



**UNIVERSITY OF JOHANNESBURG
KINGSWAY CAMPUS**

FACULTY OF LAW

SUPPLEMENTARY EXAMINATION: 2018

SUBJECT NAME: COMMERCIAL LAW 1B DURATION: 120 minutes

**SUBJECT CODE: KMR1B11 MARKS: 70
COL41B1**

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THIS PAPER RUNS TO 4 (FOUR) 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.**

QUESTION 1

- 1.1 Name two ways in which a director may be removed and briefly explain each process. (4)

Firstly, removal by shareholders which requires an ordinary resolution and the director must get notice and an opportunity to make a presentation to the shareholders before they vote.

Secondly, removal by directors, the directors need a ground on which to remove a director e.g. incapacitation, neglects duties, becomes disqualified or ineligible. (4)

- 1.2 Name any three (3) persons who are ineligible to be appointed as a director. (3)

Ineligible:

- **Juristic person**
- **An unemancipated minor or a person under a similar legal disability**
- **A person who does not satisfy any requirement in a company's MOI.(3)**

- 1.3 Name any three (3) persons who are disqualified from being a director. (3)

Disqualified: (any three)

- **A person who has been prohibited by a court of law**
- **A person who has been declared a delinquent**
- **An unrehabilitated insolvent**
- **A person who is prohibited in terms of any public regulation from being a director**
- **A person who has been removed from 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 or other offences. (3)**

1.4 Name any three (3) persons who may bring an application to declare a director to be delinquent or to be placed under probation. (3)

(any three)

- **A company**
- **A shareholder**
- **A director**
- **A company secretary or prescribed officer**
- **A registered trade union that represents employees of the company**
- **Any other representative of the employees of the company**
- **The Commission**
- **Take Over Regulation Panel. (3)**

1.5 Explain the business judgment test in terms of section 76 (4) of the Companies Act 71 of 2008. (4)

S 76(4)-It is a rule that prevents a court from interfering, with the reasonable business decisions of directors of the company, in other words the decisions that directors make in the ordinary course of business, and of which at that time believed it to be in the best interests of the company. When the director made the decision it must be an informed one, he must have had no financial interest and there must have been a rational basis for believing that the decision was in the best interests of the company.

- **If a director can prove these three requirements, in terms of the business judgement rule he/she cannot be held liable for breaching a fiduciary duty.(4)**

1.6 Differentiate between a *de facto* director and an *ex officio* director. (2)

De facto – a person who acts a director but who hasn't officialy been appointed as one yet. Ex officio – this person is a director due to the fact that they hold another office/title within the company (2)

1.7 Explain the differences between a manager and a director. (4)

A manager is an employee of a company, whereas a director does not have to be. Directors are responsible for the strategic vision and decision making of the company, whereas managers are responsible for the implementation of the strategy and those decisions. Directors are accountable to shareholders, whereas managers are accountable to the board of directors. (4)

- 1.8 Explain the difference between an executive and a non-executive director. (2)

An executive director is a director who is responsible for the day to day running of the company and they are employees of the company and receive a salary. A non-executive director is not involved in the day to day running of a company and are not employees of the company. (2)

- 1.9 Discuss the main elements of the fiduciary duty of a director as contained in the Companies Act 71 of 2008. (5)

Directors should not place themselves in a conflict of interest situation(1) and should disclose any matter that may pose a potential conflict of interest between the directors personal interests and that of the company. (1)

A director must act in good faith and for a proper purpose. (1)

A director must act in the best interests of the company. (1)

A director must not use the information from a company that he obtained as a result of his position as a director for his own benefit and purpose or to knowingly cause harm to the company or its subsidiary and should communicate as early as possible to the board any information that comes to the attention of the director unless it is immaterial or generally available to the public. (1)

TOTAL

[30]

QUESTION 2

Arya and Adya are two directors of Chauhan Ltd. One of their competition companies, Singh Moves (Pty) Ltd, has approached Arya and Adya about a possible merger. They think that instead of being in competition with one another, it would be best to merge and have one company working together.

