



UNIVERSITY OF JOHANNESBURG
KINGSWAY CAMPUS

FACULTY OF LAW

JUNE EXAMINATIONS 2020

SUBJECT NAME: Company Law

DURATION: 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

(a)

Grey (Pty) Ltd RF produces tea. Clause 8 of its memorandum of incorporation provides as follows: "Any agreement in terms of which the company binds itself as surety for the obligation of another must be approved in advance by an ordinary resolution of the shareholders. This provision may be amended only with unanimous shareholder approval." The notice of incorporation has drawn attention to the existence of clause 8.

Your client has discovered that the managing director has concluded three suretyships on behalf of Grey (Pty) Ltd RF over the past six months:

- (i) Grey (Pty) Ltd RF assumed liability towards Ready Bank Ltd as surety for a debt of Tom, a supplier to the company. No meeting was called, and no shareholder approval given for this transaction.
- (ii) Grey (Pty) Ltd RF assumed liability towards Willing Bank Ltd as surety for a debt of Rick, an employee. A shareholder meeting was called and the minutes state that the transaction was approved by ordinary resolution. However, it has now transpired that some of the proxies allowed to vote at the meeting had not been properly appointed in accordance with the Companies Act.
- (iii) Grey (Pty) Ltd RF assumed liability towards Silver (Pty) Ltd, a subsidiary of Grey (Pty) Ltd RF, as surety for a debt of Harry, a supplier to Silver (Pty) Ltd. Silver (Pty) Ltd holds 2 per cent of the shares in Grey (Pty) Ltd RF. A shareholder meeting was called and the minutes state that the transaction was

approved by ordinary resolution. However, it has now transpired that some of the proxies allowed to vote at the meeting had not been properly appointed in accordance with the Companies Act.

Evaluate whether each of the suretyships are binding on Grey (Pty) Ltd (RF). Note that the provisions of sections 44 and 45 of the Companies Act on financial assistance are not relevant to this question.

(15)

(b)

Comment briefly but critically on the judicial application of principles of company representation in recent case law of the Supreme Court of Appeal and Constitutional Court.

(10)

[25]

QUESTION 2

(a)

A Blue, the managing director of Purple (Pty) Ltd RF has suggested that the company should reduce the number of shareholders by eliminating shareholders who hold less than 5% of the ordinary shares. These shareholders are B Mauve, C Red, D Yellow, and E Green, who each holds 4% of the shares; F Green, who holds 3% of the shares, and H Green, who holds 1% of the shares. This proposal by A Blue is supported by three of the remaining four directors, but S Orange, a non-executive director of Purple (Pty) Ltd RF has voted against it. S Orange does not hold any shares in Purple (Pty) Ltd RF, but she was appointed as a director by E, F, and H Green in terms of the following provision in the memorandum of incorporation:

“All shareholders who are direct descendants of the founder of this company, Dr Z Green, will have the right to jointly appoint one director to the board. This provision may not be amended or removed from the company’s constitution unless it is approved by a formal resolution of all the ordinary shareholders of the company.”

S Orange knows that this proposal would simultaneously eliminate the three remaining direct descendants of Dr Z Green. She knows that A Blue has long had an issue with this appointment right in the memorandum, especially since the Green shareholders hold only a small portion of the shares.

While the descendants of Dr Z Green are intent on keeping their shares, most of the other small shareholders do not mind selling their shares at a good price.

- (i) Explain what procedure in the Companies Act of 2008 could be used by the board to compel the unwilling shareholders to sell or surrender their shares to the company and whether it could succeed.
- (ii) Advise the unwilling shareholders what protection exists in the Act to resist the use of this procedure by the board.
- (iii) Further advise the Green shareholders, as well as S Orange, which, if any, of the remedies provided by the Act to protect their rights can be used to prevent the plans of the board from being carried out.
- (iv) Evaluate whether A Blue and the other directors who support the proposal might be violating the standard of conduct expected of a director.

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QUESTION 3

Write an essay on **one** of the topics listed below under A to D.

TOPIC A

"In short, section 332(1) allows for a corporate body to be held vicariously liable for crimes committed by directors or servants, acting within the scope of their employment or authority, or while furthering the interests of the corporate body. It has been argued that "in South Africa, the theory behind corporate responsibility and the translation of this theory into a realistic form of corporate responsibility is in desperate need of review."

(Borg-Jorgensen & Van der Linde "Corporate Criminal Liability in South Africa – time for a change?" 2011 *TSAR* 452 (part 1).)

Critically comment on the current South African approach to corporate criminal liability and possible approaches to reform or review it.

TOPIC B

"The salaries of mining CEOs have been increasing at an exceedingly high rate, while dividends per share over the same period have decreased significantly (Crowley 2013). The perception of the impact of executive compensation on mining industry performance is further reinforced by recent media publications which blame labour unrest on the widening income inequality gap between mining executives and ordinary workers (Secombe 2013; Van Vuuren 2013)."

(Bussin, M., 2018, 'Chief executive officer compensation sensitivity in the South African mining industry', *Acta Commercii* 18(1), a573)

Evaluate the current regulation of director remuneration in South Africa and comment on possible approaches to reform or review it.

TOPIC C

"Despite its possible shortcomings, the requirement that companies should have a social and ethics committee is a welcome step in the right direction."

(Kloppers “Driving corporate social responsibility through the Companies Act: An overview of the role of the social and ethics committee” 2013 *PER/PELJ* 414.)

Reflect critically on the role of the social and ethics committee and its possible shortcomings, suggesting improvements.

TOPIC D

“A number of questions immediately present themselves. First, do corporations have responsibilities for the realization of human rights? If so, on what basis do corporations have such responsibilities? Secondly, what is the content of the duties that corporations have for the realization of fundamental rights? And, finally, what legal mechanisms should be adopted to enforce the responsibilities of corporations for the protection of fundamental rights?”

(Bilchitz “Corporate Law and the Constitution: towards binding human rights responsibilities for corporations” 2008 *SALJ* 754.)

Critically consider the possible conceptual foundation for the recognition of human rights obligations of corporations and their directors and explain how the conflicting interests could be balanced in corporate decision-making.

[25]
TOTAL [100]