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ACCOUNTING TECHNICIAN PROGRAMME

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SUGGESTED SOLUTIONS

1. (a) The Articles of Association of a company deal with internal management of a company and as such they need to respond to the ever changing business environment. Some of the legal rules governing the alteration are as follows:

   (i) Every company has power under Section 31(1) of the Companies Act to alter or add to its articles. A company thus can change its existing articles or introduce into it new terms altogether.

   (ii) Alteration of Articles of Association or addition thereto would be as valid as if it had been initially included in the articles (Section 13(2) of the Companies Act.

   (iii) Alteration of Articles of Association must be made by a special resolution of the company in a general meeting.

   (iv) Alteration of Articles of Association as a statutory provision cannot be excluded by a provision in the articles or by contract.

   (v) Alteration of Articles of Association should not bring the articles into conflict with the Companies Act Section 31(1) expressly provides that the power to alter the articles is subject to the Act.

   (vi) Alteration of Articles of Association is subject to the Memorandum of Association. Any provisions that are in conflict with the memorandum will be invalid (*Wetton v Saffery)*.

   (vii) Alteration of Articles of Association can only be effective if made directly and not indirectly. For instance if a company has no power under its articles to reduce its share capital, a special resolution to do that cannot be an alteration of the articles to confer that power on the company (*Hutton v Scarborough Cliff Hotel Ltd)*.

   (viii) Alteration of Articles of Association should be exercised bonafide for the benefit of the company as a whole for all the shareholders as a body as expressed by the majority of the members who vote.

   (ix) An aggrieved party would not be granted an injunction to restrain a company from altering its Articles of Association but would still be entitled to seek damages against the company if the inevitable consequence of the alteration of the articles is breach of contract *(Southern Founderies Ltd vs Shirlaw)*.

   (b) Where a company has entered into a contract with a third person, a subsequent alteration of the articles may put the company in breach of the contract. This is exactly the sort of situation prevailing in the present case. It was held in *Punt vs Symons and Company* that the statutory right of a company to alter its articles would normally be sufficient to prevent the granting of an injunction to restrain an alteration.

An injunction cannot be granted to prevent the adoption of the articles and in that sense they are binding on all and sundry, but the company will nonetheless be liable in damages if such action is contrary to the previous engagements of the company.

This then means that, Patrick cannot obtain an injunction restraining CTL from effecting an alteration of its articles of association. What he can do, however, is to sue CTL for damages for breach of the contract.

(c) (i) Section 8(3) of the Companies Act provides that no members of the company shall be bound by an alteration in the memorandum made after the date on which he became a member in so far as the alteration requires him to take more shares than the number held by him on the date on which the alteration is made in any way increases his liability as at that date to pay money to the company, unless he agrees in writing, either before or after the alteration is made, to be bound thereby.

This therefore means that Section 8(3) of the Companies Act made the alteration of the memorandum ineffective with regard to John. He should not take up the shares allotted to him as a result of the alteration in memorandum.

(ii) The above provision is obviously designed to protect members from having their financial obligations to the company forcibly increased, and it is therefore subject to a proviso which allows any member to agree in writing either before or after the alteration is made, to be bound by the alteration (Section 8(3) of the Companies Act. So, if John made the agreement in writing, he will be bound by the alteration made.

2. (a) This deals with the question of what is meant by the word shareholder. The definition of this word is fund in Section 31(3) of the Companies Act (1984) which provides that in the case of a company limited by shares and an unlimited company, each member shall be a shareholder of the company and shall hold at least one share and every holder of a share shall be a member of the company. How then does one become a member of a company?

Section 31 (1) states that the subscribers of the memorandum of a company shall be members of the company and shall be entered in its register of members. Subsection 2 states that every other person who agrees to become a member of the company and whose name is entered in its register of members shall be a member of the company.

A person becomes a member of a company, therefore, either by subscription or by agreement. A subscriber, then, becomes a member of a company on subscription, even if his name is not entered on the register or shares are not allotted to him, though if the company allots all its shares to other persons the courts must recognize the inevitable and not treat the subscriber as a shareholder (*Baytrust Holdings Limited v IRC)*.

TPL therefore cannot force Chimimba to be a member of the company as he neither subscribed to the memorandum nor did he expressly or impliedly agree to become a member.

(b) The effect of the register is stated in the following terms by Section 37 of the Companies Act.

The register of members shall be *prima facie* evidence of any matter by this Act directed or authorized to be inserted therein.

