UNIVERSITY OF JOHANNESBURG

KINGSWAY CAMPUS

FACULTY OF LAW

FINAL EXAMINATION: NOVEMBER 2021

<u>SUBJECT NAME</u>: COMMERCIAL LAW 1B **<u>DURATION</u>: 120 minutes**

<u>SUBJECT CODE</u>: KMR1B21
COL41B1 **<u>MARKS</u>: 70**

<u>EXAMINERS</u>: **Mr Sershiv Reddy**
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<u>MODERATOR:</u> **Prof Juanitta Calitz**

THIS PAPER RUNS TO **5 (FIVE)** PAGES

GENERAL INSTRUCTIONS TO STUDENTS

1. **Answer all the questions in your script.**
2. **Write clearly and legibly.**
3. **Number your answers carefully.**
4. **Leave a line open between each answer (for example, between questions 1.1 and 1.2).**
5. **Ensure the correct use of grammar and spelling.**

SECTION A

QUESTION 1

1.1 Explain when a member of a Close Corporation may be held personally liable for the debts of the Close Corporation. (2)

A member can be held personally liable where there is gross abuse (1) of the separate legal personality of the CC.(1)

1.2 Distinguish between a testamentary trust and an *inter vivos* trust. (2)

Testamentary= It is based on a will and is formed after the founder's death (1), while an *inter vivos* trust is based on an agreement and is formed during the founder's lifetime (1).

1.3 Is it possible to establish a close corporation today? Provide reasons for your answer. (3)

No (1). From 1 May 2011 (1), no new close corporations can be established due to the companies act 21 of 2008 coming into effect

1.4 What are the consequences of a trustee who acts without authority? (1)

There are no legal consequences (actions are void) (1)

SUB-TOTAL	**[8]**

SECTION B

QUESTION 1

Vee is a newly appointed director in Fundi Ltd, a company dealing with educational supplies. She has a BCOM degree and has only been a director for one year and does not have much knowledge regarding the educational field but is keen to prove herself to the company. Vee is required to organise stock for the company for the upcoming month relating to stationery. Vee does her research and finds what she thinks is a suitable stationery stock for the company for the month of November. The company later finds out that the stock is not suitable for educational purposes as it is disposable. The other directors and shareholders are furious with Vee in performing her functions.

Advise the company on the following:

1.1 Explain what duty of care Vee is supposed to exercise as a director of Fundi Ltd. (3)

exercise care, skill and diligence ((3)

1.2 Argue whether Vee has breached her duty of care. (7)

One needs to assess whether Vee exercised care, skill and diligence that is reasonably expected of a person carrying out the same functions as those carried out by Vee AND having the general knowledge, skill and experience of Vee. It therefore involves analysing Vee's own spefici knowledge, skill and experience (subjective test), as well as a director in Vee's position (objective test). Subjectively, Vee is inexperienced and has very little knowledge regarding educational supplies and therefore does not possess sufficient skills. Objectively, a director in Vee's position may not have made the same mistake as a reasonable person would have guarded against such a mistake. She may not be held liable as subjectively she did not possess the required skills, knowledge and care of a director.

1.3 Assume for this question only, Vee was a manager of Fundi Ltd and not a director and her actions caused a loss to some of the employees. Will Vee be held liable for such a loss? Provide reasons for your answer. (3)

Yes (1). In terms of the Companies Act (s 218), (1) Any person who contravenes the companies act is liable to any other person for loss suffered by that person as a result of the contravention (1).

[Subtotal 13 marks]

QUESTION 2

Joe is a director in Beez Ltd. He has been a director in Beez Ltd for 8 years and knows the company quite well. Joe has been tasked with finding a new tender for the company. Beez Ltd is willing to pay R 5 million for the tender. Joe decides to award the tender to his wife, Molly as they would then receive the R 5 million from the company. Molly receives the tender but does not perform as agreed in the contract and Beez Ltd suffers a loss.

The shareholders come to you for advice:

1. Advise the shareholders as to whether Joe has breached his fiduciary duty. (8)
2. Explain whether Joe can be declared a delinquent. (4)
3. What are the consequences of being declared a delinquent? (3)

Subtotal **[15]**

QUESTION 3

Phil and Claire are directors in RealEstate Ltd. The company has been doing well, but the directors wish to obtain more capital for the expansion of the company. Phil and Claire decide that they offer 200 shares to the public in order to gain some funds for RealEstate Ltd. They are required to draw up a prospectus relating to the offer of securities. They ask Mitchell, their marketing manager to draw up the prospectus and then promote it to the public. They come to you for advice.

Answer the following questions:

3.1 Distinguish between a primary offering and secondary offering of securities and explain which one relates to the above scenario. (3)

Primary offerings: is an offer by a company to the public of securities to be issued by that company to raise funds for that company.(1)

Secondary offering: is an offer for sale to the public of any securities of a company made by a person other than that company. The secondary offeror sells securities for his or her own account, not to raise funds for the company.(1)

The scenario relates to a primary offering. (1)

3.2 Explain to the directors what information must be included in their prospectus. (4)

Assets and liabilities, profits and losses, cash flow and general financial position as well as the securities being offered.

