



## **DEPARTMENT OF MERCANTILE LAW**

### **COMMERCIAL LAW II (CLA 2601)**

#### **TUTORIAL LETTER 201/2/2011**

#### **SECOND SEMESTER**

Dear Student

You should have already 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 deals with the particulars of the lecturers, the discussion classes and details of the examination and
- 3 Tutorial Letter CLA2601/103/2/2011, indicating the references to the second edition of the prescribed textbook.
- 4 Kindly note that Tutorial Letter CLA2601/202/2/2011 replaces Tutorial Letter CLA2601/201/3/2011. You will therefore not receive a Tutorial Letter CLA2601/201/3/2011.

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- 1 **FEEDBACK ON ASSIGNMENT 01**

#### **QUESTION 1**

Answer: (3)

**Reason:** See *Companies and other Business Structures in SA*, par 12.2.2 (first edition) or par 16.3.2.1 and par 16.3.2.2 (second edition).  
See also study unit 10.2.2 in the study guide.

(1) is INCORRECT. A partner *en commandite* is also liable for the partnership debts, but his or

her liability is limited to a specific amount.

(2) is INCORRECT. If an extraordinary partner starts acting as an ordinary partner and starts participating in the management of the partnership, he or she loses his or her protection.

(3) is CORRECT. A silent partnership is a partnership that is run in only some of the partners' names.

(4) is INCORRECT. Only a partner *en commandite*'s liability is restricted to a specific amount. A silent partner remains liable for his or her share of the partnership debts.

## QUESTION 2

Answer: (4)

**Reason:** See *Companies and other Business Structures in SA*, par 12.5 and 12.6.2 (first edition) or par 16.6 and 16.8 (second edition).

(1) is CORRECT. Each partner has the right to participate in the management of the partnership in transactions that fall within the business scope of the partnership.

(2) is CORRECT. See reason mentioned in (1)

(3) is CORRECT. The partners may agree to limit or exclude one or more of the partners from the management of the partnership.

(4) is INCORRECT. See reason in (3).

## QUESTION 3

Answer: (1)

**Reason:** See *Companies and Other Business Structures* par 12.3, 12.4 and 12.6 (first edition) or par 16.4, 16.5 and 16.6-16.8 (second edition).

(1) is INCORRECT. This is one of the *essentialia* of a partnership.

(2) is CORRECT. Partners share in the losses of the partnership in the same relation as in the partnership's profits, unless they agree otherwise.

(3) is CORRECT. Due to the fact that a partnership does not enjoy separate legal personality, the partners are co-owners of the partnership assets.

(4) is CORRECT. It is a natural consequence of a partnership agreement that partners will not receive compensation for the contributions they make. They are remunerated by the profits made and divided between them.

**QUESTION 4**

Answer: (2)

**Reason:** See *Companies and other Business Structures in SA*, par 14.2, 14.9 and 14.12 (first edition) or par 17.3, 17.4 and 17.11 (second edition).

(1) and (4) are CORRECT. Natural and legal persons may be party to a trust as founders, trustees or beneficiaries.

(2) is INCORRECT. A trustee cannot expose trust assets to business or other risks because this would be a breach of a trustee's fiduciary duties.

(3) is CORRECT. A business trust holds the advantage of limited liability. Trusts are not exposed to risks and failures.

**QUESTION 5**

Answer: (1)

**Reason:** See *Companies and other Business Structures in SA*, par 14.9 and 14.10 (first edition) or par 17.11 and 17.12 (second edition).

(1) is INCORRECT. A trustee must comply with his powers in terms of the trust deed. No powers may be inferred but has to be specifically stated in the trust deed.

(2) is CORRECT. A trustee must exercise an independent discretion at all times with respect to trust matters.

(3) is CORRECT. A trustee must act with care diligence and care reasonable expected of a person who manages the affairs of another.

(4) is CORRECT. A trustee must invest the trust property prudently in a manner which ensures capital growth for the trust.

