providing written undertaking by Thabo to be personally liable Excell CC may refuse to pay. Thabo may cite section 63 that provides for joint and severally liable for debts of the CC by all members.
- 3.2.1 Members of CC owe their fiduciary duties to the CC as a legal persona. In terms section 42(2) members must act honestly and in good faith and must exercise their powers to manage and represent the CC in its interests and for its benefit. A member must avoid a conflict of interest between his interests and those of the CC, in particular a member may not derive unwarranted personal economic benefit from the CC nor compete with it in its business activities.

3.2.2 A member who has breached his fiduciary duties is liable to the CC for any loss suffered by the CC as a result of thereof. Where a member fails to disclose possible opportunity any material interest in any contract with the CC, the contract is voidable at the option of the CC.

3.2.3 The legal actions available are usually regulated by an Association agreement, which is an agreement between the members of a CC regulating the internal relations between members themselves and members and the CC.

3.3

3.3.1 FALSE

3.3.2 TRUE

3.3.3 TRUE

3.3.4 FALSE

3.3.5 FALSE

SECTION B

QUESTION

1. 2

2. 3

3. 3

4. 2

5. 3

6. 4

7. 1

8. 4

9. 2

10.3

OCT/NOV 2016

SECTION A

QUESTION 1

- 1.1 In Salomon v Salomon it was held that a company is a separate legal subjects with its own rights and liabilities and exists separate from its owners. However in Dadoo v Krugersdorp Municipal Council the court held that legal personality is not absolute and that sometimes it can be ignored by piercing or lifting the corporate veil where shareholders misuse or perpetuate fraud under the guise of a company.
- 1.2 Kangaroo Breweries is an external company. An external company is a foreign company that carries business within the Republic. To operate in South Africa the company has to register with the CIPC within 20 business days after it first begins to conduct activities within the Republic. The CIPC must assign a unique registration number to each external company that has been registered.
- 1.3 Names must not be the same or confusingly similar to existing names or trade-marks, or falsely imply or suggest or be such as would reasonably mislead a person to believe incorrectly that a company is part of or associated with another company or entity or with a particular person.
- 1.4 The contract concerned is a pre-incorporation contract. Pre-incorporation contracts are applicable under both common law and statutory law. In terms of the common law it is impossible to conclude such a contract as agent/principal relationship is a contract that cannot exist if there is no principal. The alternative where the promoter concludes a cession contract in his own name and after the company is registered, cedes the rights and delegates the obligations to the company. In terms of section 21 a person may enter into a written agreement in the name of, or purport to act in the name of, or on behalf of, an entity contemplated or proposed to be incorporated

but does not exist yet at the time of the agreement with the intention or understanding that the proposed company will be incorporated later. The person may give notice to the company of this contract in the prescribed manner. If the company takes a decision on the contract it must file a notice of the decision with the CIPC.

- 1.5 Alex is jointly and severally liable with any other such person for liabilities in the pre-incorporation contract if the company is not incorporated, or if, after being incorporated the company rejects any part of the agreement or action.

QUESTION 2

2.1

A resolution may be adopted by written consent, given in person, or by electronic communication, if it is submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution. Such a resolution is deemed to have been adopted if it is supported by persons entitled to exercise sufficient voting rights for it to have been adopted as an ordinary or special resolution,

Shareholders can also take resolutions by way of formal or informal unanimous consent. In *re Duomatic Ltd* it was held that formal requirements for the particular action must be complied with for validity.

2.2

2.3

2.3.1

- 2.3.2 An elected director may be removed by an ordinary resolution at a meeting of holders of the shares entitled to be voted in an election of that director, if the director has received notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive. The particular director must be given reasonable

opportunity to make a presentation to the meeting in person. An agreement between shareholders only not to dismiss a director may circumvent section 77, but falls foul of section 15(7) and thus may be void to the extent that it is in conflict with Act. Section 77 does not deprive a director of a right nor a right they have at common law, or prevent the affected director from applying to a court for damages or other compensation for loss of office as a director.

2.4

- 2.4.1 The company is bound by the contract concluded by Johannes because of the operation of section 20(7) of the Companies Act 2008. The section provides that a person dealing with a company in good faith is entitled to assume that the company has complied with all of the internal procedures requirements in terms of its MOI and any rules unless the person knew or reasonably ought to have known of any failure by the company with its formal or procedural requirements. In this case Xander does not suspect any irregularities and there is no indication that Xander knew or reasonably ought to have known that Johannes failed to comply with procedures and that he had acted in bad faith.
- 2.4.2 A company secretary is the chief administrator of his or her company. Section 86 of the Companies Act obliges a public company or State Owned Company to appoint a company secretary who is knowledgeable and experienced in the relevant laws, while other companies are not obliged to have a company secretary but may appoint one. Thus Gangman's Tile Pty Ltd is not obliged but may appoint a company secretary.
- 2.4.3 Section 46 of the Companies Act regulates distributions. In terms of the section distributions may be made in the following circumstances;

- The board of directors must authorize the distribution unless it is made in terms of the existing legal obligation of the company, or court order
- It must reasonably appear that the company will satisfy the solvency and liquidity test immediately after completion of the distribution
- The board of the company must acknowledge, by means of a resolution, that it has applied the solvency and liquidity test and reasonably concluded that the company will satisfy this test immediately after completing the proposed distribution.

The distribution must then be carried out. If the distribution is not carried out within 120 business days after acknowledgement by the board, the board must make a new acknowledgement in respect of the remaining distribution.

QUESTION 3

3.1

In a case of insolvency of a member or upon his death the trustee or executor is compelled to sell his member's interest. This duty by the executor of a deceased estate to dispose of the member's interest must be exercised subject to the provisions of the association agreement. In the absence of an association agreement, the executor of a deceased estate may only transfer the member's interest to an heir or legatee if he qualifies to become a member and if the remaining members give consent. If they fail to give consent within 28 days the executor must sell the member's interest of the deceased to the CC, to the remaining members or to an outsider on the same terms .

3.2

Section 54 provides that every member of the CC is an agent of the CC, and any act of a member binds the CC irrespective of whether the act was performed for the carrying on of business of the CC or not. In *J&K Timbers v GL & S Furnitures* it

was held that if the member so acting had no power to act he will still bind the CC in respect of a third party dealing with the GG unless the outsider ought reasonably to have known that the member had no such power. In *Point 2 Point Same Day Express CC v Stewart* it was stated that since no constructive notice exists knowledge of internal restrictions on members' powers is not imputed on outsiders. Outsiders are entitled to assume that each member has the necessary authority to act on behalf of the CC in a transaction. Thus a bona fide outsider who does not know of internal restrictions of power is, in principle, not affected by it and thus a CC may be bound by a contract falling outside its business scope even if it was not actually or ostensibly authorized or ratified by the CC.

3.3

Subject to exceptions, only natural persons may be members of a CC. No juristic person may directly or indirectly hold a member's interest in a CC.

3.4

Members of CC owe their fiduciary duties to the CC as a legal persona. In terms section 42(2) members must act honestly and in good faith and must exercise their powers to manage and represent the CC in its interests and for its benefit. A member must avoid a conflict of interest between his interests and those of the CC, in particular a member may not derive unwarranted personal economic benefit from the CC nor compete with it in its business activities.

3.5

3.5.1 FALSE

3.5.2 FALSE

3.5.3 TRUE

3.5.4 FALSE

3.5.5 TRUE

