

# **COURSE OUTLINE**

**COMPANY LAW 'A'**

**JANUARY 2011**

## GENERAL INFORMATION

### PURPOSE

This course seeks to expose the student to the various business forms and company groupings in South Africa, with special emphasis on the imminent changes as a result of the new Companies Act 71 of 2008. Relevant aspects relating to meetings, resolutions and corporate personnel will also be discussed.

### ASSUMPTION OF PRIOR LEARNING

Before you start this course, you must be able to:

- Write and communicate in coherent English,
- Demonstrate a thorough knowledge of the general principles of the law of contract,
- Demonstrate a working understanding of the law of agency,
- Be capable of independent learning,
- Understand the system of judicial precedent and the important role precedent plays in our law,
- Read, analyse and extract principles from law reports and other source material, and
- Apply legal problem solving techniques to practical situations.

### CRITICAL OUTCOMES

Apart from the knowledge and skill that relate directly to Company Law, the following skills are central to the study and practice of law which the course intends to enhance. By the end of this course you should be able to:

- *Identify* and *solve* practical legal problems,
- *Organise* and *manage* yourself and your work load,
- *Analyse* and *evaluate* the information conveyed during lectures and contained in the course handout,
- *Communicate* effectively in class debate, discussions, seminars and written examinations,
- Use technology,
- Recognise problem-solving contexts in company law.

### **SPECIFIC OUTCOMES**

By the end of this course, students will be able to achieve the following outcomes:

- Provide an overview of the concepts and principles of company law in South Africa.
- Identify and distinguish between the essential elements of each business form.
- Evaluate and appreciate the comparative advantage(s) and disadvantage(s) of each business medium.
- Provide an overview of the rights, duties, obligations and liabilities of the parties to the various business enterprises.
- Apply the knowledge acquired during the course to solve practical problems with regard to business enterprises.

### **TEACHING METHODS AND LEARNING RESPONSIBILITY OF STUDENTS**

From the outset, this course aims to analyse and critique the law in its present state and consider the imminent changes to this area of law. To this end a combination of formal lecturing and class discussions will be conducted. Emphasis will fall on discussing and evaluating relevant case law and legislation and the practical implications of the material studies.

Students are expected to take responsibility for their own learning by reading and preparing the course material provided. The required reading for each topic is contained in the course outline and students are advised to keep up to date with cases, legislation and relevant textbook and journal articles.

## STUDENT ASSESSMENT

<p><b>SPECIFIC OUTCOMES</b></p> <p><u>On completion of this course, you should be able to:</u></p>	<p><b>ASSESSMENT CRITERIA</b> (What evidence must you provide to show that you are competent?)</p> <p><u>You must be able to:</u></p>	<p><b>ASSESSMENT TASKS</b></p> <p><u>The evidence will be gathered in:</u></p>
<p>Provide an overview of the concepts and principles of Company Law in South Africa.</p>	<ul style="list-style-type: none"> <li>• Apply statutory and common law principles.</li> <li>• Identify critical aspects of case law.</li> <li>• Demonstrate and understanding of the concepts and principles contained in the case law and statutes.</li> </ul>	<ul style="list-style-type: none"> <li>• Class discussion and seminars</li> <li>• Class assignments</li> <li>• Test</li> <li>• Examination</li> </ul>
<p>Identify and distinguish between the essential elements of each business form.</p>	<ul style="list-style-type: none"> <li>• Describe and explain the various business structures.</li> <li>• Identify the relevant legislative provisions.</li> <li>• Identify critical aspects of case law regarding each business form.</li> <li>• Demonstrate an understanding of the concepts and principles contained in the case law and statutes.</li> </ul>	<ul style="list-style-type: none"> <li>• Class discussion and seminars</li> <li>• Class assignments</li> <li>• Test</li> <li>• Examination</li> </ul>
<p>Evaluate and understand the comparative advantage(s) and disadvantage(s) of each business medium.</p>	<ul style="list-style-type: none"> <li>• Compare the business structures in respect of the limitations and requirements imposed by statute and the common law.</li> <li>• Compare the business structures in respect of the advantages associated with each structure having regard to practical situations.</li> </ul>	<ul style="list-style-type: none"> <li>• Class discussion and seminars</li> <li>• Class assignments</li> <li>• Test</li> <li>• Examination</li> </ul>

