

LEARNING UNIT 1: SHAREHOLDER AND COMPANY MEETINGS

Question 1

Thinta is appointed to his first job as a company secretary of the newly incorporated private company. On his first day at work, he is tasked to arrange a general meeting of the company to be held in the next 10 days after the delivery of the notice to all the shareholders. Thinta without reading the Companies Act 71 of 2008 ('the Act'), prepares a notice of the shareholders meeting. In the notice the meeting is scheduled only a week after the delivery of the notice to all shareholders of the company and a copy of one of the resolutions which should be considered in the meeting is not included. Tazi, a friend and a colleague, informs Thinta that the notice is invalid as it does not comply with all the requirements in terms of the Act and consequently the meeting cannot take place.

Suppose the notice complies with other requirements of a notice of the meeting in terms of the Act. With reference to relevant authority, advise Thinta on whether Tazi is correct. When you refer to relevant authority, please use your own words. A mere reproduction of what is written in the Act will not earn marks. [10]

DEAR LML4086 STUDENT

Thanks very much for your participation in the discussion forum and please continue to participate. My colleagues will continue to post questions and guidelines (feedback) dealing with other learning units on a weekly basis.

Please see the proposed answer below. Please note how I have structured it. When you answer problem - type questions, please try to structure your answers in the line with the proposed answer below.

Answer 1

Identification of the problem and applicable sections of the Act ('theory')

This question is about the delivery of notice of each shareholders meeting. It is specifically about the required number of days that the notice of meeting should be delivered before the date of the meeting in terms of section 62(1) of the Companies Act 71 of 2008 ('the Act') and about the defect as a result of omitting to include a copy of one of the resolutions which should be considered in the meeting as required in terms of section 62(3) (c) of the Act.

Discussion of the applicable sections of the Act (theory)

Section 62(1) of the Act provides that a company should deliver the notice of every shareholders meeting in compliance with all the requirements. It stipulates that in a public company and Non – Profit Company, the notice should be delivered at least 15 days before the meeting and in any other case at least 10 days before the meeting.

However, section 62(2) (A) of the Act provides an exception to section 62(1) of the Act. It states that a company may provide the notice of meeting with fewer days than as required in section 62(1) of the Act or the companies MOI. This is on condition that every person who is entitled to vote in any issue in the meeting is present at the meeting and supports the motion to ignore the required number of days of the notice of meeting.

Section 62(3) of the Act requires that the notice of shareholders meeting be accompanied by a copy of the resolution of which the company has received notice and the notice on the value of voting rights that are needed for the proposed resolution to be adopted. Failure to include a copy of the resolution means that the notice contains a material defect.

However, section 62(4) of the Act also provides a relief in circumstances where there is a material defect. It provides that a material defect in delivering the notice of meeting to shareholders may be ignored (subject to subsection (5) of the same section) only on condition that every person who is entitled to vote in the any issue in the meeting is available in the meeting and supports the motion to approve the acceptance of a defective notice.

Section 62(5) of the Act provides that if the material defect of giving notice is about one or more issues in the meeting, any such issue may be removed in the agenda of the meeting and the notice be acceptable with respect to other issues to be considered in the meeting. Furthermore, the meeting may continue to discuss the matter that has been removed in the agenda of the meeting provided the defective notice has been accepted in terms of section 62(4) of the Act.

NOTE THE MISTAKE IN THE ACT. IT REFERS TO SECTION 62(4) (d) AND THERE IS NO (d). IT SHOULD ONLY BE SECTION 62 (4).

Application of the applicable sections (theory)

Firstly, although the number of days of the notice of the meeting is fewer than the minimum number which is 10 days, section 62(2) (A) of the Act may save the notice from invalidity. The conditions provided in section 62(2) (A) of the Act should be complied with.

Secondly, although the copy of the resolution to be considered in the meeting is not included in the notice of meeting, section 62(4) of the Act subject to subsection (5) of the Act may save the notice from invalidity. The conditions provided in these sections should be complied with.

Conclusion

Therefore, in view of what is discussed above, Tazi's assertion that the meeting cannot take place is incorrect.

See section 62 of the Act, M0001 letter on page 2 and the prescribed textbook paragraph 5.5

LEARNING UNIT 2

Dear Students

Welcome to the second topic of discussion, based on learning unit 2. The question posted below deals with another organ of a company, which is a director. From the discussion in learning unit 1, it is clear that a company cannot operate on its own as it is a non-living person. It therefore requires living persons to give it direction. This learning unit will enlighten you on the relevant persons who are responsible for the daily running of the company (directors) and those that are supposed to oversee the actions taken by directors (board committees and company secretary).

