

# **Tutorial Letter 101/3/2018**

**Company Law**

**LML4806**

**Semesters 1 & 2**

**Department of Mercantile Law**

**IMPORTANT INFORMATION:**

This tutorial letter contains important information  
about your module.

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# 1 INTRODUCTION

Dear Student

We would like to welcome you to this module and hope that you will find it both interesting and rewarding. We shall do our best to make your study of this module successful. You will be well on your way to success if you start studying early in the semester and resolve to do the assignment(s) properly.

You will receive a number of tutorial letters from us during the semester. A tutorial letter is our way of communicating with you about teaching, learning and assessment. **You must read all the tutorial letters** you receive during the semester **immediately and carefully**, as they always contain important and sometimes urgent information. This tutorial letter contains important information about the scheme of work, resources and assignments for this module. Please read it carefully and keep it safe so that you can consult it, if needed, as you work through the study material, complete assignments, prepare for the examination and direct questions to your lecturers.

You must be registered on myUnisa to be able to submit your assignments online, gain access to the library functions and various learning resources, to "chat" to your lecturers and fellow students about your studies and the challenges that you may encounter, and to participate in online discussion forums on myUnisa. **Most importantly, however, is the fact that all the learning units for the module are available on myUnisa, and you will only be able to access the online study material for this module if you have registered on and have access to myUnisa.** Please visit the LML4806 module sites on myUnisa often. The module site for the first semester is LML4806-18-S1, and the module site for the second semester is LML4806-18-S2. To access myUnisa, follow this link: <https://my.unisa.ac.za> and login with your student number and password. You will see LML4806-1-S1 and LML4806-1-S2 in the row of modules in the grey blocks across the top of the web page. Click on the module you want to access.

**Also, please activate your myLife e-mail address, as we will send all official correspondence about this module to your myLife address, and not your private e-mail address.** Please consult the booklet *Study @ Unisa* for more information about activating your myLife e-mail address and accessing the LML4806 module site on myUnisa.

Because we want you to be successful in this partially online module, we will also provide you with some of the study materials in printed format. This will allow you to read the study materials without going online. While these printed materials may look slightly different from the online study materials, the content is in fact the same. Remember, the printed support materials are purely a backup to what is available on myUnisa, so please start studying immediately – don't wait for the printed material to arrive.

In this tutorial letter you will find the assignments and assessment criteria as well as instructions on how to complete and submit the assignments. This tutorial letter also provides all the information you need with regard to the prescribed study material and other resources and how to obtain them. Please study this information carefully and make sure that you obtain the prescribed material as soon as possible.

The prescribed study material for this module consists of:

- all the tutorial letters

- the study guide
- the prescribed textbook
- the Companies Act 71 of 2008

We will give you more details about the prescribed textbook in part 4.1.

We have also included general and administrative information about this module. Please study the sections of the tutorial letter dealing with this carefully.

## 2 PURPOSE AND OUTCOMES

### 2.1 Purpose

This module consists of selected topics that fall under company law. On completion of this module, you should be able to identify, analyse and solve complex legal problems relating to certain aspects of company law and engage with legal texts in order to critically evaluate different points of view on corporate law issues. You should also have acquired sufficient academic knowledge and skills relating to corporate law to embark on a career in law.

For the purposes of this module, we assume that you have mastered and can confidently apply the theory relating to company law presented in the module MRL2601. **This is an advanced module on Company Law and it focuses on the application and analysis of legal principles in corporate law.**

### 2.2 Outcomes

You will notice that we have included learning outcomes for each learning unit in the course material. These learning outcomes indicate what competence you should be able to demonstrate at the end of this learning experience. If you work through the learning material by following the guidance we offer and by participating in the discussion forums on myUnisa, you should be able to achieve the learning outcomes.

Note that there is a new Learning Unit 12 which has been added to the study material. This new Learning Unit 12 is not included in your Study Guide, but is attached to this Tutorial Letter as an Addendum entitled “The Impact of the Constitution and Globalisation on Company Law”. Please ensure that you study this material as part of the prescribed study material.

## 3 LECTURER(S) AND CONTACT DETAILS

### 3.1 Lecturer(s)

Your lecturers for this module are:

Ms R Cassim (course leader)	Tel 012 429 6780	email cassir@unisa.ac.za
Mr C Swart (course leader)	Tel 012 429 8494	email swartwjc@unisa.ac.za
Dr M Bekink	Tel 012 429 8441	email bekinm@unisa.ac.za
Prof DM Farisani	Tel 012 429 8486	email farisdms@unisa.ac.za
Dr J Geldenhuys	Tel 012 429 8472	email geldej@unisa.ac.za

Dr M Lehloenya	Tel 012 429 8037	email lehlopm@unisa.ac.za
Mr S Makhubu	Tel 012 429 4878	email makhusn@unisa.ac.za
Adv MA Mthembu	Tel 012 429 8489	email mthemma@unisa.ac.za

Please contact us if you have any queries about the actual content of this module – in other words, if you have any academic queries. The lecturers will not entertain any queries concerning tips and / or topics to be covered in the examination paper. However, we unfortunately cannot help with administrative queries.

### 3.2 Department

This module is presented by the Department of Mercantile Law. The general telephone number for the Department of Mercantile Law is **012 429 8579**. Use this number until you have been given the names of the lecturers responsible for this course. Please have your learning material and student number at hand when you contact us by telephone.

If you want to set out your queries in a letter, send your letters to:

The Module Leader (LML4806)  
Department of Mercantile Law  
PO Box 392  
Unisa  
0003

You may also **fax** letters to us. Our fax number is **012 429 3343**.

**You may not enclose letters to us in assignments.**

You are also welcome to come and see us to discuss any queries about or problems with the content of this module. However, **please make an appointment beforehand**, to make sure that we are available to see you. Our offices are situated in the **Cas van Vuuren Building, Main Campus, Muckleneuk, Pretoria**.

### 3.3 University

#### Communication with the University

Unisa website: <http://www.unisa.ac.za> & <http://mobi.unisa.ac.za>. All study-related information is available on the Unisa corporate website in both web and mobi formats.

myUnisa website: <http://my.unisa.ac.za/portal> & <http://my.unisa.ac.za/portal/pda> You can access information relating to your studies via the myUnisa website or mobi site.

E-mail: [info@unisa.ac.za](mailto:info@unisa.ac.za). You may send an e-mail to [info@unisa.ac.za](mailto:info@unisa.ac.za) for information on how to contact Unisa via e-mail.

SMS: 32695 (only for students in South Africa) You may send an SMS to 32695 for more information on how to contact Unisa via SMS. You will receive an automatic response SMS with various SMS options. The cost per SMS is R1,00.

Fax: You may fax enquiries to 012 429 4150; your enquiry will then be routed to and attended to by the relevant department.

