



UNIVERSITY
OF
JOHANNESBURG

MEMO

<u>FACULTY</u>	: Law
<u>DEPARTMENT</u>	: Mercantile Law
<u>CAMPUS</u>	: APK
<u>MODULE</u>	: BEL41A0/ KPR0011 BUSINESS ENTERPRISES LAW
<u>SEMESTER</u>	: First
<u>EXAM</u>	: June 2021

<u>DATE</u>	: 21 June 2021	<u>SESSION</u>	: 12:30
<u>ASSESSOR(S)</u>	: Ms ME Rostoll		
<u>MODERATOR</u>	: Mr Faadhil Adams		
<u>DURATION</u>	: 3 HOURS	<u>MARKS</u>	: 70

Please read the following instructions *carefully*:

1. NB - The Faculty of Law takes a zero-tolerance approach towards issues like plagiarism, sharing of assessment questions, and unauthorised assistance by anyone else, in writing the assessment. Dishonest conduct will have severe consequences for your academic and professional careers.
2. Answer all questions.
3. Write in full sentences where applicable. Do NOT make use of "SMS speak".
4. You will have **three (3) hours** to complete the test. Two (2) hours within which to complete the exam and provision of one hour is made to submit the exam.
5. ALL students have to submit their answers no later than **15h30** on the day of the assessment.

6. If you experience any problems with regards to either writing or submitting your assessment, please contact Mrs Rostoll immediately via email (merostoll@uj.ac.za) or WhatsApp (0828536819).

FORMAT OF THE TEST

- a. There are **two sections** in the paper. **Section A** contains short questions (multiple choice questions and multiple answer questions) and **Section B** contains the application questions. There will be a separate link for each section. **Please make sure that you complete both sections.**
- b. **Section A** is an online test with 11 questions. One of the questions is a multiple answer question (ie you must choose all the correct statements and will only be credited if you have all of them and no incorrect ones in your selection) and ten are multiple choice questions (one correct answer). The system will indicate which ones are which.
- c. There is no negative marking – if you get a question wrong you will not score marks for that question, but no marks will be deducted from the correct answers.
- d. Please note that you will be afforded two attempts for Section A in the event of any technical/network issues. The questions will be randomised and you will be able to back-track. Please note that if you have to use the second attempt to complete this section, then you will not get the same questions as the first attempt due to the system selecting from a pool of questions.
- e. Answer all questions in **section B** in Arial 11 font 1.5-line spacing.
- f. Submit your answers in the space provided under each question in Blackboard.
- g. **ONLY USE THE FOLLOWING OPTION FOR SECTION B IF YOU ARE UNABLE TO TYPE YOUR ANSWERS IN THE SPACE PROVIDED ON BLACKBOARD.** Please type your answers in a Word document and submit your answers by using the link which had been provided under the "Examination - June 2021" link on Blackboard. The link will be titled "SUBMIT HERE IF YOU ARE UNABLE TO TYPE YOUR ANSWERS ON BLACKBOARD". Be sure to number your answers carefully.
- h. The mark allocation is as follows: short questions range between 2 to 5 marks each (Section A total: 40), there are two application questions of 15 marks each. The one question consists of two sub-questions with the following mark allocation, 8 and 7 marks respectively. The other question consists of five sub-questions of 3 marks each. (Section B total: 30).
- i. The total for the examination is 70 marks.

SECTION A

MULTIPLE CHOICE AND MULTIPLE ANSWER QUESTIONS

GROUP 1 [2 marks each – 1 question will be selected]

(2)

LEVEL 2

1. A subsidiary can acquire shares in its holding company provided that –
 - a. The subsidiary and the holding company satisfy the solvency and liquidity test.
 - b. The acquired shares must be immediately cancelled.
 - c. **The acquired shares may not be voting shares.**
 - d. The holding company will still have redeemable shares in issue.
2. Blue Ltd has agreed to sell the greater part of its undertaking to Yellow (Pty) Ltd. It has not changed the alterable rules of the Companies Act.
 - a. The transaction must be approved by the shareholders of Blue Ltd and Yellow (Pty) Ltd.
 - b. **Shareholders who vote against the transaction will be able to rely on the appraisal remedy.**
 - c. If 10% of the shareholders in Blue Ltd vote against the transaction, the transaction cannot be reviewed by the court.
 - d. If 20% of the shareholders in Blue Ltd vote against the transaction, the transaction cannot be implemented.
 - e. More than one of the above.
3. A friendly takeover is –
 - a. An agreement between two or more companies which will result in all their assets and liabilities being held by one company after the merger.
 - b. **A change in control of a company that is supported by its board of directors.**
 - c. A restructuring of the share capital of a company.
 - d. All of the statements [a - c].
 - e. None of the statements [a - c].
4. Metal Gear (Pty) Ltd has four shareholders who hold Class A ordinary shares. Hezlet holds 50% of the shares, Shaun holds 20% of the shares, and Pranith and Tami hold 15% each. Metal Gear (Pty) Ltd wants to issue a further 100 Class A ordinary shares.