Question:

Tom and Jerry are directors of Donald Duck Enterprise (Pty) Ltd. Donald Duck Enterprise (Pty) Ltd have received a tax rebate from the Receiver of Revenue services. As a director in charge of company finances, Jerry redirects the rebate to his personal account. Upon discovery, Tom considers taking legal action against Jerry for defrauding Donald Duck Enterprise. It is Tom's position that since this indiscretion has occurred more than once, Jerry should be prohibited from ever holding a directorial position. With reference to the relevant provision of the Companies Act, discuss which remedy resonates with Tom's assertions. In your answer, give an opinion on whether this remedy will achieve the desired outcome.

Dear Students

I would like to convey my gratitude to students who took time and effort to participate in this forum with me. It is highly appreciated.

To all other students registered for this module, you are encouraged to make full use of this forum as it gives you an idea regarding the type of questions that you are going to encounter during the examination session. It is our humble plea that you please participate.

Answer.*Background*

Section 162 provides that directors can be declared “delinquent” or “under probation” on various grounds and on application by certain categories of applicants. It is envisaged that this section aims to protect companies and corporate stakeholders against those who have proven themselves to be unable to manage the business of a company effectively. In most instances a person who has been declared “delinquent” or “under probation” (the exception being an order of delinquency granted in terms of s 162 (6) (a)) is afforded the option to apply for such an order to be suspended and/or set aside, if the person can demonstrate, for example, a satisfactory degree of rehabilitation, as well as the fact that there is a reasonable prospect that he/she would be able to serve successfully as a director of a company in the future (s 162 (12)).

Circumstances upon which a person may be declared a delinquent

A person must be declared delinquent by the Court under the circumstances prescribed in s 162 (5). These grounds are that the person consented to serve as a director, or acted as such while ineligible or disqualified in terms of s 69, unless exempted from disqualification in terms of s 69 (11) (s 162 (5) (a) (i). The exception in sub-s 5 (a) (ii) does not exist due to the deletion of s 69 (12) by s 46 (c) of Act No. 3 of 2011), or while under a Court order of probation, acted as a director in a manner that contravened that order (s 162 (5) (b)); or where a person, while being a director, grossly abused the position of director (s 162 (5) (c) (i)), took personal advantage of information or an opportunity, contrary to s 76 (2) (a) (s 162 (5) (c) (ii), or intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary contrary to s 76 (2) (a) (s 162 (5) (c) (iii)).

The implications of the delinquency order

A declaration of delinquency made on the basis of s 162 (5) (a) or (b) is unconditional and applies for the lifetime of the person declared delinquent (s 162 (6) (a)). A declaration of delinquency made on the basis of s 162 (5) (c)–(f) may be made subject to any conditions the Court sees fit and subsists for a period of seven years from the date of the order, or a longer period if so determined by the Court (s 162 (6) (b)). A person who has been declared delinquent in terms of s 162 (6) (b) may, at any time more than three years after the order was made, apply to Court to have the order of delinquency suspended and replaced by an order of probation (s 162 (11) (a)) and may, at any time more than two years after the order was suspended, apply to have the order set aside (s 162 (11) (b) (i)). The Court may only grant the order if the applicant has satisfied any conditions attached to the original order (s 162 (12) (a)) and having regard to the circumstances that led to the original order and subsequent conduct of the applicant, if it is satisfied that the applicant has demonstrated progress

towards rehabilitation and there is a reasonable prospect that he/she would be able to serve successfully as a director of a company in the future (s 162 (12) (b)).

Application of the provisions of the Act to the facts of the case

Tom wants Jerry removed from office indefinitely. His plea will not be possible as Jerry's misconduct does not fall under conduct regulated by section 162 (5) (a) and (b). Jerry's conduct falls under the categories mentioned in section 162(5) (c)-(f). This means that the order to be granted may be made subject to any conditions the court considers appropriate and subsists for seven years from the date of the order, or such longer period as determined by the court.

NB: *Please take note of the fact that I have discussed other issues pertaining to the delinquency order applications which were not relevant in answering this question, but are important in your understanding of this section. These are rehabilitation and reversal of the order by the delinquent upon passing of a certain time period.*

In responding to this question, the key issue is to identify what is it that the question wants you to do. In this instance, the question wants you to identify the cause of action available to Tom in order to ban Jerry from ever holding a position of a director. Once you have identified the cause of action, then give a little background on it and then discuss its provisions.

