

General Subject Related Discussions : Study Unit 01 - Meetings and the provisions of the Companies Act 71 of 2008

Second semester 2018

Introduction

The management of the business and affairs of a company is conducted through meeting. It is therefore imperative that a company should ensure that its meetings comply with the provisions of the Companies Act 71 of 2008 to be valid. Carefully read through the two questions below and see if you are able to provide the correct legal advice by using the following steps:

1. Identify the specific legal problem that appears from the given facts while keeping in mind what is asked.
2. Identify the applicable principles and provisions of the Companies Act 71 of 2008.
3. Consider whether any case is relevant, and if so discuss the relevant principles.
4. Apply the provisions and legal principles to the given facts.
5. Conclusion: Clearly answer the specific question asked.

Now try to answer the following questions. Remember in this discussion form you may also raise any other topic related to study unit 1 you wish to discuss.

Question 01

Themba lives in Knysna. He is a shareholder of Electrotech Limited. He received notice of an annual general meeting of Electrotech Limited to be held in Pretoria. He cannot attend the meeting on that day, but feels strongly about certain of the proposed resolutions set out in the notice of the meeting, and wants to express his views on these matters to the board of directors. Themba also wishes to vote against certain of the resolutions which the company proposed to pass. Advise Themba of two methods under the Companies Act 71 of 2008 that he could use to exercise his right to vote and to express his views at the annual general meeting of Electrotech Limited.

Questions 02

Pele (Pty) Ltd calls a meeting of its shareholders to vote on the proposed merger of the company with another company. The notice of the meeting does not state a record date. Discuss the relevance of the record date in this instance, and the consequences of the failure to specify the record date in the notice of the meeting.

(2018-07-16 08:36:22)

Question 01

Two methods under the Companies Act 71 of 2008 that Themba could use to exercise his right to vote and to express his views at the annual general meeting of Electrotech Limited.

1. Themba could appoint a Proxy (a person authorized to act on behalf of Themba)

In terms of section 58(1) of the Companies Act 71 of 2008 any person, even a non-shareholder, may be appointed as a proxy. Unless the memorandum of the incorporation provides otherwise, there is no limit to the quantity of proxies a shareholder can appoint to represent her at an annual general meeting. With written consent a proxy can participate in, speak and vote at a shareholder's meeting on behalf of the shareholder. According to the Ingre v Maxwell case there must be at least two persons present to constitute a valid meeting. Where one person is in attendance and holds the proxies of all other persons who were entitled to attend the meeting the meeting is not valid.

2. Themba could unless prohibited by the MOI a company interms of section 63(2) of the Companies Act 71 of 2008 attend the meeting by means of electronic communication.

In terms of section 63(2) of the Companies Act 71 of 2008, a shareholders meeting may be conducted by electronic communication, or Themba or Themba's proxies may participate by electronic communication.

Questions 02

The relevance of the record date in the meeting Pele (Pty) Ltd called, and the consequences of the failure to specify the record date in the notice of the meeting.

According to Section 59(1) of Companies Act 71 of 2008 the board of a company may set a record date for the purpose of determining which shareholders are entitled to receive the notice, vote etc. in the case were Pele (Pty) Ltd.'s board of directors failure to specify the record date in the notice of the meeting the others of the law of business structures clearly states under paras 11.3 page 214 "that unless the memorandum of incorporation or rules provide otherwise ,the record date would be ,in the case of a meeting , the latest date by which the company is required to give notice to the shareholders of the meeting, or, in any other event, the date of the action or event".

(2018-10-02 17:13:34)

Mr WJC SWART

Dear Student

See below guidance on how to approach the posted question. It is not only the answer that is important to note but also see if you can understand the structure in which the proposed answer is presented. The structure should help you with most company law questions and ensure that you cover all the aspects of the legal problem you are confronted with.

Legal problem/question

It has to be determined whether a shareholder (Themba) can participate in a shareholder meeting without being physically present.

Identify the relevant provisions in the Companies Act 71 of 2008

- a. Section 58 deals with the appointment of a proxy.
- b. A person may be appointed to represent the shareholder (Themba) at the meeting. *It is important to note that the person who is appointed as the proxy does not have to be a shareholder of the company. See section 58(1).*
- c. The proxy may participate in, speak and vote at a shareholders meeting.
- d. The appointment must be contained in a written form dated and signed by Themba. See section 58(2)(a).
- e. The appointment of a proxy is valid for one year. See section 58(2)(b).