If you need to contact the university in connection with matters not related to the content of this module, please consult *Study @ Unisa*. This booklet contains information on how to contact the University (e.g. to whom you can write for different queries, important telephone and fax numbers, addresses and details of the times certain facilities are open).

Always be able to quote your student number when you contact the University.

## 4 RESOURCES

### 4.1 Prescribed books

Your prescribed textbooks for this module for this year are:

- (1) Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J and Yeats J *The Law of Business Structures* (2012) Juta Cape Town
- (2) Juta's Pocket Statutes *The Companies Act 71 of 2008 and Regulations* 10<sup>th</sup> ed (2017) Juta Cape Town

Study the paragraphs of the prescribed textbooks to which you are referred in the various learning units.

You can obtain the prescribed textbooks from the university's official booksellers. Please consult the list of official booksellers and their addresses in *Study @ Unisa*. If you have difficulty obtaining your book(s) from these booksellers, please contact the Prescribed Book Section at 012 429 4152, or e-mail [vospresc@unisa.ac.za](mailto:vospresc@unisa.ac.za).

### 4.2 Recommended books

There are no recommended books for this module.

### 4.3 Electronic reserves (e-reserves)

In addition to your prescribed study material, you also need to study the cases below. These cases can be found on the library website under **Find e-reserves & Recommended books**.

#### Learning unit 03

- *Rabinowitz v Van Graan* 2013 (5) SA 315 (GSJ) (reckless, gross negligent or fraudulent conduct)
- *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 (5) SA 179 (WCC) (business judgment rule)
- *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC) (section 75)

#### Learning unit 08

- *Vlok NO v Sun International South Africa Ltd* 2014 (1) SA 487 (GSJ) (section 124)

Learning unit 09

- *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others* 2013 (4) SA 539 (SCA)
- *Cloete Murray NO v First Rand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA)
- *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA)

Learning unit 11

- *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP)

**4.4 Library services and resources information**

For brief information, go to: <http://www.unisa.ac.za/contents/studies/docs/myStudies-at-Unisa2018-brochure.pdf>

For more detailed information, go to the Unisa website: <http://www.unisa.ac.za/>, click on **Library**.

For research support and services of personal librarians, go to: <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=7102>

The Library has compiled numerous library guides:

- finding recommended reading in the print collection and e-reserves – <http://libguides.unisa.ac.za/request/undergrad>
- requesting material – <http://libguides.unisa.ac.za/request/request>
- postgraduate information services – <http://libguides.unisa.ac.za/request/postgrad>
- finding, obtaining and using library resources and tools to assist in doing research [http://libguides.unisa.ac.za/Research\\_Skills](http://libguides.unisa.ac.za/Research_Skills)
- how to contact the Library/find us on social media/frequently asked questions – <http://libguides.unisa.ac.za/ask>

**5 STUDENT SUPPORT SERVICES**

For information on the various student support systems and services available at Unisa (e.g. student counselling, tutorial classes, language support), please consult *Study @ Unisa*.

**5.1 Contact with fellow students**

We recommend that you have contact with fellow students. One way to do this is to form study groups.

You can obtain contact details for students in your area from the following department:

Directorate: Student Administration and Registration  
PO Box 392  
Unisa  
0003

## 5.2 myUnisa

If you have access to a computer that is linked to the internet, you can quickly access resources and information at the University. The myUnisa learning management system is Unisa's online campus, which will help you to communicate with your lecturers, other students and the administrative departments of Unisa – all through the computer and the internet.

To go to the myUnisa website, start at the main Unisa website, <http://www.unisa.ac.za>, and then click on the **Login to myUnisa** link on the right-hand side of the screen. You can also go there directly by typing in <http://my.unisa.ac.za>.

Please consult *Study @ Unisa* for more information about myUnisa.

## 5.3 Free computer and internet access

Unisa has entered into partnerships with establishments (referred to as telecentres) in various locations across South Africa to enable you (as a Unisa student) free access to computers and the internet. This access enables you to conduct, inter alia, the following academic-related activities: registration; online submission of assignments and engaging in e-tutoring activities and signature courses. Please note that any other activity outside of these is for your own cost, for instance printing and photocopying. For more information on the telecentre nearest to you, please visit [www.unisa.ac.za/telecentres](http://www.unisa.ac.za/telecentres).

# 6 STUDY PLAN

We would like to support you in your learning process. However, we can do this only if you take responsibility for your own learning. To ensure that you submit all the assignments and prepare for the examinations in time, please consult the tutorial letters and the rest of the study material, and plan a schedule for your learning process. You could base your own, more detailed schedule on the study plan we propose below:

WEEK	ACTIVITY
1	Work through learning unit 1 and participate in the online discussion forum.
2	Work through learning unit 2 and participate in the online discussion forum.
3	Work through learning unit 3 and participate in the online discussion forum.
4	Work through learning unit 4 and participate in the online discussion forum.
5	Work through learning unit 5 and participate in the online discussion forum.
6	Work through learning unit 6 and participate in the online discussion forum.
7	Work through learning unit 7 and participate in the online discussion forum.
8	Work through learning unit 8 and participate in the online discussion forum.
9	Work through learning unit 9 and participate in the online discussion forum.
10	Work through learning unit 10 and participate in the online discussion forum.
11	Work through learning unit 11 and participate in the online discussion forum.
12	Work through learning unit 12 and participate in the online discussion forum.



13	Revise learning units 1, 2, 3, 4, 5 and 6.
14	Revise learning units 7, 8, 9, 10, 11 and 12.

Refer to *Study @ Unisa* for general time management and planning skills.

## 7 PRACTICAL WORK AND WORK-INTEGRATED LEARNING

There are no practicals or work-integrated learning for this module.

## 8 ASSESSMENT

### 8.1 Assessment criteria

**You must be able to solve complex legal problems by identifying, analysing and applying the applicable legal principles from the Companies Act 71 of 2008.**

### 8.2 Assessment plan

Refer to paragraph 8.8 for information about your examination.

Assignments test your understanding of the learning material and your ability to apply what you have learnt. **Three written assignments are set for this module.** You have to submit **Assignment 01** to gain admission to the examination. The marks you obtain for **Assignments 01 and 02** make up your year mark. **Assignment 03** is a self-evaluation assignment and must not be submitted.

**Your assignments must be submitted electronically via myUnisa or by post and must not be e-mailed to your lecturers.**

**We urge you to submit your assignments electronically via myUnisa and not to submit them by post because the postal system is not always reliable. Late assignments will not be accepted and will be returned unmarked.**

**Please ensure that you keep proof of the submission of all your assignments (even when posting) and that you keep a copy of your original assignment submitted.**

If you are registered for the **first semester**:

Submit **Assignment 01 for semester 1** to reach Unisa on or before **5 March 2018** to gain admission to the examination and to have the mark count towards the year mark.