LEARNING UNIT 3 (Duties of Directors)

Dear Students

Welcome to the third topic of discussion, based on learning unit 3. In study unit 2 you were introduced to one of the organs of a company namely that of directors. Learning unit 3 will enlighten you on the duties of directors. The question posed deals with one of these duties.

Question

Mr Modise, an expert in paint manufacturing, was recently appointed as a director of Rainbow Paints (Pty) Ltd, a company that manufactures and sells brightly coloured paint. Mr Modise authorised the purchase of base paint, which would be used in the manufacturing of the company's brightly coloured paint. This specific base paint was totally unsuitable for the manufacturing of brightly coloured paint and Rainbow Paints (Pty) Ltd had to destroy three thousand litres of the paint which had been manufactured with the unsuitable base paint. Rainbow Paints (Pty) Ltd wants to sue Mr Modise for the damage, because it is

well known to everybody in the paint industry that this type of base paint should not be used in the manufacture of brightly coloured paint.

Advise Rainbow Paints (Pty) Ltd whether Mr Modise has breached his duty to act with care and skill and whether the company is likely to succeed in its action against Mr Modise. (2017-02-10 10:57:55)

Dear LML 4806 Student

Thank you very much for your participation in the discussion forum. Your answers were well founded.

Please continue to participate in future discussions. My colleagues will continue to post questions and guidelines (feedback) dealing with other learning units on a weekly basis.

Please see the proposed answer below. Note how the answer is structured. When you answer a problem type question, please try to structure your answer in a similar way.

Answer:

The Companies Act, 2008 confirms that a director is under a fiduciary duty to act with a certain degree of care, skill and diligence. Section 76(3) provides that a director must exercise his or her powers and perform the functions of a director:

- in good faith and for a proper purpose;

- in the best interest of the company; and

with the degree of care, skill and diligence that may reasonably be expected of a person-

carrying out the same function in relation to the company as those carried out by that director; and

having the general knowledge skill and experience of that director.

This means that a director has to act in good faith and for a proper purpose, and in the best interest of the company. This is a common law principle which has been partially codified in the Act. The Act requires a director to exercise a degree of care, skill and diligence that may reasonably be expected of the person performing the functions of a director.

Section 76(4) provides that a director satisfies his or her obligations if:

- he or she has taken reasonably diligent steps to become informed about a particular matter; has no material personal financial interest in the subject matter; and has a rational basis for believing, and did believe that the decision was in the best interest of the company .Section 76(4) entails that a director should not be held liable for decisions that lead to undesirable results, where such decisions were made in good

faith, with care and on an informed basis and which the director believed were in the interest of the company.

In *Fisheries Development Corporation of SA Ltd v Jorgensen*; ***Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd*** the court held that the extent of a director's duty of skill and care largely depends on the nature of the company's business, that the law does not require of a director to have special business acumen, and that directors may assume that officials will perform the duties honestly.

In determining whether or not a director has acted with the required degree of care, skill and diligence the director must pass both an objective and a subjective test. An objective test is applied to determine what a reasonable director would have done in the same situation. In addition a subjective test is also applied taking into account the general knowledge, skill and experience of the particular director. It is therefore clear that much more is expected of a director who is qualified and experienced, than is the case if the director is inexperienced.

For determining the degree of skill required from Mr Modise, a subjective as well as an objective test must ensue. Firstly one would have to determine Mr Modise's subjective expertise and experience and secondly, whether under the circumstances one could reasonably say that he exercised the care that one would expect from a person with his experience. Mr Modise gave himself out as a director with the necessary expertise. A further aspect for consideration is the fact that he as director, had authority to authorise the purchase of the paint. Clearly the nature of the business and the task laid upon him also requires expertise. It seems that Mr Modise breached his duty of care and skill.

In terms of section 77 of the Companies Act, 2008 a company may recover loss, damages or costs sustained by the company from a director under the following circumstances:

- in terms of the principles of common law relating to breach of a fiduciary duty;
- in accordance with the principles of the common law relating to delict for breach of the duty to act with the required degree of care, skill and diligence.

In order to claim for delict, obviously all the requirements must be proven. Under the circumstances all the elements of a delict seem to be evidenced and will the director be liable for the damages.

