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CS PART II SECTION 4

CORPORATE SECRETARIAL PRACTICE

THURSDAY: 30 November 2017. **Time Allowed: 3 hours.**

Answer ALL questions. Marks allocated to each question are shown at the end of the question.

QUESTION ONE

EASE OF DOING BUSINESS

The ease of doing business is an index created by the World Bank Group. Higher rankings indicate better, simpler regulations for business and stronger protection of property rights. Empirical research shows that the economic growth is impacted and boosted by improvement of regulations.

The Doing Business 2017 report placed Kenya at position 92 out of 190 countries surveyed, with Mauritius and Rwanda outspacing Kenya at 49th and 56th place respectively. For Kenya, this was an improvement by 21 places signalling the paying off by a raft of business reforms initiated by the government. Kenya's improvement was credited to five reforms in the areas of starting a business, obtaining access to electricity, registering property, protecting minority investors and resolving insolvency. For this, Kenya was also ranked as the world's third most reformed country. This was especially due to enactment of the Companies Act, No.17 of 2015 and the Insolvency Act, 2015.

The Companies Act No.17 of 2015 replaced the old Companies Act, Cap 486 which had been in place since 1948. Among the new and drastic legal changes introduced in the Companies Act, No.17 of 2015 include:

- A company can now have one shareholder.
- Private companies with less than five million shillings paid up share capital are exempted from the requirement to engage a company secretary.
- Companies are no longer obligated to have a common seal.
- Private companies are no longer obligated to hold an Annual General Meeting.
- Companies are no longer obligated to have Memorandum of Association and therefore the ultra vires rule is no longer applicable.
- At registration, entrepreneurs are now provided with standard Articles of Association which can be adopted by the company.
- At registration, the Act eliminated the requirement to have registration documents notarised before Commissioner of Oaths, which reduced procedural complexity and the time to start a business.
- Official documents like notices can now be circulated on email.

Other than legal changes, the other major improvement was introduction of Huduma Centres which started in November 2013. Today, there are more than 38 Huduma centres in the country serving over 30,000 customers daily and offering about 45 government services.

Technological advancement in the country has also put Kenya on an improvement trajectory in terms of ease of doing business. Mpesa, Mshwari, Mkesho, Equitel, Airtel money, Online Insurance and e-banking products have transformed Kenya into a financial hub in the region. Every day, the ICT sector is introducing new innovations in the market aimed at reducing the cost of business transactions.

Required:

(a) Other than the areas identified in this case, identify four other areas that the government of your country should invest in so as to reduce the cost of doing business. (4 marks)

(b) Support with relevant examples, how the following new provisions in the Companies Act, No.17 of 2015 can reduce the cost of doing business:

(i) Private companies are no longer obligated to hold an Annual General Meeting. (4 marks)

(ii) Official documents like notices convening meetings can now be circulated in a digital format either on email or by posting them on the company's website. (4 marks)

(c) List two cases against the following new requirements in the Companies Act, No.17 of 2015:

(i) A company can now have one director or one shareholder. (2 marks)

(ii) Exemption for private companies with paid up share capital of less than five million shillings from having a company secretary. (2 marks)

(d) Highlight in each case, one point for and one point against the requirement that:

(i) Companies are no longer obligated to have a company seal. (2 marks)

(ii) Companies are no longer obligated to have a Memorandum of Association. (2 marks)

(Total: 20 marks)

QUESTION TWO

(a) The Articles of Association of Valley Limited authorised the directors of the company to borrow money to finance business activities, provided that they were authorised by a resolution passed at the general meeting of the company. The directors borrowed money from Fadhili Community Bank to purchase farm equipment without authority of the appropriate resolution. The company has been sued in default by the bank and the company's lawyer claims in defense that the transaction was ultra-vires.

Required:

(i) State the rule in Royal British Bank Vs. Turquand and how it relates to the above case. (2 marks)

(ii) Discuss five exceptions to the rule in (i) above. (10 marks)

(b) The Companies Act, No.17 of 2015 does not make it mandatory for a company to have a common seal.

