



## DEPARTMENT OF MERCANTILE LAW

### COMMERCIAL LAW II (CLA2601)

#### TUTORIAL LETTER 201/3/2011

Dear Student

You should already have received the following tutorial letters:

- 1 Tutorial Letter CLA2601/101/3/2011, which deals with various matters (including assignments 01 and 02).
- 2 Tutorial Letter CLA2601/102/3/2011, which contains the particulars of the lecturers and information about the discussion classes and the examination.

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- 1 FEEDBACK ON ASSIGNMENT 01

#### QUESTION 1

Answer: (1)

Reason: See ***Companies and other Business Structures***, par 12.3.1 and 12.3.2 and **Study Guide par 10.3**

(1) is CORRECT. All partners have a right to share in the profits of the partnership and this is one of the *essentialia* of a partnership.

(2) is INCORRECT. All partners have a right to share in the profits of the partnership and this is one of the *essentialia* of a partnership. Each partner must contribute something appreciable to the partnership although the contribution need not be capable of a precise pecuniary assessment.

(3) is INCORRECT. All partners have a right to share in the profits of the partnership and this is one of the *essentialia* of a partnership.

(4) is INCORRECT. All partners have a right to share in the profits of the partnership and this is one of the *essentialia* of a partnership.

## QUESTION 2

Answer: (3)

Reason: See ***Companies and other Business Structures, par 12.7 and 12.6.2 and Study Guide par 10.7***

(1) is CORRECT. A partnership may be dissolved if a partner dies.

(2) is CORRECT. A partnership may be dissolved if a partner retires.

(3) is INCORRECT. A partnership may not be dissolved because of a partner's lack of implied authority. The partnership will be bound by the transaction if the partner was given general authority by the partnership agreement and the transaction falls within the scope of the partnership business.

(4) is CORRECT. A partnership may be dissolved upon the effluxion of the period of time for which it was agreed that the partnership would exist.

## QUESTION 3

Answer: (4)

Reason: See ***Companies and other Business Structures, par 12.4 and Study Guide par 10.4***

(1) is INCORRECT. A partnership does not exist independently from its partners.

(2) is INCORRECT. The rights and liabilities of the partnership are those of the partners.

(3) is INCORRECT. A partnership does not enjoy perpetual succession, whereas a company does.

(4) is CORRECT. The assets of a partnership are held by partners as co-owners.

## QUESTION 4

Answer: (1)

Reason: See ***Companies and other Business Structures, par 14.9 and Study Guide par 12.10-12.12***

(1) is INCORRECT. The trustee is the owner of the trust assets and the assets in his or her personal estate. He or she is, however, viewed in law as the owner of two separate estates. If one of the two estates is declared insolvent, the creditors of the insolvent estate will usually not be permitted to attach assets belonging to the other estate.

(2) is CORRECT. The law prohibits mixing assets belonging to the two separate estates.

(3) is CORRECT. The assets, liabilities and duties of the trust are vested in the trustee.

(4) is CORRECT. A trust is not a legal person. Therefore it does not enjoy separate existence and it cannot be the bearer of rights and duties.

## QUESTION 5

Answer: (2)

Reason: See ***Companies and other Business Structures***, par 14.1 and 14.12 and **Study Guide** par 12.2-12.3

(1) is CORRECT. Even though trusts are not separate legal personae, trust debts are usually only paid out of the trust estate.

(2) is INCORRECT. Any person, natural or legal, may be a trust beneficiary.

(3) is CORRECT. It is possible to provide for the continuation of a trust despite a change in trustees or trust beneficiaries. Therefore trusts may enjoy the privilege of perpetual existence.

(4) is CORRECT. Trusts are not generally regulated by the same legislation that is applicable to companies and close corporations. There are no rules relating to disclosure of information in trusts. Therefore, trusts enjoy a greater degree of confidentiality.

## 2 FEEDBACK ON ASSIGNMENT 02

### QUESTION 1

Answer: (4)

Reason: See ***Companies and other Business Structures***, par 2.10 and **Study Guide** par 3.11

(1) is CORRECT. A written contract is entered into by a person who is acting on behalf of a company to be formed.

(2) is CORRECT. The person entering into the agreement has the intention that once the company comes into existence, the company will be bound by the contract.

(3) is CORRECT. A person who enters into a pre-incorporation contract will be jointly and severally liable if the company is not incorporated or if, once incorporated, the company rejects any part of the agreement.

(4) is INCORRECT. Once the company is incorporated, the board of directors may within three months and not twelve months after the date of incorporation, completely, partially or conditionally ratify or reject any pre-incorporation contract.