LEARNING UNIT 4

The Memorandum of Incorporation of Concord Ceramics (Pty) Ltd (RF) provides that the board of directors have authority to contract on behalf of the company subject to the condition that if the value of a contract exceeds R1 million the approval of shareholders by special resolution is required. The Memorandum of Incorporation further provides that this last-mentioned provision may only be amended by unanimous approval of all the shareholders.

Are third parties deemed to be aware that the consent of the general meeting is required for transactions in excess of R1 million?

To what extent is the doctrine of constructive notice still applicable to this company?

Suppose that Mike, a site manager on one of the company's plants, regularly contracts on behalf of the company without having a mandate to do so. The board of directors takes note of this behaviour, but never takes any steps to caution Mike against contracting on behalf of the company. Mike enters into a contract with Timothy for the purchase of raw materials. The company now argues that Mike did not have authority to enter into the contract and that it is not bound to the contract. Advise Timothy on whether the company can be held bound to the contract.

Dr J GELDENHUYS' ANSWER

The Memorandum of Incorporation of Concord Ceramics (Pty) Ltd (RF) provides that the board of directors have authority to contract on behalf of the company subject to the condition that if the value of a contract exceeds R1 million the approval of shareholders by special resolution is required. The Memorandum of Incorporation further provides that this last-mentioned provision may only be amended by unanimous approval of all the shareholders.

Are third parties deemed to be aware that the consent of the general meeting is required for transactions in excess of R1 million?

Yes, as this is a RF-company. Section 19(5) of the Companies Act determines that a person is deemed to have knowledge of any provision of a company's Memorandum of Incorporation in terms of section 15(2)(b) (relating to special conditions applicable to the company and additional requirements regarding their amendment). This is subject to the condition that the name of the company includes the ending "RF" and that the company's Notice of Incorporation contains a prominent statement drawing attention to such a provision as required by section 13(3).

To what extent is the doctrine of constructive notice still applicable to this company?

Section 15(2)(b) of the Companies Act determines that a company may include restrictions and conditions in its Memorandum of Incorporation pertaining to the company's capacity. Before a third party dealing with the company would be required to acquaint themselves with these restrictions and conditions, certain requirements must be met in terms of the Companies Act:

- There must be a restriction or conditions in the Memorandum of Incorporation of the particular company.
- A prohibition against amendment of the restriction or condition must be included in the Memorandum of Incorporation.

- The company's name must be followed by "RF" to warn the third party of the special restrictions or conditions.
- The Notice of Incorporation that is lodged together with the Memorandum of Incorporation must include a provision that draws attention to the fact that special restrictions or conditions apply to the company.

Suppose that Mike, a site manager on one of the company's plants, regularly contracts on behalf of the company without having a mandate to do so. The board of directors takes note of this behaviour, but never takes any steps to caution Mike against contracting on behalf of the company. Mike enters into a contract with Timothy for the purchase of raw materials. The company now argues that Mike did not have authority to enter into the contract and that it is not bound to the contract. Advise Timothy on whether the company can be held bound to the contract.

Estoppel applies only when the agent did not have actual authority to bind the company. Take particular note of the fact that the misrepresentation (i.e. that the agent had the necessary authority when, in fact, he or she did not) must have been made by the company as principal. In *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd*, the court decided that estoppel could not only arise from the Articles (note that this would be the Memorandum of Incorporation in terms of the current Companies Act), but also because the company with full knowledge and approval allowed an ordinary director to act as the managing director and, in this manner, culpably represented that he was entitled to act.

Based on such misrepresentation, the company will be prevented (estopped) from denying liability if the third party can prove that

- the company misrepresented, intentionally or negligently, that the agent concerned had the necessary authority to represent the company
- the misrepresentation was made by the company
- the third party was induced to deal with the agent because of the misrepresentation

LEARNING UNIT 5 (Corporate Finance)

Dear Students

Learning Unit 5 focus on corporate finance. It examines the various types of shares, how shares are issued, the persons who are required to approve the issue of shares, debentures, hybrid securities, the securities register, securities registration and transfer, and public offerings of securities.

You are expected to study the relevant sections of the Companies Act 71 of 2008 dealing with these matters. Ensure that you read and understand the relevant sections of the Companies Act dealing with these matters. In addition, study Chapters 4, 8 and 9 of your prescribed textbook.

Learning Unit 5 introduces you to some important principles and concepts. It is important for you to understand these principles and concepts.

