COMPANY LAW

REVISION STUDY PACK

JOSEPH
hewilladd@outlook.com
0784683517

Abbreviations:

MOI - Memorandum of Incorporation

TB - Companies and other Business Structures 3rd edition (Textbook) (normally in footnotes)

MO001 - MO001/4/2016 (Module Online Company Law 'Study Guide') (normally in footnotes

BR - Business rescue

Question

Lesego is a director of One Stop Groceries (Pty) Ltd. When the company needed to appoint a new marketing agent to advertise its products in Gauteng, Lesego persuaded the board to appoint 'The Best CC' by convincing them that The Best CC would be ideal for this task. However, Lesego did not disclose the fact that his brother had a substantial member's interest in The Best CC. The Best CC was appointed, but a few months later it became clear that One Stop Groceries (Pty) had suffered substantial losses in Gauteng because its products were not being advertised effectively, since The Best CC had no experience in this type of work. A number of shareholders in One Stop Groceries (Pty) ltd now want to hold the company's directors liable for breach of their duty to act in the best interest of the company and their duty to care, skill and diligence by appointing an inexperienced close corporation as their marketing agent.

Advise Lesego and the other directors of One Stop Groceries (Pty) Ltd on whether they can escape liability on the basis of the business judgment rule.

Duties as Directors

Section 76 requires a director to act in good faith and in the best interest of the company[1]. A director should act with the degree of care, skill and diligence that may

reasonably be expected of a person carrying out such functions and having the same skill and experience of that director – the reasonable man/woman test.

Directors are required to disclose any "personal financial interest". They may not use their position as director or information gained as a director to make a secret profit or gain advantage for themselves or someone else or to cause hare or detriment to the company.[2]

Business judgment rule

According to the business judgment rule (section 76(4)), the director will be regarded as having acted in the best interest of the company and with the required degree of care, skill and diligence if the director:

- Took reasonable steps to become informed about the matter;
- had no material personal financial interest in the subject matter of the decision or had no reasonable basis to know that any related person had a personal financial
  interest in the matter, or disclosed his/her interest;
- made or supported a decision in the belief that it was in the best interest of the company.

A director will also 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[3].

Application of facts and conclusion

As Lesego and his brother are related persons, it is clear that Lesego had a material personal interest in the appointment of The Best CC. The other members of the board relied upon the information that Lesego gave them, and had a rational belief that the decision was in the best interest of the company.

Accordingly, as Lesego did not disclose his interest, he cannot rely upon the business judgment. The other members of the board, acting in good faith, may rely upon the business judgment rule.

Question2

The board of directors of Green Fields Ltd ('the company') approaches you for advice. The board has resolved to issue shares to the following persons:

- **the newly appointed chief executive officer of the company;**
- **a new director, Mr Brown, who will be joining the board of directors in three months' time; and**
- **certain employees of the company in terms of an employee share scheme.**

However, the board of directors is uncertain whether approval from the shareholders of the company is required to issue these shares. The board is further unsure about how the payment for these shares is to be determined. The board is particularly concerned about the consequences if they do not comply with the requirements of the Companies Act. Advise the board of directors of Green Fields Ltd on the above matters. Refer to particular sections of the Companies Act where applicable.

The issue of shares relates to section 41 of the Act.

The Companies Act regards the decision to issue shares as a management decision, i.e the board of directors have the power to issue shares without the approval of the shareholders, unless the Memorandum of Incorporation ("MOI") imposes specific limitations.

The board will however need shareholder approval when the issue of shares is to:

A special resolution is requires when shares are issued to:

1- where the shares are issued to directors (including future directors), or to certain prescribed officers of the company;

2 – where the shares are issued to a person related or inter-related to the company or a director or prescribed officer of the company;

3 – where the shares are issued to a nominee of a director or prescribed officer of the company.

An ordinary resolution is required when shares are issued to:

1 – Under an agreement underwriting the shares;

2 – in the exercise of a pre-emptive right to be offered and to subscribe shares;

3 – In proportion to existing holdings, and on the same terms and conditions as have been offered to all the shareholders of the company or to all the shareholders of the class or classes of shares being issued;

4 – pursuant to an employee share scheme; or

5 – pursuant to an offer to the public[4].

The board of directors also has the authority to increase the authorized shares of the company. Section 40 provides that the board may only issue shares for adequate consideration. The board must determine what an adequate consideration for the shares would be.

Shares may also be issued in exchange for future services or payments. When shares are issued for future services or future payment, the shares must be issued immediately and should be held in trust until the future obligations are fulfilled.

Where the voting power of a class of shares that is to be issued is equal to or exceeds 30% of the total voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions, a special resolution by all the shareholders is required.

As per Section 44 of the Act, to the extent that the MOI provides otherwise, the board may authorize the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purposes of any securities of the company, should certain conditions be complied with.

Application of facts and conclusion

In this particular instance, Green Fields Ltd will need to obtain shareholder approval for the issue of shares, via a special resolution for the issuance of the shares to the newly appointed chief executive officer of the company and for the new director. Approval by means of an ordinary resolution is required for the issue of the shares to certain employees of the company in terms of an employee share scheme.

The shares need to be issued for adequate consideration. The board must determine what an adequate consideration for the shares would be.The board may authorize the company to provide financial assistance to the receivers of the shares, if necessary, should conditions be complied with in terms of section 44 of the Act.

QUESTION 3

Chris, Barbara and Tumo are directors of Zero Degrees (Pty) Ltd. Chris is regarded as a savvy businessman, whose sharp negotiation skills have earned the company good profits since the company was incorporated ten years ago. Chris is approached by Ben, a director of Ninety Nine Degrees (Pty) ltd to make his negotiation skills available on a government contract that promises to yield substantial profits for Ninety Nine Degrees (Pty) ltd and to Chris in his personal capacity. Zero Degrees (Pty) Ltd has also made a bid on the contract.

Chris agrees, and proceeds to render his services to Ninety Nine Degrees (Pty) Ltd.

In your opinion, does Chris have an obligation to tell the board of Zero Degrees (Pty) Ltd about his personal gains, or is this a case of 'every person for himself"?

Duties as Directors

Section 76 requires a director to act in good faith and in the best interest of the company A director should act with the degree of care, skill and diligence that may reasonably be expected of a person carrying out such functions and having the same skill and experience of that director – the reasonable man/woman test.

The common law position is that directors have a fiduciary relationship with the company. This relationship applies to all directors of companies.

Section 75 provides that directors are required to disclose any "personal financial interest" if they conflict with those of the company (unless this information falls within section 76(2)(*b*), namely that the information is: immaterial to the company, generally available to the public; or known to the other directors.) They may not use their position as director or information gained as a director to make a secret profit or gain advantage for themselves or someone else or to cause harm or detriment to the company.

As indicated in the case of *Robinson v Randfontein Estates Gold Mining Co Ltd*, " *Where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his personal interest conflicts with his duty."*

Application of facts and conclusion

Chris is a director of Zero Degrees (Pty) Ltd and is therefore in a fiduciary relationships with the company. Chris is accordingly not permitted to use his position to make a secret profit to the disadvantage/harm of Zero Degrees (Pty) Ltd.

Chris has also not disclosed his financial interest/conflict of interest to Zero Degrees (Pty) Ltd that he will be assisting another company with the same bid. This is in breach of his fiduciary duty towards Zero Degrees (Pty) Ltd and this company may hold Chris personally liable to recover any losses as per this breach.

Question4

Loan Sharks (Pty) Ltd ("the company") provides unsecured loans to mineworkers and communities around the platinum belt in Marikana. The company's revenue has shrunk as a result of a crippling 5 month labour strike

in 2014. During this labour strike, most of the company's clients did not received any wages, and therefore were unable to repay their loans with the company.

This will probably create cash flow problems for the company in the future, as it will not have enough cash in hand to service its own creditors.

In order to pre-empt a looming financial disaster and to remain financially stable, the company has laid off many of its employees. The company has also learnt that its creditors, of which Fin Bank is an extremely important one, are very worried about the situation and are contemplating taking steps against Loan Sharks (Pty) Ltd. Because the situation of the company does not comply with the statutory requirements for commencing with business rescue, the board pf the company resolved instead to deliver a proposal to creditors in terms of which the company offers to settle 80% of all the claims of its creditors as full and final settlement. The board of the company expects that most of the creditors will accept the offer, but that it will be rejected by some individual creditors. You are approached by the company's board, who asks you to advise them whether there is a procedure in the Companies Act which can be used to make the offer to the creditors and upon their acceptance of the offer will bind dissenting creditors. In your advice to the company, clearly identify the procedure that can be used and by whom the proposal may be made in terms of the procedure. Also clearly explain the manner in which the proposal must be made, the procedure that needs to be followed for the proposal to be adopted, and the court's role during this procedure.

Compromise – section 155

What is a compromise and who may apply for this procedure:

A compromise is an agreement between a company and its creditors in terms of which the creditors agree to accept less than their full claims against the company e.g. accepting 50 cents in the rand in full settlement of what is due to them.

A company may use this option even if the company is not financially distressed, but not if the company is engaged in business rescue proceedings

Who may propose a compromise and what is the procedure?

A company's board of directors or the liquidator of the company (if the company is being wound up) may propose a compromise to all creditors.

A proposal for a compromise must be made by delivering a copy of the proposal and notice of a meeting to consider the proposal to the Commission and to every creditor of the company or every member of the relevant class of creditors whose name and address is known to, or can reasonably be obtained by the company.

A proposal for a compromise will be regarded as adopted, if is supported by a majority in number, representing at least 75 per cent in value of the relevant voting creditors.

What should the compromise contain?

Such a proposal must contain all information reasonably required to decide whether or not to accept or reject the proposal.[5] The proposal must be divided into three parts, namely:

1. Part A – Background;
2. Part B – Proposals; and
3. Part C – Assumptions and conditions.
4. Other accompanying requirements:

    - Projected balance sheet and statement – which must include a notice of any significant assumptions on which the projections are based, and may include alternative projections based on varying assumptions and contingencies;

    - Certificate by authorized director or prescribed officer of company – stating that any factual information provided in the proposal appears to be accurate, complete and up to date; and any projections provided are estimates made in good faith on the basis of factual information and assumptions.

Effects of approval and role of court:

A compromise will not be enforceable until it has been made an order of court. This requires one application to court – it is not necessary to ask the court's permission to arrange a meeting where the proposed compromise will be discussed and voted on.

In terms of s155(7(*b*), the court may sanctions the compromise if it considers it just and equitable to do so. The court must have regard to:

- The number of creditors of any affected class of creditors who were present or represented at the meeting and who voted in favour of the proposal; and

- In the case of a compromise in respect of a company that is in liquidation, a report by the Master.

If the compromise is approved by the court, a copy of the order must be filed with the Commission by the company within 5 business days. A copy of the order must also be attached to each copy of the company's Memorandum of Incorporation that is kept at the company's registered office or elsewhere as contemplated in section 25.

The order of court sanctioning a compromise is final and binding on all the company's creditors but does not affect the liability of any person who is a surety of the company.

QUESTION 5

Tim was a director of Beta (Pty) Ltd, of which he and his brother Gilbert were the only two shareholders. Tim tried to circumvent certain regulations governing eh export of traditional sports supplements by calling the consignment natural vitamins. He was subsequently tried and was convicted of fraud in 2013. As a result, he was disqualified from acting as a director of the company, and was removed from the office. Tim, however, believes that he has mended his ways and wants to be reinstated as a director of Beta (Pty) Ltd. He has made an application to the court to be reinstated. Gilbert, however, strongly objects to Tim's being reinstated as a director.

Advise Tim on his chances of success, with reference to the common law, relevant case law and the provisions of the company's Act.

In spite of this disqualification, s 69(11) gives a court a discretion to grant an exemption. As per section 69(8) (*b*)(iii) a disqualification in terms of this section ends at the later of 5 years after the date of removal from office, or at the completion of the sentence imposed for the relevant office, or at the end of one or more extensions, as determined by a court form time to time, on application by the Commission.

The relevant persons will have to make an *ex parte* application to court for permission to act as a director. The applicant will have to prove to the court that he has been rehabilitated from his wrongful ways and can be trusted with responsibilities of directorship.