Choose the correct statement/s –

 - a. **Pre-emptive rights (in terms of section 39) would apply.**
 - b. Pre-emptive rights (in terms of section 39) would not apply.
 - c. **Each shareholder will be entitled to the following: Hezlet 50 shares, Shaun 20 shares, Pranith and Tami 15 shares each.**
 - d. Each shareholder will be entitled to the following: Shaun 50 shares, Hezlet 20 shares, Pranith and Tami 15 shares each.
 - e. Each shareholder will be entitled to the following: Shaun 50 shares, Hezlet 20 shares, Pranith and Tami 30 shares each.

GROUP 2 [3 marks each – 2 questions will be selected]

(6)

LEVEL 3

5. The memorandum of incorporation of Haphazard Ltd provides that the main object of the company is to manufacture key chains and that the capacity of the company is limited to transactions that will further this main object. Haphazard Ltd's board of directors take the decision to purchase a game farm on behalf of the company. According to the common law *ultra vires* doctrine (complete with the correct phrase) –
- The directors as an organ of the company had the authority to enter into this transaction.
 - The general meeting of shareholders could ratify this transaction by way of a special resolution.
 - The general meeting of shareholders could ratify this transaction by way of unanimous assent.
 - The transaction would be null and void.**
6. In *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) the court held in the majority judgment that –
- Actual authority and ostensible or apparent authority are the opposite sides of the same coin.
 - Ostensible authority is the authority of an agent as it appears to others.
 - Actual authority is the authority of an agent as it appears to others.
 - Both actual and ostensible authority is the authority of an agent as it appears to others.
- All of the statements.
 - 1 and 2.**
 - 1 and 4.
 - 1 and 3.
7. In *One Stop Financial Services (Pty) Ltd v Neffensaam Ontwikkelings (Pty) Ltd and Another* 2015 4 SA 623 (WCC) the court held that –
- The *Turquand* rule only comes into operation once the third party proves that the individual director (purporting to represent the company) has authority (i.e. ostensible authority) to bind the company.
 - The *Turquand* rule has essentially been codified in section 20(7) of the Companies Act 71 of 2008.
 - The Companies Act 71 of 2008 is not intended to change the well-established principles of the common law *Turquand* rule, and as such cannot be seen to now allow a third party to presume the authority of an individual, ordinary director.
 - All of the statements.**

GROUP 3 [4 marks each – 1 question will be selected]

(4)

LEVEL 5

8. The board of Y (Pty) Ltd proposed an amendment of the company's memorandum of incorporation changing the voting rights of its class C ordinary shares from two votes

per share to one vote per share. T holds 5% of the class C ordinary shares in Y (Pty) Ltd and has informed the board that he objects to the amendment. Although T voted against the resolution, the transaction was approved by 87% of the votes exercised. T then demanded to be paid the fair value of his shares. Y (Pty) Ltd made an offer to pay the amount of R500 per share but T regards this as insufficient. Relying on his rights under the Promotion of Access to Information Act (PAIA), T wants to obtain copies of the bank statements and management accounts of Y (Pty) Ltd to prove the actual fair value of the shares.

Evaluate T's prospects of success and select a reason for your view.

- a. **T will not succeed, because section 164 of the Companies Act has built-in mechanisms for the determination of share value.**
 - b. T will not succeed, because the Companies Act contains an exhaustive list of records accessible by a shareholder.
 - c. T will succeed, because the Companies Act is based on the dual values of transparency and disclosure.
 - d. T will succeed, because PAIA gives effect to the fundamental right to information and the Companies Act must be interpreted to give effect to the Bill of Rights.
 - e. T will succeed, provided he can prove that he is acting in good faith and without an ulterior motive.
9. The memorandum of incorporation of Q Ltd has recently been amended by changing the preferential dividend of the class B preference shares from R5 per share to R4.50 per share. R, who holds 2% of the class B preference shares, objected to this amendment and voted against the special resolution. The amendment was approved by 90% of the votes exercised. R submitted a demand for the fair value of her shares but does not agree with the value being offered by Q Ltd. She wants access to the books and accounting records of Q Ltd in order to show that her shares are worth more than what she is being offered, but the company refuses to disclose this information. R wants to bring an application under the Promotion of Access to Information Act (PAIA).

Evaluate the likely outcome of R's application.

- a. **The application will be unsuccessful, because section 164 of the Companies Act has built-in mechanisms for the determination of share value.**
- b. The application will be unsuccessful, because the Companies Act contains an exhaustive list of records accessible by a shareholder.
- c. The application will succeed, because the Companies Act is based on the fundamental values of transparency and disclosure.
- d. The application will succeed, because PAIA gives effect to the fundamental right of access to information and one of the objects of the Companies Act is to promote compliance with the Bill of Rights.
- e. The application will succeed if R can prove that she does not have an ulterior motive and is acting in good faith.

10. The shareholders of S Ltd have approved a scheme of arrangement but Y is one of the shareholders who voted against the scheme. He objected to the proposal and notified S Ltd that he wants to surrender his shares for their fair value. Y feels that the shares are worth much more than the R50 000 which S Ltd offered to pay. To prove his point, Y has brought an application under the Promotion of Access to Information Act (PAIA) for copies of the management accounts of S Ltd. The company is opposing the application.

Assume that you are the judge presiding in this matter. Indicate which of the statements below should represent the essence of your decision.