Question

The board of directors of ABC (Pty) Ltd has taken a resolution to issue shares: -to its existing directors and their spouses; and in pursuance of an employee share scheme.

The board is however uncertain whether they need to obtain the approval of the shareholders of the company for the resolution. Advise the board of directors of ABC (Pty) Ltd whether the resolution needs to be approved by the shareholders.

Dear Students

Thank you for your responses to the question, particularly at a time when I know you are busy with the submission of your first assignment.

Please note that in an exam, in order to obtain the full marks for the question, you must motivate and explain the reason for your answer by referring to the relevant provisions of the Companies Act 71 of 2008, and by applying the legal principles to the facts given to you. You must then draw a conclusion on the question given to you.

This question deals with whether the approval of shareholders is required when the board of directors issues shares.

Answer

Section 41 of the Companies Act 71 of 2008 sets out those instances when the approval of shareholders is required to the issue of shares. It also sets out certain exceptions when the approval of shareholders would not be required.

In terms of section 41(1) of the Companies Act an issue of shares must be approved by a special resolution of the shareholders if the shares are issued to director, future director, prescribed officer or future prescribed officer of the company, or to a person related or inter-related to the company or to a director or prescribed officer of the company, or to a nominee of any of these persons. Since the board of directors has resolved to issue the shares to its existing directors, the shareholders would have to approve, by special resolution, the issue of the shares to the directors.

Regarding the issue of the shares to the spouses of the directors, section 41(1)(b) of the Companies Act provides that the shareholders must approve by special resolution the issue of shares to a person related or inter-related to the company, or to a director or prescribed officer of the company. The term 'related' is defined in section 1 of the Companies Act as meaning, when used in respect of two persons, persons who are

connected to each other in any manner contemplated in section 2(1)(a) to (c). In terms of section 2(1)(a) of the Companies Act an individual is related to another individual if they are married. Therefore, the shareholders would have to approve, by special resolution, the issue of the shares to the spouses of the directors.

Regarding the issue of the shares in pursuance of an employee share scheme, in terms of section 41(2)(d) of the Companies Act the approval of the shareholders is not required if shares are issued pursuant to an employee share scheme that satisfies the requirements of section 97 of the Companies Act. Therefore, provided the employee share scheme in question does satisfy the requirements of section 97 of the Companies Act, the shareholders of ABC (Pty) Ltd would not be required to approve the issue of the shares pursuant to the employee share scheme.

Learning Unit 6.(Capital Maintenance)

Question 1

The board of directors of TTT (Pty) Ltd wants the company to repurchase some of its shares from some of its shareholders. This is with the aim of reducing the number of shareholders thereby reducing the cost of dividends.

The board of directors has identified seven shareholders from whom the company would repurchase its shares. One of the shareholders is Tani, a member of the board of directors of the company. The identified shareholders including Tani together hold 6% of the ordinary shares.

The board of directors comes to you for advice on the nature of the transaction and the requirements that the company must before the transaction can take place. With reference to the relevant sections of the Companies Act 71 of 2008, advise the board accordingly.

[10]

Question 2

Suppose there is an existing agreement between the seven shareholders and the company and these shareholders together hold 60% of ordinary shares. The existing agreement is that the company will repurchase its shares from the seven shareholders at a certain date. The due date for the company to fulfil its obligation as per the agreement has come.

In the board meeting held for the purpose of discussing the repurchase of its shares by the company as per the agreement, the board of directors discover that should the company fulfil its obligation as per the agreement between it and the shareholders, the company will only remain with ordinary shares held by its subsidiaries and redeemable shares held by other eight shareholders.

The board of directors comes to you for advice on how the company should deal with the repurchase of its shares under these circumstances. With reference to relevant sections of the Companies Act 71 of 2008, advise the board accordingly. [10]

Feedback

Thanks very much for participating on this discussion forum. Please see the feedback and attempt to construct your own answer in your notes. Please continue to participate as this will enable you to prepare better for your examination. Thanks again.

GUIDELINES TO THE ANSWER

First, you have to define what a distribution is in terms of section 1 of the Companies Act 71 of 2008 ('the Act') and make a determination or come to a conclusion as to whether this transaction is a distribution or not. This is a repurchase of the company's shares in terms of section 48 of the Act. (1)

Secondly, you have to provide the requirements which should be satisfied when dealing with a distribution of this nature in terms of section 46 of the Act. Note that a mere repetition or reproduction of the section will not earn marks. You should explain the relevant sections of Act in your own words were possible. (3)

Thirdly and of utmost importance, you have to apply the applicable provisions of the Act in the facts. A substantial amount marks will be allocated here. (3)

As you apply section 46, you will note that it should be read together with section 48 of the Act and other applicable sections. In other words the Act or any other legislation should be read holistically. In this case the number of the shares to be repurchased and the fact that one of the seven shareholders is also a director of the company trig.