(i) The name of any person may without sufficient cause be entered in or omitted from the register of members of a company.

or

(ii) The person aggrieved or any member of a company or the company may apply to the court for rectification of the register. It is therefore possible from the foregoing position of the law that a register may indicate a person as a member of a company when he is not.

(c) Section 5 of the Companies Act provides for the types of Companies and definitions thereof and these are:

(i) A company limited by shares which is a company that has the liability of its members limited to the amount, if any, unpaid on the shares respectively held by them. *Section 5(1)(a) of the Companies Act*.

(ii) A company limited by guarantee which is a company that has the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of its being wound up. *Section 5(a)(b) of the Companies Act*.

(iii) An unlimited company which is a company that does not have any limit on the liability of its members. *Section 5(1)(c) of the Companies Act*.

(iv) A private company is one which by its memorandum of articles:

(1) restricts the right to transfer its shares if any *Section 5(3)(9) of the Companies Act*.

(2) limits the total number of its members to fifty not including persons who are bonafide in the employment of the company and persons who, having been formerly bonafide in the employment of the company, were, while in that

employment, and have continued after the termination of that employment to be, members of the company *Section 5(3)(b) of the Companies Act*.

(3) prohibits the company from making any invitations to the public to acquire any shares or debentures of the company *Section 5(3)(c) of the Companies Act*.

Section 5(4) further defines a private company as one whose articles of association contain provisions which constituted the company a private company immediately prior to the commencement of the Act.

(v) A public company which is any company other than a private company *Section 5(5) of the Companies Act*.

3. (a) This rule is to the effect that if the majority of members take a decision that is merely foolish or negligent (and not fraudulent or beyond their powers) then only the majority can reconsider the matter. It will not be reviewed by the court which is not the right forum for making optimum business decisions. In *Lord v The company of Copper Miners* a member of a chartered company brought proceedings based on his objection to various decisions taken by large majorities of members in general meeting, Lord Cottenham LC applying the majority rule held that unless the member was alleging fraud the court would not consider his complaints.

The principle that members are free to make foolish or negligent decisions was recently restated by Lord Justice Dillon in *Multinational Gas & Petrochemical company v Multinational Gas & Petrochemical Services Ltd*.

Similarly, if the directors of a company make a foolish or negligent decision without acting fraudulently or beyond their powers then that is a matter for reconsideration by the directors themselves or by the majority of members (*Pavlides v Jensen)*.

(b) The legal issue to be decided here is whether Jacob can insist on the articles being enforced. It now seems settled that in such a situation the court will not consider actions that attempt to invalidate the proceedings of meetings on the ground of mere mistakes in procedure as there is no evidence that the decision could have been different had the correct procedure been followed.

In *Browne v La Trinidad* it was held that a court of equity would refuse to interfere where an irregularity has been committed, if it is within the power of the persons who have committed it to correct it by calling a fresh meeting and dealing with the matter with all due formalities.
In the present case, there is also no evidence that the shareholders would have voted otherwise had the directors followed the correct procedure. If restrained from acting on the decision, the company can always call for a

fresh meeting to correct on the defect and eventually come up with the same decision as before. This is, therefore, the right case in which the court will not interfere with the decision of the majority shareholders. Perhaps the most illustrative case of this principle is *Bentley – Stevens v Jones* in which a director of a company alleged that the extraordinary general meeting which had removed him from office was invalid because it was convened by a director who was not acting in pursuance of any board resolution. Justice Plowman dismissed the motion to restrain the company from acting on the removal resolution because if the irregularity had not occurred the result would have been the same.

In MacDougal v Gardiner it was held that if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.

PML should therefore leave their decision as sit is for, on the position of the law as stated above, Jacob cannot succeed in obtaining the injunction contemplated.

4. (a) A company may incur liability through the acts of its directors in two ways. First, the directors' control of its affairs; because of that control, the acts are sometimes treated as those of the company itself. In *Tesco Supermarkets vs Nattras*, it was held that a corporation must act through living persons. The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodment of the company.

In *Lennard's Carrying Company Limited vs Asiatic Petroleum Company Limited*, a company owed a ship which sank, causing her cargo to be lost. The managers of that company were another limited company whose Managing Director, Mr Lennard, managed the ship on behalf of the owners. Evidence showed that the loss was the result of default by Mr Lennard in that although he knew or ought to have known of the ship's unseaworthiness, he did nothing to prevent the ship from putting to sea. In an action for the purchasers of the cargo for compensation, the company sought to the advantage of a shipping status which excused the owner of a sea-going ship from liability for "any loss or damage happening without his fault". It was held that the company was liable for the loss on the ground that Mr Lennard was the directing mind of the company and his action therefore was the action of the company.

