

UNIVERSITY OF FORT HARE  
NELSON R MANDELA SCHOOL OF LAW  
(East London Campus)

Law of Business Entities B  
LMB 321E

Main EXAMINATION

NOVEMBER 2019

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Time: 3 hours

Subject: LMB 321E

Marks: 100

This paper consists of Nine (9) pages including the cover page

Internal Examiners

Adv S Muthugulu-Ugoda

Internal Moderator

Prof A van Coller

INSTRUCTIONS

1. Answer ALL questions.
2. Do not separate subsections of questions.
3. Pay careful attention to marks allocated.
4. WRITE LEGIBLY.
5. Answer Question 3 on the question paper.

### QUESTION ONE (20 MARKS)

Sam and Susan formed a company with the name 'Randfontein Estates Gold Mining Company'. *Randfontein Estates Gold Mining Company's* sole business is to develop and sell a piece of property that it owns. Susan owns 80 per cent of the issued share capital of *Randfontein Estates Gold Mining Company* and Sam holds 20 per cent. One day while on the business for *Randfontein Estates Gold Mining Company*, Sam meets an old school friend who offers to sell to Sam a piece of property with potential for development. The property is situated very near the property owned by *Randfontein Estates Gold Mining Company*. Sam decides to take up this personal offer and purchase the property for himself. Sam thereafter offers to sell the property to *Randfontein Estates Gold Mining Company* but at twice the price that he paid for it. When Susan discovers the facts, she is furious and threatens to sue Sam for not acquiring the property for *Randfontein Estates Gold Mining Company* in the first place. Advise Sam of his legal position.

### QUESTION TWO (8 MARKS)

Who may utilise the statutory derivative action provided for in section 165 of the 2008 Act?

### QUESTION THREE (72 MARKS)

In respect of each of the following questions, indicate which one of the following statements is the incorrect statement:

1. A shareholders' meeting:
  - a. Must be properly called and convened
  - b. May commence only if a quorum of members is present
  - c. Must be held either at the place at which the company is registered or at its principal place of business
  - d. Must be held after notice has been to all persons who are entitled to attend the meeting
  
2. The record date defined in section 1 of the 2008 Act is directly relevant in determining:
  - a. The voting power of the various shareholders of the company
  - b. Which of the shareholders of the company are entitled to notice of a shareholders' meeting
  - c. To decide any matter by written consent or electronic communication
  - d. The powers and duties of the directors of the company

3. If the board of directors of a company does not determine a record date for any action or event:
- i. The record date will be determined by the company's MOI or the rules of the company, provided that such matters are included in the company's MOI or rules
  - ii. The record date will be determined by the date of the action or event in question
  - iii. In the case of a meeting of shareholders, the record date will be the latest date by which the company is required to give the shareholders notice of the meeting
  - iv. The record date may be determined retrospectively by the directors of the company by means of a written resolution approved by a majority of the shareholders of the company
4. A shareholders' meeting may be called:
- i. By the board of directors of a company
  - ii. By any person, provided that such person is authorised to call the meeting by the company's MOI or rules
  - iii. At any time or place
  - iv. At the discretion of the board of directors of a company, in the interests of the shareholders of the company
5. A demand for a shareholders' meeting:
- i. May never be made by the shareholders of a company
  - ii. May be set aside by an order of court
  - iii. Must specify the purpose for which the meeting is proposed
  - iv. May be withdrawn by a shareholder, provided that the withdrawal occurs prior to the start of the meeting
6. A shareholders' meeting:
- i. Must be properly called and convened.
  - ii. May commence and vote on resolutions without a quorum of members present provided that sufficient further members arrive before the meeting closes.
  - iii. May be held either at the place at which the company is registered or at its principal place of business or any other accessible location.
  - iv. Must be held after notice has been to all persons who are entitled to attend the meeting.
7. The record date defined in section 1 of the 2008 Act is directly relevant in determining:
- i. Which of the shareholders of the company are entitled to notice of a shareholders' meeting.
  - ii. Which of the shareholders of the company are entitled to receive a specific dividend.
  - iii. The dates of commencement and termination of a director's term of office.

The voting power of the various shareholder of the company.

10. If the board of directors of a company does not determine a record date for any action or event:

i. The record date will be determined by the date of the action or event in question.

ii. In the case of a meeting of shareholders, the record date will be the latest date by which the company is required by the Act to give the shareholders notice of the meeting.

iii. The record date may be determined retrospectively by the directors of the company by means of a written resolution approved by a majority of the shareholders of the company.

iv. The record date will be determined by the company's MOI or rules of the company, provided that such matter are included in the company's MOI or rules

11. A shareholders' meeting may be called:

i. By the board of directors of a company.

ii. By any person, provided that such person is authorised to call the meeting by the company's MOI or rules.

iii. By the union representing the majority of the workers of a company.

iv. At the discretion of the board of directors of a company, in the interests of the shareholders of the company.