<p>Provide an overview of the rights, duties, obligations and liabilities of the parties to the various business enterprises.</p>	<ul style="list-style-type: none"> <li>• Describe the rights, duties, obligations and liabilities of the parties to the various business enterprises.</li> <li>• Apply the common law and legislative principles in respect of the rights, duties, obligations and liabilities of the parties to the various business forms.</li> <li>• Demonstrate an understanding of and apply the relevant principles of the law of agency and contract to practical situations</li> </ul>	<ul style="list-style-type: none"> <li>• Class discussion and seminars</li> <li>• Class assignments</li> <li>• Test</li> <li>• Examination</li> </ul>
<p>Apply the knowledge acquired during the course to solve practical problems with regard to business enterprises.</p>	<ul style="list-style-type: none"> <li>• Identify the relevant legal problem or issue.</li> <li>• State the relevant law, and discuss the relevant legal precedents with regard to that issue.</li> <li>• Apply the law to the facts in order to come to a reasoned conclusion about the problem and the legal remedies that might flow from the finding.</li> </ul>	<ul style="list-style-type: none"> <li>• Tests</li> <li>• Examination</li> </ul>

### **ASSESSMENT STRATEGY**

The class work component of the course amounts to 30% of the final mark and comprises of one test and three short assignments.

The remaining 70% of the final mark comprises of one two hour examination which will contain:

- Problem questions which require the application of statute, common law and case law to solve practical issues;
- Case notes; and
- Theory type questions, in which students are required to describe, explain and critically evaluate the current law.

## **DP CERTIFICATE**

Attendance at lectures is compulsory and a register will be taken during each lecture. It is accepted that the ideal of 100% attendance is generally not attainable, however, students may miss no more than five lectures for this course. Students are responsible for collecting, retaining and presenting all relevant documents (doctor's letters etc) in respect of the lectures missed and filling out the necessary LOA (leave of absence) form.

Please be reminded that signing for another student constitutes fraud and any student caught doing so will be prosecuted in terms of the student disciplinary code.

A student who misses more than five lectures over in the course will not have met the course requirements and as a result such student's DP certificate will be removed and he/she will not be allowed to write the examination.

## **READING MATERIAL**

### Prescribed texts:

- Benade *et al Entrepreneurial Law Incorporating the New Companies Act Manual* 4<sup>th</sup> (special) edition, Butterworths (2009)
- *The New Companies Act and Amendment Bill, The : A Comparative Consolidation* Juta (2010)
- Pretorius & Delpport, *Student Case Book on Business Entities*, 3<sup>rd</sup> edition, Butterworths
- Companies Act 61 of 1973
- Companies Act 71 of 2008
- Close Corporations Act 69 of 1984

### Recommended texts:

- Beuthin and Luiz, *Beuthin`s Basic Company Law*, 3<sup>rd</sup> edition, Butterworths
- Cilliers & Benade, *Corporate Law* 3<sup>rd</sup> edition, Butterworths
- Kunst (ed), *Henochsberg on the Companies Act Vol I and II*, Butterworths
- Pretorius and Delpport, *Hahlo`s South African Company Law through the Cases*, 6<sup>th</sup> edition, Juta
- Davis, D. *et al, Companies and Other Business Structures in South Africa*. Oxford University Press (2009)

## COURSE OUTLINE

### 1. TYPES AND CATEGORIES OF COMPANIES

Companies Act of 2008	Other
Sections 8–10, 11(3), 13, 19(3), 23	<i>Fundstrust v van Deventer</i> 1997 (1) SA 710 (A)
Schedule 1	
Schedule 5 item 4	