This case is similar to *Ex part Barron,* where the applicant applied to court for authorization to act as a director. The court held that the factors that affect the discretion of the court are:

- The type of offence;
- Whether or not it was a first conviction;
- The type of punishment imposed;
- Whether it was a public company; and

- The attitude of shareholders and whether all the shareholders supported this application.

In this case the court acted more leniently towards a private company than a public company.

In *Ex Parte Tayob* the applicants had been convicted of bribery. They brought an application one year after their conviction – the court concluded that too little time had passed to prove that the applicants had rehabilitated form their dishonest ways.

Conclusion:

Matters counting in the accused's favour is the fact that this is his first offence – also the court acts more leniently towards a private company. Matters counting against the accused is the short time frame passed and the fact that the other shareholder, a family member, does not support the rehabilitation.

QUESTION 6

McNuggets Ltd issued shares for which the consideration was payable in future instalments. The subscribers still owe the consideration of 5% of the shares originally allocated to them. The company now wants to waive the debt owed by each subscriber to the company, as the company's yearly financials showed a huge profit.

Critically discuss the requirements that have to be met in terms of the Companies Act if the company wants to write off the outstanding part of the issue price. (no need to discuss financial assistance).

Section 40(2) of the Companies Act provides that before a company issues any particular shares, the board must determine the consideration for which, and the terms on which, those shares will be issued e.g the board must decide what value the company will receive in exchange for issueing shares to the holder of those shares – must be for adequate consideration to the company, as determined by the board.

When shares are issued for future payments, such shares are held in trust until the future event occurs. While the shares are held in trust, voting or appraisal rights are not exercisable.

QUESTION 7

Explain whether it is possible for a valid resolution of shareholders to be passed without convening a meeting of shareholders.

It is possible to take decisions without convening a meeting. If the company wishes to take an ordinary resolution in such a way, the company must submit a proposed resolution to every person who is entitled to vote on the resolution.

The shareholders are then entitled to exercise their vote in writing within 20 days from receiving he proposed resolution and to return the written vote to the company. Such a resolution is adopted if it is supported by persons entitled to exercise sufficient voting rights for it to be adopted as an ordinary or special resolution, at a properly constituted shareholders meeting. If adopted, it has the same effect as if it had been approved by voting at a meeting.

Within 10 days after adopting a resolution, the company must deliver a statement describing the results of the vote. No business that is required to be conducted at the annual general meeting of the company may be conducted without convening a meeting.

QUESTION 8

Thandi is one of the five directors of Surfs Heaven (Pty) Ltd. The other directors are of the opinion that Thandi is neglecting her duties as director because she is out surfing all the time. The board of directors has therefore taken a solution to remove her as director. Thandi is very unhappy about this and believes that she is in fact promoting the company by surfing regularly. She wants the matter to be reviewed.

8.1 Advise Thandi on the grounds upon which a director may be removed by the board of directors as well as on whether the matter may be reviewed.

8.2 Explain how your answer would have differed (if at all) if the board of directors of Surfs Heaven (Pty) Ltd had consisted of only Thandi and one other director.

A director may be removed by shareholders and in some circumstances, by the board of directors. A director may be removed by an ordinary resolution adopted at a shareholders meeting.

In terms of s71(2), the notice of a shareholders' meeting to remove a director, and the resolution, must be given to the director prior to considering the resolution to remove the director. The period of notice that should be given is equivalent to that which a shareholder is entitled to receive when convening a meeting.

The director must be allowed the reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.

If a company has more than 2 directors and it is alleged by a shareholder or by a director that the director of the company has become ineligible or disqualified, a director may be removed by a resolution of the board of directors if:

- 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; or
- The director has neglected or been derelict in the performance of the functions of director.

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. An application for review must be brought within 20 business days from the date the decision is taken by the board. The court may confirm the determination of the board, or remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated, or non-resident, or has been negligent or derelict.

8.2 The above rules do not apply to a company that has fewer than 3 directors. In the case of a company that has fewer than 3 directors, any director or shareholder may apply to the Companies Tribunal to determine any matter referred to above.

QUESTION 9

The Memorandum of Incorporation of Guns 'n Roses (Pty) Ltd ('the company') provides that the main business of the company is the manufacturing and sale of toy guns. Mr Hoodlum, one of the directors, has been authorised by a board resolution to act on behalf of the company. While acting on behalf of the company Mr Hoodlum concludes a contract with Mr Brothel for the purchase of a nightclub. Mr Brothel has no knowledge of the contents of the Memorandum of Incorporation of the company. Mr Orthodox, a majority shareholder of the company, is upset about the purchase of the nightclub. Mr Orthodox approaches you for legal advice and requires you to advise him on the following:

Is the contact concluded by Mr Hoodlum and Mr Brothel valid and enforceable against the company? Give Reasons.

Section 19(1) provides that a company has all the legal capacity and the powers of a natural persona except to the extent that a juristic person is incapable of exercising any such power. The company y is also not restricted by its main business. Although the company's MOI may impose restrictions on the legal capacity of the company, any such restrictions would not render invalid any contract that conflicts with these restrictions. The company cannot rely upon the ultra vires doctrine in terms of section 19(4). Thus the contract is valid and binding on the company and the other party to the contract.

QUESTION 10

Tom, Jerry, Garfield, and Mickey form a new company with the name Cat and Mouse Limited. Tom is appointed as an executive director of the company, while Jerry, Garfield, and Mickey are appointed as non-executive directors of the company. They have been informed that the company must appoint an audit committee and decide that they will all be members of the audit committee. They also wish to appoint Minnie, the company secretary, to sit on the audit committee. With reference to the Companies Act 71 of 2008, advise Tom and Jerry of the following:

1. **Who is required to appoint the first members of the audit committee? (2)**
2. **May Tom, Jerry, Mickey and Minnie be members of the audit committee? (5)**

3. **Briefly discuss the duties that the audit committee is required by the Companies Act 71 of 2008 to perform in Cat and Mouse Limited.** (3)

Audit committee

1. Members of an audit committee are appointed by shareholders. The members are required to be directors of the company. The members are appointed at the annual general meeting.

2. As per section 94, each member (there needs to be at least 3 members) of an audit committee must:

   - be a director of the company; and
   - may not be involved in the day-to day running of the company's business (or during the previous year); and
   - may not be a prescribed officer/full time employee of the company (or during previous 3 years)

   A member of an audit committee must be a non-executive independent director of the company.

   Tom as executive director is involved in the day-to day running of the business. Minnie is not a director of the company. Accordingly Tom and Minnie will not be legible to be appointed to the audit committee; however Jerry, Garfield and Mickey are eligible to be appointed to the audit committee.

3. The duties of the audit committee (in accordance to section 90), must:

   - nominate an independent auditor for appointment;
   - determine the fees to be paid to the auditor and the terms of engagement;
   - ensure that the auditors appointment complies with legislation and policies;
   - determine the nature and scope of any non-audit services that the auditor may provide to the company and to pre-approve these services;
   - prepare a report to be included in the annual financial statements explaining how the audit committee carried out its functions, that the audit committee is satisfied with the independence of the auditor and to comment on the general accounting practices of the company;
   - receive and deal with any concerns relating to accounting practices and internal audit of the company or any related matter;
   - make submissions to the board concerning the company's accounting policies; and Perform any other functions as determined by the board.[6]

QUESTION 11

Peter, Nonhlanhla and Simon are the directors of Nguni Hide Tanneries Ltd, a company which tans and sells the hides of Nguni cattle. The board is considering the repurchase of some of its own shares by the company, or by using a subsidiary of the company to accomplish this. They are not sure if the company may do this, and if so, how to go about it and they consult you for advice. Advise them on the position regarding:

·the repurchase of its own shares by the company itself; and
· by using a subsidiary; and,
· the consequences should they not comply with the requirements of the Companies Act, 2008 in this regard.

repurchase of own shares

1. A company may acquire its own shares if the decision to do so satisfies the requirements of section 46 i.e. must be authorized by the board and must meet the liquidity and solvency test[7]. A share buyback is regarded as a distribution.

2. A subsidiary of a company may acquire shares in that company, subject to the conditions:

   - no more than 10% of all the issued shares of any class of shares of the company may be held by, or for the benefit of, all the subsidiaries of that company taken together; and
   - no voting rights attached to those shares may be exercised while the shares are held by a subsidiary of the company, also
   - after the company/subsidiary has acquired the shares, there must be shares left other than convertible or redeemable shares; and
   - there must be shares in issue that are held by shareholders other than by the company's subsidiaries

3. Should a company fail to fulfil its obligations in terms of a repurchase agreement, the company must apply for a court order to apply for the suspension of the acquisition of the shares - whereby the court may make an order that is just and equitable in view of the financial circumstances of the company to ensure that the person to whom the company is required to make the payment, should receive such payment as soon as possible.

If the company acquired shares without meeting the necessary requirements, the agreement between shareholders and the company still remains enforceable,

however the company does have the option of applying to court within two years after the acquisition to have the repurchase reversed.

QUESTION 12

Tlou is a director of Animal Park Ltd, a listed public company. Tlou and his friend Tau keep regular e-mail contact. Tlou knows that Tau usually reads his e-mails at 7h00every day. Tlou sent Tau a message at 6h00 saying that Animal Park Ltd will post good results and that the results will be published at 10h00 on the same day. On that particular day, Tau, for some unknown reason, only read his e-mails at 9:30. However, at 9h00, Tau had instructed his broker, Phiri, to buy 1000 shares in Animal Park Ltd because he had a feeling that the company was going to publish good results. Discuss whether Tau and Tlou have committed any of the insider trading offences under the Financial Markets Act of 2012. [10]

Insider trading

Insider trading is the trading of securities based on information that is not yet made public[8], which if obtained as public knowledge, would have a material effect on the price or value of the security. There is no definition of insider trading in s 1 of the Financial Markets Act ("FMA").

Section 78 of the FMA provides that an insider who knows that he has inside information and, who deals directly or indirectly in the securities listed on a regulated market to which this information relates, commits an offence.

Tau instructed his broker to purchase shares before he became aware of Animal Parks (Ltd)'s good results and before they became published. Although inside information had been forwarded to him, he was not aware that he was in possession of such information before he purchased further shares and accordingly did not act upon such information. Tau has therefore not committed any offence.

It is an insider-trading offence to disclose inside information to another person. Tlou has forwarded 'inside' information to Tau before these results were made public. Tlou has committed an offence in terms of the FMA.

QUESTION 13

Batau Ltd is an unlisted mining public company that has over 1000 shareholders. One of its current shareholders, Mbedzi (Pty) Ltd, wishes to acquire all the issued shares in the company.

The board of directors of Mbedzi (Pty) Ltd has heard that all the shareholders except Lerato, who holds 9% of the issued shares in Batau Ltd, are very keen on selling their shares.

Mbedzi (Pty) Ltd does not wish to acquire anything less than 100% ownership of Batau Ltd but the board of directors of Mbedzi (Pty) Ltd does not wish to structure the deal as a scheme of arrangement.

You are required to give legal advice to Mbedzi (Pty) Ltd on the rules that regulate such a transaction and how it could structure an offer to ensure that it would not have to acquire less than all the issued shares.

Compulsory acquisitions

A compulsory transaction/squeeze out (section 124) is a transaction where a person or offeror attains more than 90% of any class of securities in a company Batau Ltd is considered a 'regulated company' as it is a public company. A compulsory acquisition falls within the definition of an affected transaction.

If the offer has been accepted by the holders of at least 90% of the class of securities, the offeror may notify the holders of the remaining securities of the class:

- the offeror has been accepted to that extent; and
- the offeror wishes to acquire all remaining securities of that class.

After giving the notice, the offeror is entitled to acquire the securities concerned on the same terms that applied to securities whose holder accepted the original offer.

In effect this would mean that Mbedzi (Pty) Ltd can force the minority shareholders of Batau Ltd to part with their securities as Mbedzi (Pty) Ltd he will become the holder of all the securities in the company.

QUESTION 14

Discuss and explain fully the meaning and implication of the term "adequate consideration" in section 40 of the Companies Act, 2008.[10]

Adequate consideration

Section 40 provides that the board may only issue shares for adequate consideration. The board must determine what an adequate consideration for the shares would be

The determination may only be challenged on the grounds that it constituted a breach of the standard conduct expected of directors and is in breach of their fiduciary duties or in delict.

Negotiable instruments and future services, future benefits and future payments, and even assets are all allowed as consideration for newly issued shares, but shares may only be transferred to the subscriber to the extent that the instruments have become negotiable by the company, or to the extent that the subscriber has fulfilled his future obligations.