- a. **The application is dismissed because the Companies Act provides a built-in method to determine share value for purposes of section 164.**
- b. The application is dismissed because the Companies Act exhaustively sets out which records a shareholder can access.
- c. The application is granted because transparency and disclosure are core values of the Companies Act.
- d. The application is granted because the Companies Act must promote fundamental rights, including access to information in terms of PAIA.
- e. The application is dismissed because Y neglected to prove that he is acting in good faith and without an ulterior motive.

GROUP 4 [3 marks each – 1 question will be selected]

(3)

LEVEL 5

11. Y (Pty) Ltd has been identified as a possible target for an acquisition by X Ltd. The board of Y (Pty) Ltd supports the idea, as do most of Y (Pty) Ltd's shareholders. However, Z, who holds 26% of the shares in X (Pty) Ltd, has already indicated that he will not approve any of the options being considered. The memorandums of incorporation of the two companies have not changed any of the alterable rules of the Companies Act. The boards are considering several alternative structures for the deal.

Evaluate which of the following structures is most likely to be successful.

- a. **A disposal by Y (Pty) Ltd of its entire business undertaking to X Ltd in terms of s 112.**
 - b. An amalgamation or merger between X Ltd and Y (Pty) Ltd, where Y (Pty) Ltd will transfer its assets and liabilities to X Ltd and then be deregistered.
 - c. A scheme of arrangement between X Ltd and Y (Pty) Ltd in terms of s 114.
 - d. A compulsory acquisition by X Ltd of all the shares in Y (Pty) Ltd in terms of s 124.
 - e. None of the above unless Z can be convinced to support the transaction.
12. X Ltd wants to acquire control of Y (Pty) Ltd. The acquisition can be structured in various ways. The shareholders of Y (Pty) Ltd support the acquisition and a special resolution in Y (Pty) Ltd will this be possible. However, some of the shareholders in X Ltd, including G who holds 28% of the shares in X Ltd, oppose it. As a result, it is unlikely that a special resolution will be adopted in X Ltd.

Evaluate which of the following fundamental transactions would have the best prospect of success.

- a. **A disposal by Y (Pty) Ltd of its entire business undertaking to X Ltd in terms of s 112.**
 - b. An amalgamation or merger between X Ltd and Y (Pty) Ltd in terms of s113.
 - c. A scheme of arrangement between X Ltd and Y (Pty) Ltd in terms of s 114.
 - d. A mandatory offer by X Ltd in terms of s 123.
 - e. None of the above unless G can be convinced to support the transaction.
13. A Ltd is considering various ways of acquiring control of B (Pty) Ltd or its business. The board of B (Pty) Ltd supports the idea, as do most of B (Pty) Ltd's shareholders. The shareholders of A Ltd are in favour of the board's plans regarding B (Pty) Ltd. However, C, who holds 26% of the shares in A Ltd and 2% of the shares in B (Pty) Ltd, has already indicated that he will not approve any of the options being considered. The memorandums of incorporation of the two companies have not changed any of the alterable rules of the Companies Act.

Evaluate which of the following mechanisms would have the best prospect of success.

- a. An amalgamation or merger between A Ltd and B (Pty) Ltd, where B (Pty) Ltd will transfer its assets and liabilities to A Ltd and then be deregistered.
- b. **A disposal by B (Pty) Ltd of its entire business undertaking to A Ltd in terms of s 112.**
- c. A compulsory acquisition of B (Pty) Ltd by A Ltd in terms of s124.
- d. A scheme of arrangement between A Ltd and B (Pty) Ltd in terms of s 114.
- e. None of the above unless C can be convinced to support the transaction.

GROUP 5 [3 marks each – 1 question will be selected]

(3)

LEVEL 5

14. B holds 20% of the voting shares in D Ltd. B also has the right to acquire the 20% voting shares in D Ltd that are held by C. B wants to exercise this right but she vaguely recalls having listened to a radio talk once about different types of "control" in companies and is wondering whether exercising this right will be seen as a change of control.

Evaluate the implications if B were to exercise her right to acquire the 20% shares held by C.

- a. **B will have to make an offer to all the other shareholders to acquire their shares in D Ltd.**
 - b. B will be able to squeeze out the remaining shareholders of D Ltd to become the only shareholder.
 - c. The remaining shareholders will be able to rely on a compulsory acquisition to get transfer of B's shares.
 - d. The remaining shareholders will be able to rely on the appraisal remedy to get paid the fair value of their shares.
 - e. There will be no special implications for either B or the remaining shareholders.
15. For the past three years, Z has held 34% of the voting shares in X Ltd. Z is now considering to purchase the 2% shares that her friend Y holds in X Ltd. Z is unsure whether she should do this. She wants to help her friend Y who is desperately looking for a purchaser, but a colleague told Z that she would be deemed to control X Ltd if she does this.

Evaluate the implications if Z were to purchase her friend Y's shares.

- a. **Z will have to make an offer to all the other shareholders to acquire their shares in X Ltd.**
 - b. Z will be able to squeeze out the remaining shareholders of X Ltd to become the only shareholder.
 - c. The remaining shareholders will be able to rely on a compulsory acquisition to get transfer of Z's shares.
 - d. The remaining shareholders will be able to rely on the appraisal remedy to get paid the fair value of their shares.
 - e. There will be no special implications for either Z or the remaining shareholders.
16. Z has held 30% of the voting shares in X Ltd for the past five years. However, according to the will of her late grandmother, she is to inherit a further 6% of the voting shares in X Ltd. Z is unsure whether she should accede (accept the inheritance) because one of her friends warned her that this would mean she will "acquire control" of X Ltd.