12. A demand for a shareholders' meeting:

i. May be made by the shareholders of a company provided that it is supported by at least 50 percent of the shareholders.

ii. May be set aside by an order of court.

iii. Must specify the purpose for which the meeting is proposed.

iv. May be withdrawn by a shareholder, provided that the withdrawal occurs prior to the start of the meeting.

13. A director of a company:

i. Is a member of the board of a company.

ii. Must be employed by the company.

iii. Includes an alternate director of a company.

iv. Could be a person who has not formally been appointed but nevertheless acts as a director.

14. A manager of a company:

i. May never be a director of the company.

ii. Is concerned with implementing the decisions and policies made by the board of directors.

iii. Has far fewer legal responsibilities than a director but nevertheless may not act contrary to the interests of the company.

- 12. Is generally not held responsible for actions of the company in terms of the provisions of the Companies Act, 2008.
- 13. The duties of directors:
  - I. Have been partly codified by the Companies Act, 2008.
  - II. Include the fiduciary duty towards the company and a duty of reasonable care.
  - III. May be wholly excluded by a contract entered into between the director and the company.
  - IV. May in certain circumstances extend to persons other than directors, for example members of board committees.
- 14. The fiduciary duty imposed upon directors requires a director to act:
  - I. In good faith and for a proper purpose.
  - II. In the best interests of the company.
  - III. According to the wishes of the majority of the shareholders.
  - IV. With a degree of care, skill and diligence that may reasonably be expected of a person in the position of that director.
- 15. In terms of the Companies Act, 2008 a director may be held liable:
  - I. In terms of the principles of common law relating to a breach of fiduciary duty.
  - II. Under the common law relating to defect for a breach of the duty to act with the required degree of care, skill and diligence.
  - III. Where the director acquiesced in the carrying on of business knowing that it was being conducted recklessly or fraudulently.
  - IV. For an unlawful decision taken at a board meeting at which the director was not present and of which he or she had no knowledge.
- 16. The following are among the factors affecting the documenting of a company's financial information:
  - I. The provisions of the Companies Act, 2008.
  - II. The JSE listing requirements in respect of companies whose shares are listed on the JSE.
  - III. The extent to which a company embraces business practices as set out in the King 3 Code.
  - IV. Whether the majority of shareholders are resident in South Africa or abroad.
- 17. All companies are required to keep the following company records:
  - I. A copy of the Memorandum of Incorporation.
  - II. Copies of all share certificates which have been issued to shareholders.
  - III. A list of the company's directors.
  - IV. Copies of all reports presented at the last annual general meeting.
- 18. The registered office of a South African company:
  - I. Must be within the borders of South Africa.

- i. Must have its address set out in the Notice of Incorporation when the company's first incorporated.
  - ii. May be a post office box number.
  - iii. Must, according to a recent judgement of the High Court, be the same as the company's principal place of business.
17. A person who holds a beneficial interest in any securities issued by a profit company, or who is a member of a non-profit company, has the right to inspect the following company records:
- i. The company's MOI.
  - ii. The reports presented at annual meetings.
  - iii. The securities register, in the case of a profit company.
  - iv. The directors' contracts of employment.
18. In terms of section 30(3) of the Companies Act 2008, the annual financial statements of a company must:
- i. Be filed with the Commission within 30 days of being finalised.
  - ii. Include a report by the directors with respect to the state of affairs of the company including the business profit or loss.
  - iii. Include an auditor's report, if the statements are audited.
  - iv. Be presented to the first shareholders' meeting after the statements have been approved by the board.
19. Every company must maintain a securities register which must include:
- i. The name of every shareholder.
  - ii. The address of every shareholder.
  - iii. The identity number of every shareholder.
  - iv. The number of shares held by every shareholder.
20. A nominee shareholder is:
- i. A person who holds securities on behalf of other persons.
  - ii. Always a corporate entity.
  - iii. The agent of the beneficial owner of the securities.
  - iv. Not entitled to dispose of the securities without the beneficial owner's authority.
21. The Companies Act defines business rescue proceedings as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:
- i. The temporary supervision of the company and of the management of its affairs, business and property.
  - ii. The orderly liquidation of the company in the event that it cannot be rescued.
  - iii. A temporary moratorium on the rights of claimants against the company.
  - iv. The development and implementation, if approved, of a rescue plan for the company.

