FEEDBACK TUTORIAL LETTER

1st SEMESTER 2019

ASSIGNMENT 1

COMPANY LAW

CPL511S
Dear Student

I trust that, by the time you are reading this Second Tutorial Letter of 2019 for Company Law, you have received and perused your marked Assignment number 1.

It is not easy to study by way of Distance Education. You need to work systematically from the beginning of the semester; otherwise you will be unable to master the subject. Remember that your marks are often a reflection of your attitude; if you try to complete an assignment in the shortest time possible you cannot expect to do well.

Note that feedback letters do NOT contain model answers: please do not memorise / copy these.

Company Law is a difficult course, especially so if you are not proficient in the English language. However, it is not impossible to pass, or even to do exceptionally well. All it takes is hard work and commitment. Please feel free to contact me for assistance while you are studying. I prefer e-mail as method of communication, and will try my best to respond as soon as possible. Very few students approached me for assistance while they were completing their assignment. Yet during the week before the exam I am inundated with students crying that they do not understand the work. By then it is too late! I must unfortunately make it clear that I will NOT be available to explain the entire semester’s work to students who have not made the effort to work during the semester.

**IMPORTANT INFORMATION FOR THE EXAMINATION**

- **Unit 1** is an introductory Unit and a thorough reading should suffice. Make sure you understand the concept of legal personality.
- Students need NOT memorise the statutory provisions contained in Unit 7. In the examination you will be provided with selected extracts from the Companies Act 28 of 2004. You must be able to APPLY the relevant statutory provisions to case studies.
- Unit 10 will not be assessed, however it is important that you understand the roles of the various functionaries of a Company.
The following Units will be assessed by way of short questions only: Unit 4 paragraphs 4 – 6; Units 13, 14, 17.
Unit 16 and 18 will not be assessed.
EVERYTHING ELSE NOT MENTIONED HERE MUST BE STUDIED!!!

COMPANY LAW [CPL 111S]
ASSIGNMENT 1/2019

The purpose of this feedback letter is, inter alia, to make certain observation regarding your answers to the questions as contained in the aforesaid assignment in an attempt to guide you to find the most appropriate answers and/or solutions. (In these explanations, references to sections refer to sections in the study guide.)

Remember that tutorial letters form part of your study material for examination purposes.

Firstly, some general comments:

1. Some students tend not to read a question in order to establish exactly what is asked and, as a result, have lost marks.

2. Observe the mark allocation in order to decide how many facts to include in your answer. Watch out that you do not repeat yourself; this wastes time in the examination, and does not gain you any extra marks. As a rule of thumb, a question counting two marks needs no more than two to three lines, etc.

3. Read your answer! Carelessness costs marks!

4. Make sure that you have answered all the questions; there is no excuse for omitting questions.

5. Make sure of the spelling of words. You were already requested to do so in the First Tutorial Letter. There is therefore no excuse if you have lost marks as a result thereof. It is really
alarming to note that tertiary students misspell words even when copying from the study guide!

6. The use of **sms-style answering** is not accepted. Again, it is evident that most of you have not read the first tutorial letter where these issues have been addressed. A mere “Yes” or “No” answer also does not deserve any marks, as you were warned that such an answer requires a proper motivation in addition.

7. Keep your answers concise and to the point. In the examination the markers do not have time to wade through pages of jumble in order to search for one correct key word. In fact, we do not mark on key words at all; if the context in which you use the words does not show understanding no marks will be allocated.

8. Please do not copy the questions into your assignment book; the tutors have a copy of the assignment. It wastes time to have to figure out where the question ends and the answer starts.

**QUESTION 1**

In general the replies to this question were satisfactory; however some students did not read the question and proceeded to indicate whether the statements were true or false.

1.1 The two main types of companies are **companies with a share capital and companies without a share capital.**

1.2 Clause 10 of the articles of association of Aquamarine Ltd appoints you as the public relations officer of the company. After 6 months, the company decides that it will no longer make use of your services. You **cannot** rely on the provisions of the articles to enforce your appointment to this position, because the constitution of a company is only a contract between the company and its members in their capacity as members.

*Numerous students wrote that “the constitution is not a contract between the company and its directors.” Nowhere in the question does it refer to directors. Read your questions carefully and do not simply copy answers from an old memorandum that you found somewhere!*
1.3 The memorandum of Namib Diamond Mining (Pty) Ltd. makes provision for two classes of shares, namely Class A ordinary shares and Class B cumulative preference shares. All dividends due to the Class B shareholders have been paid up to date. At a general meeting of the company the Class A shareholders resolve to reduce the percentage dividend paid to the Class B shareholders. The Class B shareholders do not have to accept this, because it affects their class rights.

1.4 Tuhafeni wishes to incorporate a company in terms of Section 60(b) of the Companies Act. He does not need to find any other persons to join him as shareholders. Note that this question does not relate to the liability of the directors of a Section 60(b) company!