3.3 Should the prospectus contain an untrue statement, who may be held liable for that statement? (2)

Promoters, directors, and anybody who authorises or made the offer to the public (any 2).

[Subtotal 9 marks]

QUESTION 4

Verusha and Kubash work at different companies. They are both pharmacists in Johannesburg. They come across an opportunity to provide healthcare relief services relating to covid-19 to a community in Soweto for a period of one (1) year. Verusha has experience in dispensing medication, while Kubash has experience in administering vaccinations. They would like to work together only on this project and go their separate ways once the project is completed. Verusha and Kubash would like to establish a formal working relationship, but are not sure how to go about it.

Advise Verusha and Kubash on the following:

4.1 What is the most appropriate partnership for them to use in this instance? Provide a definition of this type of partnership (3)

They must form a particular (1) partnership. It is a more temporary and focused arrangement (1), in terms of which partners contribute their resources for a particular defined purpose only and share only in profits from that particular project together (1)

4.2 Further advise Verusha and Kubash of the key essentials that their partnership must have in order to be legally recognised as a partnership. (4)

- Each party makes an appreciable contribution (1) to the partnership – something of commercial value (money, labour or skills/expertise)
- The business is carried on for the joint benefit of the partners – should not claim individual benefits (everyone shares profits & losses) (1).
- There should be a profit objective (1)
- The contract between the parties should be a legitimate contract made(1)

4.3. In your opinion, explain whether it would be better to establish a partnership or personal liability company. (5)

Students should set out the advantages and disadvantages of each business entity AND arrive at their own conclusion for 1 mark.

A personal liability company under the Companies Act has the consequences the directors and past directors are jointly and severally liable, together with the company, for any contractual debts and liabilities of the company contracted during their respective periods of office. Whereas in a partnership, the partners are jointly and severally liable for all debts. A personal liability company is usually formed as an alternative to a partnership to reap some benefits of incorporation (such as perpetual succession). A change in membership destroys the partnership.

[Subtotal 12 marks]

QUESTION 5

Yellow Bank Ltd and Blue Bank Ltd are seeking to merge their two companies into a new company called Green Bank Ltd. Yash is a shareholder of Blue Bank Ltd, is unhappy with the proposed merger of the two companies because Yellow Bank Ltd has been known to charge high banking fees and interest rates to its clients. Yash does not approve of the merger and approaches you for advice.

Answer the following:

5.1 Explain what a merger in terms of the facts above is and fully explain the merger process between Yellow Bank Ltd and Blue Bank Ltd. (10)

A merger means that the assets and liabilities of Yellow Bank Ltd merged with those of Blue Bank Ltd, thus effectively merging corporate identities (2). In terms of the facts, the merger occurs between two companies Yellow Bank Ltd and Blue Bank Ltd, and results in the formation of new company, Green Bank Ltd (1).

The three key stages of the amalgamation or merger procedure are:

1. the merger agreement – set out terms and means of effecting the merger. Discuss the MOI, proposed directors, conversion of shares, assets and liabilities etc;

2. the shareholder approval process – BOD submits proposed transaction to SH. Special Resolution required.
3. the implementation of the merger – notify every creditor before the merger. Creditor may apply to court to review the transaction. A notice of merger must be filed to the Commission – register new company and deregister old one. (7)

5.2 Assuming that 20% of the voting rights opposed the resolution, explain in detail whether Yash can set aside the resolution voted in favour of the merger and the implications this may have on the merger. (5)

Yash is a dissenting shareholder (1) and can therefore approach court (1) set aside a shareholders resolution in favour the merger as it is a fundamental transaction (1). If at least 15% of the voting rights (1) that were exercised on that resolution were opposed to the resolution, any person who voted against the resolution may require the company to seek court approval for the transaction, in which event the resolution may not be implemented until such approval is obtained (1)

5.3 Briefly set out the circumstances in which a court may set aside a resolution. (4)

A court may set aside a resolution if the resolution is manifestly unfair to any class of shareholder (1) OR the vote was tainted by a conflict of interest (1) or inadequate disclosure of information pertaining to the fundamental transaction (1) or a failure to comply with the Companies Act or MOI (1)

5.4 Which remedy in terms of the Companies Act 71 of 2008 is available to Yash in order to exit the company? (1)

Appraisal remedy.

5.5. Briefly define the remedy identified in 5.4. above. (3)

It effectively grants dissatisfied shareholders (1) the right to tender or present their shares to the company for fair value (1) in the event of certain transactions being undertaken by the company (1).

A further 1 marks format
A further 1 marks for spelling and grammar.

[Subtotal 23 marks]

GRAND TOTAL **[80]**