Conclusion: Themba can participate in the proposed meeting by appointing a proxy.

In your analysis of the given facts, you should have noted that you are dealing with a public (Ltd) company. This is important because this brings section 61(10) into play.

Meetings of public companies registered in South Africa must be accessible by electronic participation. See section 61(10).

This can take the form of telephone communication or by video conference. See the exact wording of section 63(2).

The meeting may be conducted by electronic communication only if all the persons participating in the meeting are able to communicate concurrently with each other without an intermediary and to participate reasonably effectively in the meeting.

Access to the electronic communication is at the expense of the shareholder unless the company determines otherwise.

From this question, you should have learned that a shareholder could participate in a shareholders meeting by appointing a proxy in terms of section 58. When dealing with

a public company an additional option is available namely the participation in a meeting via electronic communication. Remember that a proxy may also make use of electronic communication to participate in a shareholders meeting.

Question 02

Legal issue/question:

The record date determine certain rights of shareholders.

The names of the shareholders whose names appear on the register of shareholders has the following rights:-

The right to receive notice of a shareholders meeting

Has the right to participate and vote at a shareholders meeting

How is a record date determined:-

The board sets the record date. Note that this date may not be earlier than 10 business days prior to the meeting.

If the board fail to set a record date, the record date is the date of the last day on which notice should be given to a shareholder of a shareholders meeting. In respect of public companies, this will be 15 business days and in respect of private companies this will be 10 business days.

Read all the provisions of section 59 again.

If you feel the need to contact me directly you are more than welcome to do so at swartwjc@unisa.ac.za or 012 429 8494.

Kind regards

Christiaan

General Subject Related Discussions : Study unit 2 - Directors, Board committees and Company secretary

Prof DM FARISANI

Ringona Ltd is a listed public company. Jombi has recently been appointed as company secretary, but not as a director. During the first board meeting that she attends to keep minutes a decision is taken by the board not to send the annual financial statement to certain parties, even though they are entitled to it, as the company did not perform well in the previous year. The board agrees that its decision is in the best interest of the company, as doing otherwise may have a negative impact

on the company. Jombi intervenes and informs the board that what they intend to do is in contravention of the Companies Act 71 of 2008. The board members immediately reprimand her and remind her that she is not a board member and therefore does not have a say. They further adopt a resolution to have her removed as company secretary.

Upon hearing that you are studying Company Law at UNISA, Jombi approaches you for legal advice. She believes that she did nothing wrong and feels that she was wrongly removed. Advise her accordingly.

(2018-07-25 10:07:15)

Prof DM FARISANI

Dear students

Thank you to those of you who answered the question. You are on the right track.

Please note that in an exam setting you need to be guided by the mark allocation and as you have limited time it is best to exclude irrelevant information as that will result in loss of precious time. We only award marks for relevant information.

The case scenario deals with the company secretary. The following points should be included in an answer to the question that has been asked :

Every public company and state-owned company is obliged by the Companies Act 2008 to appoint a company secretary (s 84(4) (a) read with s 86(1).

Each company that appoints a company secretary has to maintain a record of its company secretaries (s 85).

The company secretary is usually the company's chief administrative officer.

The company secretary should be someone with knowledge of and experience in relevant legislation as company secretary (s 86(2)(a)).

The company secretary is accountable to the board of directors.

The duties of the company secretary include, among other things, providing the directors of the company with guidance on their respective duties, powers and responsibilities; making the directors of any law that is relevant to or that affects the company (s 88(2)) (You may include the other duties, depending on the mark allocation);

The board may adopt a resolution to remove the company secretary (You should explain the circumstances);

Application of the law to the scenario: State whether Jombi was acting in accordance with her duties when she tried to guide the board regarding its decision not to send the financial statement. Here you will need to explain what the Companies Act 2008 states regarding the provision of financial statements. You should then indicate whether under the circumstances in the scenario, the board could or could not make a resolution to dismiss Jombi and explain why.