Similarly, in *Bolton & Co. Limited v Graham & Sons Limited*, the plaintiffs who were tenants of certain business premises were entitled to have the tenancy renewed unless the landlord intended to occupy the premises themselves. The question was whether the defendant company which was the landlord, had effectively formed that intention. No formal general or board meeting had been held to consider the question but the directors who managed the company caused notice to vacate the premises to be given to the plaintiffs. It was held that this was sufficient indication of the defendant company's intention to occupy the premises.

Secondly, a company may be liable for the acts of its directors because for certain purposes, directors are regarded as agents of their company. As far as those purposes are concerned, the company will be bound by their acts in accordance with the principles of agency law as applied to companies.

Generally, a company, as the principal, will be bound by the acts of its agent which are within his actual authority, whether that authority is expressed or implied. In *Hely – Hutchnson v Brayhead Limited* R, who was chairman of the company A negotiated with H as representative of company B in a certain financial transaction. R acted as the Chief Executive and Managing Director of Company A. Although no such appointment had been made, the company's board was aware of and acquiesced in his activities on behalf of the company. Subsequently, R signed documents whereby company A agreed to indemnity H against liabilities which the latter had incurred as part of the transaction. Since R had no authority from his board to sign those documents, when H claimed under them, company A denied that liability on the ground that the documents had been signed without its authority. It was held that R had no express authority from the nature of his office to sign the documents, although the company had, by its acquiescence, in his previous activities on its behalf, implied that he had authority to bind it.

A registered company may also be bound by the acts of its directors, as its agents, because they have ostensible authority under its memorandum to bind it in certain transactions e.g. the issuing of shares, borrowing of money etc. This was the view of Justice Slade in *Rolled Steel Products Holding Limited v British Steel Corporation* where he said that a company can hold out its directors as having ostensible authority to bind the company to any transaction which is within their express or implied powers. Of course, if a third party who deals with directors knows that they do not have powers to enter into that transaction on behalf of the company, he cannot rely on his authority to hold the company liable for that transaction (*Section 140(4) of the Companies Act*.

(b) The procedure to follow in the removal of directors is outlined under Section 146 of the Companies Act.

A company may, by ordinary resolutions, at any general meeting, remove from office all or any of the directors notwithstanding anything in its articles or in any agreement with any director *Section 146(1) of the Companies Act*. This is however, subject to the right to compensation open to the director under such agreement on the termination of his directorship or of any right to damages of his removal from his directorship constitutes a breach of such service agreement *Section 146(7) of the Companies Act*.

A resolution to remove a director shall not be moved at any general meeting unless notice of the intention to move it has been given to the company not less than thirty-five days before the meeting *Section 146(2) of the Companies Act*. On receipt of such notice, the company shall forthwith send a copy thereof to the director concerned who shall be entitled (a) to be head on the resolution at the meeting and (b) to send to the company a written statement, copies of which the company shall send with every notice of the general meeting or, if the statement is received too late, shall forthwith circulate to every person entitled to notice of the meeting in the same manner as notices of the meetings are required to be given *Section 146(3)(a) and (b) of the Companies Act*.

The company shall, however, not need to circulate such statement if (i) it is received by the company less than seven days before the meeting or (ii) if the court (on application by the company or any other person who claims to be aggrieved) so orders upon being satisfied that the statement is unreasonably long or that the rights conferred by this section *(Section 146 of the Companies Act* are being abused to secure needless publicity for defamatory matter.

Apart from being heard orally, the Director may (unless the court otherwise orders) also require that the written statement by him be read to the meeting *Section 146(4) of the Companies Act*.

On a resolution to remove a director, no share shall, on a poll, carry a greater number of votes than it would carry in relation to the generality of matters to be voted on at a general meeting of the company *Section 146(5) of the Companies Act*.

5. (a) (i) Ordinary shares, as the name suggests, are the types of shares which a company limited by shares can issue. Thus, if a company has one class of shares, these will necessarily be ordinary shares. In fact, where the company has more than one type of shares, it must have at least one ordinary share. Consequently, unless a company issues deferred shares, ordinary shares will form the residuary class in which is vested everything after the special rights of other classes have been satisfied.