Submit **Assignment 02 for semester 1** to reach Unisa on or before **9 April 2018** in order to have the assignment count towards the year mark.

If you are registered for the **second semester**:

Submit **Assignment 01 for semester 2** to reach Unisa on or before **13 August 2018** to gain admission to the examination and to have the mark count towards the year mark.

Submit **Assignment 02 for semester 2** to reach Unisa on or before **10 September 2018** in order to have the assignment count towards the year mark.

**If you do not submit Assignment 01 to reach the university on or before the due date, your registration will be cancelled and you will not be admitted to the LML4806 examination. If you do not submit Assignment 02, you will forfeit half of your year mark.**

**Assignments 01 and 02** each contribute 50% to your year mark. The year mark will contribute 40% to your final mark for the module and your examination mark will contribute the remaining 60%.

**We will not grant any extension for the submission of Assignments 01 and 02, because we send out comments on the assignments after the due dates. If your assignments reach the university after the due dates, the university will return these to you unmarked.**

Assignments are an extremely important part of the module. They have five purposes, namely to:

- (1) enable you to gain admission to the examination and to obtain marks contributing to your final mark for this module
- (2) compel you to work through the study material
- (3) teach you the necessary reading and writing skills expected of a future legal practitioner
- (4) teach you to make a synthesis from various sources, to collate material and present it in a logical, ordered fashion and with convincing arguments (**merely copying the study material is not acceptable**)
- (5) teach you self-evaluation: when you join the legal profession, you will have to evaluate your own arguments and submissions, and therefore you should acquire this skill as soon as possible

### **General approach to problem questions**

In order to answer problem questions satisfactorily, you must work through the prescribed study material carefully. Many students say that they find it difficult to answer questions **in their own words**. This is a skill you have to acquire – remember that you will not have your course material with you during the examination. However, there are **three easy steps** to assist you in answering problem questions:

- (1) **Study** the relevant course material until you understand it. While you are reading the particular section or chapter, make notes or list the key words and concepts.
- (2) **Summarise** that particular section or chapter in your own words by using your notes and key words.
- (3) **Finalise** your summary by making use of references to the study material, case law and other relevant authority.

In order to complete your assignments satisfactorily, you are expected to consult your Study Guide, prescribed textbooks and tutorial letters. Carefully read the questions, determine what you are being asked to do, and use the relevant information in your course material to answer the questions. Make sure that you have identified the relevant legal aspect, set out the legal principles briefly with reference to applicable case law and other authorities, applied these principles to the facts given in the question, reached a conclusion, and answered any specific question that may have been asked.

**Neatness** is essential. **Plan** your answers in advance.

You need to learn to write concise and logical legal arguments. It is very easy to write a long, rambling answer in which you include everything which could possibly relate to the problem, but you will not earn good marks that way. You must learn to summarise your course material so that you can provide factually correct, concise and logical answers. This will teach you how to give similar answers in an examination.

Do not join answers to different assignments together. Submit each assignment **separately**.

Submit the answers to all the questions for a particular assignment at the same time.

Although you may work together with other students when preparing assignments, you must each write and submit your own work. It is unacceptable for a group of students to submit identical assignments just because they worked together. If you do this, none of these assignments will be marked. Furthermore, the students involved may be penalised or the University may subject them to disciplinary proceedings.

### 8.3 Assignment numbers

#### 8.3.1 General assignment numbers

Assignment	General assignment number
<b>First semester</b>	
Assignment 01	01
Assignment 02	02
<b>Second semester</b>	
Assignment 01	01
Assignment 02	02

#### 8.3.2 Unique assignment numbers

##### FIRST SEMESTER

Assignment	Unique number
Assignment 01	<b>821034</b>
Assignment 02	<b>804102</b>

## **SECOND SEMESTER**

<b>Assignment</b>	<b>Unique number</b>
Assignment 01	<b>867422</b>
Assignment 02	<b>821978</b>

### **8.4 Assignment due dates**

## **FIRST SEMESTER**

Assignment 01	5 March 2018
Assignment 02	9 April 2018

## **SECOND SEMESTER**

Assignment 01	13 August 2018
Assignment 02	10 September 2018

### **8.5 Submission of assignments**

There are two written assignments for this module. **You must submit assignments electronically via myUnisa.** You may not submit assignments by fax or e-mail.

**Please ensure that you keep proof of the submission of all your assignments and that you keep a copy of your original assignment submitted.**

For detailed information on assignments, please refer to *Study @ Unisa*.

When you submit an assignment via myUnisa, it needs to be in PDF (portable document format). Software to convert Word documents to PDF is available on myUnisa. You may also download a free PDF converter from <http://www.primopdf.com/index.aspx>.

To submit your assignment online, go to the module site on myUnisa and click on the **Assignments** tool. Then follow the instructions below:

Type in your student number, and then click on the assignment number you wish to submit.

Follow the instructions on the screen to make sure that your assignment is uploaded on myUnisa.

If you experience problems with myUnisa, contact [bugmaster@unisa.ac.za](mailto:bugmaster@unisa.ac.za). Describe the problem and/or the message in detail.

## 8.6 The assignments

### FIRST SEMESTER COMPULSORY ASSIGNMENTS

#### a) Assignment 01 (Due date: 5 March 2018) (Unique number: 821034)

Bongani has been a non-executive director of Apex (Pty) Ltd since 2012. He is also a director and sole shareholder of a management consultancy business, Infinity (Pty) Ltd. Apex (Pty) Ltd is undergoing a process of internal restructuring. Without knowing of Bongani's involvement with Infinity (Pty) Ltd, one of the other directors of Apex (Pty) Ltd proposes to the board of directors of Apex (Pty) Ltd that Infinity (Pty) Ltd should be approached for advice on the recruitment of key staff. The board of directors of Apex (Pty) Ltd will be voting on this issue at the next board meeting which is scheduled for next week.

(a) Bongani seeks your advice. He wants to know whether he must disclose his interest in this matter to the board of directors of Apex (Pty) Ltd and if so, what procedure he must adopt to do so. (8)

(b) Assume that Bongani does not disclose his interest. Explain whether the contract between Apex (Pty) Ltd and Infinity (Pty) Ltd will nonetheless be valid. (7)

**Total: [15]**

#### b) Assignment 02 (Due date: 9 April 2018) (Unique number: 804102)

Deli Delight (Pty) Ltd ("Deli Delight") recently released its financial statements which reflected a huge profit. As a result, several investors are keen to purchase shares in Deli Delight. Sifiso, who is currently not a shareholder, approaches Deli Delight. The board of directors of Deli Delight resolves to issue some shares in Deli Delight to Sifiso, but on condition that payment shall be made before or when the shares are issued. Simphiwe, one of the prescribed officers and shareholders of Deli Delight, is opposed to his brother, Sifiso, purchasing the shares. He believes that he (Simphiwe), together with Deli Delight's other shareholders, must first be afforded an opportunity to subscribe for the shares. Advise Simphiwe whether he has the right to be first afforded an opportunity to subscribe for the new shares in Deli Delight.