**2 FEEDBACK ON ASSIGNMENT 02****QUESTION 1**

Answer: (2)

**Reason:** See *Companies and other Business Structures in SA*, par 2.6 and 13.1 (first edition) or par 2.6 and 15.1 (second edition).

(2) is CORRECT. Fabulous NPC can be described as a non-profit company as it has a public benefit objective.

**QUESTION 2**

Answer: (4)

**Reason:** See *Companies and other Business Structures in SA*, par 3.2. and 3.5 (first edition) or par 4.3 and 4.9 (second edition).

(1) is CORRECT. A share is one of the units into which the proprietary interest in a profit company can be divided.

(2) is CORRECT. A share is issued by a company and is movable property transferable in any manner provided for by the Companies Act or any other legislation.

(3) is CORRECT. A share can be described as a measure of a shareholder's interest in a company, measured by an amount of money, for purposes of liability and interest but also consisting of a series of mutual covenants entered into by the shareholders.

(4) is INCORRECT. A debenture is a document issued by the company acknowledging that it is indebted to the holder in the amount stated therein.

**QUESTION 3**

Answer: (2)

**Reason:** See *Companies and other Business Structures in SA*, par 2.9.5 (first edition) or par 2.10.2 (second edition).

(2) is CORRECT. Any special conditions will be set out in a company's memorandum of incorporation.

(1), (3) and (4) are INCORRECT. See the reason in (1).

**QUESTION 4**

Answer: (1)

**Reason:** See *Companies and other Business Structures in SA*, par 13.5 (first edition) or par 15.5 (second edition).

(1) is CORRECT. James, a property evaluator, has not acted with the necessary care and skill reasonable expected of a person with his knowledge and experience and has breached his duty of care and skill.

(2), (3) and (4) are INCORRECT. See the reason in (1).

**QUESTION 5**

Answer: (3)

**Reason:** See *Companies and other business structures in SA*, par 13.2 and 13.3 (first edition) or par 15.1 and 15.3 (second edition).

(1) is CORRECT. A member's interest in a close corporation may be held by a trustee of an

*inter vivos* trust.

(2) is CORRECT. A member's interest in a close corporation may be held by an insolvent or other legally disabled person.

(3) is INCORRECT. A member's interest in a close corporation may not be held jointly by two persons.

(4) is CORRECT. A member's interest in a close corporation may be held by a minor.

### 3 FEEDBACK ON ASSIGNMENT 03

#### QUESTION 1

**See *Companies and other Business Structures in SA*, par 2.9.2 and 2.9.3 (first edition) or par 2.10.12 and 2.10.13 (second edition).**

- One or more persons may incorporate a profit company, while three or more persons may incorporate a non-profit company.
- Each person should complete and sign a Memorandum of Incorporation.
- The Notice of Incorporation must be filed with the Commission together with the prescribed fee and must be accompanied by a copy of the Memorandum of Incorporation, unless the company uses the Memorandum of Incorporation, which is provided for in the Schedule 1 of the Companies Act, 2008.
- A Memorandum of Incorporation can be in a form that is unique to the company or the company can use the Memorandum of Incorporation provided for in Part A or B of Schedule 1 of the Companies Act, 2008.
  
- The Commission may reject a Notice of Incorporation if it is incomplete or improperly completed. Any deviation from the design or content of the prescribed form does not invalidate the action taken by the person completing the form unless the deviation negatively and materially affects the substance of the Notice of Incorporation or where the deviation would reasonably mislead a person reading the notice.
- In each instance it would depend on the particular completed form to determine whether the Notice of Incorporation will be regarded as invalid.
- The Commission is compelled to reject a Notice of Incorporation if the initial directors of the company are less than the prescribed minimum number of members.
- The Commission is also compelled to reject a Notice of Incorporation where one or more of the suggested directors are disqualified from becoming directors and the remaining directors are fewer than the required minimum.