Evaluate the implications if Z were to accept the inheritance of the shares.

- a. **Z will have to make an offer to all the other shareholders to acquire their shares in X Ltd.**
- b. Z will be able to squeeze out the remaining shareholders of X Ltd to become the only shareholder.
- c. The remaining shareholders will be able to rely on a compulsory acquisition to get transfer of Z's shares.
- d. The remaining shareholders will be able to rely on the appraisal remedy to get paid the fair value of their shares.
- e. There will be no special implications for either Z or the remaining shareholders.

GROUP 6 [5 marks each – 1 question will be selected]

(5)

LEVEL 4

17. The boards of directors of E (Pty) Ltd and S (Pty) Ltd, two courier companies, have proposed that the two companies should join forces as their businesses might be more competitively operated as one. E (Pty) Ltd will, however, retain the international division of its business. S (Pty) Ltd only conducts business in South Africa. The idea is that the two companies will transfer all their assets and liabilities pertaining to their local operations to a new company, E&S (Pty) Ltd. E&S (Pty) Ltd is to be formed as part of the agreement between the two companies. S (Pty) Ltd will be deregistered.

The current financial position of E (Pty) Ltd is as follows –

- Total assets R25 million
- Total liabilities R20 million

The current financial position of S (Pty) Ltd is as follows –

- Total assets R10 million
- Total liabilities R12 million

The projected financial position of E (Pty) Ltd if the agreement is implemented is as follows –

- Total assets R15 million
- Total liabilities R11 million

The projected financial position of E&S (Pty) Ltd is as follows –

- Total assets R20 million
- Total liabilities R21 million

Based on your analysis of the facts, advise whether the proposal can be submitted to the shareholders for their approval.

- The proposal cannot be submitted to the shareholders of either E (Pty) Ltd or S (Pty) Ltd.**
 - The proposal can be submitted to the shareholders of S (Pty) Ltd, but not to the shareholders of E (Pty) Ltd.
 - The proposal can be submitted to the shareholders of E (Pty) Ltd, but not to the shareholders of S (Pty) Ltd.
 - The proposal can be submitted to the shareholders of both E (Pty) Ltd and S (Pty) Ltd.
 - As neither E (Pty) Ltd nor S (Pty) Ltd is a regulated company, the proposal need not be submitted to the shareholders of either company.
18. X (Pty) Ltd manufactures and distributes vehicle spare parts and its board commenced merger discussions with Y (Pty) Ltd, one of its competitors in the industry. The two boards are proposing that each of the two companies will transfer the distribution part of their undertakings (the “distribution assets and liabilities”) to a new company, X&Y Distributors (Pty) Ltd, that will be formed in terms of the agreement. Y (Pty) Ltd will also transfer all its other assets and liabilities (the “manufacturing assets and liabilities”) to X (Pty) Ltd and Y (Pty) Ltd will be deregistered.

The current financial position of X (Pty) Ltd is as follows –

- Total assets R20 million
- Total liabilities R18 million

The current financial position of Y (Pty) Ltd is as follows –

- Total assets R5 million
- Total liabilities R7 million

The projected financial position of X (Pty) Ltd if the transaction is implemented is as follows –

- Total assets R16 million
- Total liabilities R13 million

The projected financial position of X&Y Distributors (Pty) Ltd is as follows –

- Total assets R9 million
- Total liabilities R12 million

Based on your analysis of the facts, advise whether the proposal can be submitted to the shareholders for their approval.

- a. **The proposal cannot be submitted to the shareholders of either X (Pty) Ltd or Y (Pty) Ltd.**
- b. The proposal can be submitted to the shareholders of Y (Pty) Ltd, but not to the shareholders of X (Pty) Ltd.
- c. The proposal can be submitted to the shareholders of X (Pty) Ltd, but not to the shareholders of Y (Pty) Ltd.
- d. The proposal can be submitted to the shareholders of both X (Pty) Ltd and Y (Pty) Ltd.
- e. The proposal need not be submitted to the shareholders of X (Pty) Ltd and Y (Pty) Ltd because they are not regulated companies.

19. V (Pty) Ltd manufactures and distributes vehicle spare parts and its board commenced discussions with W (Pty) Ltd, one of its competitors in the industry. The two boards are proposing that each of the two companies will transfer the distribution part of their undertakings (the “distribution assets and liabilities”) to a new company, V&W Agencies (Pty) Ltd, that will be formed in terms of the agreement. W (Pty) Ltd will also transfer all its other assets and liabilities (the “manufacturing assets and liabilities”) to V (Pty) Ltd and W (Pty) Ltd will be deregistered.

The current financial position of V (Pty) Ltd is as follows –

- Total assets R18 million
- Total liabilities R19 million

The current financial position of W (Pty) Ltd is as follows –

- Total assets R7 million
- Total liabilities R4 million

The projected financial position of V (Pty) Ltd if the transaction is implemented is as follows –

- Total assets R3 million
- Total liabilities R2 million

The projected financial position of V&W Agencies (Pty) Ltd is as follows –

- Total assets R22 million
- Total liabilities R21 million

Based on your analysis of the facts, advise whether the transaction proposal can be submitted to the shareholders for their approval.