**QUESTION 2**

Answer: (3)

Reason: See ***Companies and other Business Structures* par 4.4 and Study Guide par 6.3**

(1) is CORRECT. A proxy may delegate authority to act on behalf of the shareholder to another person.

(2) is CORRECT. A copy of the proxy appointment form must be delivered to the company before the shareholders' meeting.

(3) is INCORRECT. It is not a requirement that a copy of the proxy appointment form must be registered with the Companies and Intellectual Property Commission for it to be valid.

(4) is CORRECT. A shareholder may alter the proxy by cancelling it in writing, appointing another proxy and deliver a copy of the revocation to the proxy and the company.

**QUESTION 3**

Answer: (1)

Reason: See ***Companies and other Business Structures*, par 8.1 and 7.8 and Study Guide par 8.3**

(1) is CORRECT. Public companies and state owned companies must appoint an auditor every year at the annual general meeting. Other companies may do so voluntarily.

**QUESTION 4**

Answer: (2)

Reason: See ***Companies and other Business Structures*, par 3.3 and Study Guide par 5.3**

(2) is CORRECT. Deferred shares are usually issued for the remuneration of promoters of the company for services rendered in the establishment thereof.

**QUESTION 5**

Answer: (3)

Reason: See ***Companies and other Business Structures*, par 13.8 and Study Guide par 11.9**

(1) is INCORRECT. New members of a close corporation are bound by any existing formal association agreement.

(2) is INCORRECT. The manner in which members settle disputes may be regulated in the association agreement.

(3) is CORRECT. An association agreement is not a prerequisite for the formation and running of a close corporation.

(4) is INCORRECT. Members of a close corporation that have concluded an association agreement may conclude other members' agreements.

### 3 FEEDBACK ON SELF-EVALUATION ASSIGNMENT 03

#### QUESTION 1

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) of the Companies Act 71 of 2008 partly abolishes this doctrine by providing that a person must not be regarded as having received notice or knowledge of the contents of any document relating to a company merely because the document can be regarded as a public document. The doctrine is only partly abolished because subsection (5) provides for two exceptions: that a person must be regarded as having received notice and knowledge of (i) any provision of a company's Memorandum of Incorporation if the company's Notice of Incorporation or a Notice of Amendment has drawn attention to the provision and (ii) the effect of the personal liability of directors and former directors of a personal liability company. Therefore, if Sarah has concluded a contract with Obex (Pty) Ltd after the Companies Act 71 of 2008 had come into operation, she will not be deemed to have any knowledge of the contents of any public documents of Obex (Pty) Ltd, except those provisions of its Memorandum of Incorporation to which attention is drawn in the company's Notice of Incorporation or a Notice of Amendment (if any).

**See *Companies and other Business Structures* par 2.13-2.14 and Study Guide paragraph 4.3.1.**

#### QUESTION 2

The proposed agreement between Big (Pty) Ltd and Small (Pty) Ltd is a merger or amalgamation agreement and therefore one of the transactions to which the appraisal remedy, provided for in section 164 of the Companies Act 71 of 2008, applies. The appraisal remedy entails that a dissenting shareholder has the right to require the company to pay him or her the fair value in exchange for his or her shares.

The following procedure applies:

- A dissenting shareholder who wants to exercise his or her appraisal rights must notify the company in writing of his or her opposition before the relevant resolution is to be voted on.
- If the resolution is passed the shareholder must demand payment of the fair value of his or her shares from the company.
- The fair value must be determined by the company.
- Dissenting shareholders who do not accept the company's offer can either allow the offer to lapse and keep their shares or they can apply to court to determine the fair value of their shares.

- Shareholders can either surrender their shares for the amount determined by the court or they can withdraw their demands if they regard the value determined by the court as unacceptable.

**See *Companies and other Business Structures* par 11.5 and Study Guide par 9.3.2.**

### QUESTION 3

In terms of section 54(1) of the Close Corporations Act 69 of 1984, every member of a close corporation is an agent of the corporation in relation to a person who is not a member of the corporation and is dealing with the corporation. Thus, if a member acts on behalf of the corporation with an outsider, such act will bind the corporation irrespective of whether or not the contract falls within the scope of business of the corporation (s 54(2)). The only exception is where the specific member does not have the authority to act for the corporation and the outsider knew, or ought reasonably to have known, that the member had no such power. The *ultra vires* rule does not apply to close corporations (s 2(4)), and the doctrine of constructive notice does not apply to either the founding statement (s 17) or the association agreement (s 45(1)). There is nothing in the facts to indicate that Techno Music Ltd knew, or ought to have known, that Li does not have the authority in terms of the association agreement to represent the close corporation or that contracts exceeding R10 000 must first be consented to by the other member. The agreement will thus bind the corporation despite the fact that Li did not obtain the prior consent of the other member.