QUESTION 15

Discuss the various types of shareholders' meetings under the Companies Act 71 of 2008 and the various methods by which such shareholders' meetings may be convened under the Companies Act 71 of 2008. Further discuss the consequences and prescribed procedures under the Companies Act 71 of 2008 if acompany fails to convene a shareholders' meeting. [15]

Shareholders meetings

A shareholders' meeting is a meeting of shareholders who are entitled to exercise voting rights in relation to a matter. The board of directors, or any other personal specified in the company's MOI or rules, may call a shareholders' meeting at any time, and must be called for in the following circumstances:

- at any time that the board is required to convene a meeting and to refer a matter to decision by shareholders as provided for in the Act or by the MOI e.g. to elect a director; and
- when a meeting is demanded by shareholders, provided that the demand is signed by the holders of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.

An annual general meeting must be held every year by a public company where specific matters are discussed e.g. appointment of an audit committee.

If the company wishes to make an ordinary resolution without convening a meeting, the company must submit a proposed resolution to every person who is entitled to vote on the resolution. The shareholders are then entitled to exercise their vote in writing within 20 days from receiving the proposed resolution and to return the written vote to the company. A shareholder is entitled to appoint a proxy to attend, participate in, and vote at the meeting on behalf of the shareholder.

An election of a director that could be conducted at a shareholders' meeting may instead be conducted by written polling of all the shareholders entitled to exercise voting rights in relation to the election of that director. A company may also provide for participation in a shareholders' meeting by electronic communication.

In an event that no person is authorized to convene a meeting, any shareholder may request the Companies Tribunal to issue an administrative order for a shareholders' meeting to be convened.

If a company fails to convene a meeting, a shareholder may apply to court for an order requiring the company to convene a meeting on a date, and subject to any terms that the court considers appropriate

QUESTION 16

Meropa Ltd holds 20% of the voting shares in Motheo Ltd, while Thebe Ltd holds 25% of the voting shares in the same company. The remaining 55% of the voting shares in Motheo Ltd are held by Molemo Ltd.Explain what is meant by "a group of companies" and whether a principal-subsidiary relationship exists between Motheo Ltd and any of the other three companies.

[10]

Group of companies

A group of companies is defined as two or more companies that are related or interrelated. One company is related to another company if:

- one company directly or indirectly controls another company; or
- one company is a subsidiary of another company

A subsidiary is a company that is controlled by a holding company

A principle-subsidiary relationship does exist between Motheo Ltd and the other 3 companies since Molemo Ltd owns more than 50% of the voting shares and is therefore the controlling company. (Motheo Ltd is a subsidiary of Molemo Ltd). As the companies are all related by means of a common controlling company (Molemo Ltd), the companies form part of a group of companies.

QUESTION 17

Samson was recently appointed as a business rescue practitioner for Rubber Tyres and Tracks (Pty) Ltd. Some of the affected persons in the company are unhappy because Samson has started drafting the business rescue plan without consulting them. Advise Samson regarding the following matters:

(a) Is he compelled to consult any persons before drafting the business rescue plan? (3)

(b) **The Companies Act of 2008 prescribes the contents of a business rescue plan. Name the four parts into which the plan must be divided and give one example of the items or aspects that must be included in each of the parts respectively. (8)**

(c) **Explain the requirements of section 152 of the Act for the business rescue plan to be finally and validly approved at the meeting called for this purpose. (4)**

Business rescue

(a) The company must notify every shareholder and creditor, as well as any registered trade union representing the company's employees and those employees not represented by trade unions, of:

- the resolution;
- the date on which it became effective; and
- the grounds on which the resolution was taken.

Should the company not notify the affected persons as prescribed, the business rescue resolution lapses.

(b) The plan must contain the following parts:

- Part A – Background

Mainly contains financial information e.g. complete list of the material assets of the company, indicating which assets were held as security by creditors at the start of the business rescue proceedings and a list of the creditors of the company when business rescue proceedings began.

- Part B – Proposals

Here all the proposed measures to assist the company in overcoming its problems and managing its debts are set out e.g. which assets of the company will be available to pay creditors in terms of the business rescue plan;

- Part C – Assumptions and conditions

This part of the plan must indicate any conditions that must be fulfilled before the plan can come into operation e.g. a projected balance sheet and statement of income and expenses for the next three years based on the assumption that the plan will be adopted.

- Certificate

The plan must conclude with a certificate in which the business rescue practitioner states that the information provided in the plan appears to be correct and up to date, and that the projections were made in good faith on the basis of factual information.[54]

(c) The business rescue practitioner must convene a meeting of the company's creditors (and if applicable the shareholders) to consider the rescue plan;

The practitioner must explain the plan and inform the meeting as to whether he believes that there is a reasonable prospect of the company being rescued;

The representatives of the employees must also be given an opportunity to address the meeting. The meeting may discuss and propose amendments to the plan before voting on its approval.

If the plan is supported by more than 75% in value of all the creditors who voted, and at least 50% in value of independent creditors who voted, and if no rights of shareholder of any class are altered, the plan is regarded as approved.[55]

QUESTION 1

1. **Explain whether it is possible for a valid resolution of shareholders to be passed without convening a meeting of shareholders. Refer to the position in terms of the common law, case law as well as the Companies Act 71 of 2008.**
   (10)

Answer:[9]

When the board of directors propose a resolution to the shareholders, the board may decide whether the decision will be taken at a meeting or by written consent votes.

Previously, in terms of the English and South African case law, the common law rule of unanimous assent was accepted. In terms of this rule, certain decisions may be valid without

[9] MO01 p 8 - Shareholders acting other than at a meeting | TB p 102

a meeting being held if all the members are fully aware of the facts and they have all assented thereto, but assent need not be in writing.

In *Gohlke and Schneider v Westies Minerale (Edms) Bpk 1970*, the court held that members may validly appoint a new director to the board without any formal meeting having been held if there is evidence of their unanimous consent.

In *In re Duomatic Ltd 1969* the court held that the unanimous approval of the directors' remuneration by the two directors holding all the voting shares in a company could be regarded as a resolution of a general meeting approving the payment.

In terms of the Companies Act of 2008, the common law rule of unanimous consent has been changed. Shareholders still exercise their rights through resolutions at meetings but now according to the 2008 Act, a resolution may be submitted to shareholders and, if adopted in writing by the required majority (no longer unanimous assent), will have the same effect as if it had been adopted at a meeting without a general meeting of shareholders actually having been held (section 60 Act 2008).

The shareholders must exercise their vote in writing within 20 days of receiving the proposed resolution and must return the written vote to the company. If the resolution is adopted it has the same effect as having been approved by voting at a meeting.

The Act or the MOI of a company may state that certain resolutions must be approved via a meeting and not through written votes.

2. The shareholders meeting of Noakes Ltd is attended by Ms. Mthembu who holds 10% of the voting rights, Ms. Farisani who holds 5% of the voting rights and Mr. Lehloenya who holds 20% of the voting rights in the company. Advise whether a quorum has been met to allow the meeting to begin in terms of the Companies Act of 2008. (5)

[15]

Answer:[10]

In terms of section 64 of the Act 2008, at least 25% of all voting rights that are entitled to be exercised in respect of at least one matter to be decided must be present for a meeting to begin. The 25% aggregate of voting rights is referred to as a quorum. A company's MOI may specify lower or higher in place of the Act's default.

If a company has more than two shareholders, a meeting may not begin (even if the quorum percentage is met), unless at least three shareholders are present and if these members are present can exercise the required percentage of voting rights.

[10] MO001 p 6 - Quorum | TB p 99 - Quorum

Mthembu holds 10%, Farisani holds 5% and Lehloenya holds 20%. The minimum percentage quorum has been met in terms of the Act as well as at least three shareholders are present. The meeting may begin in accordance with the Act. It is uncertain if the MOI differs.

QUESTION 2

Jack is one of five directors of Surfs Heaven (Pty) Ltd. The other directors are of the opinion that Jack is failing to fulfill his duties as director because he is surfing all the time. The board of directors has therefore taken a resolution to remove him as director. Jack is very unhappy about this and believes that he is "promoting" the company by surfing regularly. He wants the matter to be reviewed.

(a) Advise Jack on the grounds upon which a director may be removed by the board of directors as well as on whether the matter may be reviewed.

(b) Explain how your answer would have differed (if at all) if the board of directors of Surfs Heaven (Pty') Ltd consisted of only Jack and one other director?

[10]

Answer (a):[11]

A director may be removed by shareholders and in some circumstances, the board of directors. A director may be removed by an ordinary resolution adopted at a shareholders' meeting. In terms of section 71(2) the director must be given the opportunity to address the meeting in which his position as director may be removed through shareholder votes.

If removed by resolution of the board of directors, s/he may be removed on the grounds that s/he has:

- Become ineligible or disqualified
- Incapacitated to the extent that the director is unable to perform the functions of a director
- Neglected or has been derelict in the performance of the functions of a director.

Where a director has been removed by resolution of the board, the director affected may apply to the court to review the determination of the board. This application for review must be brought within 20 days from the date of the decision taken by the board.

In conclusion, the other directors will most likely attempt to remove Jack on the ground that he has neglected or has been derelict with his performance as a director.

Answer (b):[12]

To remove a director based on their performance (as last listed above) and the company has fewer than three directors or shareholders, the decision in *Talisman Compressed Air (Pty) Ltd v Dykman* should be considered. In this case it was held that shareholders or directors who

[11] TB p 140 - 142 / 147

[12] TB p 104 - Case study and par just above case study.

allege that another director of the company has neglected or been derelict in the performance of the functions of director, may apply to the Companies Tribunal for determination on such directors' neglect or dereliction (section 71(8)). The application subject to proper notice and the *audi alteram partem* rule.

In conclusion, the director other than Jack could apply to the Companies Tribunal to determine if the director, Jack, is in fact negligent and derelict with his duties.

QUESTION 3

Mr. Sibanda purchased a second hand BMW Z4 motor vehicle on 1 November 2012 from TrustUs Ltd for R300 000-00. The salesperson informed Mr. Sibanda that the company could also finance the purchase price of the motor vehicle and took him to the office of Mr. Naidoo, "the head of motor vehicle finance" at the dealership. On Mr. Naidoo's office door was a big advertisement which referred clients to Mr. Naidoo should they wish to obtain motor financing. Mr. Naidoo assisted Mr. Sibanda to complete the necessary application form for the required finance which was accepted and signed by Mr. Naidoo on behalf of TrustUs Ltd. One of the terms of the agreement was that the loan amount would be paid out to Mr. Sibanda on 10 December 2012. On 11 December 2012 Mr. Sibanda noticed that the loan amount had not been paid to him. He immediately phoned the dealership but was informed by Mr. Kudumane the branch manager that the company was not under any obligation to pay out the loan amount to Mr. Sibanda on the following grounds:

(a) Firstly, the agreement was void and unenforceable because the Memorandum of Incorporation of the company limited the amount that could be provided per transaction to R200 000-00. Mr. Kudumane pointed out that Mr. Sibanda should have known about this provision because the Memorandum of Incorporation of the company was available for inspection by Mr. Sibanda at the premises of TrustUs Ltd.

(b) Secondly, the agreement is void and unenforceable because Mr. Naidoo was not authorised to conclude the loan agreement on behalf of TrustUs Ltd.

Advise Mr. Sibanda on his rights in this situation, including whether the loan agreement is valid and enforceable against TrustUs Ltd and whether he can compel the company to provide the finance as stated in the contract. In your answer you should also critically discuss the two grounds upon which the company relies to avoid liability.

[15]

Answer (a):[13]

Section 19(3) of the Act 2008 broadens the capacity of a company compared to the Act 1973. The company's MOI may restrict , limit or qualify the purposes, powers or activities of the

[13] MO001 p 28 - Legal capacity and ultra vires doctrine | p 29 - Doctrine of constructive notice

company in terms is section 19(1)(b)(ii), but any such restrictions would not render any contract invalid if it conflicts with these restrictions - section 20(1)(a). The contract remains valid and binding. In terms of section 20(6) of the Act provides that each shareholder has a claim for damages against any person who fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or limitation or restriction in terms of the MOI, unless ratified by special resolution - section 20(2).