- a. **The proposal can be submitted to the shareholders of both V (Pty) Ltd and W (Pty) Ltd.**

- b. The proposal cannot be submitted to the shareholders of either V (Pty) Ltd or W (Pty) Ltd.
- c. The proposal need not be submitted to the shareholders of V (Pty) Ltd and W (Pty) Ltd because they are not regulated companies.
- d. The proposal can be submitted to the shareholders of V (Pty) Ltd, but not to the shareholders of W (Pty) Ltd.
- e. The proposal can be submitted to the shareholders of W (Pty) Ltd, but not to the shareholders of V (Pty) Ltd.

GROUP 7 [4 marks each – 1 question will be selected]

(4)

LEVEL 5

20. K (Pty) Ltd was registered as a company on 19 May 2020. On 16 March 2020 Jason concluded a lease agreement with L Ltd for premises from which the soon to be incorporated company, (K (Pty) Ltd) could conduct its trading activities. However, K (Pty) Ltd found cheaper premises and informed L Ltd in writing on 19 June 2020 that it would not be taking up the lease.

Evaluate the legal position and select the best advice for L Ltd regarding the contract.

- a. **The notice is valid, but L Ltd can hold Jason personally liable on the lease contract.**
- b. The notice is invalid because a lease contract between K (Pty) Ltd and L Ltd came into existence on 19 May 2020.
- c. The notice is invalid because a lease contract between K (Pty) Ltd and L Ltd came into existence on 16 March 2020.
- d. The notice is valid, but L Ltd can hold K (Pty) Ltd liable for three months' rent.
- e. The notice is invalid because K (Pty) Ltd is deemed to have ratified the contract on 16 June 2020.

21. On 9 March 2020 Vinesh concluded a franchise contract with X Ltd on behalf of a company he was busy incorporating. The company, W (Pty) Ltd, was incorporated on 15 April 2020. However, due to various factors, W (Pty) Ltd decided to rather operate its business independently. On 3 June, W (Pty) Ltd notified X Ltd in writing that it rejects the franchise contract.

Evaluate the legal position and select the best advice for X Ltd regarding the contract and the rejection notice.

- a. **The rejection notice is valid, but X Ltd can hold Vinesh personally liable on the franchise contract.**
- b. The rejection notice is invalid because a franchise contract between W (Pty) Ltd and X Ltd came into existence on 15 April 2020.
- c. The rejection notice is invalid because a franchise contract between W (Pty) Ltd and X Ltd came into existence on 9 March 2020.
- d. The rejection notice is valid, but X Ltd can hold W (Pty) Ltd liable for three months' franchise fees.
- e. The rejection notice is invalid because W (Pty) Ltd is deemed to have ratified the franchise contract on 9 June 2020.

22. In February 2020, Y was in the process of incorporating a company, X (Pty) Ltd, to conduct a restaurant business. On 28 February 2020 Y concluded several contracts

on behalf of the soon to be incorporated company, including a contract of employment with Z, a chef. X (Pty) Ltd was eventually incorporated on 19 May 2020. On 12 June 2020, Z received a notification from X (Pty) Ltd that the company is rejecting the contract of employment.

Evaluate the legal position and select the best advice for Z regarding the contract and the notification she received.

- a. **The rejection is valid, but Z can hold Y personally liable on the contract.**
- b. The rejection is invalid because an employment contract between Z and X (Pty) Ltd came into existence on 28 February 2020.
- c. The rejection is invalid because an employment contract between Z and X (Pty) Ltd came into existence on 19 May 2020.
- d. The rejection is valid, but Z can hold X (Pty) Ltd liable for three months' salary.
- e. The rejection is invalid because X (Pty) Ltd is deemed to have ratified the contract of employment on 28 May 2020.

GROUP 8 [4 marks each – 1 question will be selected]

(4)

LEVEL 5

23. The shareholders of M Ltd have approved a scheme of arrangement providing for the exchange of their shares for shares in M Ltd's subsidiary N Ltd. The approval resolution was adopted with the support of 75% of the votes. [The memorandum of incorporation of M Ltd has not altered the default percentage for passing of a special resolution.] L, who voted against the scheme, wants to have the resolution set aside. L feels that some of the shareholders who supported the scheme had a conflict of interest as they already held some shares in N Ltd and should not have been allowed to vote. L wants to remain a shareholder of M Ltd.

Evaluate which of the possible solutions below will best suit L's purpose.

- a. **A demand that M Ltd either apply to the court for approval of the resolution or abandon the transaction.**
 - b. An application to the Takeover Regulation Panel to interdict the implementation of the scheme.
 - c. An application to court to have the resolution set aside on the basis that the vote was materially tainted by a conflict of interest.
 - d. An application to court to have the resolution set aside on the ground of manifest unfairness.
 - e. An application to court to determine the fair value of L's shares.
24. X Ltd has issued 20 000 class A shares and 5 000 class B shares. A scheme of arrangement between X Ltd and its shareholders was approved by special resolution on 19 June 2020 with the support of 77% of the voting rights. [The memorandum of incorporation of X Ltd has not altered the default percentage for passing of a special resolution.] The scheme entails that X Ltd will repurchase 20% of its shares in each class. The class A shareholders will receive R250 per share, which is 10% above the market value of the shares on the date the scheme was announced. Class B shareholders, on the other hand, will receive R1 000 per share, which is 15% below the market value of the shares on the date the scheme was announced. M, who holds 2 000 of the class B shares, is one of the shareholders who voted against the scheme. He is most unhappy with the provisions of the scheme pertaining to class B shares.