**See *Companies and other Business Structures* par 13.9 and Study Guide par 11.10.**

### QUESTION 4

A member of a close corporation can be liable for the corporation's debts in terms of the Close Corporations Act 69 of 1984

- if the separate juristic personality of the corporation is abused
- if the name of a corporation is used without the abbreviation
- if the proper name or registration number of the corporation is not used
- if the corporation is deregistered while having outstanding liabilities
- if loans are made without the consent of all the members
- if a member fails to make his or her initial contribution to the corporation
- if payment is made in respect of the acquisition of a member's interest in contravention of section 39 of the Close Corporations Act 69 of 1984
- if financial assistance is given to enable a person to acquire a member's interest in contravention of section 40 of the Close Corporations Act 69 of 1984
- if a person takes part in the management of the corporation while being disqualified from doing so in terms of section 47(1)(b) or (c) of the Close Corporations Act 69 of 1984
- if the office of the accounting officer of the corporation is vacant for a period of six months
- if a member breaches his duty of care and skill
- if a member breaches a fiduciary duty
- in the case of reckless behaviour

**See *Companies and other Business Structures* par 13.13 and Study Guide par 11.14.**

## 4 FEEDBACK ON CONCEPT EXAMINATION PAPER

**PLEASE NOTE:** The answers below are guidelines only and should not be regarded as model answers.

### SECTION A

#### QUESTION 1

1.1 Sonnenburg (Pty) Ltd will be defined as a profit company.

1. Profit companies may be incorporated by one or more persons,
2. Profit companies have the object of financial gain for its shareholders.
3. Four entities qualify as profit companies, namely (1) a public company, (2) a state-owned company, (3) a personal liability company and (4) a private company.

Non-profit companies -

1. were previously registered as section 21 companies
2. are incorporated by at least three persons
3. are used for a public benefit, or an object relating to one or more cultural or social activities or communal or group interests
4. directors are not allowed to obtain any financial gain from the company
5. do not need to have members

**See *Companies and other Business Structures*, par 2.6.**

1.2 RF is an abbreviation for the word “ringfencing” and is intended to warn outsiders dealing with the company that the Memorandum of Incorporation (MOI) contains special conditions, which they should check. The Notice of Incorporation must also contain a statement drawing attention to such provisions.

**See *Companies and other Business Structures* par 2.9.5 and par 3.3.1 of Tutorial Letter 501/2011.**

1.3 A translated version of the MOI may only be in an official language; French is not an official language and the French version of the MOI is therefore not valid. Furthermore, in the event of a conflict between the MOI and a provision in the translated version of the MOI, the provision in the original MOI prevails.

**See *Companies and other Business Structures*, par 2.9.10.**

1.4 Annette can enter into a pre-incorporation contract on behalf of the company to be formed. A pre-incorporation contract is a contract into which a person enters on behalf of a company which has not yet been incorporated. It is entered into with the aim of binding the company once it comes into existence.

A person who enters into such a contract is held jointly and severally liable for liabilities emanating from the pre-incorporation contract -

- if incorporation does not take place
- once the process of incorporation has been completed and the company does not ratify any part of the agreement (note, however, that joint and several liability will not apply if after incorporation, the contract is substituted by another similar contract)

Annette will thus be liable if the incorporation does not take place or, if the incorporation takes place, but the contract is not ratified. She will, however, be able to recover from the company any benefit that the company has received from the contract.

**See *Companies and other Business Structures*, par 2.10.**

## QUESTION 2

- 2.1 Section 19(1)(b) of the Companies Act 71 of 2008 now considerably widens the capacity of a company. It provides that a company has all the legal capacity and the powers of a natural person, except to the extent that a juristic person is incapable of exercising any such power or if the company's Memorandum of Incorporation provides otherwise. The capacity of a company is therefore no longer limited by its main or ancillary objects or business. Although the company's Memorandum of Incorporation may limit, restrict or qualify the purposes, powers or activities of the company (in other words impose restrictions on the legal capacity of the company) in terms of section 19(1)(b)(ii), any such restrictions would not render any contract invalid that conflicts with these restrictions (section 20(1)(a)). Thus, the contract remains valid and binding upon the company and the other party to the contract.

James is authorised and the company has the necessary capacity. It is irrelevant that James bought a car that is outside the company business.

**See *Companies and other Business Structures*, par 2.12.**

- 2.2 Section 46 of the Companies Act regulates distributions. The payment of dividends to shareholders is a distribution in terms of the Companies Act.