General Subject Related Discussions: Study Unit 3: Duties of Directors

Dr M BEKINK

Question 1

It has been discovered that Amanda, the former managing director of Page (Pty) Ltd, allowed the company to carry on its business while it was insolvent. This resulted in additional liabilities for the company. Amanda is not concerned about personal liability as the company has indemnified him. She also feels that as she is no longer a director of the company she cannot possibly be held liable for the loss. Advise Amanda, is she indemnified? (10 marks)

Question 2

You are the legal advisor of Omega Ltd. The company has appointed two new directors Kate and Samson. They have heard that directors may be held liable for loss incurred by companies. This worries them. They are mainly concerned about the possibility of being held liable for failing to exercise the required degree of care, skill and diligence but believe that the business judgement rule may assist them. Advise Kate and Samson on what the business judgement rule entails. (10 marks)

Regards Dr Bekink (2018-07-30 15:52:19)

Section 78 of the Companies Act, 2008 deals with indemnification and directors insurance. Section 78 allows a company to take out indemnity insurance to

- protect the director against any liability or expenses for which the company is permitted to indemnify a director;
- protect itself against any expenses that the company is permitted to advance to a director or for which the company is allowed to indemnify the director.

Note that indemnification and directors liability as provided for in section 78 applies to current and former directors of companies.

A company may not indemnify a director in respect of liability arising out of certain circumstances (see sections 75, 76 and 77 of the Companies Act) such as a breach of his or fiduciary duties. A company may also not indemnify a director, where the

director acquiesced in the carrying on of the company's business in insolvent circumstances while knowing that it was being so conducted.

Application:

As section 78 of the Companies Act applies to current and former directors it will also apply to Amanda. Also, while a company may indemnify a director, it may not do so where the director is carrying on the company's business in insolvent circumstances while knowing that it is being so conducted. Amanda will therefore not be able to rely on the indemnity but will be personally liable for any loss damages or costs sustained by the company as a direct or indirect consequences of his conduct.

Question 2:

A director's duty of care and skill has its origin in the common law. In *Fisheries Development Corporation of SA Ltd v Jorgensen* [1980 (4) SA 156 (W)] the concepts of care and skill were examined. The court held as follows:

- i. The required degree of care and skill to a large degree depends on the nature of the company's business and the specific duties assigned to the director. A distinction must be drawn between executive and nonexecutive directors in the sense that a nonexecutive director is not expected to give continuous attention to the affairs of the company.
- ii. It is not expected of a director to have special expertise or experience. What is expected is that the director exercises the degree of skill and care one could reasonable expect from a person with his or her knowledge and experience. Directors are not liable for mere errors of judgment.
- iii. A director may rely on other officials and management unless there are reasons for questioning the judgment of such officials or management. A director must however still give due regard and exercise his or her own judgment in doing so.

Remedies against a breach of the duty of care and skill may be based on contract if a contract was concluded between the company and the director. Alternatively, a delictual claim for damages exists. In order to claim for delict, obviously all the requirements must be proven.

Section 76 of the Companies Act of 2008 has partially codified the duty of care and skill and provides that the director must exercise that degree of care, skill and diligence that may reasonable be expected of a person carrying out the same functions in relation to the company as those carried out by the director.

An objective test is applied to determine what a reasonable director would have done in the same situation. An objective test applied contains subjective elements in that the general knowledge, skill and experience of that particular director in question are taken into consideration. Therefore, the Act adopts a dual test.

In terms of the new Act, a statutory business judgment rule section 76(4) of the Companies Act 71 of 2008 is also accepted. This provision states that a director will be regarded as having acted in the best interest of the company and with the required degree of care, skill and diligence if the director

- had taken reasonably diligent steps to become informed about the matter;
- had no personal financial interest in the matter;
- made, or supported a decision in the belief that it was in the best interest of the company;
- had a rational basis for believing that the decision was in the best interest of the company

then his/her actions will be excused.

Discussion Forum: Learning unit 3

Question1:

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- had taken reasonably diligent steps to become informed about the matter;
- had no personal financial interest in the matter;
- made, or supported a decision in the belief that it was in the best interest of the company;
- had a rational basis for believing that the decision was in the best interest of the company

then his/her actions will be excused.

General Subject Related Discussions : Study Unit 4: Capacity and representation of a company

Ms R CASSIM This study unit deals with the capacity and representation of a company. (2018-08-06 12:12:39)

Question

The Memorandum of Incorporation of ABC (Pty) Ltd states that the company's business is restricted to poultry farming. In an effort to expand the company's business to game farming and breeding, on behalf of ABC (Pty) Ltd the board of directors of ABC (Pty) Ltd purchases a kudu for R25 million from Mark, a game breeder.

Discuss with reference to the Companies Act 71 of 2008 and the Memorandum of Incorporation of ABC (Pty) Ltd, whether the contract for the purchase of the kudu from Mark is valid.