Explain two methods a company could use to execute documents in the absence of a common seal. (4 marks)

(c) With reference to the Capital Markets Authority Regulations on mergers and takeovers, explain four circumstances that might lead to withdrawal of a take-over offer. (4 marks)

(Total: 20 marks)

QUESTION THREE

(a) As the markets globalise, regulations become more complex as companies grow. This makes board's demands to continue increasing and become complex as well. The market globalisation demands good corporate governance which entails the board to form committees. These committees are expected to effectively handle the board's workload and apply particular expertise to the board.

Required:

(i) As the corporate secretary in an insurance company, advise the Board on three relevant committees they might form. (3 marks)

(ii) Highlight two functions for each of the committees identified in (a) (i) above. (6 marks)

(iii) Formulate seven good governance practices that the board committees should embrace for their effectiveness. (7 marks)

(b) Nzizaka Public Limited Company had three shareholders namely, Nzili, Zano and Zaka. Two of the shareholders namely, Zano and Zaka were directors and held 5 per cent of the shares each. Nzili who was not a director held 90 per cent of the shares.

There was no annual general meeting held for quite some time.

Zano and Zaka frustrated Nzili's effort to call for a meeting under the Companies Act by refusing to attend.

Nzili issued a special notice of his intention to move an ordinary resolution to remove the two directors at the next extra-ordinary general meeting. Further, Nzili sought the court's intervention through application to hold the meeting.

Zano and Zaka opposed Nzili's application to the court.

Required:

Advise Nzili who feels aggrieved by the action of the two directors. (4 marks)

(Total: 20 marks)

QUESTION FOUR

(a) Capital Microfinance Limited is a financial services provider that offers credit to small and medium enterprises (SMEs). The company is planning to raise more capital through the issue of shares in the alternative investments market segment (AIMS) of the securities exchange. The company is also providing credit access by accepting a charge over shares as collateral.

Required:

(i) Advise the board on the precautions to be taken before creating a charge over shares offered by a customer. (4 marks)

(ii) Examine four conditions to be satisfied for a company to issue shares at a discount. (4 marks)

(b) Chidutani Limited, a private company has been converted into a public limited company (PLC) under the provisions of the Companies Act, No.17 of 2015.

The company proposes to constitute an audit committee.

Required:

Draft a board resolution covering the following matters:

- Members of audit committee.
- Chairman of the audit committee.
- Quorum of meeting of the audit committee.
- Functions of the audit committee.

(6 marks)

(c) A resolution was passed at an annual general meeting (AGM) of a public company for payment of dividend at a rate higher than that recommended by the board of directors.

Required:

(i) Examine the validity of the resolution. (2 marks)

(ii) Assess circumstances under which the board might revoke the dividend declared at the AGM. (4 marks)

(Total: 20 marks)

QUESTION FIVE

(a) A listed company can establish an Employee Share Ownership Plan (ESOP) to enable its employees own shares in the company. This scheme must be registered with the Capital Markets Authority and structured as a Unit Trust.

Required:

Explain five benefits of structuring the investment as a unit trust. (5 marks)

(b) Explain three reasons why the body in charge of Retirement Benefits Schemes in your country might deregister a retirement benefits scheme. (3 marks)

(c) During a heated debate at a board of directors meeting, some of the directors were divided as to whether they should proceed to reduce the share capital of the company or not.

This was based on the report which had been tabled by the company's auditor and adopted by the members in the recently held general meeting, indicating a tremendous decline in the performance of the company over the last two years, and the need to revive the company's operations as soon as it is practically possible.

Required:

As the company secretary and chief advisor to the board, advise the directors on two ways through which the share capital may be reduced. (4 marks)

(d) The unclaimed financial assets law provides a legislative framework of dealing with unclaimed financial assets such as income, dividends and interests.

The law provides for abandonment duration and conditions under which dividends payable to shareholders may be presumed as being unclaimed.

In addition, the law provides for consequences of not claiming financial assets as well as the procedure of filing a claim.

Required:

With reference to the above statement, demonstrate the role of a company secretary within the unclaimed financial assets framework. (8 marks)

(Total: 20 marks)

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