#### QUESTION 2

**See *Companies and other Business Structures in SA*, par 2.9.6 and 2.9.7 (first edition) or par 2.10.3 and 2.10.4 (second edition).**

a) The company's Memorandum of Incorporation and rules are binding between:

- a company and each shareholder;
- or among the shareholders of a company;
- the company and each director; and
- the company and each prescribed officer of the company, or other person serving the

company as a member of the audit committee or as a member of a committee of the board of directors.

- b) Unless a company's Memorandum of Incorporation provides otherwise, the Board of Directors of a company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in the Companies Act, 2008 or in the Memorandum of Incorporation.

The board must publish a copy of the rules in the manner required in terms of the Memorandum of Incorporation or in the manner set out in the rules themselves.

A copy of the rules must also be filed with the Commission if this is in accordance with the Memorandum of Incorporation and the rules themselves.

**Any rules developed by the board must be consistent with the Companies Act, 2008 and with the company's Memorandum of Incorporation, otherwise such rules will be deemed to be void to the extent of the inconsistency.**

Any rule made by the Board of Directors takes effect 20 business days after the rule is published; or the date, if any, specified in the rule, whichever date is the later.

The rule is binding on an interim basis from the time it takes effect until it is put to a vote at the next general shareholders' meeting of the company. The rule will become permanent once it is ratified by an ordinary resolution at the shareholders' meeting.

Where the rule is not accepted by the majority of the shareholders, the Board of Directors may not make a substantially similar rule within the ensuing 12 months, unless it has been approved in advance by ordinary resolution at a shareholders' meeting.

### QUESTION 3

**See *Companies and other Business Structures in SA*, par 6.11.2 (first edition) or par 6.13.2. (second edition).**

A director may be removed by the board of directors on the following grounds:

If a company has more than two directors and it is alleged by a shareholder or by a director that a director of the company has become ineligible or disqualified.

Where a director has become incapacitated to the extent that the director is unable to perform the functions of a director and is unlikely to regain that capacity within a reasonable time.

The director is no longer resident within the Republic in circumstances in which there are no other directors resident within the Republic; or  
The director has neglected or been derelict in the performance of the functions of director or the board.

Where the board has taken a resolution to remove the director, the director may apply to a court to review the determination of the board, which application must be made within twenty business days from the date the decision is taken by the board. The abovementioned rules do not apply to a company that has fewer than three directors.

## 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.

- Profit companies may be incorporated by one or more persons,
- Profit companies have the object of financial gain for its shareholders.
- 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 -

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

**See *Companies and other Business Structures in SA*, par 2.6 (first edition) or par 2.6 (second edition).**

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 in SA*, par 2.9.5 (first edition) or par 2.10.5 (second edition) and par 3.3.1 of the study guide.**

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 in SA*, par 2.9.10 (first edition) or par 2.10.8 (second edition).**

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 in SA*, par 2.10 (first edition) or par 2.11 (second edition).**

## 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 in SA*, par 2.12 (first edition) or par 2.13 (second edition).**

- 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 in SA*, par 3.8 (first edition) or par 4.15 (second edition).

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 and
- any matter raised by shareholders

See *Companies and other Business Structures in SA*, par 4.7 (first edition) or par 5.13 (second edition).

### 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 or
- 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 or
- a person who is prohibited in terms of public regulation.

See *Companies and other Business Structures in SA*, par 6.5 (first edition) or par 6.6 (second edition).

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.

**See *Companies and other Business Structures in SA*, par 8.1 (first edition) or par 13.2 (second edition).**

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 or
- file a complaint with the Commission.

**See *Companies and other Business Structures in SA*, par 11.8 (first edition) or par 14.5 (second edition).**

#### **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 in SA*, par 13.9 (first edition) or par 15.9 (second edition).**

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) and
- 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 in SA*, par 13.8 (first edition) or par 15.8 (second edition).**

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.

**See *Companies and other Business Structures in SA*, par 13.12 (first edition) or par 15.12**

**(second edition).**

- 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 in SA*, par 13.2 (first edition) or par 15.1 (second edition).**

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

**Your lecturers**