**[15]**

### SECOND SEMESTER COMPULSORY ASSIGNMENTS

#### a) Assignment 01 (Due date: 13 August 2018) (Unique number: 867422)

The board of directors of Abayomi Ltd approaches you for advice. The board has resolved to issue shares to the following persons:

- (i) the newly appointed chief executive officer of the company;
- (ii) a new director, Mr Molefe, who will be joining the board of directors in three months' time;  
and
- (iii) certain employees of the company in terms of an employee share scheme.

However, the board of directors is unsure of certain matters surrounding the issue of these shares. With reference to the relevant provisions of the Companies Act 71 of 2008 advise the board of directors of Abayomi Ltd on the following:

- (a) Whether the approval from the shareholders of Abayomi Ltd is required to issue the shares referred to in (i), (ii) and (iii) above; (10)
  - (b) The consequences that would follow if the board of directors does not comply with the requirements of the Companies Act 71 of 2008 to issue such shares; and (3)
  - (c) How the payment for these shares is to be ascertained. (2)
- Total: [15]**

**b) Assignment 02 (Due date: 10 September 2018) (Unique number: 821978)**

Mahlangu is the chief executive officer of Monifa Ltd, a listed company which develops educational software programmes for children. The company is on the verge of introducing a mathematics software educational package which will revolutionise learning in primary schools. The company has not yet made any public announcement about this new invention. Only Mahlangu and the managing director, Bongani, know about this invention. Bongani's personal assistant, Lerato, saw the documents containing this confidential information about the invention when she was asked to file documents. Lerato told Fulu about the contents of the documents. Fulu immediately purchased shares in Monifa Ltd for herself. Lerato also told Thakhani to buy shares in Monifa Ltd without telling her why she should do so. Thakhani did not purchase any shares in Monifa Ltd. Edward, Fulu's husband, bought 1 000 shares in Monifa Ltd without discussing any matters relating to the shares with Fulu. When the new software programme was announced publicly, the price of the company's shares immediately increased by 10%.

Explain whether Lerato, Fulu, Edward and Thakhani can be held liable for any offences under the Financial Markets Act 19 of 2012 regulating insider trading. You must include a discussion of the definitions of an "insider" and "insider trading" in your answer, but do not discuss the defences to the insider trading offences. [15]

### **8.7 Other assessment methods**

There are no other assessment methods for this module.

### **8.8 The examination**

You will write **one two-hour paper**, which is marked out of **80**. Your examination mark out of 80 will be adjusted to a mark out of 60, and added to your year mark to get to your final mark for this module. Your year mark will be taken into account only if you obtain a subminimum of 40% in the examination. To pass this module, you have to obtain a minimum final mark of 50%.

For the examination you have to study the Study Guide, the prescribed sections of your textbook and the Companies Act 71 of 2008, as well as all the tutorial letters you received during the semester.

You will be permitted to take the Juta's Pocket Statutes *The Companies Act 71 of 2008 and Regulations* 10<sup>th</sup> ed (2017) or any other edition into the exam venue with you or any edition of the LexisNexis version of the Companies Act 71 of 2008, provided that the book is clean and that you do not have any notes, markings, highlighted portions or pieces of paper in the

**book.** If you have any notes, markings, highlighted portions or pieces of paper in the book, the book will be confiscated and you will not be permitted to use it during the exam.

You may not bring the Companies Act 71 of 2008 into the exam with you in any format other than in the format of the Juta's Pocket Statutes *The Companies Act 71 of 2008 and Regulations* or the LexisNexis version of the Companies Act 71 of 2008. This means that you will not be permitted to bring your own printout of the Companies Act 71 of 2008 into the exam venue. You will also not be permitted to take the Study Guide, the prescribed textbook or any other books or materials into the exam with you.

If you intend to bring the Companies Act 71 of 2008 into the exam venue with you, we advise you to purchase your copy of the Juta's Pocket Statutes *The Companies Act 71 of 2008 and Regulations* or the LexisNexis version of the Companies Act 71 of 2008 at the beginning of the semester. You do not want to be in a situation where you are unable to find the book a few days before your exam because of a shortage of stock. The Unisa Library has a few copies of these books as well.

**Even though you will have a copy of the Companies Act 71 of 2008 in the exam venue with you, we encourage you to study the relevant sections of the Companies Act 71 of 2008 well so that you do not waste time in the exam paging through the Companies Act, looking for the relevant sections of the Act or copying out lengthy sections of the Act. The Companies Act should be with you in the exam venue to be used merely as a guide. The exam is generally a lengthy exam comprising application type questions and you will be expected to apply the relevant sections of the Companies Act 71 of 2008 to the application type questions given to you. You must know your work well, plan your answers and use your time in the exam wisely.**

Please consult *Study @ Unisa* for general examination and examination preparation guidelines.

## 9 FREQUENTLY ASKED QUESTIONS

*Study @ Unisa* contains an A–Z guide to the most relevant study information. Please refer to it should any of your questions not be answered by this or any other tutorial letter.

### 1. Where do I find additional information about the structure of the examination?

Answer: Please note that it is against Unisa policy for lecturers to provide additional information (i.e. information other than that given in the Study Guide or tutorial letters) regarding the content of the examination.

### 2. How can I ensure that I work through all the prescribed material for this module?

Answer: Draw up your own schedule to ensure that you cover the module content. Give yourself sufficient time for revision. If you know that you need to go through the work more than once to pass, make provision for the extra time you require in your schedule. Also see the proposed study plan in this tutorial letter.

### 3. Can I bring any edition of the Companies Act 71 of 2008 into the exam venue with me?

Answer: Yes you may but only if you bring the Juta's Pocket Statutes *The Companies Act 71 of 2008 and Regulations* or any edition of the LexisNexis version of the Companies Act 71 of 2008 into the exam venue with you. In addition, the book must be clean and must not have any notes, markings, highlighted portions or pieces of paper in it. If you have any notes, markings, highlighted portions or pieces of paper in the book, the book will be confiscated and you will not be permitted to use it during the exam.

## **10 IN CLOSING**

Unisa is a university of excellence. To graduate from a university of excellence you need to be a student of excellence. Students of excellence will approach this module with the necessary discipline, thorough preparation, focus, dedication and participation throughout the semester. We, your lecturers for this module, have devoted many hours in preparing this study material; if you master it properly, you will complete the module successfully.

We wish you every success in your studies.