Evaluate which of the following is the best option available to M:

- a. **A demand that X Ltd either apply to the court for approval of the resolution or abandon the transaction.**
 - b. An application to court to have the resolution set aside on the ground of a material procedural irregularity.
 - c. An application to court to have the resolution set aside on the ground of manifest unfairness to the class B shares.
 - d. An application to court to determine the fair value of the class B shares.
 - e. An application to the Takeover Regulation Panel to interdict the implementation of the scheme.
25. F Ltd has agreed to sell 60% of its assets to G (Pty) Ltd. The transaction was approved by 80% of the shareholders, but shareholder H objected to the transaction and voted against it. He alleges that the summary of the terms of the sale agreement that was sent to shareholders was vague and misleading. H wants to stop the transaction from being implemented.

Consider which of the legal steps below will best achieve H's purpose.

- a. **A demand that F Ltd either apply to the court for approval of the resolution or abandon the transaction.**
- b. An application to court to have the resolution set aside on the basis that the vote was materially tainted by inadequate disclosure.
- c. An application to court to have the resolution set aside on the ground of manifest unfairness.
- d. An application to court to determine the fair value of his shares.
- e. An application to the Takeover Regulation Panel to interdict the implementation of the transaction.

GROUP 9 [5 marks each – 1 question will be selected]

(5)

LEVEL 5

26. All the voting shares in Y Ltd are held by X Ltd. Y Ltd holds 70% of the voting shares in Z Ltd.

Select all the statements that correctly describe the relationship between two or more of these companies.

- a. **Y Ltd and Z Ltd are subsidiaries of X Ltd.**
- b. **Z Ltd is the subsidiary of Y Ltd.**
- c. **X Ltd, Y Ltd and Z Ltd are related companies.**
- d. **X Ltd, Y Ltd and Z Ltd form a group of companies.**
- e. X Ltd and Z Ltd are inter-related companies.

27. X Ltd holds 60% of the voting shares in Y Ltd. Y Ltd holds all the voting shares in Z Ltd.

Select all the statements that correctly describe the relationship between two or more of these companies.

- a. **X Ltd is the holding company of Y Ltd and of Z Ltd.**
- b. **Y Ltd is the holding company of Z Ltd.**
- c. **X Ltd, Y Ltd and Z Ltd are related companies.**
- d. **X Ltd, Y Ltd and Z Ltd form a group of companies.**
- e. X Ltd and Z Ltd are inter-related companies.

28. D (Pty) Ltd owns all the voting shares in E Ltd. In turn, E Ltd holds 55% of the voting shares in F Ltd.

Select all the statements that correctly describe the relationship between two or more of these companies.

- a. **D (Pty) Ltd is the holding company of E Ltd and of F Ltd.**
- b. **E Ltd is the holding company of F Ltd.**
- c. **D (Pty) Ltd, E Ltd and F Ltd are related companies.**
- d. **D (Pty) Ltd, E Ltd and F Ltd form a group of companies.**
- e. D (Pty) Ltd and F Ltd are inter-related companies.

29. Mr X holds 60% of the general voting rights in Y Ltd. Y Ltd holds 70% of the general voting rights in Z Ltd.

Select **all** the statements that correctly describe the relationship between the natural and juristic persons above.

- a. **Z Ltd is a subsidiary of Y Ltd.**
- b. **Y Ltd and Z Ltd constitute a group of companies.**
- c. **Mr X and Y Ltd are related persons.**
- d. Y Ltd and Z Ltd are subsidiaries of Mr X.
- e. Y Ltd and Z Ltd are inter-related companies.

GROUP 10 [4 marks each – 1 question will be selected]

(4)

LEVEL 5

30. The board of M Ltd proposed an amendment of the company's memorandum of incorporation changing the preference dividend of its class B preference shares from R6 per year to R5.50 per year. The amendment was approved by special resolution at a general meeting of M Ltd, with the support of 80% of the votes exercised. L holds 5% of the class B preference shares. When she received the notice of the meeting she sent a notice to the board stating her objection to this proposed change. L did not attend the meeting, because she was feeling ill that day. When she was informed of the result of the vote three days after the meeting, she immediately sent a demand to be paid the fair value of her shares in terms of s 164 of the Companies Act. M Ltd has informed her that the company will not be making her an offer for her shares,

L should be advised that she –

- a. **Did not comply with the procedural requirements for relying on s 164.**
- b. Should apply to court to determine the fair value of the shares and force M Ltd to make an offer.
- c. Should instruct an independent auditor to determine the fair value of the shares and then submit a final demand.
- d. Cannot rely on s 164 because M Ltd did not enter into a fundamental transaction.
- e. Should institute a derivative action against the board of directors.