Samuel, one of the shareholders of ABC (Pty) Ltd, is unhappy about the purchase of such an expensive kudu by the company. Assuming that the contract between ABC (Pty) Ltd and Mark for the purchase of the kudu is valid, discuss whether Samuel has any claim for damages in this regard in terms of the Companies Act 71 of 2008.

Dear Students

We encourage you to participate in the discussion forum questions, as doing so will assist you with your exam preparation. I have set out a guideline to the question on capacity and representation below.

Question 1

In terms of section 19(1)(b) of the Companies Act a company has the legal capacity and the powers of a natural person, except to the extent that a juristic person is incapable of exercising any such power, or the company's Memorandum of

Incorporation provides otherwise. Therefore, the capacity of a company is no longer limited by its main or ancillary objects or business. A transaction is not void merely because it is prohibited or restricted in terms of its Memorandum of Incorporation. The fact that the company is restricted to poultry farming is therefore irrelevant. Accordingly the contract for the purchase of the kudu from Mark is valid.

See further your Study Guide para 4.2 and your prescribed textbook at pages 134-138.

Question 2

Even though an ultra vires transaction will be binding on the company, the shareholders are provided with recourse to claim back their losses from the person who acted beyond the scope of the company's capacity.

Section 20(6) of the Companies Act provides that each shareholder has a claim for damages against any person who intentionally, fraudulently, or due to gross negligence, causes the company to do anything inconsistent with the Companies Act or a limitation, restriction or qualification on the powers of the company as stated in its Memorandum of Incorporation, unless that action has been ratified by special resolution in terms of section 20(2).

The purchase of the kudu is in contravention of the Memorandum of Incorporation of the company. It has not been ratified by special resolution of the shareholders. Therefore Samuel will have a potential claim for damages if he can successfully prove that the company intentionally or due to gross negligence purchased the kudu from Mark.

See further your Study Guide para 4.2 and your prescribed textbook at pages 140-141.

(2018-08-13 11:31:05)

General Subject Related Discussions : Learning Unit 5: Corporate Finance: shares, debentures and public offerings

SN MAKHUBU

Good afternoon Ladies and Gentlemen,

Please study learning unit 5 and attempt to answer the question below.

Please when you answer the question, ensure that you identify the problem, explain the applicable principle/theory and case law if any, apply the theory to the facts and conclude. PLEASE BE DETAILED.

Question

The board of directors of CISC (Pty) Ltd has resolved to award 3% shares instead of R200 000.00 payment of dividends to the six shareholders of the company. The board thinks that this will increase the capital of the company, as the company needs more cash to purchase new machinery for production. The board of directors approaches you for advice.

Advise the board of directors fully on whether such a transaction is permitted in terms of the Companies Act 71 of 2008, what should happen if one of the shareholders prefers to be paid cash instead of being awarded shares and provide the prerequisites, if any, of paying cash instead of awarding shares.

(10)

Thanks very much.

(2018-08-14 15:53:57)

Mr SN MAKHUBU

Memorandum for learning unit 5

I would advise the board that:

Theory/application

Section 47 (1) of the Companies Act 71 of 2008, provides that subject to the MOI,

The board of directors of the company may with a resolution approve the issue of shares pro rata to shareholders instead of paying cash.

Shares of one class may be used as capitalisation shares in respect of shares of another class.

Subject to compliance with section 46 of the Act, the board of directors when resolving to award capitalisation shares, may at the same time resolve to permit any shareholder who is entitled to the award to elect to instead of capitalisation share to receive cash payment determined by the board.

Section 47(2) of the Act provides that the board of directors cannot authorise payment of cash unless it considered the solvency and liquidity test and it is satisfied that the company has complied with solvency and liquidity.

Yes, the transaction is permitted subject to compliance with the aforementioned requirements. Secondly, subject to compliance with section 46 of the Act, the board may permit a shareholder who is entitled to the award to choose instead of capitalisation shares to be paid cash.

Prerequisites of paying cash instead of capitalisation shares.

In terms of section 46 (1) of the Act, a company can make a distribution unless:

The board by resolution has authorised the distribution.

It reasonably appears that the company will satisfy solvency and liquidity test immediately after completing the proposed transaction.

The board of the company by resolution has acknowledged that it has applied solvency and liquidity test as provided in section 4

and reasonably concluded that the company will satisfy solvency and liquidity test immediately after completing the proposed distribution.

The board must comply with the aforementioned requirements before paying cash to shareholders.

Maximum 10

See the prescribed textbook section 9.7 and section 47 and 46 of the Companies Act 71 of the Companies Act 71 of 2008.(2018-08-22 17:59:10)