Conclusion to the validity of the contract. The contract remains valid between the parties. The shareholders may have a claim for damages against Mr. Naidoo for exceeding the limits contained in the company's MOI.

Section 19(5) of the Act 2008 provides for two exceptions to the partly abolished doctrine of constructive notice in section 19(4). These two exceptions are that:
A person is deemed to have knowledge of the provisions of a company's MOI in terms f section 15(2)(b) or (c) relating to restrictive or procedural requirements if the company's name includes the letters "RF" and the notice contains a prominent statement drawing attention to such a provision, as required in section 13(3).

In conclusion to the expectation that Mr. Sibanba should have know about the limitations in the company's MOI. The letters "RF" is not shown in the name of the company to indicate a restriction. There would be no real reason for Sibanda to seek out the restrictive sections contained in the company's MOI (according the new Act).

The second exception applies to a personal-liability company. A person is also regarded as having received notice of and having knowledge of the effect of section 19(3) on a personal-liability company. Section 19(3) provides that the directors and past directors of an 'Inc' are jointly and severally liable, together with the company, for any debts and liabilities of the company contracted during their respective periods of office. [Not part of the answer to this question. Second exception listed for convenience]

Answer (b):[14]
Representation relates to a person acting under the company's authority. When the company gives an agent authority to act on its behalf, the agent will possess actual authority and will bind the company to acts which fall within the scope of the mandate given to him.

Where an agent acts on behalf of the company without the authority to do so, any contracts concluded between the agent and third party will remain valid. The misrepresentation by the agent does not affect the contract if the third party is bona fide. If a person could have know or reasonably suspected that the agent didn't have the necessary authority, the contract will be void and unenforceable.

[14] MO001 p 29 - Representation

In this case the fact that salesperson walked Mr. Sibanda to Mr. Naidoo and referred to him as the "head of the sales department" not to mention the big advertisement stating that clients can obtain financing from Mr. Naidoo gives the reasonable impression that authority has been conferred to him by the company. The company could be bound by the contract on the basis of estopple.

If Mr. Naidoo in fact has no authority from the company, shareholders can hold him liable and could claim damages for fraudulent or due to gross negligence caused the company to act in contravention of the limitation or restriction on the authority of the directors.

QUESTION 4

Gaby, an existing shareholder of the company, wants to buy more shares in Weinberg (Pty) Ltd. She intends to pay for the shares by selling her delivery truck to Weinberg (Pty) Ltd. The board of directors of Weinberg (Pty) Ltd is aware that Gaby wants to use the proceeds of the sale for the purchase of shares in the company. The company does not need the delivery truck now and the price is slightly higher than its true value but Gaby is a friend of the managing director and he has persuaded the board that they should assist her in acquiring more shares in the company because the company "can afford it" and "may possibly have some use for the truck" sometime in the future.

Advise Weinberg (Pty) Ltd whether the company may purchase the delivery truck under these circumstances and whether there are any requirements that must be satisfied if the transaction is allowed.

Also indicate whether, and if so, how your answer would differ if the company needed the delivery truck and the purchase price of R700 000 was a fair price.

In your answer also refer to relevant case law.

[15]

Answer:[15]

In order to ascertain whether an intended transaction constitutes as financial assistance in connection with the purchase of shares, the transaction must pass two phases. The first is whether the transaction constitutes assistance and the second whether it the assistance is for the purpose of acquiring shares in a company.

To determine whether the transaction qualifies as financial assistance the impoverishment test as formulated in *Gradwell (Pty) Ltd v Rosta Printers Ltd 1959*[16] should be relied upon. This test considers whether the transaction will have the effect of "leaving the company poorer" and if so, then financial assistance has been provided.

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[15] MO001 p 49 | Tut 201 p 12-13

[16] (4) SA 419 (A)

In *Lipschitz NO v UDC Bank Ltd 1979*[17] the court held that the impoverishment test is not the only test for determining whether financial assistance has been provided. Providing security or otherwise exposing the company to risk will also qualify as financial assistance. The court further held that if the company buys an asset from a person in order to enable that person to acquire shares in the company, it will depend on the facts whether this constitutes financial assistance.

These factors that have emerged from case law to assist in this regard:
Whether the company needs the asset in its normal course of business and whether the company paid a fair price for it.

In terms of section 44 of the Act 2008, if the person obtained a loan to purchase shares in a company and that company stood surety for that loan, it will constitute financial assistance.

In this case, as first stated, Weinberg (Pty) Ltd does not require the delivery truck in its ordinary business operations and also paid more for the truck than its market value. The transaction would therefore qualify as financial assistance for the purpose of acquiring shares.

If Weinberg (Pty) Ltd did require the delivery truck and paid the fair price for it, it would not have qualified as financial assistance.

QUESTION 5

Exit Ltd holds 85 of the shares in Enter (Pty) Ltd. It is Exit Ltd's wish to make Enter (Pty) Ltd a wholly-owned subsidiary. A scheme of arrangement in terms of section 114 of the Companies Act 2008 was proposed between Exit Ltd and the holders of the other 15 ordinary shares of Enter (Pty) Ltd. In terms of the proposed scheme of arrangement the holders of the other 15 ordinary shares would surrender their shares in Enter (Pty) Ltd in exchange for shares in Exit Ltd. At a meeting of the ordinary shareholders of Enter (Pty) Ltd, Lufuno, Lento and Thando who together hold 10% of the voting rights in the remaining 15% of shares of Enter (Pty) Ltd not already held by Exit Ltd, voted against the scheme. Some of the other shareholders also voted against the proposal, but a sufficient number of the other holders of the voting rights in the remaining 15% of the shares who voted at the meeting, voted in favour of the scheme to have it approved.

Advise Lufuno, Lento and Thando on their legal rights to attempt to prevent the implementation of the scheme of arrangement.

[15]

[17] (1) SA 7 89 (A)

Answer: [18]

In terms of section 115 of the Act 2008, the court may intervene in the implementation of any fundamental transaction. This section provides that despite the fact that a special resolution was held, the company may not proceed with the implementation of any proposed fundamental transaction in the following circumstances:

- Where the special resolution approving the proposed transaction was opposed by at least 15% of the voting rights that were exercised on that resolution. Any person who voted against the resolution may require that the company obtain court approval, in which case, the proposed transaction may not proceed without a sanction of court
  OR
- Where the court finds the resolution is manifestly unfair to any class of security holders or that vote was materially tainted by conflict of interest, inadequate disclosure, or failure to comply with the Companies Act or MOI or any other applicable company rules, or finds any other procedural irregularity and as a result orders that the resolution be set aside.

Only 10% of the remaining holders of voting rights are against the implementation. As stated above, at least 15% is required for court intervention. Since there is no overt conflict of interest of procedural irregularity this section cannot be relied upon to stop the fundamental transaction.

Alternatively, in terms of section 115, a security holder who voted against the proposed fundamental transaction may seek an appraisal remedy in terms of which the security holder may have his/her securities independently valued and the n repurchased by the company at a fair price. This remedy can only be sought if s/he (the aggrieved security holder):

- Notified the company in advance of the intention to oppose the special resolution
  AND
- Was present at the meeting and voted against the special resolution.

When the resolution is then passed the company must advise the dissenting shareholders accordingly. The shareholders have 20 days to demand, if they so wish, for the company to pay them a fair price value for their shares.

Because court intervention is not an option, Lufuno, Thando and Lento may need to use the appraisal remedy if they mentioned to the company in advance of their intention to oppose the resolution. The second requirement has been met considering they were at the meeting and voted against the special resolution.

QUESTION 6

Impossibly Thin (Pty) Ltd is a company that develops and sells slimming products. They have 3 slimming products, Thin, Slender and Fit. Thin sells excellently and they derive

[18] MO001 p 59 - Court intervention in the implementation of fundamental transactions | TB p 215 - Appraisal remedy

70% of their income there from. Slender only makes up 30% of their income. Fit, is still being developed. All of a sudden three members of the public become severely ill, apparently because of using Thin, and are hospitalised. Impossibly Thin (Pty) Ltd receives bad press reports and Thin has to be withdrawn from the market until further tests and research have proven it safe. Peter and Anne, the directors of Impossibly Thin (Pt y) Ltd want your advice as they have heard about business rescue proceedings and think that it may be appropriate in the circumstances to assist Impossibly Thin (Pty) Ltd to survive the next few months as the company's cash flow is severely affected by the withdrawal of Thin.

Advise the board of directors of Impossibly Thin (Pty) Ltd on:

(a) What business rescue proceedings entail according to its definition in the Companies Act of 2008 and under what circumstances a company will be regarded as financially distressed. (6)

(b) Explain briefly to them how and under what circumstances they as directors can commence business rescue proceedings and whether Impossibly Thin (Pty) Ltd meets these requirements. (4)

(c) Explain briefly what the legal consequences of business rescue proceedings will be on legal proceedings against the company during the business rescue proceedings. (5)

[15]

Answer (a):[19]

According to section 128(1) of the Companies Act 71 of 2008, the definition of business rescue is as follows:

(b) ''business rescue'' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;

Section 128(1) definition of financially distressed

(f) ''financially distressed'', in reference to a particular company at any particular time, means that—

[19] Definitions in Companies Act 2008 section 128(1)

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;

Answer (b):[20]
Business rescue proceedings may be commenced by resolution of the board of directors of a company. The board of directors may take a formal decision (majority vote) to begin rescue business proceedings under certain specific circumstances.
These circumstances are:
The board must have reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company. Once the board has reasonable grounds to believe that the company is financially distressed it must pass a business rescue resolution, or deliver a written notice to each affected person explaining why they have decided to not adopt a business rescue resolution. The notice must be in Form CoR123.3 and a copy must be delivered to each person in accordance to regulation 7 or be informed of the availability of a copy of the notice.

Answer (c):[21]
Legal consequences on company activities under BR:

- Most civil proceedings are paused until the end of the BR process (s 133)
- Disposal of company's property is restricted (s 134)
- Refinancing the company is facilitated by allowing for company assets to be used to secure loans, but obligations to employees enjoy preference (s 135), as well as post-commencement finance
- Employee contracts are protected (s136(1))
- Other contracts may be suspended or cancelled in certain circumstance (s 136(2))
- The status of issued shares may not be altered, and shareholders may only participate in decisions about BR if their interests will be affected
- Directors must cooperate with the BR practitioner

In terms of section 135 of the Act 2008 provides that claims for remuneration or other payments due to employees during business rescue proceedings enjoy preference above all other creditor's claims, even those of secured creditors who provided post-commencement financing to the company. The remuneration and expenses paid to the business rescue practitioner, as well as claims for costs of business rescue proceedings rank higher than employee remuneration (above).

In terms of section 136(2), a business rescue practitioner can suspend, for the during of the proceedings, any obligation of the company in a contract to which the company is a party

[20] MO001 p 65 - Board of directors begin business rescue proceedings | TB p 238-240

[21] MO001 p 66 | TB p 247

(except an employee contract or an obligation to which ss 35A or 35B of the Insolvency Act apply). The BR practitioner can also apply to court to entirely, partially or conditionally cancel any agreement to which the company is a party.

QUESTION 7

Johannes is the managing director of Your Money Ltd, a listed company which provides financial advice. The company is on the verge of introducing a creative new financial package combined with smart phone, and investment devices that will revolutionise electronic investment services and costs in South Africa. The company has not as yet made any public announcement about this and only Johannes and his assistant manager William know about this information. However, William's secretary Maria saw the confidential documents on his desk and now also knows about this new product. She has informed her sister Sarah and her brother Joel about this. Sarah did not act on this information as she did not have enough money to buy shares, but Maria and Joel bought 6000 and 5000 shares respectively. When the company announces this new product, the price of the company's shares increases by 12%.