14. An "affected person" for purposes of business rescue proceedings includes:
- i. The company's customers.
  - ii. The company's employees.
  - iii. The company's shareholders.
  - iv. The company's creditors.
15. An "affected person" may apply to court to have business rescue proceedings set aside on any of the following grounds:
- i. The majority of "affected persons" are opposed to business rescue proceedings.
  - ii. There is no reasonable basis to believe that the company is financially distressed.
  - iii. There is no reasonable prospect that the company will be rescued.
  - iv. The company has failed to comply with the procedures set out in section 129 of the Companies Act.
16. The legal consequences of business rescue proceedings include:
- i. Most civil legal proceedings against the company are stayed.
  - ii. Disposal of the company's property is restricted.
  - iii. Re-financing of the company is facilitated by allowing for company assets to be used to secure loans.
  - iv. Employees' contracts of employment may be modified if needed to assist the company's rescue.
17. The shareholders of a company which is in business rescue proceedings:
- i. Are included in the class of "affected persons".
  - ii. Have the right to convert their equity to loans of the same value during business rescue proceedings.
  - iii. Do not have the right to vote on the business rescue plan, unless the shareholders rights are affected thereby.
  - iv. Have the right to be notified of important events forming part of the business rescue proceedings.
18. In order for a court to assess whether there is a reasonable prospect of rescuing a company, it should be provided with information on:
- i. The knowledge and experience of the proposed business rescue practitioner.
  - ii. The likely costs of resuming the company's business.
  - iii. The likely availability and source of capital enabling the company to meet its running expenses.
  - iv. Why the proposed business rescue plan would have a reasonable prospect of success.
19. One of the consequences of business rescue proceedings is that legal proceedings may not be started or continued against the company in any forum except:
- i. With the written consent of the business rescue practitioner.

- With the permission of the court, subject to any condition the court may impose.
    - As a set-off against a claim instituted by the company in legal proceedings commenced before or after business rescue proceedings started.
    - With the written permission of the majority of the company's creditors.
  
- 31. The director of a company which is under business rescue proceedings:
  - i. Must continue to perform his or her functions during the business rescue procedure.
  - ii. Works under the authority and according to all reasonable instructions of the business rescue practitioner.
  - iii. Remains bound by all the duties contained in section 76 and subject to the liabilities contained in section 77 of the Companies Act.
  - iv. Must deliver books and records of the company to the business rescue practitioner within five days after the beginning of business rescue proceedings.
  
- 32. The business rescue practitioner must:
  - i. Be a member in good standing of a legal, accounting or business management profession that is subject to regulation by a regulatory authority, or be licensed by the Commission to practice as a business rescue practitioner.
  - ii. Lodge security equivalent to 6 months of the company's turnover with the Master of the High Court.
  - iii. Not be subject to an order of probation in terms of section 162(7) of the Companies Act.
  - iv. Not be disqualified from acting as a director of the company in terms of section 69(8) of the Act.
  
- 33. The following statements or reports do not form part of an audit:
  - i. The Chairman's report.
  - ii. The financial director's report.
  - iii. The group financial review.
  - iv. The profit and loss account.
  
- 34. The Auditing Profession Act 2005:
  - i. Regulates all accountants and auditors regardless of whether they are "registered".
  - ii. Establishes the Independent Regulatory Board for Auditors.
  - iii. Provides the legislative framework for overseeing and regulating the auditing profession.
  - iv. Is part of a wider international trend towards greater regulation of the auditing profession.
  
- 35. A private company must appoint an auditor if:
  - i. In the course of its primary activities it holds assets exceeding R5 million in a fiduciary capacity for persons who are not related to the company.

- 14. All the holders of beneficial interests are also directors of the company.
  - 15. It has a public interest score of 350 or more.
  - 16. It has a public interest score of between 100 and 349, and its financial statements are compiled internally.
17. The following companies must appoint a registered auditor:
- 17.1. State owned companies.
  - 17.2. Public companies whose shares are listed on the stock exchange.
  - 17.3. Public companies whose shares are not listed on the stock exchange.
  - 17.4. Non-profit companies.
18. A retiring auditor may be automatically reappointed at an annual general meeting without any resolution being passed, unless any of the following circumstances apply:
- 18.1. The retiring auditor is no longer qualified for appointment.
  - 18.2. The retiring auditor is no longer willing to accept appointment.
  - 18.3. The retiring auditor is over the age of 75.
  - 18.4. The company's audit committee objects to the reappointment.

**Total Marks: 100**