A distribution may be made in the following circumstances:

- The board of directors must authorise the distribution.
- It must reasonably appear that the company will be able to satisfy the solvency and liquidity test immediately after the distribution has been made.
- *Solvency test*: Considering all reasonably foreseeable financial circumstances of the company at that time, the assets of the company (as fairly valued) equal or exceed the liabilities of the company (as fairly valued).
- *Liquidity test*: Considering all reasonably foreseeable financial circumstances of the company at that time, it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the distribution. If the distribution was in the form of giving a loan to a shareholder or forgiving a loan made to a shareholder, the period runs from 12 months after the test was considered.

The distribution must be made within 120 days after the test was applied, otherwise the resolution by the board must be taken again and the test must be applied again.



As long as these requirements are met, dividends can be paid out of the share capital of a company.

**See *Companies and other Business Structures*, par 3.8.**

2.3 Section 61(8) stipulates that at least the following matters must be transacted at the Annual General Meeting:

- election of directors to the extent required by the Act or the company's Memorandum of Incorporation
- appointment of an auditor for the following financial year
- appointment of an audit committee
- presentation of the directors' report
- presentation of audited financial statements for the immediately preceding financial year
- presentation of an audit committee report
- any matter raised by shareholders

**See *Companies and other Business Structures*, par 4.7.**

### QUESTION 3

3.1 If a person is **ineligible** to be appointed as a director it means that such a person is **absolutely prohibited** from becoming a director, with no exceptions.

For example:

- a juristic person
- a minor
- a person who does not satisfy the requirements of a company's MOI

If a person is **disqualified** from being appointed as a director, it means that (with the exception of a person who has been prohibited from being a director by a court of law) a person **may still be appointed as a director of a company with the permission of the court.**

For example:

- a person who has been declared delinquent
- an unrehabilitated insolvent
- a person who has been removed from an office of trust
- a person who has been convicted of theft, fraud or perjury
- a person who is prohibited in terms of public regulation

**See *Companies and other Business Structures*, par 6.5.**

3.2 A public company or state-owned company is required to appoint an auditor every year at the annual general meeting. Other companies (such as private companies, personal liability companies and non-profit companies) are not required under the Companies Act to appoint an auditor, but may do so voluntarily. Peter Sellers Ltd is a public company and must appoint an auditor.

### 3.3 The aggrieved party can

- attempt to resolve the dispute by using ADR procedures
- apply to the Companies Tribunal for adjudication
- apply to the high court
- file a complaint with the Commission

**See *Companies and other Business Structures*, par 11.8.**

### QUESTION 4

4.1 In terms of section 54(1) of the Close Corporations Act 69 of 1984, every member of a close corporation is an agent of the corporation in relation to a person who is not a member of the corporation and is dealing with the corporation. Thus if a member acts on behalf of the corporation with an outsider, such act will bind the corporation irrespective of whether or not the contract falls within the scope of business of the corporation (s 54(2)) (1). The only exception is where the specific member does not have the authority to act for the corporation and the outsider knew or ought reasonably to have known that the member had no such power. The *ultra vires* rule does not apply to close corporations (s 2(4)), and the doctrine of constructive notice does not apply to either the founding statement (s 17) or the association agreement (s 45). There is nothing in the facts to indicate that Durban Property (Pty) Ltd knew or ought to have known that Elaine does not have the authority in terms of the association agreement to represent the close corporation or that contracts exceeding R25 000 must first be consented to by the other members. The agreement will thus bind the corporation despite the fact that Elaine did not obtain the prior consent of the other members.

**See *Companies and other Business Structures*, par 13.9.**

4.2 Any of the following matters may not be altered by the association agreement:

- the manner in which an insolvent member's interest may be disposed of (s 34)
- persons who are disqualified from taking part in the management of the close corporation (s 47)
- the power of a member to call a meeting of members (s 48)
- a blanket approval of a member's breach of duties in terms of sections 42 and 43 of the Act

**See *Companies and other Business Structures*, par 13.8.**

4.3 Section 59(1) of the Close Corporations Act provides that every corporation must appoint an accounting officer. The accounting officer must determine whether the annual financial statements are in agreement with the accounting records of the corporation. A close corporation does not have to appoint an auditor.

4.4 Most natural persons may become members of a close corporation. Even though certain natural persons may not have the legal capacity to participate in the management of a close corporation, even minors, insolvent persons and other persons with legal disabilities may with assistance become members of a close corporation. James and Nadine may thus become members of the close corporation.

No juristic person (that is, another close corporation or a company) may however be a member. Soul Silver (Pty) Ltd may not become a member.

**See *Companies and other Business Structures*, par 13.2.**

**We wish you success in your studies!**

**Your lecturers**