2.1 A merger is known as a..... (1)

Fundamental transaction

2.2 Indicate whether the proposed transaction is an affected transaction. (1)

Yes, it is an affected transaction as a regulated company is involved in the merger

2.3 Name the type of resolution that is required for the approval of such a transaction. (1)

A special resolution is required

2.4 Name the three key stages of a merger. (3)

- The merger agreement (1)

- The shareholder approval process (special resolution) (1)

- The implementation of the merger (1)

2.5 One of the shareholders of Chauhan Ltd, Arnav, is not keen on a merger and would prefer not being a part of it and she is willing to give up her shareholding as a result. Name the remedy available to Arnav, as well as the steps that need to be taken for such remedy. (8)

The appraisal remedy

Steps:

- Shareholder must send written notice to the company before the shareholder meeting takes place**
- Shareholder must vote against the resolution**
- If resolution is passed, company must inform the shareholder**
- shareholder then has 20 days to demand company buys back shares**
- Company must then make an offer to buy back shareholders shares**

- **If shareholder is not happy with the offer made by company**
- **or if company does not make an offer**
- **shareholder may approach the court to make an order**
- **Court then makes an order**
- **The order may be set aside or the decision may be placed under review.**

Any 8 points – 1 mark each

TOTAL

[14]

QUESTION 3

Internet-for-All Ltd is a newly incorporated company. Madison, one of the directors of the company, wants the company to offer shares to the public in order to obtain capital.

- 3.1 Name the document which the company should draw up in order to make an offer of shares to the public and provide a brief definition. (2)

A prospectus (1) – it is an invitation to the public, inviting the public to take up shares in a company (1)

- 3.2 Identify the type of offering referred to above and provide a reason for your answer. (2)

An initial public offering (1), as the company is making an offer for the first time (1). Also primary offering would be correct.

- 3.3 Kayla saw the advert advertised by Internet-for-All Ltd and decided to subscribe for shares in the company based on the information she was provided with. It later appeared that there was false information contained in the document and now, because of this untrue statement, Kayla has suffered a loss. Who can Kayla hold liable for the loss? (2)

Directors (1), promoters (1) or any person who allowed the prospectus to be published (1) – any 2 points – 1 mark each

TOTAL

[6]

QUESTION 4

Raina is an entrepreneur who is very interested in starting her own business. She is not familiar with the various enterprises and was wondering if the only option available to her would be to register a company. Raina comes to you to seek advice on the options that are available to her in relation to the various types of business enterprises that she could start. She has also heard of partnerships, close corporations and the business trust but is not sure of exactly what they are.

4.1 Explain to Raina **in an email** the various types of business enterprises that she may wish to consider. Your email should state this by identifying the type of enterprise as well as the respective characteristics of each. (12)

4.2. Raina has heard of a close corporation and thinks that such a business may be a viable option for her future business. Advise her whether it would be possible to incorporate a close corporation or if there is any other method to acquire a close corporation presently. (4)

A further 2 marks will be allocated for format and numbering.

A further 2 marks will be allocated for language and spelling. (4)

From:

(½)

To:

(½)

RE: Different types of business entitites [1] format mark

Dear Raina[1] format mark

I refer to the above matter and wish to advise you as follows:

There are various types of business entities that one may decide to choose depending on the individuals needs and circumstances. One doesn't have to necessarily register a company. Any one of the following can be used: (1)

A company; close corporation, business trust or a partnership. (4)

A company is a legal person which can acquire rights and duties separate from its members. (1)

A close corporation is/was usually suited for small businesses. They have their own legal personality and enjoy perpetual succession. (1) A CC can have between 1 and 10 members and there is no separation between ownership and control. Every member can participate in the business and make binding decisions on behalf of the corporation. (1)

The type of trust that would be applicable under these circumstances would be a business trust which is an ordinary trust in which the trustees have been given the power to carry on business and trade. (1) The trustees are given similar powers to that of directors (company) or members (CC) and the beneficiaries have similar rights to that of shareholders. (1)

A partnership is a contract between 2 or more persons in which each partner agrees to contribute to the partnership business, which is carried on for the joint benefit of the parties with the object of making a profit. (1)

A partnership is not a separate legal person. (1)

In terms of the Companies Act 71 of 2008 no new Close Corporations will be registered.(1) However, the close corporations that are in existence can continue to exist indefinitely or convert to a company in terms of the Act.(1)

However, if you still wish to continue with your new business as a close corporation then it is still possible to purchase a 'shelf close corporation'. (1)

This is a close corporation which is already registered in terms of the Close Corporations Act.(1)

Trust that you find the above to be of assistance.

Yours sincerely, [½] format mark

Format email signature[½]

Maximum 2 marks for format and numbering
Maximum 2 marks for language and spelling

TOTAL	[20]
GRAND TOTAL	[70]