31. R Ltd had proposed a reorganisation of its share capital by consolidating its class A and class B ordinary shares. The company retained an expert to prepare a report detailing the implications of the change for the shareholders of the shares involved, which report was sent to shareholders. At the general meeting to consider the transaction, it was approved with the support of 95% of the votes exercised. Q is

opposed to the consolidation of the class A and class B ordinary shares. He holds a number of class B ordinary shares and voted against the resolution because he feels that the expert was not independent and that important consequences of the transaction were omitted from the report.

Select the best advice for Q.

- a. Q can hold the expert personally liable for the misstatements in the report.
- b. Q cannot take action because the rule in *Foss v Harbottle* states that companies are governed by majority rule.
- c. **Q can have the resolution set aside on the ground of inadequate disclosure or procedural irregularity.**
- d. Q can have the resolution set aside by establishing commercial unfairness.
- e. Q can apply to the Takeover Regulation Panel to interdict the implementation of the transaction.

SECTION B

QUESTION 1

[15]

LEVEL 6

Below are selected clauses from the memorandum of incorporation (MOI) of Z (Pty) Ltd. Z (Pty) Ltd is seeking your advice in respect of the validity of each of these clauses. You are requested to do the following:

- Consider whether each of the clauses is compliant or non-compliant with the relevant provisions of the Companies Act, 2008; and
- Motivate in detail your advice in all instances (i.e. provide motivation where the clause is either compliant, non-compliant or partially compliant).

The system will randomly select five clauses. One mark is awarded for indicating whether the clause is compliant/non-compliant and two marks for motivating the answer. $5 \times 3 = 15$

Marks were still given even if student incorrectly identified whether it is compliant/non-compliant. Thus if motivation is correct marks were awarded.

- | |
|---|
| <p>(a) The company is authorised to issue 1 000 class A ordinary shares and 400 class B preference shares, entitled to a non-cumulative preference dividend of R2.00 per year.</p> <p>Compliant. According to Section 36 of the Companies Act, 2008, a company's MOI must set out a company's authorised shares by specifying the classes of shares, the number of shares in each class and the preferences, rights, limitations or other terms associated with that class.</p> <p>(b) All the authorised classes of shares have one vote each.</p> <p>Compliant. The CA provides for great flexibility in the matter of voting rights. There is no statutory provision requiring a shareholder to have voting rights or specifying that each share must carry at least one vote. Voting rights are left to the provisions of a company's MOI certain shareholders may well have no voting rights at all, or, for certain transactions, some shareholders may have greater votes than others.</p> |
|---|

- (c) The board will not have the power to increase the number of authorised shares unless it has been approved by ordinary resolution of the shareholders.
Compliant. The 2008 Act introduced the so-called 'default' provisions of the Act (provisions that will automatically apply to a company unless altered in a company's MOI). These empower the board of directors (and not the shareholders) to determine a company's authorised and issued shares. However, due to the fact that section 36 is an alterable provision, it basically permits directors to both authorise and issue shares without reference to the body of shareholders, unless the provision is altered. (section 36(3))
- (d) The board may only issue further shares if the issue has been approved by ordinary resolution of the board of directors.
Compliant. The 2008 Act provides that the board itself may resolve to issue shares of the company at any time, but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's MOI. In other words, the prior approval of shareholders is no longer required for the issue of shares (unless the company's MOI alters this power that is automatically given to directors in terms of the Act).
- (e) Shares may be transferred only with the prior consent of the board of directors.
Compliant. A share is movable property, transferable in any manner provided for in, or recognised by, the Act. A private company is required to restrict the transferability of its securities (section 8(2)(b)(ii)(bb)), and this can be done by providing for a right of pre-emption, or by making transfer subject to the consent of the board.
- (f) The shareholders will not have pre-emptive rights when further shares are being issued.
Compliant. The Act makes a distinction between public and private companies in this regard. In the case of a private company, section 39 makes the right of pre-emption a default position. In other words, shareholders in private companies automatically have this pre-emptive right unless it is changed or abolished by the company's MOI.
- (g) The company must always have at least 5 directors.
Compliant. Private companies must have at least one director. The MOI can specify a higher number than the minimum required in terms of the Act. The MOI cannot invalidate the act of a board where it acts without the required number of directors.
- (h) The company may remunerate directors for their services, subject to approval of the shareholders by ordinary resolution.
Non-compliant. According to section 66(9) of the Companies Act may directors only be remunerated for their services as directors if the shareholders approved it with a special resolution within the previous two years. The MOI cannot alter the position where a lower standard is applicable as is required in the Companies Act.
- (i) A director can only be removed by the person who appointed him, or her or by special resolution of the shareholders.
Compliant. The first part is correct in terms of section 66, a company's MOI may provide for the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of the MOI. In terms of the second part, section 71 will apply. This section provides as follows: despite the MOI or rules; and despite any agreement between the company

and a director; and despite any agreement between any shareholders and a director; may a director be removed by an ordinary resolution adopted at a shareholders' meeting. The MOI cannot entrench the position of any director and cannot override the will of ordinary shareholders as expressed in an ordinary resolution. Section 15(2)(a)(iii) provides that the MOI of a company may include any provision imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement than would otherwise apply to the company in terms of an unalterable provision of the Act.