1.5 The directors of Galaxy (Pty) Ltd have proposed an amendment to its articles. A special resolution is required to effect this change. At the general meeting convened to adopt the special resolution, only 4 of the 20 shareholders are present. They are Lerato, who holds 15% of the votes, Cindy, who holds 5% of the votes, Tsepo, who holds 4% of the votes, and Ismael, who holds 1% of the votes. The meeting can proceed since they do have a quorum. Once again numerous students simply copied the answer (probably from the worksheet on e-learning) without noticing that the question was not the same!

1.6 Annika is a shareholder of Nogood (Pty) Ltd. The day before the annual general meeting she discovers that her dog has eaten her share certificate. She will be able to vote at the meeting because a share certificate is not a share / her name will be in the register of members.

Remember that the register of members is kept at the registered office of the company, not at the Registrar of Companies.

1.7 Section 60(b) of the Companies Act makes provision for a particular kind of company with the directors being jointly and severally liable for the contractual debts of the company.
1.8 Share capital is divided into 3 main classes, namely preference shares, ordinary shares and deferred shares.

1.9 The articles of Sea and Sun Ltd. provide that directors shall be appointed and removed by special resolution of the shareholders. The shareholders are dissatisfied with the conduct of Harry, one of the directors. A general meeting is convened in terms of section 228 of the Companies Act, and an ordinary resolution is adopted to remove Harry from office. His removal is valid because he was removed in terms of the Act.

1.10 A director is not obliged to hold qualification shares in a company, unless required to do so in terms of the articles of the company.

Whether the director has to pay for the shares or can be given them as payment for services rendered bears no relevance to this question.

QUESTION 2

In case-study questions it is not sufficient to simply state the theoretical requirements. You need to APPLY the law to the facts. (See “How to answer problem questions” attached to this tutorial letter as Annexure A) The only requirement for a pre-incorporation contract that is relevant to this case study is that the company must ratify the contract.

It appears that Josua entered into a statutory pre-incorporation contract in terms of section 42 of the Companies Act. In terms of section 42 the company must actually ratify or adopt the contract after its incorporation. The company can choose whether or not to ratify the contract; if the company does not ratify the contract the contract lapses.

The company did not ratify the contract and it can therefore not be enforced against the company.

In principle, the trustee incurs no liability in terms of the pre-incorporation contract. In this instance, however, the contract provided for the trustee's personal liability should the company refuse to ratify the contract, and Josua can therefore be held personally liable.

QUESTION 3

Value of issued share capital with voting rights:
(Class C shares have no voting rights.)

Annie: \[10 \times N\$10 = N\$100, \ 10 \times N\$15 = N\$150\] Total N\$250

Benjamin: \[10 \times N\$10 = N\$100, \ 10 \times N\$15 = N\$150\] Total N\$250
Carol: \[20 \times N$10 = N$200, \quad 5 \times N$15 = N$75\] Total N$275

Dick: \[25 \times N$15 = N$375\]

Edgar: \[10 \times N$10 = N$100\]

Fred: no voting rights

\textbf{TOTAL = N$1 \, 250}

\textbf{Voting rights present at meeting:}

Annie: 250

Carol: 275

Dick: 375

Edgar: 100

\textbf{TOTAL = N$875}

\textbf{Quorum:} \[25\% \text{ of } N$1 \, 250 = N$312.50\]

A quorum is present

\textbf{Voting in favour:}

Dick: 375

Edgar: 100

\textbf{TOTAL = N$475}

Voting majority required = 75\% \text{ of } N$875 = N$656.25

The resolution has not been adopted.

\textbf{PLEASE NOTE THAT YOU NEED NOT MEMORISE THE PROVISIONS OF THE COMPANIES ACT DISCUSSED IN UNIT 7. YOU WILL BE PROVIDED WITH A HANDOUT CONTAINING THE RELEVANT PROVISIONS OF THE COMPANIES ACT.}

Before starting to answer this type of question, there are certain issues that you need to clarify for yourself. You will not be awarded any marks for this; but it will influence your final answer.

- Is this a public company or a private company? How do you determine this?
- Is the resolution an ordinary resolution or a special resolution? In some instances I will provide you with this information, however in other instances you will need to rely on your other areas of the work to determine this: for example I expect you to know that the constitution of the company can only be changed by way of a special resolution; on the other hand directors can be removed by way of an ordinary resolution.
• Do preference shareholders have the right to vote in the particular instance? How do you decide this?

Other aspects to bear in mind:
• If the Directors (or Managing Director) have called the meeting, sections 188 and 189 bear no relevance. These sections are only applicable if a SHAREHOLDER experiences the need to convene a meeting.
• It is quite legal to decide a special resolution by way of a show of hands; the provisions regulating the demand for a poll are similarly not relevant.
• The AUTHORISED share capital of the company plays no role in the outcome of your answer. Only ISSUED share capital is taken into consideration.
• The Act says that the person to whom a shareholder gives a proxy “NEED not be a member of the Company”. This does NOT mean that the proxy MAY not be a member.