Explain whether Maria, Sarah and Joel may incur civil liability under the legislation regulating insider trading. Your answer should include a discussion of the meaning of 'insider' and 'inside information'. You do not have to discuss the available sanctions or the criminal offences. [15]

Answer:[22]

Financial Markets Act 19 of 2012 definitions of:

''inside information'' means specific or precise information, which has not been made public and which—

a) is obtained or learned as an insider; and
b) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market;

'insider'' means a person who has inside information—

a) Through—
   i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or
   ii) having access to such information by virtue of employment, office or profession; or
b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a);

In terms section 78 of the Financial Markets Act (FMA) five listed offences are:

[22] MO001 p 71 | TB p 227 (MO001 more important)

1. An insider who knows that he has inside information and who deals directly or indirectly or through an agent for his own account in the securities listed on a regulated market to which the inside information relates - section 78(1)
2. An insider who knows that he has inside information and who deals directly or indirectly or through an agent for any other person … - section 78(2)
3. Any person who deals for an insider directly or indirectly or through an agent in the securities listed on a regulated market to which information possessed by the insider relates or which are likely affected to be affected by it, who know the person is an insider - section 78(3)
4. An insider who knows that he possesses inside information and discloses that information to another person - section 78(4)(a). Even if that person does not act on the information. Disclosure alone is an offence.
5. An insider who knows that he has insider information encourages, cause a person to deal, discourage or stop another person from dealing in the securities … to which the information relates - section 78(5). Even if no actual information was disclosed but the insider encourages or discourages another person to act in a certain way would also be considered an offence.

What must first be determined is whether the information is inside information. Considering the lack of public announcements and the confidentiality of the files, it could be considered inside information was obtained by Maria, the secretary. As shown after the public announcement the share price increased. Both parts of the definition met.

Maria commits two offences as an insider (insider in terms of the definition par (a)(ii)). The first, by purchasing shares for herself using the information obtained in confidential files and thus committing a crime in terms of section 78(1) of the Financial Markets Act of 2012. The second, committed in terms of section 78(4)(a) by disclosing information contained in the confidential files to another person. Even if Maria disclosed this information and Joel and Sarah did not act on it, she would still have committed these crimes.

Joel who is acting on the obtained disclosed information and most likely knows that Maria obtained the information by virtue of her office could be considered an insider in terms of the definition par (b) and would thus commit a crime in terms of section 78(1) because he purchased shares for himself.

Sarah commits no offence. Simply having information disclosed to her and not acting based on that information is not an offence as contained in the FMA.

Other Notes:[23]
Defences for numbers listed above (except 5. Which has no defence)

[23] TB p 227 - 228

QUESTION 1

Lesego is a director of One Stop Groceries (Ply) Ltd. When the company needed to appoint a new marketing agent to advertise its products in Gauteng, Lesego persuaded the board to appoint The Best CC by convincing them that The Best CC would be ideal for this task. However, Lesego did not disclose the fact that his brother had a substantial member's interest in The Best CC. The Best CC was appointed but a few months later it became clear that the company had suffered substantial losses in Gauteng because its products were not being advertised effectively, since The Best CC had no experience in this type of work. A number of One Stop Groceries (Pty) Ltd's shareholders now want to hold the company's directors liable for breach of their duty to act in the best interest of the company and their duty of care, skill and diligence by appointing an inexperienced close corporation as their marketing agent.

Advise Lesego and the other directors of One Stop Groceries (Pty) Ltd on whether they can escape liability on the basis of the business judgment rule.

[10]

Answer:[24]

The Companies Act contains a "business judgment rule" in section 76(4). In terms of this provision states that a director will be regarded as having acted in the best interest of the company and with due care, skill and diligence if the director:

- Took reasonable steps to become informed in the matter
- Had no material personal financial interest in the subject matter or had no reasonable basis to know that any related person had a personal financial interest in the matter, or disclosed his or her interest
- Made, or support, a decision in the belief that it was in the best interests of the company. OR. Had a rational basis for believing, and actually have believed that the decision was in the best interest of the company.

In this case Lesego had a personal financial interest when he suggested his brother's company as an advertising company to advertise One Stop Groceries. With the knowledge that his brother's company had no real experience he may have had the company's interests in mind but did not exercise the required care, skill and diligence when picking the optimal advertising company. Lesego may not be able to escape liability.

The other directors could possibly escape liability if they had no reasonable basis to know that the company they hired for advertising was a fellow director's direct family and had a personal financial interest. Lesego did not disclose his interests and they could not reasonably have known. For the other directors to escape liability it is required that they take reasonable steps to become informed of the matter. If they did investigating the matter and made a decision in

[24] MO001 p 24 | TB p 124 | See similar answer in Oct/Nov 2015 Question 2

good faith resulting in an incorrect/bad decision, a director cannot be held liable in terms of section 76(3)(b) or (c).

COMMENT: To answer this question successfully, students should have referred to the business judgement rule and its elements, as set out in section 76(4) of the Companies Act 71 of 2008 ("the Act").When applying the theory, a student must be able to identify that Lesego and his brother are
related persons for purposes of the Act. This has the effect that Lesego had a material personal interest in the appointment of The Best CC. Because Lesego had not disclosed this interest, he
cannot rely upon the business judgement rule. However, the other members of the board may rely upon the business judgement rule as they reasonably relied upon the information Lesego gave them.

QUESTION 2

Gary is a preference shareholder of Fast Cricket Balls Ltd, a company that manufactures South African cricket balls. The preference shares do not confer the right to vote. The company is under severe pressure as a result of competition from India. Consequently, the demand for South African cricket balls has decreased to such an extent that a resolution has been proposed for the winding-up of Fast Cricket Balls Ltd. Gary is very upset about the proposed resolution.

Advise him on whether he has the right to vote on the proposed resolution.
[10]

Answer:[25]

Preference shareholders rights to vote is usually curtailed in the MOI of a company (section 37(5)(a)) but even if the MOI provides the preference shareholders have no right to vote, they still an irrevocable right to vote (in certain circumstances) in terms of the Companies Act. The circumstances under which the irrevocable vote applies applies when there is a proposal to amend the preferences, rights, limitations and other terms associated with their shares (section 37(3)(a)).

In the Act 1973 preference shareholders could always vote on resolutions which directly affected the rights or interests attached to their shares, and resolutions for the winding-up of the company or for a reduction of share capital. These circumstances on which preference shareholders could vote is not mentioned in the Act 2008.

[25] MOo o1 p 35-36

The case *Utopia Vakansie-Oorde Bpk v Du Plessis* provides guidance in this regard. The court held that the concept "interests" was much broader than the concept "rights". The court further held that "affect" implies that the rights or interests of the preference shareholders must potentially be prejudiced by the proposed resolution. It is submitted that the proposed winding-up of a company will directly affect the interests of preference shareholders and that this would still be a resolution on which the preference shareholders would have a right to vote in terms of the new Act 2008.

Therefore, in this case, Gary as a preference shareholder will have a reason to protect his interests in the company and will be able to exercise his irrevocable vote in terms of the Act 2008 and in terms of the *Utopia Vakansie-Oorde* case.

COMMENT: The holders of preference shares generally do not have the right to vote at general meetings.The right to vote is usually curtailed in the Memorandum of Incorporation of a company.
However, section 37(3)(a) provides that the holder of a share has an irrevocable right to vote on
any proposal to amend the preferences, rights, limitations and other terms associated with their shares. In contrast with the Companies Act 61 of 1973 which explicitly provided that a proposed resolution for the winding up of the company does not confer voting rights upon preference shareholders, the Companies Act 71 of 2008 is silent on this matter. Based on Utopia Vakansie-
Oorde Bpk v Du Plessis, one may argue that the rights of preference shareholders are "affected" by a proposed winding up and therefore preference shareholders will be entitled to vote on such a resolution.

QUESTION 3
Manjane (Pty) Ltd has 14 shareholders who each hold 1 share in the company Vintos Ltd is one of the shareholders that holds 1 share in Manjane (Ny) Ltd. Vintos Ltd wishes to make an offer to acquire all the issued shares in the Manjane (Pty) Ltd and has decided to offer each of the other shareholders R1 million for their respective shares The board of Vintos Ltd has heard that all the shareholders except one are very keen to sell their shares. However, Vintos Ltd does not wish to acquire anything less than 100% ownership of Manjane (Pty) Ltd The board of Vintos Ltd does not wish to structure the deal as a scheme of arrangement.

Advise Vintos Ltd regarding the rules which regulate such a transaction and how it could structure an offer to ensure that it would not have to acquire less than all the issued shares. [10]

Answer:[26]

[26] MO001 p 64 - Compulsory acquisitions

An offeror who has had his offer for acquisition of a class of securities of a regulated company accepted by more than 90% of the class may notify the outstanding holders of securities that he wishes to acquire the remaining securities who is also then entitled to acquire them on the same terms as the original offer (section 124(1)(a) and (b)). This is known as compulsory acquisitions (and falls within the definition of affected transaction) or "squeeze out". The offeror practically forces the minority shareholders to part with their securities and then becomes the holder of all securities of the company.
Manjane (Pty) Ltd is a private company and falls under what is considered a regulated company.

Therefore Vintos could notify the remaining shareholder of the offer and that Vintos is entitled to acquire the last share. The payment for the last share will remain the same as the original offer for the first shares (section 124(1)(a) and (b)).

COMMENT: The best way of approaching the transaction as described in the question paper is to make a compulsory acquisition in terms of section 124 of the Act. The offeror will being able to force the minority security holders to sell if the offer is accepted, amongst other requirements, by at least 90% of the current holders of security. Students would have successfully answered this
question if they discussed and applied the requirements set out in section 124 of the Act.

QUESTION 4
The board of directors of Wanabee Ltd wants to issue shares to some of its employees to express their appreciation for their loyal and hard work during the past ten years. The employees have to render future services in return for the shares. One of the directors of Wananbee Ltd, Sandile, is however very concerned that this would not amount to "adequate consideration" in terms of the Companies Act 71 of 2008 and that the directors will incur liability should they proceed to do so.
Advise Sandile on whether the issue of shares in return for future services will amount to "adequate consideration" in terms of the Companies Act 71 of 2008 and also on the possibility of the directors incurring liability for their actions.
[15]

Answer:[27]
In terms of section 40(2) of the Companies Act, 2008 the section provides that before a company issues any particular shares, the board must determine the consideration for which, and the terms on which, those shares will be issued. The board must decide what value the company will receive in exchange for issuing shares to the holder of those shares.
In terms of section 40(1), the board of a company may issue authorised shares only:

- For adequate consideration to the company, as determined by the board;

[27] MO001 p 38 | TB p 80

- In terms of conversion rights associated with previously issued securities of the company; or
- As a capitalisation share (as contemplated in section 47)

The consideration for the shares can also be received in the future or in terms of an agreement for future services or benefits - section 40(5). This is a new approach taken by the Act 2008. Such shares are held in a trust until that future event occurs. While the shares are held in a trust, voting or appraisal rights are not exercisable (unless the trust deed provides differently).

Since there has to be a consideration before shares are issued, that consideration must be capable of being given a monetary value, and that the value must be recorded. Issuing shares with no consideration could result in donations tax. The board determines what adequate consideration is. The consideration is up to the discretion of the board.

The determination may be challenged on the grounds that it constituted a breach of the standard of conduct expected of directors (in terms of section 76) and is in breach of their fiduciary duties or in delict (in terms of section 77).

The effect that a challenge will have on the consideration is still uncertain in our law. The consequences depend on whether the determination remains valid, or if it is invalidated by the challenge. If it remains valid, the subscriber is unaffected because shares are regarded as fully paid once the consideration determined has been received. If it is invalidated, the subscriber might be liable for the difference between the consideration already tendered and the adequate determination as indicated after the challenge.

COMMENT: To answer this question successfully, one has to consider the provisions of section 40 of the Act. Section 40 provides that the board determines whether the consideration for shares to be issued by the company is adequate. Consideration means that anything of value is given and
accepted in exchange for any property, service or the like. Consideration may be either in cash or in any other form. The fact of the matter is whether shares are issued for cash or non-cash consideration, the consideration should always be adequate. Shares may also be issued in exchange for future services or payment. When shares are issued for future services or future payment, the shares must be issued immediately and should be held in trust until the future obligations are fulfilled. With regard to liability, the board will incur liability because they breached their fiduciary duties in issuing shares for inadequate consideration.

QUESTION 5

Rafia is approached to become a director of Enter (Pty) Ltd. A friend tells Rafia that he believes Enter (Pty) Ltd is a member of a group of companies. This worries Rafla, who is convinced that apart from the fact that the group has its own separate legal personality, there are other consequences that flow from the existence of a group of companies.

Rafia approaches you with a request to provide her with an explanation how to determine whether a company is a subsidiary of another company, and to advise her about the legal consequences that flow from the existence of a group of companies. Advise Rafia accordingly. [20]

Answer:[28]

Subsidiary company is defined in section 3(1)(a) of the Act 2008. This section provides that a company is a subsidiary company (company S) of another company (holding company (company H)) if one or more nominees of the holding company or any of its subsidiaries, alone or in combination:

- Is directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of the subsidiary company, pursuant a shareholder agreement or otherwise; or
- Has the right to appoint or elect, or control the appointment or election of, directors of the subsidiary company who control a majority of the votes at a meeting of the board.