- (j) The company relieves the directors from all liability whatsoever and indemnifies them in respect of all liability.
Non-compliant. Section 78 of the CA deals with indemnification and directors' insurance. A company cannot undertake not to hold a director liable for breach of fiduciary duties. Any provision in an agreement, the MOI or rules of a company, or a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of a duty. Except to the extent that a company's MOI provides otherwise, the company may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company.
- (k) The notice period for shareholder meetings will be 5 business days.
Non-compliant. In respect of all companies (except public or non-profit companies), the notice convening the meeting must be sent 10 business days before the date of the meeting. The provisions of the MOI may prescribe a longer minimum notice.
- (l) Any shareholder is entitled to appoint one of the other shareholders of the company as proxy to participate in, and speak and vote, at meetings.
Non-compliant. The CA changes the common law and allows a shareholder to appoint any individual as his or her proxy. A person does not have to be a shareholder in the company to be appointed as a proxy (section 58).
- (m) Proxy appointments must be in writing in the prescribed form and must be lodged with the company no later than 48 hours before the meeting.
Non-compliant. Section 58 of the CA provides that a shareholder of a company may 'at any time' appoint any individual as a proxy to participate in, and speak and vote at, a shareholders meeting on behalf of a shareholder. See Barry v Clearwater Estates where the court held that the provisions of section 58(1) are unalterable. The right of a shareholder to appoint a proxy 'at any time' is a provision that does not allow its alteration in any way by a company's MOI.
- (n) The quorum for any meeting is three or more shareholders who can together exercise at least 40 per cent of the voting rights that are entitled to be exercised on at least one matter to be decided at the meeting.
Compliant. Unless a company's MOI says otherwise, a shareholders' meeting may not begin until sufficient persons are present at the meeting to exercise, in aggregate, at least 25 per cent of all of the voting rights that are entitled to be exercised in respect of at least one matter to be decided at the meeting. A company's MOI may specify a lower or higher percentage in place of the Act's default quorum of 25 per cent.
- (o) Any special resolution will be adopted if it is supported by at least 70 per cent of the voting rights exercised on the resolution.

Compliant. A special resolution means a resolution adopted with the support of at least 75 per cent of the voting rights exercised on the resolution, or a 'different' (which could be higher or lower) percentage as specified in a company's MOI, either at a shareholders' meeting, or by holders of the company's securities acting other than at a meeting (section 60). There must at all times be a margin of at least 10 percentage points between the requirements for adoption of an ordinary resolution and a special resolution on any matter.

- (p) Any ordinary resolution will be adopted if it is supported by more than 45 per cent of the voting rights exercised on the resolution.

Non-compliant. An ordinary resolution means a resolution adopted with the support of more than 50 per cent of the voting rights exercised on the resolution (or a higher percentage as required by the company's MOI) either at a shareholders' meeting, or by holders of the company's securities acting other than at a meeting. There must at all times be a margin of at least 10 percentage points between the requirements for adoption of an ordinary resolution and a special resolution on any matter.

QUESTION 2

[15]

LEVEL 5

Apollo Brush Manufacturers (Pty) Ltd is a company whose primary business consists of a factory that produces various brushware products for the local market. The factory has a large number of machinery that comprise the assets of the company. As a result of an economic downturn the company decides to sell one of its machines. One of the shareholders has heard about the negotiations and is opposed to the idea. He says that the machine that the directors want to sell forms the backbone of the company's business and is worth more than all the other machinery put together. He says that the machine that the directors want to sell undoubtedly involves more than half the company's value.

A. Identify this transaction and explain the requirements that need to be satisfied. (7)

- This is a fundamental transaction (1) regulated by s 112 of the Companies Act (1)
- As the company is disposing of the greater part of its assets (1)
- In terms of s 115 of the Companies Act (1)
 - **Note: marks were awarded if students made reference to the requirements of section 115**
- This fundamental transaction needs to be approved by means of special resolution (1)
- Quorum of at least 25% of the voting rights must be present (1)
- The shareholders can also ratify such a transaction (1)
- A shareholders meeting needs to be convened by
 - Delivering a notice of such meeting (1)
 - In the prescribed manner (1)
 - Accompanied by a written summary of the precise terms of the transaction (1)
 - And information on how it should be approved (s 115) (1)
 - And information on remedies available to dissenting shareholders (appraisal remedy) (s 164) (1)

(Maximum of 7 marks to be awarded for question (A))

B. Explain how a shareholder who is opposed to the transaction will be protected should the transaction be approved. (8)

- *Dissenting shareholders has the right to insist on court approval in terms of s 115 (1)*
 - *If resolution opposed by 15% or more of votes exercised, any dissenter may require company to seek court approval, or (1)*
 - *Court may grant leave to any dissenter (voted against resolution) to apply for review by court (if under 15% opposed) (1)*

(Maximum 3 marks for discussion of court approval)

- *Should a dissenting shareholder want to make use of the appraisal remedy in terms of s 164 (1), the following should be followed:*
 - *By sending written notice to the company before resolution, that the shareholder objects and plans on using the appraisal remedy (1)*
 - *Voting against the resolution (1)*
 - *The company has 10 days to inform the shareholders that the special resolution has been approved (1)*
 - *20 business days after of this notice – shareholders must demand fair value from company (1)*
 - *5 days after effective date or period for demands – company must offer to pay fair value (1)*
 - *Should the company fail to do so, or if there is disagreement in re the value, the shareholders may bring a court application (1)*

(Maximum 5 marks for discussion of appraisal remedy)

TOTAL

[70]