- 1.1. Non-Profit Company
- 1.2. Profit Company
  - 1.2.1. State Owned Company
  - 1.2.2. Private Company
  - 1.2.3. Personal Liability Company
  - 1.2.4. Public Company
- 1.3. External Company

### 2. CLOSE CORPORATIONS

Companies Act of 2008	Other
Schedule 2	<i>Blesovsky NO and Others v Shipper and Another</i> (2001) (4) SA 1269 (W)
Schedule 3 Part A	<i>Stellenbosch Farmers' Winery v Distillers Corp</i> 1962 (1) SA 458 (A)
Schedule 5 item 3(2)	<i>Gatenby v Gatenby</i> 1996 (3) SA 118 (E)
	<i>Constantaras v BCE Foodservice Equipment (Pty) Ltd</i> 2007 (6) SA 338 (SCA)

- 2.1. Nature, Characteristics, Advantages and Disadvantages
- 2.2. Membership and Member's Interest
- 2.3. Fiduciary Duties and Duty of Care and Skill
- 2.4. Remedies for Members and the CC
- 2.5. Personal Liability for Debts
- 2.6. The Effect of the 2008 Companies Act

### 3. THE CORPORATE ENTITY

Companies Act of 2008	Other
	<i>Salomon v Salomon and Co</i> [1897] AC 22 (HL)
	<i>Dadoo Ltd v Krugersdorp Municipal Council</i> 1920 AS 530
	<i>Dhlomo v Natal Newspapers (Pty) Ltd</i> 1989 (1) SA

	945 (A)
	<i>Financial Mail (Pty) Ltd v Sage Holdings Ltd</i> 1993 (2) SA 451 (A)
	<i>Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd</i> 2001 (1) SA 545 (CC)
	<i>Lategan NNO v Boyes</i> 1980 (4) SA 191 (T)
	<i>Botha v Van Niekerk</i> 1983 (3) SA 513 (W)
	<i>R v Hammersmith &amp; Another</i> (1983) 80 LGR 322
	<i>Glazer v Commission on Ethics for Public Employees</i> 431 So 2d 752 (La 1983)
	<i>Cape Pacific v Lubner Controlling Investments</i> 1995 (2) SA 790 (A)
	<i>Airport Cold Storage (Pty) Ltd v Ebrahim and Others</i> 2008 (2) SA 303 (C)
	Cilliers JB & Luiz SM "The corporate veil – an unnecessarily confining corset?" 1996 (59) <i>THRHR</i> 523
	Domanski A "Piercing the corporate veil – a new direction?" 1986 <i>SALJ</i> 224 (especially pp 225–228; 234–235)
	Larkin MP "Regarding judicial disregarding of the company's separate entity" 1989 <i>SA Mercantile Law Journal</i> 277 (especially pp 280–285)

- 3.1. The Effect of the Status of Corporate Entity
- 3.2. Piercing the Corporate Veil
  - 3.2.1. Companies Act of 2008
  - 3.2.2. Case Law

#### 4. FORMATION OF THE COMPANY

Companies Act of 2008	Other
Sections 11–18	
Schedule 5 item 8	

- 4.1. Introduction
- 4.2. Name of the Company
- 4.3. Right to Incorporate
- 4.4. Registration of the Company
- 4.5. Memorandum of Incorporation
- 4.6. The Effect of the 2008 Companies Act



## 5. OFFICE BEARERS AND DIVISION OF CORPORATE FUNCTIONS

Companies Act of 2008	Other
Sections 86–89	<i>Ganes v Telecom</i> 2004 (3) SA 615 (SCA)
	<i>Lipschitz v Wolperty &amp; Abrahams</i> 1977 (2) SA 732 (A)
	<i>In re Maidstone Buildings Provisions Ltd</i> 1971 1 WLR 1085 (Ch)
	<i>Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd</i> [1971] 2 QB 711; [1971] 3 All ER 16 (CA)
	<i>Nelson v James Nelson &amp; Sons</i> [1914] 2 KB 770
	<i>In re Newspaper Proprietary Syndicate: Hopkinson v Newspaper Proprietary Syndicate</i> 1900 (2) Ch 349
	<i>Moresby White v Rangeland</i> 1952 (4) SA 285 (SR)
	<i>John Shaw &amp; Sons v Shaw</i> [1935] 2 KB 113 (CA)
	<i>Stott v Stott</i> 1932 GWL 39
	<i>Ben-Tovim v Ben-Tovim</i> 2001 (3) SA 1074 (C)