(ii) A company will occasionally issue deferred shares to founders of its business. No dividends are paid to deferred shareholders unless ordinary shareholders are paid a certain amount of dividend in that financial year. In other words, the deferred shareholder is entitled to participate in the distribution of the company's profits only after a declared dividend has been paid on ordinary shares. However, deferred shares are hardly in use any longer.

(iii) The essential characteristic of a preference share is that its holder has priority in the return of capital on the company's winding up. However, this will have to be expressly stated in the articles as it does not automatically follow that merely because one is a preference shareholder and entitled to priority in the distribution of assets on winding up (see *Re: Syston and Thurmaston Gas Light and Coke Co. Ltd)*.

In the case of dividends, a preference shareholder is entitled to priority if the company decides to pay a dividend to its members. If it does not make that decision he cannot compel it to do so. (See: *(Bond v Barrow Hematite Steel and Co Ltd)*.

(b) Transfer of shares is the voluntary conveyance of rights and duties of a member as represented in a share from shareholder to a person who desires to be a member. Shares of any member of a company limited by shares are part of his personal estate and movable property *(Section 43(1) of the Companies Act)*. As such he can transfer them to any person. For this reason any provision in the articles which restricts the right to transfer shares in a company will be ineffective unless the shares are not fully paid up. *Section 50(3)of the Companies Act*.

(c) Shares can be transferred by a written instrument in the prescribed form or in any other form approved by the company's directors *Section 43(1) of the Companies Act*. Thereafter, it must be registered by the company because until the registration and the entry of the transferee's name in the company's membership register in respect of the shares are done, the transferor remains their holder *(Article 10 Table A)*. The instrument may be logged for registration by the transferor or the transferee *Section 49(3) of the Companies Act*.

The transfer cannot be registered without the delivery of the instrument of transfer to the company *Section 49(1) of the Companies Act*. The company is empowered by Section 50(2) of the Companies Act to refuse registration of any transfer which is not accompanied by the appropriate share certificate.

(d) Apart from transfer, shares may change hands through the operation of law. *Section 54(2) of the Companies Act* provides that on the death of a shareholder where he was a joint shareholder, his legal representative can be registered as shareholders in his place. Similarly where a receiving order is made against an individual under the Bankruptcy Act, ownership of his shares will devolve on his trustee in bankruptcy. In the case of a company which is in receivership of the shares which it held in another company will be transmitted to its receiver.

Prior to registration in the company's membership register as holders of the shares, these persons will be entitled to the same dividends, rights and remedies as if they were already registered *Section 54(3) of the Companies Act*. However, they will not be allowed to vote at any meeting of the company before they are registered as members.

6. (a) According to Section 212 of the Companies Act, a registered company may be wound up by a court order on the application of:

(i) the company itself; or

(ii) the creditor of the company; or

(iii) a member of the person representative of the deceased member or the trustee in bankruptcy of the bankrupt member; or

(iv) the Attorney General; or

(v) the liquidator of the company appointed in a voluntary liquidation.

Where a shareholder is petitioning for winding up of his company then, unless the shares he has in the company devolved on him by operation of law, he must show that he has held them and has been registered in respect of them for at least six months. Where the petitioner is a contingent or prospective creditor, he must give reasonable security for cost and prove to the court's satisfaction that there is a *prima facie* case for winding up the company.

(b) Under Section 213(1), the court may order a company to be wound up if:

(i) the company has resolved by special resolution that it should be wound up by the court; or

(ii) the company does not commence its business within one year if its incorporation or suspends its business for a whole year; or

(iii) the number of members is reduced below two; or

(iv) the company is unable to pay its debts; or

(v) the company has covered the period for which it was intended to last or an event has occurred on whose occurrence it was provided that the company should be dissolved; or

(vi) the court is of the opinion that the company should be wound up;

Under Section 213(2) of the Companies Act, the court may also grant a compulsory winding up petition by the Attorney General if, in his opinion:

(vii) the business or objects of the company are unlawful; or

(viii) the company is being operated for an illegal purpose; or

(ix) the company has persistently failed to comply with any provision of the Act.

(c) A petition for winding up on the ground that the company has ceased carrying on business for a year will not succeed if the court is satisfied that the failure to commence or suspension of business is only temporary. In other words, the petition will not be granted if the company intends to commence business or resume it after that year.