Learning Unit 7 (Groups of Companies)

Question

Tik Ltd, Tak Ltd and Tuk Ltd, all independent companies, have voting rights in Axe Ltd. Tik Ltd and Tak Ltd each hold 40% of Axe Ltd's voting shares, while Tuk Ltd holds the remaining 20%. Tuk Ltd may remove two directors, who each exercise 30% of the voting rights at the board meetings of Axe Ltd. Explain whether a holding company-subsidary company relationship exists between

Axe Ltd and any of the other companies.
[10]

Dr J GELDENHUYS

FEEDBACK ON QUESTION

A company (company 1) is regarded to be a subsidiary of another company (company 2) if the other company (company 2) or its subsidiaries or nominees, is able to exercise or control the exercise of a majority of the general voting rights associated with the shares of the first company (company 1). The exercise of votes can be direct or as a result of a shareholder agreement. The holding-subsidary relationship will also be deemed to exist where a company or any of its subsidiaries or nominees is entitled to appoint or control the appointment of enough directors in another company to control a majority of votes at a meeting of the board of the latter company. In the facts provided, it is stated that Tik Ltd, Tak Ltd and Tuk Ltd are independent companies, which means that none of the companies is a subsidiary of any of the others. Furthermore, Tik Ltd and Tak Ltd, which are the majority shareholders in Axe Ltd, hold an equal share of voting rights in that company. Consequently, none of the two companies are able to exercise the requisite control over the majority of voting rights in respect of the shares of Axe Ltd. Obviously, Tuk Ltd also cannot exercise control over the majority of the voting rights in Axe Ltd. In addition, it is not mentioned anywhere in the facts that Tik Ltd, Tak Ltd and Tuk Ltd are entitled to appoint or control the appointment of a number of directors of Axe Ltd that would enable such directors to control a majority of votes at Axe Ltd's board meetings. The ability of a company to remove directors on the board of another company is not a factor indicative of a holding company-subsidary company relationship in terms of the Companies Act. It can, therefore, be concluded that no principal-subsidary relationship exists between Axe Ltd and either Tik Ltd, Tak Ltd or Tuk Ltd.

Learning Unit 8 (Takeovers, offers and Fundamental transactions.)

Dear Student

Welcome to the discussion, based on learning unit 8. Learning unit 8 will enlighten you on transactions that significantly affect the ownership of a company's assets or that signals a change in its shareholding.. The question posed deals with one of these aspects.

Question 1

Peninsula Ltd held 90% of the shares in Limpopo (Pty) Ltd. Peninsula (Ltd) wished to make Limpopo (Pty) Ltd a wholly-owned subsidiary. A scheme of

arrangement was proposed in terms of section 114 of the Companies Act of 2008 between Peninsula Ltd and the 10% ordinary shareholders of Limpopo (Pty) Ltd. The effect of the scheme was that the 10% ordinary shareholders would give up the shares in Limpopo (Pty) Ltd in exchange for shares in Peninsula Ltd. The scheme was approved at a meeting of the ordinary shareholders of Limpopo (Pty) Ltd. Lebo, Jane and Hamid, who together hold 17% of the voting rights in Limpopo (Pty) Ltd, voted against the scheme .

Advise Lebo, Jane and Hamid of their legal rights

Dear Students

Thank you for your participation. You have answered the question very well. Please continue to participate.

Please note the proposed answer below:

In order to answer this question you should start by briefly explaining that section 114 of the Companies Act permits the scheme of arrangement between a company and a class of shareholders. The arrangement must be approved by the prescribed majority of shareholders in the class. In terms of section 114 (2), an independent expert must compile a report on the proposed scheme of arrangement. The report must be furnished to the board and to the shareholders of Peninsula Ltd and Limpopo (Pty) Ltd.

You should further advise Lebo, Jane and Hamid of their remedy under section 115. In terms of this section Peninsula Ltd may not proceed with the scheme of arrangement without the approval of the court if the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution and by any person who voted against the resolution requiring the company to seek court approval

Furthermore Lebo, Jane and Hamid are entitled under section 115 (8) to seek an appraisal remedy if they had notified Peninsula Ltd of their intention to oppose the special resolution and were present at the meeting and voted against the special resolution. Lebo, Jane and Hamid may demand that their shares be independently valued and bought back by Limpopo (Pty) Ltd at a fair price.