A company is a wholly owned subsidiary of another company if all the general voting rights associated with issued securities of the subsidiary company are held or controlled, alone or in any combination:

- By the holding company
- One or more of its subsidiaries
- One or more nominees of the holding company
- Any one of its subsidiaries

Several important legal consequences flow from the existence of a group, even though the law does not recognise a separate legal personality of a group.

Main consequences are grouped as follows:

- Acquisition of shares

In terms of 48(2), a subsidiary company may acquire shares in its holding company provided that the acquisition does not amount to more than 10% in aggregate of the number of issued shares on any class of shares of the holding company taken together.

- Directors' conduct

Section 76 provides that a director may not use his position as a director, or any information obtained while acting in this capacity, to gain advantage. May also not use the information to harm the company.

- Public offerings

An employee share scheme as defined in section 95 of the Act 2008 established by a company for employees or officers of a company or of a subsidiary company. In this way, an employee

[28] MO001 p 52 - 53 | TB p 62 or 66

of one company in the group is treated as being an employee of the holding company or another subsidiary company, that is, an employee of the group.

- Disposal of all or greater part of assets or undertaking

Section 115 provides that a company may not dispose or give effect to an agreement to dispose the greater part of its assets or undertaking, unless disposal is approved by special resolution by persons authorised to exercise votes. Requires at least 25% of all voting rights.

- The solvency and liquidity test

- Financial assistance

Assistance in terms of section 44 provides that the board may authorise the company to provide financial assistance to any person for the purposes of, or in connection with, the subscription of any securities issued.

Assistance in terms of section 45 only applies to directors but also intra-group granting of financial assistance.

COMMENT: To determine whether a holding-subsidiary relationship exists between two or more companies,
the definition in section 3(1)(a) should be considered and discussed. The legal consequences of
such a holding-subsidiary relationship between two or more companies affect the following:
• the acquisition of shares
• directors' conduct
• public offerings
• the disposal of all or the greater part of assets or undertaking
• the solvency and liquidity test
• financial assistance

QUESTION 6

Shaydi (Pty) Ltd, a road construction company, concluded a five year contract with the Department of Public Works to build toll roads. This contract was the company's major source of income. At the end of the five year period, the Department of Public Works decided not to renew the contract due to the public opinion on toll roads. Shaydi (Pty) Ltd was left in a financial dilemma which resulted in its board filing a resolution to commence business rescue proceedings.

The trade union representing the employees of Shaydi (Pty) Ltd is worried that the business rescue proceedings might cause job losses and forfeiture of their members' salaries.

Advise the trade union movement on the effects of business rescue proceedings on employment contracts, remuneration of employees and the rights of employees to

participate in the business rescue proceedings.
[10]

Answer:
In general, business rescue proceedings have no effect on the rights and interests of employees. Employees are regarded as "affected persons" in terms of section 131, and therefore have the right to participate and negotiate in business rescue proceedings. The rights of employees are protected during business rescue proceedings, for example, the business rescue practitioner may suspend any contractual obligations of a company, except for employment-related contracts. The effect of business rescue proceedings on employment contracts and the way in which unpaid remuneration is dealt with, is explained in detail in your prescribed textbook at paragraph 12.5.4.

QUESTION 7
The board of directors of Giveme Ltd has taken a resolution to issue some of its shares to:

(a) its existing directors and their spouses, and
(b) in pursuance of an employee share scheme

The board is however uncertain whether they need to obtain the approval of the shareholders of the company for the resolution. Advise the board of directors of Giveme Ltd on whether the resolution needs to be approved by the shareholders of the company. [10]

The board of directors have the power to issue shares without the approval of the shareholders but these shares must be authorised by the Memorandum of Incorporation. In certain circumstances, however, the board will need shareholder approval. This approval will sometimes be in the form of a special resolution and in other cases in the form of an ordinary resolution. In this specific case, a special resolution will be required when the shares are issued to directors and their spouses. When shares are issued in terms of an employee share scheme an ordinary resolution is required.
See your prescribed textbook at paragraph 4.7.4.

QUESTION 8
Samson who is the legal advisor of Bulk Shares Ltd, a public listed company, sees correspondence between Mat, the managing director of the company, and a business associate while going through some of the legal documents pertaining to a proposed new investment. From the correspondence it is clear that Bulk Shares Ltd is in the process of concluding a multi-million rand deal with a major role player in the mining industry, and that the share price of Bulk Shares Ltd will rise considerably once this news is made public. Samson immediately phones his brother Jo to tell him the news. Jo however, cannot afford to purchase shares as he is a student. Samson also tells his girlfriend Patty, who immediately buys 200 shares to sell at a profit when the share price rises. Samson also buys 200 Fshares which he intends to sell at a later date. Two months later, after the conclusion of the deal and a drastic rise in the share price, Patty sells her shares in Bulk Shares Ltd at a 40% profit. Samson decides not to sell his shares just yet.

Explain whether Patty, Samson and Jo may incur civil liability under the legislation regulating insider trading. Your answer should include a discussion of the meaning of 'insider' and 'inside information'. You do not have to discuss the available sanctions or the criminal offences.
[15]

Answer:
This question deals with insider trading which is regulated by the Financial Markets Act 19 of 2012. The Financial Markets Act prohibits insider trading. To answer this question, students should be familiar with the term "insider" and "inside information". Insider-trading offences are dealt with in chapter 11 of your prescribed textbook.
It is important to note that this question was set when the Securities Services Act 36 of 2004 still regulated insider trading.

COMMENT: Insider trading is now regulated by the Financial Markets Act 19 of 2012 ('FMA'). Previously, it was regulated by the Securities Services Act 36 of 2004, but this Act has now been repealed. Before the insider trading offences are discussed, the concepts of "inside information" and "insider" must be defined. Inside information is specific or precise information that has not been made public, which is obtained or learned as an insider, and if it were made public would be
likely to have a material effect on the price or value of any security listed on a regulated market. An insider is a person who has inside information owing to his or her role as director, employee or shareholder of an issuer of securities listed on a regulated market, or who has access to such information by virtue of his employment, office or profession, or where such person knows that the source of the information was an insider.
The FMA lists various insider trading offences. One insider trading offence under the FMA is that of dealing. An insider who knows that he or she has inside information and who deals directly or indirectly, or through an agent for his or her own account in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.
Insiders would not be guilty of the offence of dealing if they prove on a balance of probabilities that he they only became an insider after they had given the instruction to deal to an authoriseduser and the instruction was not changed in any manner after they became an insider. Another offence under the FMA is that of disclosure. An insider who knows that he or she has inside information and who discloses such inside information to another person, commits an offence. A further offence under the FMA is that of encouraging another person to deal. An insider who knows that he or she has inside information and who encourages another person to deal in securities listed on a regulated market to which the inside information relates commits an offence

QUESTION 4

Batau Ltd is an unlisted mining public company that has over 1000 shareholders. One of its current shareholders, Mbedzi (Pty) Ltd, wishes to acquire all the issued shares in the company.

The board of directors of Mbedzi (Pty) Ltd has heard that all the shareholders except Lerato, who holds 9% of the issued shares in Batau Ltd, are very keen on selling their shares.

Mbedzi (Pty) Ltd does not wish to acquire anything less than 100% ownership of Batau Ltd but the board of directors of Mbedzi (Pty) Ltd does not wish to structure the deal as a scheme of arrangement.

You are required to give legal advice to Mbedzi (Pty) Ltd on the rules that regulate such a transaction and how it could structure an offer to ensure that it would not have to acquire less than all the issued shares.

[15]

Answer:[29] [Requires more]

[Compulsory acquisition - Fundamental transaction - Affected transaction - Regulated company]

An offeror who has had his offer for acquisition of a class of securities of a regulated company accepted by more than 90% of the class may notify the outstanding holders of securities that he wishes to acquire the remaining securities who is also then entitled to acquire them on the same terms as the original offer (section 124(1)(a) and (b)). This is known as compulsory acquisitions (and falls within the definition of affected transaction) and "squeeze out". The offeror practically forces the minority shareholders to part with their securities and then becomes the holder of all securities of the company. A compulsory acquisition is an affected transaction.

A regulated company is defined in section 117(1)(i) as a company to which Part B, Part C and the Takeover Regulations apply, as determined in accordance with section 118(1). A regulated company must be a public company (Ltd) (s 118(1)(a)), a state-owned enterprise unless exempted in section 9, or a private company ((Pty) Ltd) but only if the percentage of securities have been transferred (not between related persons) within a 24-month period (s 118(1)(c)(i)). Batau Ltd is a public company and therefore considered a regulated company to which Part B, Part C and Takeover Regulations apply. Mbedzi (Pty) Ltd has acquired more than 90% of the issued shares and can therefore 'force' the minority shareholders, in this case, Lerato, to part with their shares. These minority shares are bought for the original amount offered for the majority shares.

QUESTION 1

[29] MO001 p 54-55, 64

1. **The Memorandum of Incorporation of Guns 'n Roses (Pty) Ltd (the company) provides that the main business of the company is the manufacturing and sale of toy guns. Mr. Hoodlum, one of the directors, has been authorised by a board resolution to act on behalf of the company. While acting on behalf of the company Mr. Hoodlum concludes a contract with Mr. Brothel for the purchase of a nightclub. Mr. Brothel has no knowledge of the contents of the Memorandum of Incorporation of the company. Mr. Orthodox, a majority shareholder of the company, is upset about the purchase of the nightclub Mr. Orthodox approaches you for legal advice and requires you to advise him on the following:**

   1.1. Is the contract concluded by Mr. Hoodlum and Mr. Brothel valid and enforceable against the company? Give reasons for your answer. (5)

Answer:[30]

[Old ultra vires rule - new position in law]

The new position in law broadens the old ultra vires rule. The ultra vires doctrine was based on the understanding that a company exists in law only for the purpose for which it was incorporated. According to this doctrine, when an act on behalf of the company falls outside the main and ancillary objects, the company does not exist as a legal person for the purposes of that contract and such an act is not binding on the company.

The Act 2008 does not render contracts invalid (section 20(1)(a)) even if they are entered into beyond the limitations or restrictions placed by the MOI in terms of section 19(1(b)(ii). The contract remains valid and binding on both the company and the other party.

Therefore, in this case, the contract between Mr. Hoodlum and Mr.Brothel is valid and enforceable.

1.2. Are there any remedies available to him as shareholder in the case where the company has already concluded the contract? Give reasons for your answer. (5)

Answer:[31]

Section 20(6) of the Act 2008 provides that each shareholder has a claim for damages against any person who fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or limitations, restrictions or qualification on the powers of the company as stated in the MOI, unless ratified by a special resolution in terms of section 20(2).

1.3. Are there any remedies available to him as shareholder in the case where the company and its directors are still contemplating the conclusion of the

[30] MO001 p 27-28

[31] MO001 p 28

contract? Also discuss whether Mr. Brothel may have any claims against the company or its directors in such a case. Give reasons for your answer. (5)

[15]

Answer:[32]

Where the company or directors have not yet concluded the contract that is inconsistent with the limitations or restrictions stated in the MOI, one or more shareholders, directors or prescribed officers of the company may obtain a court order restraining the company or directors from doing so. A third party who did not know of the limitations and acted in good faith will be able to claim for damages suffered as a result - section 20(2). In terms of section 20(4) the shareholders, directors or prescribed officers, or trade union[33] representing employees may also institute proceedings to prevent a company from doing anything inconsistent with the Act.

2. The Companies Act 71 of 2008 introduces the solvency and liquidity test which directors of companies must apply prior to embarking on certain actions or transactions. With reference to this statement you are required to do the following:

2.1. Explain the requirements of the solvency and liquidity test as set out in section 4 of the Companies Act 71 of 2008.

(5)

Answer:[34]

To satisfy this test, a company must, consider all its reasonably foreseeable financial circumstances, meet the following conditions:

The assets of the company, fairly valued, must equal or exceed its liabilities; and it must appear that the company will be able to pay its debts as they become due in the ordinary course of business for 12 months following the date on which the test is undertaken, or, in the case of distribution 12 months following that distribution.