Your lecturers

## **11 ADDENDUM**

### **SELF-EVALUATION ASSIGNMENT**

#### **QUESTION 1**

Tim was a director of Beta (Pty) Ltd, of which he and his brother Gilbert were the only two shareholders. Tim tried to circumvent certain regulations governing the export of traditional sports supplements by calling the consignment natural vitamins. He was subsequently tried and was convicted of fraud in 2013. As a result, he was disqualified from acting as a director of the company, and was removed from the office. Tim, however, believes that he has mended his ways and wants to be reinstated as a director of Beta (Pty) Ltd. He has made an application to the court to be reinstated. Gilbert, however, strongly objects to Tim's being reinstated as a director.

Advise Tim on his chances of success, with reference to the common law, relevant case law and the provisions of the Companies Act 71 of 2008.

#### **QUESTION 2**

McNuggets Ltd issued shares for which the consideration was payable in future instalments. The subscribers still owe the consideration of 5% of the shares originally allocated to them. The company now wants to waive the debt owed by each subscriber to the company, as the yearly financials have shown a huge profit.

Critically discuss the requirements to be met in terms of the Companies Act 71 of 2008 if the company wants to write off the outstanding part of the issue price. (You are not required to discuss financial assistance.)

#### **QUESTION 3**

Explain whether it is possible for a valid resolution of shareholders to be passed without convening a meeting of shareholders.

#### **QUESTION 4**

Thandi is one of the five directors of Surfs Heaven (Pty) Ltd. The other directors are of the opinion that Thandi is neglecting her duties as director because she is out surfing all the time. The board of directors has therefore resolved to remove her as director. Thandi is very unhappy about this and believes that she is in fact promoting the company by surfing regularly. She wants the matter to be reviewed.



- 4.1 Advise Thandi on the grounds upon which a director may be removed by the board of directors as well as on whether the matter may be reviewed.
- 4.2 Explain how your answer would have differed (if at all) if the board of directors of Surfs Heaven (Pty) Ltd had consisted of only Thandi and one other director.

## LEARNING UNIT 12

# The impact of the Constitution and Globalisation on Company Law



**Study the following prescribed sections in your prescribed textbook: 5.1, 5.4.2, 6.1, 11.5, 11.9.3, 12.12, 12.18.3.2, 14.2, 19.1, 19.2.2, 19.2.3 and 20.1.**

**Study sections 5, 7, 20(9), 58, 63(2), 72, 76, 162, 164, 165 and 218(2) of the Companies Act.**

**Study sections 8, 9, 10 and 39(2) of the Constitution of the Republic of South Africa, 1996**

### 12.1 INTRODUCTION

The values and beliefs that govern the running of business operations are based on constitutional values and principles and often reflect African values that comprise the concept of ubuntu. Company law at first glance is a technical commercial subject based mainly on statute. However, upon scrutiny several transformation values are reflected in the module content.

This study unit provides examples to illustrate the importance of constitutional principles and values in the interpretation and application of the law regulating company law. The Constitution of the Republic of South Africa, 1996 ('the Constitution') and its values that also imbue values of ubuntu plays an important role particularly in the interpretation of legislation. Promoting these values in the development of the common law plays a pivotal role in ensuring that the law adapts to suit the community it serves. This evolving nature of law is foundational to the principle of transformative constitutionalism.

You will know that you understand this learning unit if you are able to answer the following **key questions**:

- What African values comprise the concept of ubuntu?
- Explain whether it is possible to enforce the principles of ubuntu and the constitutional principles in a court of law.
- Name three cases in which the court has applied principles of ubuntu.
- What does 'Africanisation' mean?
- What does the *audi alteram partem* rule entail?
- What is meant by transformative constitutionalism?
- What constitutional principles are important for purposes of South African business?
- Mention examples of how the court has developed the common law to adapt to serve the community.
- Explain the test that is used by the court to determine whether it is necessary to develop the common law.
- What does corporate social responsibility entail?
- How is corporate social responsibility reflected in the Companies Act?
- Which stakeholders are recognised as being affected by corporate behaviour underlying the concept of corporate social responsibility?
- In what ways would corporate social responsibility be potentially beneficial to

companies?

- Which companies are required to appoint a Social and Ethics Committee?
- What are the functions of the Social and Ethics Committee?
- What is globalisation?
- What are the main characteristics of the modern corporate world?
- In what ways does the Companies Act recognise globalisation?

## 12.2 THE IMPORTANCE OF THE INFUSION OF AFRICAN LEADERSHIP PHILOSOPHIES AND CONSTITUTIONAL VALUES

Important terms	Meaning
Africanisation	Renewing the focus on Africa and ensuring that teaching is adapted to African values, realities and conditions.
Constitutional values / principles	Human rights based on democratic values and social justice.
Corporate social responsibility	A business approach that contributes to sustainable development by delivering economic, social and environmental benefits for all stakeholders.
Globalisation	The integration of nations through the flow of goods, information, services and capital. It is a process by which businesses develop international influence.
Locus standi	The right of a party to appear and be heard before a court.
Organisation for Economic Co-operation and Development ('OECD')	A group of 34 democratic member countries supporting free market economies that discuss and develop economic and social policy.
Stakeholders	Persons who can affect or be affected by the actions, objectives and policies of a business, including creditors, directors, employees, government (and its agencies), owners (shareholders), suppliers, unions, and the community from which the business draws its resources.
Transformative constitutionalism	A long-term project of constitutional enactment, interpretation and enforcement to transform the country's political, legal and social institutions and power relations in a democratic way.
Ubuntu	Ubuntu is based on the inherent belief that one is never alone, as expressed in the African idiom ' <i>Motho ke motho kabatho</i> ' (loosely translated as 'I am because you are').

**Africanisation** aims to ensure that people in a particular context such as the community or family in the case of traditional African societies maintain sound relationships tailored on accommodating opposing views and conciliating competing interests. An inclusive approach of joint decision-making in matters that affect the business as a whole is foundational to the ubuntu concept. A more horizontal approach is propagated where not all decisions are made from the top. Ubuntu means people are people through others. Ubuntu is an underlying concept of Africanism. Ubuntu comprises of a set of values that find expression in the Zulu saying '*umuntu ngumuntu ngabantu*', which means that **a person is a person through other people**. Ubuntu was given explicit application in our jurisprudence in the highest court in *S v Makwanyane* 1995 (6) BCLR 665 (CC). Madala J noted that *ubuntu* advocates **social justice** and **fairness**.

In *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 3 SA 238 (SCA), para 38, Harms JA describes ubuntu as a relationship of **mutual respect**. In a similar vein in *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 4 SA 327 (CC) Mokgoro J associated ubuntu with a general obligation to treat people with respect and dignity, to avoid undue confrontation and to give reasons for administrative decisions.

The second report issued by the Institute of Directors of South Africa *King Report on Corporate Governance*, 2002 first canvassed the notion of introducing African business values to be applied in South Africa, which is now summarised as 'ubuntu'. Although certain universal principles will always be applied in decision-making in business, ubuntu has become an important principle which also permeates the latest King Report on Corporate Governance, 2016 ('King IV'). The importance of ubuntu in the South African context is recognised where it states that 'the common purpose of all human endeavours, individual or corporate, should be that of service to humanity' (King IV 24).