- 5.1. Employees
- 5.2. Prescribed Officers
  - 5.2.1. Secretary
  - 5.2.2. Manager
  - 5.2.3. Managing Director
- 5.3. Chairman of the Board of Directors
- 5.4. Division of Corporate Functions and Powers

## 6. AUDITORS

Companies Act of 2008	Other
Sections 90–93	Sections 2–3, 38, 45–46 and 48 Auditing Profession Act 26 of 2005

- 6.1. Functions of the IRBA
- 6.2. Registered Auditors
- 6.3. Appointment of Auditor
- 6.4. Resignation of Auditor
- 6.5. Rotation of Auditor
- 6.6. Rights and Functions of the Auditor
- 6.7. Liability of the Auditor

## 7. DIRECTORS

Companies Act of 2008	Other
Sections 19, 66–78	Sections 73 and 77 of the Security Services Act of 2004
	<i>Howard v Herrigel NNO</i> 1991 (2) SA 660 (A)
	<i>Ex parte Barron</i> 1977 (3) SA 1099 (C)
	<i>Ex parte Bennet</i> 1978 (2) SA 380 (W)
	<i>Movie Camera Company (Pty) Ltd v Van Wyk and another</i> 2003 (2) All SA 291(C)
	<i>Robinson v Randfontein Estates Gold Mining</i> 1921 AD 168
	<i>Regal (Hastings) Ltd v Gulliver</i> [1942] 1 All ER 378
	<i>Sibex Construction v Injectaseal</i> 1988 (2) SA 52 (T)
	<i>Industrial Development Consultants v Cooley</i> 2 All ER 162
	<i>Bellairs v Hodnett</i> 1978 (1) SA 1109 (A) @ 1130E–F
	<i>Atlas Organic Fertilizers v Pikkewyn</i> 1981 (2) SA 173 (T)
	<i>CyberScene Ltd v i-Kiosk Internet and Information</i> 2000 (3) SA 806 (C)
	<i>Coronation Syndicate Ltd v Lilienfeld</i> 1903 TS 489
	<i>Fisheries Development Corporation of SA Ltd v Jorgensen</i> 1980 (4) SA 156 (W)
	<i>Mears v African Platinum Mines</i> 1922 WLD 48
	<i>S v Shaban</i> 1965 (4) SA 646 (W)
	<i>In re Brazilian Rubber Plantations</i> [1911] 1 Ch 425
	<i>Percival v Wright</i> [1902] 2 Ch 421
	<i>Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman</i> 1998 (2) SA 138 SCA
	<i>Terblanche NO v Damji</i> 2003 (5) SA 489 (C)
	McLennan “Directors’ fiduciary duties and the 2008 Companies Bill” 2009 <i>TSAR</i> 184

- 7.1. Introduction
- 7.2. Relationship with the Company
- 7.3. Types of Directors
- 7.4. General
- 7.5. First Directors
- 7.6. Election of Directors
- 7.7. Ineligibility and Disqualification
- 7.8. Vacancies on the Board and Removal of Directors
- 7.9. Liability of Directors
- 7.10. Indemnification and Director’s Insurance
- 7.11. Directors’ Rights and Duties (NB!!!)
  - 7.11.1. Duty to Act in Good Faith

- 7.11.2. Duty to Act in the Best Interests of the Company
- 7.11.3. Duty to Act with Due Care and Skill
- 7.11.4. Prohibition on Insider Trading
- 7.11.5. Disclosure of Information in Contracts Between Director and Company