Solvency relates to its assets and liabilities and liquidity refers to its future cash flows.

2.2. List the actions or transactions to which the solvency and liquidity test must be applied.

(5)

Answer:[35]

- When a company wishes to provide financial assistance for subscription of securities in terms of section 44

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[32] MO001 p 28

[33] Only instance where trade union may prevent a company from acting

[34] MO001 p 47 | TB p 75-76

[35] TB p 74

- If a company grants loans or other financial assistance to directors and others as contemplated in section 45
- Before a company makes a distribution as provided for by section 46
- If a company wishes to pay cash in lieu of issuing capitalisation shares in terms of section 47
- If a company wishes to acquire its own shares as provided for in section 48.

1. **Name four insider-trading offences provided for in the Financial Markets Act (4)**

Answer:[36]

- ✓ An insider that uses inside information for his/her own benefit - s 78(1)
- ✓ An insider that uses inside information on behalf of another person for that person's benefit - s78(2
- ✓ A person who is not an insider but works on the insider's behalf knowing the person to be an insider - s 78(3)
- ✓ An insider who discloses inside information to another person even if the person does not act on the information - s 78(4)(a)
- ✓ An insider encourages or discourages another person when dealing in securities based on inside information - s 78(5)

2. **Fully explain who (which persons) can be held liable for insider trading offences. (6)**

Answer:

- The insider acting on his own behalf, on the behalf of someone else. The insider is also held liable for simply disclosing such information.
- The person acting as an agent who knows he is acting for an insider based on inside knowledge
- The person acting on the inside information disclosed to him.

QUESTION 4

1. **Mohape is the chief executive officer of Big Education Ltd. A listed company, manufacturing educational PC games for children. The company is on the verge of introducing a new educational package which includes e-books and smartphones which will revolutionise learning in primary schools. The company has not yet made any public announcement about this new invention. Only Mohape and the managing director Mapitsi, know about this invention. Mapitsi's**

[36] MOo01 p 71

personal assistant, Edith, saw the documents containing this confidential information about the invention when she was asked to file documents. Edith told Bethu about the content of the documents and at a later stage, without explaining why, told Patricia to take all her savings and immediately buy shares in Big Education Ltd, which Bethu did. Mandla, Bethu's husband, bought 3 000 shares in Big Education Ltd without discussing any matters relating to the shares with Bethu. Edith bought 1 000 shares in Big Education Ltd. Once the invention was announced publicly, the price of the company's shares immediately increased by 15%.

Discuss whether Edith, Bethu and Mandla committed any offences under the legislation regulating insider trading. You do not have to discuss the sanctions for the offences. (15)

Answer:

[Insider defined - Inside information defined - list offences - persons who can commit these offences]

''inside information'' means specific or precise information, which has not been made public and which—

a) is obtained or learned as an insider; and
b) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market;

'insider'' means a person who has inside information—

a) Through—
    i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or
    ii) having access to such information by virtue of employment, office or profession; or
b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a);

In terms section 78 of the Financial Markets Act (FMA) five listed offences are:

1. An insider who knows that he has inside information and who deals directly or indirectly or through an agent for his own account in the securities listed on a regulated market to which the inside information relates - section 78(1)
2. An insider who knows that he has inside information and who deals directly or indirectly or through an agent for any other person … - section 78(2)
3. Any person who deals for an insider directly or indirectly or through an agent in the securities listed on a regulated market to which information possessed by the insider relates or which are likely affected to be affected by it, who know the person is an insider - section 78(3)

4. An insider who knows that he possesses inside information and discloses that information to another person - section 78(4)(a). Even if that person does not act on the information. Disclosure alone is an offence.
5. An insider who knows that he has insider information encourages, cause a person to deal, discourage or stop another person from dealing in the securities … to which the information relates - section 78(5). Even if no actual information was disclosed but the insider encourages or discourages another person to act in a certain way would also be considered an offence.

Persons who may be held liable:

- The insider acting on his own behalf, on the behalf of someone else. The insider is also held liable for simply disclosing such information.
- The person acting as an agent who knows he is acting for an insider based on inside knowledge
- The person acting on the inside information disclosed to him.

In this case, Edith committed an offence by disclosing the information to Bethu; encouraging Bethu and Patricia to deal in the securities; and buying shares for herself. Bethu has committed an offence by acting on the information disclosed to her for her own behalf. Mandla committed no offence because he did not act on any information illegally obtained.

QUESTION 1

1. **Briefly discuss the main similarities and differences between a shareholders' meeting and an annual general meeting with reference to public and private companies. (5)**

Answer:[37]

Both a shareholder's meeting and an annual general meeting is a meeting of shareholders. Annual general meetings of a public company (Ltd) must be held annually (no more than 15 months after the previous one) as provided for by section 61(7). There is no statutory provision that provides for mandatory annual general meetings for private companies ((Pty) Ltd). Section 61(8) lists particular matters that must be discussed at an annual general meeting.

2. **Briefly discuss the differences between an ordinary resolution and a special resolution. (5)**

Answer:[38]

Ordinary resolution means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution (or a higher percentage if the MOI requires) either at a shareholders' meeting, or by the holders of the company's securities acting other than at a

[37] MO001 p 8 | TB p 102 | Tut 201 p 9-10

[38] MO001 p 9 | TB p 103 |

meeting (section 60). The support required does not apply to the removal of a director (which cannot be higher than 50%).

Special resolution means a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage (higher or lower) as specified in the MOI of the company, either at a shareholders meeting, or by the holders of the company's securities acting other than at a meeting (section 60) (supra). A special resolution is compulsory for certain resolutions stipulated in the Act or the company's MOI.

The different percentage for special resolution is subject to the condition that there must always be a difference of at least 10% between the percentages required for an ordinary and a special resolution.

3. What does the solvency and liquidity test in terms of the Companies Act 71 of 2008 entail? Give two examples of circumstances when this test should be applied. (5)

Answer:[39]
A company satisfies the solvency and liquidity test if, considering all the reasonable foreseeable financial circumstances of the company at the time, the assets of the company as fairly valued, equal to or exceed the liabilities of the company fairly valued (solvency test); and 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 twelve months after the due date on which the test is considered or, in the case of a distribution, twelve months following that distribution (liquidity test).

The solvency and liquidity test is applied when a company makes any distributions or share repurchases, gives financial assistance for the purchase of its shares, gives financial assistance to its directors, makes a loan, amalgamates or merges with another company.

4. Discuss the meaning of the following types of directors:
4.1. ex officio director (1)
4.2. alternate director (2)
4.3. temporary director (2)

Answer:[40]
Ex officio director: a person who is a director of a company as a consequence of holding some other office, title, designation or similar status.

[40] Tut 201 p 11

Alternative director: A person who is elected or appointed to serve as a member of the board of directors in substitution for a particular elected or appointed director of that company. Such a director may act as a director only in the absence of the person who appointed him.
Temporary director: A director who is appointed by the board of directors to fill a vacancy and to serve as a director on a temporary basis until the vacancy has been filled by a director who has been elected by shareholders.

5. **Name two instances when a person would be ineligible to be appointed as a director and three instances when a person would be disqualified from being appointed as a director. (5)**

Answer:[41]
Ineligible:
A juristic person or a trust
An unemancipated minor or a person under similar legal disability (insane persons)
Any persons who do not satisfy the requirements of the company's MOI

Disqualified:
A person prohibited by a court of law from becoming a director
A person declared a delinquent
An unrehabilitated insolvent
A person prohibited in terms of any public regulation
A person removed from an office of trust because of dishonesty
A person who has been convicted without option of a fine for fraud, theft, forgery, perjury
A person disqualified in terms of the company's MOI

QUESTION 2

1. **The following paragraph is an extract from the judgment of Rogers J in Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd 2014 5 SA (WCC):**

   "[74] Section 76(4) makes clear that the duty imposed by section 76(3)(b) to act in the best interests of the company is not an objective one, in the sense of entitling a court, if a board decision is challenged, to determine what is objectively speaking in the best interests of the company. What is required is that the directors, having taken reasonably diligent steps to become informed, should subjectively have believed that their decision was in the best interests of the company and this belief must have had a 'rational basis'".

   Discuss the business judgment test/rule with specific reference to the provisions of section 76(4) of the Companies Act 71 of 2008, the performance or advice of the people and committees which a director is entitled to rely on to make his/her

[41] MO001 p 13 | TB p 130 | Tut 201 p 11

judgement, the effect and general gist of the test, and the arguments for and against the business judgment rule.

Answer:[42]
In terms of section 76(4) of the Companies Act 2008, the business judgement rule provides that a director will have satisfied the duty to act in the best interests of the company and the duty to act with the degree of care, skill and diligence, provided the three elements of the business judgement rule is present.
A director is regarded as having exercised the required degree of skill, care and diligence if the director:

- Took reasonable steps to become informed about the matter
- Had no material personal financial interest in the subject matter of the decision or had no reasonable basis to know that any related person had a personal financial interest in the matter, or disclosed his interests
- Made, or supported, a decision in the belief that it was in the best interests of the company

A director may also rely on the performance and advice of employees, professional persons and the board or board committee as provided for in terms of section 76(4)(b).

The business judgement rule entails that a director should not be held liable for decisions that lead to undesirable results, where such decisions we made in good faith, with care and on an informed basis and which the director believed were in the interests of the company.

2. **A Ltd holds 51 percent of the shares issued in B (Pty) Ltd. A Ltd also holds 20 percent of the shares issued in C (Pty) Ltd, and 60 percent of the shares issued in D (Pty) Ltd. B (Pty) Ltd holds 20 percent of the shares issued in E (Pty) Ltd. C (Pty) Ltd holds 45 percent of the issued share capital in E (Pty) Ltd. D (Pty) Ltd also holds a 35 percent shareholding in E (Pty) Ltd. Explain whether E (Pty) Ltd is a subsidiary of A Ltd.**

Answer:[43]
To determine if E (Pty) Ltd is a subsidiary of A Ltd it must first be determined what control is and whether the companies mentioned are holding or subsidiary companies.

Definition of control: Section 2(2) of the Act 2008 provides that where a company (company H) controls another company (company S) or its business if company S is a subsidiary of company H; or -

[42] MO001 p 24 | TB p 124 |

[43] MO001 p 52-53 | TB p 63-64 | Tut 201 p 12

- Company H together with related or interrelated persons, is directly or indirectly able to exercise or control exercise of majority voting rights associated with the securities of company S; or
- Company H has the right to appoint or elect, or control the appointment or election of, directors of company S, who control a majority of the votes at a meeting of the board.

In terms of section 3(2) makes it clear that the number of shares held is not the test for control of a company. Control is determined by an analysis of voting power.

Assuming that all the shares percentage has the ratio of voting power, A Ltd controls B (Pty) Ltd with majority shares of 51%. A Ltd also owns 20% shares in C (Pty) Ltd and a majority percentage of 60% in D (Pty) Ltd.

With majority control on both B (Pty) Ltd who owns 20% in E (Pty) Ltd and D (Pty) Ltd who owns 35% in the same company means that a majority of shares is owned by A Ltd. E (Pty) Ltd is therefore a subsidiary of A Ltd.

COMMENT: To answer this question successfully, students had to discuss the meaning of control and had to determine whether A Ltd controls E (Pty) Ltd or controls companies that control E (Pty) Ltd. In this scenario, A Ltd controls B (Pty) Ltd and D (Pty) Ltd, which together control E (Pty) Ltd. Therefore this makes E (Pty) Ltd a subsidiary of A Ltd.]

QUESTION 3

1. **Carol wants to buy shares in Dakota Hotel Limited. She does not have money available to do so, but she offers to sell some catering equipment she had left over from an unsuccessful business to Dakota Hotel Limited. The company agrees to pay R500 000 for the catering equipment. Carol then uses the money to purchase 10 000 shares in Dakota Hotel Limited.**
   1.1. **With reference to the relevant case law, advise the board of directors of Dakota Hotel Limited whether or not the purchase of the catering equipment would qualify as financial assistance as contemplated in section 44 of the Companies Act 71 of 2008.**
   (8)

Answer:[44]

In order to ascertain whether an intended transaction constitutes as financial assistance in connection with the purchase of shares, the transaction must pass two phases. The first is whether the transaction constitutes assistance and the second whether it the assistance is for the purpose of acquiring shares in a company.