In *South African Broadcasting Corporation Ltd and Another v Mpofu* [2009] 4 All SA 169 (GSJ) ('Mpofu') Victor J (with Jajbhay J and Horn J concurring), considered the importance of sound corporate governance, and leadership qualities of directors. The court held that the Constitution recognises the importance particularly in respect of state-owned companies that fall within the definition of 'organ of state' in section 195. This section deals with basic values and principles governing public administration. It requires a high standard of professional ethics that must be promoted and maintained (*Mpofu* para 55).

The court in *Mpofu* stressed that African leadership philosophy and values must be applied so as to 'emerge from the past of subjugation and exploitation' that are remnants of the historical impact of slavery and colonialism, imperialism and globalisation on the continent of Africa. Sound leadership is the catalyst for positive transformation (para 61).

In *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), Sachs J expressed that *ubuntu-botho* is not only window-dressing that should be 'invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is foundational to our constitutional culture of reconciliation and bridge-building to overcome and transcend the devastating remnant effects of past divisions in South Africa (See *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) para 48 for a description of the historic inequities). Ubuntu represents 'the element of **human solidarity** that binds together liberty and equality'. It supports and adds to the fundamental rights in the Constitution (*Mpofu* para 65). That the values of ubuntu should underlie corporate decision making is bolstered further by the finding of the highest court in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC):

The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of

the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

One of the rules of natural justice is the ***audi alteram partem***-rule. This principle is firmly entrenched in our law. It basically means that before any judicial functionary takes a decision on a matter, both sides of the story must be heard. It originates from the natural desire of man to be fair to his fellow human beings. This principle is similar to the principle found in traditional African societies with their strong emphasis on the due observance of procedure. All members of the community must be allowed to voice their opinions when their interests are affected. The *audi alteram partem*-principle is reflected in ubuntu. Ubuntu ultimately dictates that one has to be fair in all one's relationships, which will include being quick to listen compassionately to other people's stories and slow to pass judgment.

In summary, the values of ubuntu are embodied in the following elements that apply in business:

- The ability to show compassion
- Social justice and fairness
- Harmony and humanity
- Recognising the inter-connectedness of people and the accompanying responsibilities
- Integrity and ethical behaviour
- Open channels of communications and transparency
- Due process and sensitivity in dealings with one another

**Please note!** Other similar values also form part of the concept of ubuntu. This list is not a closed list.

### 12.2.1 Constitutional principles / values

Section 8(2) of the Constitution provides that the Bill of Rights binds a natural or a juristic person (like a company or close corporation) to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. When applying a provision of the Bill of Rights to a natural or juristic person, in order to give effect to a right in the Bill of Rights, a court must apply, or, if necessary, develop the common law to the extent that legislation does not give effect to that right (s 8(3)). A court may develop the rules of the common law to limit the right, provided that the limitation is in accordance with the limitation clause contained in section 36(1) of the Constitution.

The values of ubuntu are reflected in the Constitution:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) human dignity; the achievement of equality and the advancement of human rights and freedoms.  
(s 1)

Ubuntu underlies the building of our constitutional democracy and to develop African leadership values to be applied in companies. The values/principles of ubuntu and the constitutional values are infused in the various aspects in the module content. However, these values are subtle underlying values and are generally not in itself a course of redress.

Some examples of how the values of ubuntu are imbued in the law regulating different South African businesses are set out below:

- It is a rule in all business enterprises that the chosen name should not be offensive, racist or impinge negatively on any individual or legal person's right to dignity.

- The values of ubuntu must inform the manner in which corporate decisions are taken by directors. Proper, constructive dialogue requires the infusion of the culture of ubuntu to promote social cohesion (*Mpofu* paras 62, 64 and 66).
- One of the purposes of the Companies Act is to promote compliance with the Bill of Rights in the application of company law. The Bill of Rights is contained in Chapter 2 of the Constitution (s 7 (a)). It enshrines the rights of all people and affirms the fundamental democratic values of human dignity, equality and freedom. In addition, it regulates the relationship between economic citizens and thus may have fundamental implications for company law.
- The Companies Act also aims to 'continue to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner within the global economy' (s 7 (e)).
- Directors in performing their functions in companies must consider the interests of other stakeholders such as the community and the environment in which the company that they serve, functions.
- Directors of companies can be removed by means of an ordinary resolution – this is despite any agreement that may have been concluded to the contrary and no special resolution is required (s 71 of the Companies Act). This may appear drastic. However, the law requires that before any such action may be taken, certain requirements should be met to ensure **ubuntu** and **fairness**. Certain procedural requirements must be adhered to before a removal can be lawfully effected.
- The Companies Act also provides protection for minority shareholders. This demonstrates the element of ubuntu and requires parties to be fair to one another.
- Principles of majoritarianism feature strongly throughout the legislation. Notably, collectivity or solidarity is also an element of ubuntu.
- The Companies Act provides for a system of informal dispute resolution before the Commission for Intellectual Property and Companies ('the CIPC' or the 'Commission'), the Takeover Regulation Panel where appropriate, and other accredited forums. This is similar to the African practice where a dispute is referred to a '*Kgoro*' which will attempt to resolve the matter. During this process, the *audi alteram partem* principle is applied.
- Ubuntu is also evident in light of the fact that **humanity is promoted** in that agreements must be respected and honoured by those who concluded them. This is evident in various types of contracts: partnership agreements, contracts concluded for the formation of trusts, shareholders agreements, the Memorandum of Incorporation which is the constitutive document of a company, and association agreements in close corporations. Fairness also plays an important role in the interpretation of shareholders' agreements.
- The disclosure requirements in the Companies Act reflect the value of transparency of ubuntu.
- The principle of transparency is imbued in the requirement that directors must disclose any financial interest that they have in any transaction affecting the company that they serve.

- The law attaches certain consequences to misconduct committed in different business enterprises. This reflects an element of **ubuntu** and **fairness** and supports the principle that '**one reaps what one sows**'. It clearly discourages conduct which would detriment outsiders and participants in the business. Although companies are recognised as separate legal persons, it is possible to disregard the juristic personality of a company to hold individuals inside the company liable in certain circumstances (s 20(9) of the Companies Act).
- The remedies provided for in the Companies Act also reflects that restorative restitution is promoted rather than imposing criminal sanctions.
- As a strategic attempt to curb corruption the Protected Disclosures Act 26 of 2000 was enacted. This piece of legislation provides protection in all types of business. Additionally, section 159 of the Companies Act has introduced protection against civil, criminal or administrative liability for making a disclosure or 'blowing the whistle' on corruption or illegal conduct in a company.
- Different persons are involved and affected by the commencement of the business rescue. One of the purposes of the Companies Act is providing for the efficient rescue and recovery of the financially distressed companies in a manner that balances the rights and interest of all relevant stakeholders (s 7(k) of the Companies Act). Business rescue proceedings recognise among others, the interests of employees. This is the first time that stakeholders other than the shareholder and company creditors have received direct protection in the Companies Act.