Thank you once again for your participation.

Learning Unit 9 (Business Rescue Mechanism)

Dear Students

The discussion for the week is based on Business Rescue. Business Rescue is a process which allows a company in financial distress to overcome its financial

challenges. But there is a catch, the company applying for business rescue must meet certain requirements before the application to commence proceedings may be granted. Through this learning unit, you will learn about the commencement of the proceedings, affected parties, who has *locus standi* to start the proceedings and any other relevant provision that applies to business rescue. As always, after reading on your learning material, you have an opportunity to discuss with all of us the question as posted below. Let us get started.

Question

Take-me-far Transportation (Pty) Ltd is a company undergoing business rescue in terms of section 129(3). At the behest of Diva Bank Ltd, the Sheriff of Court brings a warrant of execution against some of the vehicles used for the company's trading activities. In accordance with the bank's claim, the company was no longer in lawful possession of the vehicles, as the finance agreements in respect of the vehicles were cancelled prior to the commencement of business rescue proceedings, because of failure by the company to honour its monthly rental obligations with the bank. The company does not dispute the bank's claims, and took no subsequent action to rescind the judgement upon which this warrant is based.

The company launches an application, asserting that the vehicles are part of its assets to assist in the achievement of the objectives of business rescue, which is to help the company overcome its financial woes. If the sheriff proceeds with the removal of cars, this will frustrate the purport of the business rescue mechanism. In light of the facts abovementioned, advice whether the company will succeed with its application.

In response to this question, you are more than welcome to refer to case law.

Question

What happens if the vehicle is the source of income for the business to survive? Will there still be a need for business rescue to proceed if vehicles were executed in terms of an order. Because the incorporation of this business is for transport, what about other creditors. Isn't a duty of a court to confirm if there are any other outstanding court orders (for execution) before granting an order to place a company under business rescue? Then what is the purpose of sec 129, if there will be executions after the commencement of the business proceeding. Is not Diva Bank regarded as an affected person?

Dear Students

Many thanks for your contributions in so far as this learning unit is concerned. Most of your answers are correct, I cannot think of anyone who may have missed the question. Please find below my response to the question of the week. Many thanks once more and enjoy your weekend.

Answer 1

This question is based on the provisions of section 133(1) of the Companies Act 71 of 2008. In accordance with this section; during business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except -

(a) With the written consent of a practitioner;

(b) With the leave of the Court and in accordance with any terms the Court considers suitable.

The essence of this provision is that business rescue mechanism provides an automatic stay in legal proceedings against the company in financial distress, including enforcement action, against the company or in relation to any property belonging to the company or lawfully in its possession for as long as the business rescue continues.

In the case of *Madodza (Pty) Ltd (in business Rescue) v ABSA Bank Ltd* 38906/2012) [2012] ZAGPPHC 165 (15 August 2012), similar set of facts were dealt with. Sec 133 requires that the assets must either be the property or in the lawful possession of the company. The court said that it is common cause that the vehicles are not the property of the applicant. In light of the fact that the agreements were cancelled and the fact that applicant was ordered to return the vehicles, applicant did not prove that it was in lawful possession of the vehicles. In the court's view, the applicant failed to meet the requirements of sec 133 and therefore cannot succeed in its application. This case is referred to in footnote 78 of Chapter 12: 12.5.1 of your prescribed book.

Application of the principles to the present case: the fact that possession of the vehicles by the company will assist the company in achieving the objectives of business rescue is immaterial. The requirements of section 133, stands that the company under business rescue cannot be in unlawful possession of the property in order to qualify for the moratorium. In this case, the applicant company is in unlawful possession of the said vehicles owing to a writ of execution; and therefore this application does not meet the moratorium requirements as stipulated by section 133(1). The applicant will not succeed with its application.

Learning Unit 10 (Compromises)

Dear Students

Learning Unit 10 focuses on compromises. It examines the procedure for effecting a compromise contained in section 155 of the Companies Act 71 of 2008 and compares the new procedure with the previous procedure contained in section 311 of the Companies Act 61 of 1973.

You are expected to study section 155 of the Companies Act 71 of 2008 dealing with compromises. Ensure that you read and understand this section. In addition, study paragraphs 12.9 to 12.11 of your prescribed textbook.