[44] MO001 p 49 | TB p 83 |

To determine whether the transaction qualifies as financial assistance the impoverishment test as formulated in *Gradwell (Pty) Ltd v Rosta Printers Ltd 1959*[45] should be relied upon. This test considers whether the transaction will have the effect of "leaving the company poorer" and if so, then financial assistance has been provided.

In *Lipschitz NO v UDC Bank Ltd 1979*[46] the court held that the impoverishment test is not the only test for determining whether financial assistance has been provided. Providing security or otherwise exposing the company to risk will also qualify as financial assistance. The court further held that if the company buys an asset from a person in order to enable that person to acquire shares in the company, it will depend on the facts whether this constitutes financial assistance.

These factors that have emerged from case law to assist in this regard:
Whether the company needs the asset in its normal course of business and whether the company paid a fair price for it.

In terms of section 44 of the Act 2008, if the person obtained a loan to purchase shares in a company and that company stood surety for that loan, it will constitute financial assistance.

If Dakota Hotel Group Limited does not require the catering equipment and the price of R500 000 is considered fair (or higher than the equipment's value), the transaction would qualify as financial assistance for the purposes of acquiring shares. If not, the transaction would not qualify as financial assistance.

1.2. Name four (4) requirements of section 44 of the Companies Act 71 of 2008 that a company must comply with before it will be allowed to provide financial assistance. (4)

Answer:[47]

- The provision of financial assistance must be pursuant to an employee share scheme that satisfies the requirements of section 97, OR
- The provision of financial assistance must be pursuant to special resolution of the shareholders, adopted within the previous two years, approved for either a specific recipient or a general category of potential recipients.
- The board must be satisfied that immediately after providing financial assistance, the company would satisfy the solvency and liquidity test, and the terms under which the assistance is given is fair and reasonable to the company.

[45] (4) SA 419 (A)

[46] (1) SA 789 (A)

[47] MO001 p 49 | TB p 83 | Tut 201 p 14

- The board must assure that any conditions or restrictions regarding the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

2. **Your friend Jeanette, who is a chartered accountant by profession, has recently been appointed as the company secretary of Stein Holdings Limited, a company listed on the Johannesburg Securities Exchange in the Consumer Services – Retail Sector. This company has many subsidiaries, including Stein Hardware (Pty) Ltd, Stein Investment (Pty) Ltd, Stein International Holdings Ltd, Central Timbers (Pty) Ltd, Green Apple Supermarkets (Pty) Ltd, Becko Foods (Pty) Ltd, and other smaller subsidiaries. Stein Holdings Limited's shareholding and voting power in most of these subsidiary companies is 100 percent. The Stein group operates in the wholesale and retail industries. It is one of the largest retail groups in Africa. Explain to Jeanette how "control" in the context of a group of companies is defined in the Companies Act 71 of 2008.**
(3)

Answer:[48]
[Tutorial paste: To answer this question successfully, students had to mention that in terms of section 2 of the Companies Act 71 of 2008, company A controls company B (or its business) if company B is a subsidiary of company A, or company A, on its own or together with any related or interrelated person, is directly or indirectly able to exercise (or control the exercise of) the voting rights in company B (whether pursuant to a shareholders' agreement or otherwise), or has the right to appoint or elect (or control the appointment or election of) directors of company B, who control the majority of votes at the company's board meetings, or company A has the ability to materially influence the policy of company B.]

3. **The board of directors of Aviation Supplies (Pty) Ltd intends to issue new ordinary shares in order to, among other things, settle the company's existing debt obligations, incentivise employees and raise cash for the expansion of the company's operations. The board anticipates that the shares will be issued to quite a number of people including people who are not currently shareholders of Aviation Supplies (Pty) Limited. The board has heard that the Companies Act 71 of 2008 regards the decision to issue shares as a management decision. However, the board is unsure whether or not they may issue the new ordinary shares without shareholder approval. Upon hearing about the board's intentions, Reona, one of the current shareholders of Aviation Supplies (Pty) Ltd, is concerned that an issue of a large quantity of new ordinary shares will dilute the interests of the present shareholders of the company. Explain fully what is meant by "shareholders pre-emptive rights" and advise Reona on whether the current shareholders of Aviation Supplies (Pty) Ltd have any pre-emptive rights. You**

[48] Same as question 2.2 supra?

should also indicate in your answer the circumstances when shareholders' pre-emptive rights will not apply. (10)

Answer:[49]

A shareholder's pre-emptive right means that when the company decides to issue new shares, the shares must first be offered to the existing shareholders in proportion to their current shareholding (pro rata) before the shares are offered to any other person who is not a shareholder.

Shareholders in a private company have an automatic pre-emptive right as provided for by section 39 of the Act 2008 unless it's altered or negated by the company's MOI. This is to prevent dilution of the ownership in private companies. In terms of section 39(1)(b) of the Act 2008, shareholder's pre-emptive rights in a private company do not apply to shares in terms of options or conversion rights, share issued for future services or benefits, or where there is a capitalisation issue.

The default position for public and state-owned companies is that shareholders do not have this automatic right.

In this case the pre-emptive right is applicable because Aviation Supplies (Pty) Ltd is a private company, unless this right has been altered or negated in terms of this company's MOI; and unless the shares are not applicable as above.

QUESTION 4

1. **Dolphin Hides Ltd is a company trading in the production and distribution of leather products. It owns a production site in Randburg to the value of R100 million and a couple of distribution outlets to the value of R20 million. Due to the 2008 financial crises, the company has not been doing well. In light of this the general meeting adopted a resolution to sell the production site, which is the company's biggest income producing asset.**
   Maite, Peter and Mike, three of the shareholders of Dolphin Hide Ltd and each having 5 (five) percent of the voting rights, object to the sale of the production site. The objection is raised on the basis that the procedure followed for the sale of the production site, does not comply with the requirements of the Companies Act 71 of 2008. In light of the above mentioned facts, advise the aggrieved shareholders on the following aspects:
   1.1. In terms of the Companies Act 71 of 2008, explain what type of transaction the company wishes to enter into and whether the Take-over Regulations will apply to the transaction.
   (6)

[49] MO001 p 38 | TB p 82 |

Answer: [50]

The Dolphin Hides Ltd wishes to dispose of a greater part of the assets of the company, which would be considered a fundamental transaction (at first). The company is a public company and therefore considered a regulated company as provided for by section 117 of the Act 2008. This means the transaction is therefore an affected transaction. Section 112 of the Act 2008 regulates the disposal or sale of all or greater part of the assets of a company.

A regulated company is defined in section 117(1)(i) as a company to which Part B, Part C and the Takeover Regulations apply, as determined in accordance with section 118(1). A regulated company must be a public company (Ltd) (s 118(1)(a)), a state-owned enterprise unless exempted in section 9, or a private company ((Pty) Ltd) but only if the percentage of securities have been transferred (not between related persons) within a 24-month period (s 118(1)(c)(i)).

1.2. Explain how the objection of Maite, Peter and Mike to the sale of the production site may impact upon the prescribed procedure that should be followed in terms of the Companies Act 71 of 2008.
(5)

Answer:[51]

The transaction mentioned above must be approved by special resolution. If the resolution is opposed by at least 15% of the shareholders who are entitled to vote on the resolution, the approval of the court is required if, within five days of the vote, the company requested to seek court approval by a shareholder who voted against the resolution.

Maite, Peter and Mike each owning 5% of the voting rights meeting the required minimum percentage for court approval.

1.3. Suppose Dolphin Hides Ltd is on the brink of financial collapse. The board of directors has adopted a resolution to commence with business rescue proceedings. Mpho, a creditor of Dolphin Hides Ltd feels aggrieved by the decision as his claim will be subjected to a moratorium and he does not approve of the appointed business rescue practitioner. Advise Mpho on the grounds on which the resolution of the directors of Dolphin Hides Ltd to commence with business rescue proceedings and the appointment of the business rescue practitioner can be set aside in terms of the Companies Act 71 of 2008. (7)

Answer:[52]

[Business rescue proceedings - Business rescue practitioner appointment]

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[50] MO001 p 54-56 |

[52] MO001 p 67 | TB p 254-255

Business rescue proceedings may be commenced by resolution of the board of directors of a company. The board of directors may take a formal decision (majority vote) to begin rescue business proceedings under certain specific circumstances if there is a reasonable belief that the company will become financially distressed. The resolution for commencement of a business rescue plan may be set aside before the adoption of the rescue plan if there is no reasonable basis for believing that the company is financially distressed; when there is no reasonable prospect of rescuing the company; and when the company failed to comply with procedural in terms of section 129 of the Act, 2008.

The business practitioner must meet the requirements of section 138 and must provide written consent to be appointed. The only way for a BR practitioner to be removed from office is by an order of court, either in terms of section 130, or in terms of section 139. Section 139(2) lists the grounds on which the practitioner may be removed.

Other notes:[53]
List of grounds

QUESTION 5
Define the terms insider and inside information for purposes of the Financial Markets Act 19 of 2012.

Answer:[54]
The Financial Markets Act 135 of 1992 provides that a person is an 'insider' who has inside information through being a director, an employee, a shareholder of an issuer of securities on a regulated market to which the information relates, or through having access to such information by virtue of employment, office, or profession or where the person knows the direct or indirect source of such information.

'Inside information' relates to specific information that has not been made public and which is obtained or learned as an insider and if made public, would materially affect the price or value of any security listed on a regulated market.

END

OTHER NOTES:

Private company - (Pty) Ltd [Afrikaans (Edms) Bpk] In case of Afrikaans titled case law
Public company - (Ltd) [Afrikaans (Bpk)]

[53] TB p 255

[54] MO001 p 70 | TB p 225

State-owned company - (SOC)
Personal liability company - (Inc)
Non-profit company - (NPC)

Business rescue definitions:
Section 128(1)
(a) ‘‘affected person’’, in relation to a company, means—
(i) a shareholder or creditor of the company; (ii) any registered trade union representing employees of the company; and
(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;
[Affected person for the purposes of applying for a court order does not include the company or its directors]

(b) ‘‘business rescue’’ means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
(i) the temporary supervision of the company, and of the management of its affairs, business and property;
(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company;

(f) ‘‘financially distressed’’, in reference to a particular company at any particular time, means that—
(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;

(g) ‘‘independent creditor’’ means a person who—
(i) is a creditor of the company, including an employee of the company who is a creditor in terms of section 144(2); and
(ii) is not related to the company, a director, or the practitioner, subject to subsection (2);

Grounds on which a BR practitioner may be removed from office:

- Incompetence or failure for the person to perform
- Failure to exercise the proper degree of care in the performance of his functions
- Engaging in illegal acts or conduct
- No longer meeting requirements for appointment listed in section 138

- Having conflict of interest or lack of independence
- Incapacitated and unable to perform the functions of a practitioner and being unlikely to regain capacity within a reasonable time

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ADDITIONAL INFO

1. Fundamental transactions (alter a company) Are subject to approval by special resolution.
Fundamental transactions fall into 3 categories:

- Disposals of the majority of a company's assets or undertaking;
- Mergers or amalgamations; and
- Schemes of arrangement

A fundamental transaction will be an affected transaction if the company is a regulated company. A regulated company is:

- A public company;
- A state-owned enterprise (unless exempted); 0r
- A private company, but only if more than the prescribed percentage of its issued securities has been transferred in the previous 24 months, or the company's MOI expressly provides for it to be treated as a regulated company.

An affected transaction is either:

- A fundamental transaction involving a regulated company;
- An acquisition of multiples of 5 percentages in voting securities;
- A mandatory offer; or
- A compulsory acquisition (so-called squeeze-out transaction)

If a fundamental transaction is also an affected transaction, the Takeover Regulation Panel will have jurisdiction of the transaction as well.

2. Persons ineligible or disqualified to be appointed as director:

Ineligible:

- A juristic person or trust;
- An unemancipated minor or person under a similar legal disability’ Any person who does not satisfy any required in a company’s MOI.

Disqualified:

- A person who has been prohibited by a court of law form becoming a director;
- A person who has been declared to be a delinquent y a court of law;
- An unrehabilitated insolvent;
- A person who is prohibited in terms of any public regulation form being a director;
- A person who has been removed form an office of trust because of dishonesty;
- A person who has been convicted and imprisoned without the option of a fine for theft, fraud, forgery, perjury.
- A person disqualified in terms of the company’s MOI.