### 12.2.2 Constitutional interpretation and development of the common law

The constitutional values play an important role in how the court interprets and applies the legislation, and develops the common law. The guidelines for proper interpretation that have been provided by the constitutional court dictate that when a section of the legislation is capable of more than one construct - one being more restrictive and the other providing for a wider net of protection – the broader construct be preferred, particularly if a constitutional right is at stake. One of the golden rules of interpretation is that the section should be interpreted in context (See *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) paras 23 – 24; *NEHAWU v University of Cape Town* 2003 (2) BCLR 154 (CC) para 14; *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 33). This entails consideration of policy underlying the legislation and taking cognizance of the purpose of the particular section in context of the legislation, ie where it is placed in the legislation. Conceivably, jurisdictional context is also important: the economic and social aspects that are unique to the country in which it operates. In the South African context, it is likely that restitutive practices of employment equity and broad-based black economic empowerment would be considered, for instance in a scenario where the court is required to evaluate whether or not the board of directors should be held liable for their actions in certain instances.

The court has a duty to develop the common law so that the law keeps up, and remains suitable as the needs of the community it aims to serve, change. **Section 39 of the Constitution** determines that the court must, when developing the common law promote the spirit, purport, and objects of the Bill of Rights. Our common law has evolved through centuries of feudalism, colonialism, discrimination, sexism, exploitation, and apartheid. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) the highest court considered

whether the common law should be developed to require that parties to a contract should be legally required to contract with each other in good faith and on reasonable terms. Shoprite argued that good faith is too vague a concept, and should not be enforceable (par 22). The court disagreed. The court noted that the development of our economy and contract law has predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development must take into account the values of the vast majority of people who can after democratisation of the country participate in trade and commerce. The approach followed by the majority of South Africans places a higher value on negotiating in good faith than would have prevailed under colonial legal tradition (par 24). The adaptation of the common law by infusion of constitutional values is what is meant by **transformative constitutionalism**.

Although one may be tempted to on that basis alone exclude from the curriculum any legislation or cases that were decided before the democratisation of the Republic of South Africa, the court recently in *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd & another* 2016 (1) SA 621 (CC) cautioned that precedents from the pre-democratic era can still provide important guidance and the age of the common law is not conclusive in deciding whether a reason exists to change the common law. Lessons learned from human experience are timeless and have passed the logical and moral tests of time. In deciding whether the common law must be developed, the court must in each case determine whether the common law fails to give effect to the section 39(2) objectives, and if so, the court must decide what development would appropriately address the shortcomings (*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* para 30).

The court have recognised in case law that a company has several constitutional rights like a natural person. The courts have through development of the common law clarified that a company has the following rights:

Right	Case
Equality	<i>Manong &amp; Associates (Pty) Ltd v City Manager, City of Cape Town &amp; another</i> 2011 (2) SA 90 (SCA)
Reputation, a good name and honour	<i>Dhlomo v Natal Newspapers (Pty) Ltd</i> 1989 (1) SA 945 (A)
Privacy	<i>Financial Mail (Pty) Ltd v Sage Holdings Ltd</i> 1993 (2) SA 451 (A)
Identity	<i>University of Pretoria v Tommie Meyer Films</i> 1979 (1) SA 441 (A)

### 12.3 CORPORATE SOCIAL RESPONSIBILITY

**Corporate governance** is the system used to regulate and oversee corporate conduct to balance stakeholders' interests and the interests of others that may be influenced by the conduct, in order to ensure responsible behaviour while ensuring the maximum level of efficiency and profitability for a company.

**Corporate social responsibility** seeks to make modern companies responsible members of the community. The term "**CSR**" is generally understood to mean integrating economic, social and environmental imperatives into the company's activities while at the same time addressing shareholder and stakeholder expectations. It is premised on the idea that the modern company has a wide and diverse range of stakeholders, that is, both business and socio-economic



stakeholders. Broadly, corporate social responsibility means that businesses have a responsibility towards the societies in which they operate and that this responsibility needs to be managed. It refers to the involvement of companies in social projects that help to advance the society and the community in which they operate.

**Stakeholders** are those who may affect or may be affected by the company's activities. So there is a greater interdependence between companies and their stakeholders. Examples of company stakeholders include:

- shareholders
- employees, trade unions or other representatives of employees
- communities surrounding the company's operations and communities from which the company's workforce is drawn
- business partners
- national and regional governments
- regulatory bodies
- suppliers
- customers
- non-governmental and community-based organisations
- the public in general
- the environment

CSR is, therefore, a voluntary commitment by companies to manage their role within society responsibly and to contribute to sustainable development through co-operation with their stakeholders in general to improve the stakeholders' quality of life. The concept of CSR, therefore, marks a departure from the traditional and outdated perception that the only object of business is to increase profits. The focus is now clearly wider than maximising short-term profits.

### **12.3.1 Arguments advanced against CSR**

Critics of CSR argue that there is no direct link between the social behaviour of the company, on one hand, and the company's competitive advantage and performance, on the other. They argue that the role of businesses is to generate profits and that societal issues must be addressed by the State and not by businesses. It has been argued in this regard that CSR measures tend to be burdensome on businesses.

### **12.3.2 Arguments advanced in favour of CSR**

Proponents of CSR argue that CSR may benefit companies in a number of ways, including the following:

- CSR may improve the company's capability to generate sustainable value through mutually beneficial relationships with their stakeholders. Various stakeholders such as community groups, regulators and purchasing bodies will potentially favour socially responsible companies with business opportunities and this may enhance the profit potential of such companies.
- Socially responsible companies may benefit from preferential procurement and government cooperation in terms of the Broad-Based Black Economic Empowerment policies in South Africa.

- CSR may enhance the company's reputation and differentiate it from its competitors. A good reputation is a very valuable asset which a company could have. With the advent of social media a company's reputation may be instantly advanced and promoted if they engage in corporate social responsibility.
- A company with a good social record, and which treats its employees with dignity, is likely to attract, motivate and retain a productive, stable and loyal workforce.
- Increasing employee satisfaction leads to better performance by employees and this will assist the company to increase production, quality, reliability and profits.

Ultimately, it is essential that companies should continue to make profit and to operate in an economically competitive manner but they must do so in a socially responsible manner.