Regards

QUESTION FOR LEARNING UNIT 10

Simon is a director of a printing company, Print your Paper (Pty) Ltd, which specialises in the printing of academic journals. Simon is concerned about the trend to move away from publishing hard copies of journals towards publishing academic journals electronically. Although Print Your Paper (Pty) Ltd is not insolvent and does not have cash flow problems, he is considering entering into an agreement with the creditors of Print Your Paper (Pty) Ltd in terms of which Print Your Paper (Pty) Ltd offers to pay 80% of all creditors' claims against the company in full and final settlement. Simon knows the offer will be accepted by most of the creditors, but a small minority might reject the offer. Simon approaches you for legal advice in order to establish whether there is a specific procedure in the Companies Act 71 of 2008 that makes it possible to make the settlement agreement binding on all creditors if the offer is accepted by most of them. In your opinion to Simon you must:

Suggest and name a suitable procedure by referring to the requirements that must be met (you do not have to discuss the contents of the documentation); and

Discuss the effects of such a transaction, if approved, and the requirements that need to be met after approval.

Dear Students

Thank you for your responses and your participation in this Discussion Forum. I am pleased to see that all of you are on the right track with your answers, and that you have answered the questions correctly.

This question deals with compromises. Section 155 of the Companies Act 71 of 2008 sets out the procedure for a compromise.

Section 155 provides that a company may effect a compromise with its creditors, or a specific class of creditors, whether the company is in financial distress or not, unless it is in business rescue. A proposal for the compromise must be made by delivering a copy of the proposal and notice of a meeting to consider the proposal to the

Commission and to every creditor, or class of creditor, whose name and address is known to the company and can be reasonably obtained by the company. The proposal must contain certain prescribed information. The proposal must be adopted by the required majority of creditors. An application must then be made to court for an order sanctioning the compromise.

If the compromise is approved by the court, the company must file a copy of the order with the Commission within 5 business days. A copy must also be attached to each copy of the company's Memorandum of Incorporation. The position of a surety of the company is not affected by the compromise.

The court order sanctioning the compromise is final and binding on all creditors / class of creditors from the date on which a copy of the order is filed. There is no moratorium protecting the company against enforcement action by creditors in the period between delivering a copy of the proposal and filing of the order sanctioning the compromise. Creditors who oppose the compromise or even creditors who are not part of the class of creditors involved in the compromise could commence legal action against the company to enforce payment of their claims.

Learning Unit 11 (Insider Trading)

Dear Students

Welcome to the final topic of discussion.

Learning Unit 11 focuses on Insider Trading. Although you are expected to study from the textbook as well, your attention is once more drawn to the fact that your Module Online Letter deals with the topic in much more detail, therefore please ensure that you read through it carefully.

Question

Tladi arrived at the office of Nancy, who is a sharebroker, and instructed Nancy to sell his shares in Refill Ltd with immediate effect. As they were talking, Nomvula, Nancy's secretary was present in the office. Nancy sold the shares at a very good price. As Tladi left, both Nomvula and Nancy heard him telling someone called Lerato over the phone, to sell her shares in Refill Ltd, but he refused to state why she should sell.

On the following day, Nomvula, has lunch in a restaurant nearby and she recognises Tladi who sits at the table next to hers. She overhears him saying to his companion, "Lerato I still can't get over the fact that you actually forgot that the auditing firm I work for does the auditing for Refill Ltd. You should have just sold!!". When Nomvula arrives back at the office she tells Nancy that she saw Tladi. Nancy then shows her that day's newspaper article about a merger

between Refill Ltd and Somemore Ltd. She goes on to tell Nomvula that the shares of Refill Ltd have already dropped by as much as 20%. Nomvula informs Nancy about what Tladi told his companion. Nancy is shocked as she was not aware of Tladi's other connection to Refill Ltd.

State the legal positions of Tladi, Nancy, Nomvula and Lerato with reference to the Financial Markets Act. Your answer must include possible liability, defences as well as applicable sanctions, if any. Where you do not think that there is possible liability explain what your reasons are.

All the best.

Have a lovely weekend and please post your answers before 17h00 on Friday 14 April 2017.

(2017-04-07 16:16:59)

Prof DM FARISANI: Please note that you should post your answers on or before Friday 14 April 17h00. (2017-04-07 16:26:51)

{No model feedback was posted from the lecturer}