## 8. SHARE CAPITAL AND SHAREHOLDERS

Companies Act of 2008	Other
Section 35–37, 46–50, 77	<i>In re Cawley &amp; Co</i> (1889) 42 Ch 209 (CA)
	Van der Linde “The regulation of share capital and shareholder contributions in the Companies Bill 2008” 2009 <i>TSAR</i> 39
	Van der Linde “The solvency and liquidity approach in the Companies Act 2008” 2009 <i>TSAR</i> 224
	Van der Linde “The regulation of distributions to shareholders in the Companies Act 2008” 2009 <i>TSAR</i> 484

- 8.1. Share Capital
  - 8.1.1. Nature of Shares
  - 8.1.2. Classes of Shares
- 8.2. Membership of a Company
  - 8.2.1. Shareholders
  - 8.2.2. Capacity and Acquisition of Membership
  - 8.2.3. Termination of Membership
  - 8.2.4. Nominee Shareholders
- 8.3. Transfer of Securities
- 8.4. Capital Maintenance Rules
  - 8.4.1. Acquisition of Own Shares
  - 8.4.2. Distribution to Shareholders
  - 8.4.3. Financial Assistance

## 9. OFFER OF SHARES

Companies Act of 2008	Other
Sections 95–111	<i>Gold Fields Ltd and Another v Harmony Gold Mining Company Ltd and Others</i> 2005 (2) SA 506 (SCA)

- 9.1. Offer of Shares
  - 9.1.1. Initial Public Offer (IPO)
  - 9.1.2. Offer for Subscription vs Offer for Sale
  - 9.1.3. Offer to Public
  - 9.1.4. Advertisements Relating to Offers
  - 9.1.5. Prospectus

## 10. GENERAL MEETINGS AND RESOLUTIONS

Companies Act of 2008	Other
	<i>John Shaw &amp; Sons v Shaw</i> 1935 2 KB 113
	<i>Ben-Tovim v Ben-Tovim</i> 2001 (3) SA 1074 (C)
	<i>Dublin v Diner</i> 1964 (1) SA 799 (D)

- 10.1. General Meetings
- 10.2. Resolutions at Meetings

## 11. COMPANY GROUPINGS

Companies Act of 2008	Other
Section 1, 3, 4, 11, 30(3), 30(5)(b), 94(8)(c), 155(2)(b), 195(1)(i)–(j)	<i>Salomon v Salomon &amp; Co</i> [1897] AC 22 (HL)

- 11.1. Overview
- 11.2. Group of Companies
  - 11.2.1. Constitution of Group
  - 11.2.2. Definition of a Holding Company and Subsidiary
  - 11.2.3. Holding of the Majority of Voting Rights in the Subsidiary
  - 11.2.4. Wholly-owned Subsidiary
- 11.3. Subsidiary as a Member of its Holding Company
- 11.4. Regulation of Transactions between Related companies

## 12. MAJORITY RULE AND PROTECTION OF MINORITY INTERESTS

Companies Act of 2008	Other
	<i>Sammel v President Brand Gold Mining Co</i> 1969 (3) SA 629 (A)
	<i>Foss v Harbottle</i> (1843) 2 Hare 461 (67 ER 189)
	<i>Brown v British Abrasive Wheel Co Ltd</i> [1919] 1 Ch 290
	<i>Dafen Tinplate Co Ltd</i> (1907) Ltd [1920] 2 Ch 124

- 12.1. The Majority Rule in *Foss v Harbottle*
- 12.2. Protection of Minority Interests
- 12.3. *Excursus*: Protection of Whistleblowers

## 13. Corporate Governance

13.1 This part of the course will introduce students to the basic principles of corporate governance as set out in the King Code and in the 2008 Companies Act.

(Students' attention is drawn to the fact that Corporate Governance appears in the University Calendar as part of the Company Law 'B' course. It has been moved from Company Law 'B' to Company Law 'A' in an attempt to better balance the workload between the two courses).