



UNIVERSITY OF JOHANNESBURG

KINGSWAY CAMPUS

FACULTY OF LAW

JUNE EXAMINATIONS 2021

SUBJECT NAME: Company Law

DURATION: 4 (5) HOURS

SUBJECT CODE: CML9X1C

MARKS: 75

EXAMINERS: Prof KE van der Linde

External Prof A Loubser (Unisa)

THIS PAPER RUNS TO 4 PAGES.

Question 1

Write an essay on **ONE** of the topics given below. Indicate your choice as A B or C.

Topic A

“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value. This emergent consensus has already profoundly affected corporate governance practices throughout the world. It is only a matter of time before its influence is felt in the reform of corporate law as well.” (Hansmann and Kraakman “The end of history for Corporate Law” 2001 *Georgetown Law Journal* 439.)

Critically evaluate this view and consider to what extent this “emergent consensus” has been accepted in South Africa following its recent reform of corporate law and governance practices.

OR

Topic B

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse

consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.” (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (April 2008) 3.)

Critically consider the possible conceptual foundation for the recognition of human rights obligations of corporations.

OR

Topic C

“Corporate criminal liability has been stretched past the breaking point where it no longer serves the purposes of the criminal laws. It is time for further reform, this time giving renewed clarity and focus to the goals of criminal corporate liability and the prosecutor’s role in pursuing corporate fraud.” (Weissmann and Newman “Rethinking Criminal Corporate Liability” 2007 *Indiana Law Journal* 411 452)

Comment on this statement in the course of considering various solutions proposed by scholars for the imposition on companies of liability for wrongdoing.

[25]

Question 2

(a) Vuyiswa has a financial and contract-management background and is a non-executive director of Yellow (Pty) Ltd. She became aware that Yellow (Pty) Ltd had defaulted on certain payments due to Purple Ltd, the company handling the distribution of Yellow (Pty) Ltd’s products, and that Purple Ltd was threatening to cancel the agreement. At a board meeting in September 2020 the chief financial officer of Yellow (Pty) Ltd assured the board that this was a temporary cash flow problem caused by the Covid-19 lockdown regulations and that all arrears due to Purple Ltd would be paid within the next few days. Vuyiswa relied on this assurance. She then missed the next board meeting in November 2020 and did not take any steps to find out if the cash flow difficulties had been overcome and payment made to Purple Ltd. At a board meeting in January 2021 Vuyiswa learnt that Purple Ltd cancelled the distribution agreement on 19 October 2020 because of continued non-payment by Yellow (Pty) Ltd. Yellow (Pty) Ltd then had to find another distributor, at a substantially higher cost. It also suffered a loss of over R3 million as a result of the interruption in the distribution of its products. Yellow (Pty) Ltd wants to hold Vuyiswa liable for the damages it claims to have suffered as a result of the negligence of the directors in not taking action at an earlier stage to either safeguard the contract with Purple Ltd or to develop a contingency plan for distribution.

Advise Vuyiswa whether she may be liable for having breached any duty to Yellow (Pty) Ltd and whether she possibly has a defence. (15)

(b) Comment critically on the modification of the duty of care skill and diligence, referring to academic opinions. (10)

[25]

Question 3

Answer **ONE** of the following two questions 3.1 or 3.2.

3.1

(a) Moloi Ultra-protect (Pty) Ltd and Medi-fibres (Pty) Ltd incorporated a joint venture company (JV) named Moloi Medi-masks (Pty) Ltd in which Medi-fibres (Pty) Ltd holds 49% and Moloi Ultra-protect (Pty) Ltd 51% of the shares. The purpose of the JV is to supply personal protective equipment (PPE) to hospitals and the reason why the two shareholder companies formed the JV is to tap on the synergies between Moloi Ultra-protect (Pty) Ltd, which is well-known in the medical supply industry, and Medi-fibres (Pty) Ltd's ability to produce cutting-edge materials for disposable masks. Medi-fibres (Pty) Ltd has now discovered that Moloi Ultra-protect (Pty) Ltd is being investigated by the Competition Commission for price fixing over a period prior to the formation of the JV. The damage this could do to the reputation of Moloi Ultra-protect (Pty) Ltd and consequently also to Moloi Medi-masks (Pty) Ltd has led to Medi-fibres (Pty) Ltd regretting its association with Moloi Ultra-protect (Pty) Ltd. However, it has spent a considerable sum of money on advisors in setting up the structure and the JV has further incurred costs in tendering for several large contracts. Medi-fibres (Pty) Ltd would thus not like to exit from the JV. It argues that Moloi Ultra-protect's conduct is not only harming Moloi Medi-masks (Pty) Ltd but is also prejudicial to it as a shareholder.

Advise Medi-fibres (Pty) Ltd regarding the remedies it could pursue under section 163 and section 165 of the Companies Act, the purpose of these remedies, the requirements it would have to establish and the specific orders the court should be requested to make to improve the situation. Refer to applicable case law and relevant academic commentary. (15)

(b) Critically assess the South African approach to shareholder protection in fundamental transactions. (10)

OR

3.2

(a) Brown (Pty) Ltd (RF) imports coffee from Brazil. Its memorandum of incorporation contains several curious provisions believed by the incorporators to further the values of the company.

- Clause 3 of the memorandum of incorporation prohibits the company from purchasing tea. It is expressly provided that this provision may not be amended and the notice of incorporation has drawn attention to this provision.
- In the interest of transparency, clause 16 of the memorandum of incorporation provides that the company must email a copy of the agenda for each board meeting to every shareholder prior to the board meeting, otherwise any resolution adopted by the directors at that meeting will be void.
- Clause 23 of the memorandum of incorporation provides that Thomas Brown, one of the directors, will never have the authority to negotiate or conclude any contract on behalf of Brown (Pty) Ltd (RF). It is expressly provided that this provision may not be amended and the notice of incorporation has drawn attention to this provision.

Consider, providing a motivation in each instance, whether each of the following contracts is or could in certain circumstances be binding on and enforceable against Brown (Pty) Ltd (RF).

- A contract with Grey Ltd for the sale and supply of tea to Brown (Pty) Ltd (RF) in three consignments. This contract was concluded on behalf of Brown (Pty) Ltd (RF) by its managing director Felicity Green. Brown (Pty) Ltd RF has paid for, and has received the first consignment of tea. One of the significant shareholders has found out about this contract and intends preventing Brown (Pty) Ltd from continuing with it.
- A contract for the supply of stationery, based on a board resolution at a meeting on 15 April 2021. The agenda for this board meeting was not emailed to shareholders prior to the meeting.
- A contract for the supply of coffee by the company to Black CC. This contract was concluded on behalf of Brown (Pty) Ltd (RF) by its director Thomas Brown. (20)

(b) Evaluate the South African regulation of company representation by a single director and indicate whether, and if so, how, you would reform it, if you could.

(5)

[25]

TOTAL[75]