### 12.3.3 How CSR is reflected in the Companies Act

CSR is illustrated in a number of sections of the Companies Act as well as in the objectives of the corporate law reform process that preceded the passing of the Companies Act. Some of these ways are as follows:

- The extensive corporate law reform process which culminated in the passing of the Companies Act recognised the need for South African company law to be sensitive (amongst other things) to social and ethical concerns.
- One of the purposes of the Companies Act is to promote the development of the South African economy by encouraging transparency and high standards of corporate governance, *given the significant role of enterprises within the social and economic life of the nation* (s 7(b)(iii)). This manifests a realization that companies play a vital role not only in the economy, but in the social life of the country as well.
- The Companies Act specifically seeks to reaffirm the concept of the company as a means of achieving economic and *social benefits* (s 7(d)).
- The Companies Act seeks to promote the development of companies within all sectors of the economy, and to encourage active participation in economic organisation, management and productivity (s 7(f)).
- The Companies Act also seeks to encourage the efficient and responsible management of companies (s 7(j)). Sound management of companies may enhance corporate performance, lead to creation and retention of jobs and also helps to prevent corporate conduct which may have negative impacts on society. It also prevents corporate collapses due to mismanagement which may also have dire consequences on the society.
- The Companies Act provides for non-profit companies which are incorporated for social activities, public benefits, cultural activities or group interests. The objects for which non-profit companies may be registered may include prevention and education about HIV and AIDS, assistance of refugees, protection of the environment and animal welfare or child welfare and protection.
- Corporate activities may affect a wide circle of stakeholders. As such, the Companies Act has extended locus standi to a broad category of stakeholders (not only company

shareholders) to enforce its provisions and to seek redress where company directors have abused their position, for example, in the context of the derivative action (s 165) and applications to declare a director delinquent or under probation (s 162). Such stakeholders may include directors, prescribed officers, trade unions or other representative of employees, persons who have been granted leave by the court, the Commission or Takeover Regulation panel. Moreover, *any person* who contravenes any provision of the Companies Act of 2008 is liable to *any other person* for any loss or damage suffered by that person as a result of the contravention (s 218(2)).

- The Companies Act requires certain categories of companies to appoint a Social and Ethics Committee to monitor the company's activities with regard to matters relating to **social and economic development** (includes the company's standing in terms of the goals and purposes of the 10 principles set out in the United Nations Global Compact Principles; the OECD recommendations regarding corruption, the Employment Equity Act; and the Broad-Based Black Economic Empowerment), **good corporate citizenship** (includes the company's promotion of equality, prevention of unfair discrimination reduction of corruption; contribution to development of the communities in which the company's activities are predominantly conducted or its products or services are marketed; and recording of sponsorship, donations and charitable giving), **the environment, health and public safety, consumer relationships, and labour and employment issues** (s 72 and Regulation 43).

The following companies are required by the Companies Regulations to appoint a Social and Ethics Committee:

- Every state owned company
- Every listed public company
- Any other company that has had a public interest score above 500 points in any two of the previous five years

Note that CSR is also reflected in King IV, which emphasises the importance of stakeholder interests.

## 12.4 GLOBALISATION

**Globalisation** refers to the integration of nations through the flow of goods, information, services and capital. It is a process by which businesses develop international influence. The various business enterprises covered in this module are global in many ways. For example, the businesses enterprises may raise capital both domestically and internationally; the membership of the enterprises may be both local and international; there are some foreign businesses that are operating in South Africa; some South African businesses have operations in foreign jurisdictions, and some of the big listed public companies in South Africa are also listed on the stock exchanges of other countries.

The law reform process that led to the passing of the Companies Act emphasised the following characteristics of the modern corporate world:

- There is increased globalisation
- There is increased electronic communication
- There is increased sensitivity to social concerns, corporate governance and ethical concerns
- The markets are rapidly evolving

- There is greater competition for capital, goods and services
- There is an increase in international trade, foreign investment and mobility of international capital

In light of the above factors, it is necessary for South Africa's company law to be investor friendly and to be harmonised with the trend in the leading modern jurisdictions. South African company law, therefore, recognises globalisation in the following ways:

- One of the purposes of the Companies Act is to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy (s 7(e)). This manifests a realisation that South Africa is one of the participants in the wider global economy. The harmonisation of South Africa's corporate laws with the laws of other countries is, therefore, essential.
- The courts are allowed to consider foreign company law (to the extent appropriate) when interpreting and applying the provisions of the Companies Act (s 5(2)).
- The effects of decisions by English courts may be seen in a number of common law principles and statutory provisions, for example, *Salomon v Salomon* [1897] AC 22 (HL), *Royal British Bank v Turquand* (1856) 6 E & B 327; 119 ER 886, *Attorney-General v Mersey Railway Co* [1907] 1 Ch 81 (HL) and *Regal Hastings Ltd v Gulliver* [1942] 1 All ER 378; [1967] 2 AC 134 (HL) (see, for example, the statutory version of the *Turquand* rule in section 20(7) of the Companies Act as well as the common law and partially codified duties of company directors).
- The influence of corporate laws of other modern jurisdictions such as the United States of America, United Kingdom, New Zealand, Canada and Australia may be seen in a number of concepts, for example the appraisal remedy (s 164); an objective duty of care, skill and diligence (s 76(3)(c). Note that this test has some subjective elements); the business judgment rule (s 76(4)), and the statutory derivative action in terms of the Companies Act (s 165).
- The provisions relating to the appointment of proxies (s 58) and electronic communication at shareholders' meetings (s 63(2)) are a manifestation of greater sensitivities to globalisation.
- The Companies Act provides for the registration of domesticated companies and external companies.
- The Companies Act seeks to provide for increased standards of corporate governance, shareholder and investor protection (s 7). The purpose is to encourage both local and foreign investment in order to stimulate economic growth in South Africa.

## 12.5 COMPANY LAW AND THE SOUTH AFRICAN LEGAL SYSTEM

There are several pieces of legislation which affect the regulation of companies and may have an impact on companies, such as the Insolvency Act 24 of 1936, Income Tax Act 58 of 1962, the Magistrates Courts Act 32 of 1944 and the Uniform Rules of the High Court, the Promotion of Access to Information Act 2 of 2000, the Competition Act 89 of 1998, the Employment Equity Act 55 of 1998, Broad-Based Black Economic Empowerment 53 of 2003 and various environmental legislation. The legislative framework is to be viewed in the context of the Constitution of the Republic of South Africa, 1996. For example, one of the purposes of the

Companies Act is to promote compliance with the Bill of Rights in the Constitution, in the application of company law.

### **Reflection**

In this learning unit, we have provided some insight into how the law applicable to companies has been affected by, and is susceptible to Africanisation, transformative constitutionalism and globalisation. At first glance, one would think that law that is for the most part contained in legislation and subject to capitalistic values would not reflect values of ubuntu. However, the Constitution has had a significant effect in this area of law, not only because of the constitutional principles that are applicable to companies directly, but also because courts must take cognisance of the underlying constitutional values when interpreting legislation and when developing the common law.