QUESTION 4
4.1 The articles of association, as part of the company’s constitution, create a binding contractual relationship between the company and all its members as well as between the members inter se. In terms of section 71(2) of the Act the articles are deemed to have been signed by each member, who is deemed in law to be acquainted with the contents thereof and who is accordingly bound by the provisions thereof. Although Peter did not actually sign the association clause he cannot use his apparent ignorance as a defence and will be bound to the provisions thereof. Remember, the members are DEEMED to have signed the constitution; they have not actually signed it.

4.2 Read the facts carefully. The company in question is “Design Incorporated (Pty) Ltd”; it is a private company, NOT a company incorporated in terms of Section 60(b) of the Act. The shareholders can NEVER be held liable for the debts of a private company and the directors only in very rare circumstances. The facts do not indicate any wrongdoing on the part of Peter, and he accordingly does not incur any liability.

4.3 A director must exercise his powers and carry out his office with the necessary degree of care and skill. Ismael was negligent (he failed to exercise this duty as required) and as a result the company suffered damages. They can hold him liable.
Nowhere in the case study is mention made of a clause in the constitution purporting to exempt the directors from liability! Read the facts, not just previous answers. Also, a director can always be held liable by the company for damages caused by their negligence – the fact that Ismael was on official company business does not mean that he cannot be held liable.
HOW TO SOLVE PROBLEM QUESTIONS:

In order to find a legal answer to a practical problem requires reasoning, where a number of steps are to be taken in a specific order. This order is described in the flowchart on the following page.

One aspect should become clear when studying the flowchart: in order to successfully master the application of the law, we need a certain knowledge base from which we can draw partial answers. So what does that tell us about studying? Well, it points out that knowledge comes first, and understanding can only be developed on the basis of facts that have been learned. In order to develop a solution to a specific problem, you need to conduct a problem-analysis, which requires an understanding of the problem-area; but a sound knowledge base is a prerequisite for your understanding.

Knowledge → Understanding → Problem-Analysis → Problem-Solution

Always remember that in a problem question the purpose is to see whether you have the ability to solve a problem by applying the relevant legal principles. Just stating the legal principles is not enough – apply the law to the facts in order to come to a well-motivated conclusion.

Problem questions sometimes have more than one possible answer, depending on your interpretation of the facts. Even judges sometimes differ on how the facts of a case should be interpreted, so it is not unusual that you will, too. If your conclusion is motivated by applying the correct legal principles, you will get maximum marks.

BEWARE:

Sometimes you will not be confronted with a practical problem, for instance whether person A, who has bought stationery, which was afterwards utilized by A, B, and C, can claim a pro-rata refund from B and C, but with a theoretical question. Such theoretical question could be the question whether a given agreement reached between three persons, A B and C is an ordinary or an extraordinary partnership-agreement. If this is the case, you would obviously start with step 3 (LIST), and not with step 1 (GET) because the problem and the legal concept to be
checked has already been identified; also your task would end with step 7 (CONCLUDE), because there would be no practical problem/question to be answered!

**HOW TO SOLVE PROBLEM QUESTIONS:**

<table>
<thead>
<tr>
<th>Step</th>
<th>Action</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td><strong>GET</strong></td>
<td>an understanding of the practical problem/question</td>
</tr>
<tr>
<td>2.</td>
<td><strong>IDENTIFY</strong></td>
<td>a legal concept, providing a legal consequence which matches/corresponds with the desired/requested outcome, the objective</td>
</tr>
<tr>
<td>3.</td>
<td><strong>LIST</strong></td>
<td>the requirements/sub-requirements for the legal concept</td>
</tr>
<tr>
<td>4.</td>
<td><strong>EXPLAIN</strong></td>
<td>the requirements/sub-requirements for the legal concept</td>
</tr>
<tr>
<td>5.</td>
<td><strong>COMPARE</strong></td>
<td>the requirements with the facts given in the problem narrative</td>
</tr>
<tr>
<td>6.</td>
<td><strong>CHECK</strong></td>
<td>whether each and every requirement is met</td>
</tr>
<tr>
<td>7.</td>
<td><strong>CONCLUDE</strong></td>
<td>whether the legal concept selected above (step 2) is</td>
</tr>
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<td></td>
<td></td>
<td>- either applicable and its legal consequences (for instance: contractual liability, valid partnership agreement or contract, being a minor) follow</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- or not applicable and its legal consequences do not follow</td>
</tr>
<tr>
<td>8.</td>
<td><strong>ANSWER</strong></td>
<td>the practical problem/question</td>
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