In Middlesborough Assembly Rooms Co. Ltd the company was formed to build and use assembly rooms. However, because of a depression in the trade, building was suspended for over three years. It was the company's intention to resume its operation when business prospects improved. A shareholder petitioned for the company to be wound up on the ground that the company had suspended its business for over a year. It was held that the petition should be dismissed because it had not been shown that the business could not be carried on or that the company had permanently abandoned the undertaking to build assembly rooms.

In the foregoing, the advice to Clement is that his petition cannot succeed as it cannot be shown that MCCL has abandoned its business of producing cement permanently. In fact MCCL's intention is to resume its business when the economic situation in Zimbabwe improves. The closure of MCCL's business is therefore only temporary.

7. (a) Rose and Jane, taken together, are the majority shareholders in the company, CML. In ***Re: Bulge Press***, P and Q were the majority shareholders of the company each having 5,500 £1 shares. R was the minority shareholder with only 1,000 £1 shares. O and Q sought to eliminate R from the company by acquiring his shares. But since P and Q could not, as individuals, effect a takeover, they formed a company of which they were the only shareholders. This new company offered to acquire all the shares of the company in which P, Q and R were members. The offer was accepted by P and Q which together constituted 90 per cent of the shareholders. The two proceeded to give notice to R of their intention to compulsorily acquire his shares. This they did in the name of the new company. R objected and applied to the court for a remedy against oppression. The court held that P and Q's company was sham since on lifting the veil of incorporation it was merely the majority shareholders in the old company seeking to expropriate the shares of the minority R and that the Companies Act could not be used in this way.

The court's holding applies to the present case. BGDL is Rose and Jane seeking to expropriate the shares of Catherine, a minority. The Companies Act cannot be used in this way. Catherine may seek remedy of the court under Section 203(1)(b) of the Companies Act which provides that where some act of the company has been done or is proposed to be done or is threatened, any member may apply to the court for an order under the section. The court may then prohibit the proposed take-over under Section 203(2)(a) of the Act.

(b) Mr Banda's action in writing a letter to the NBS Bank Limited advising them to remit K10,000 to Mr Chirwa does not conform with corporate personality. NBS Bank Limited is a body corporate. The effect of a certificate of incorporation under Section 15(21) of the Companies Act is that the body corporate becomes a body in its own entity separate from the personalities of the shareholders. In the case of *Salomon vs Salomon and Company Limited* the court emphasized the point on the issue of a certificate of incorporation, a company becomes a body corporate, that is, it is a legal person separate and distinct from its members. In *Lee v Lees Air Farming Limited* Lee formed a private company to carry on a crop spraying business. He held 2,999 of the company's 3,000 shares, was the company's governing director and was also employed as the company's chief pilot. He was killed while piloting the company's aircraft. His widow claimed compensation for his death under the *New Zealand Worker's Compensation Act (1922)* which required an employer to pay compensation on the death of a worker. It was held that Lee was an employee of the company, and that a person may perform a dual function both as a director and employee of the same company.

The effect of these cases, including others such as *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Limited and Mecaurs v Northern Assurance Company Limited*, is that a company is a separate legal personality distinct from its shareholder. As such, none of the shareholders can exercise ownership rights over money or other property of the company unless under special circumstances, e.g. upon declaration of dividends. Even so the prescribed procedures must be followed.

Mr Banda's letter is, therefore, of no effect and as a shareholder he has no right to demand money from NBS Bank Limited either by himself or through third parties.

8. (a) Irregularly in the appointment of a director does not excuse the company from liability for the director's acts which are within his actual or ostensible authority in terms of Section 126 of the Companies Act which provides that a director's acts will be valid and binding on the company notwithstanding any defect which is discovered after his appointment or qualification.

However, since this provision applies where the director was actually appointed, it will not apply where the irregularity consists in the fact that no such appointment was made (*Morris v Kansen)*.
Even where there has not been an appointment, a company may still be bound by the acts of a person who purports to act on the company's behalf as director if the company holds him out as having authority to act in its name: Section 140(2) of the Companies Act, *Hely Hutchsom v Brayhead Ltd*.

(b) The rule set out in the case of *Royal British Bank vs Turquand* underscores the liability of a company for the acts of its directors. The rule states that a company will still be liable for the acts of its directors even if the appointment of the director or his authority is questionable or did not exist. The rule states that the absence of appointment or authority will not affect an outsider who deals with such person unless the outsider actually knew that the person was not a director and/or that he did not have the authority to bind the company. The outsiders' position is strengthened by the fact that he is not bound to enquire into the rules governing the company's internal management before he enters into any transaction with a person purporting to act on its behalf.

(c) The insider exception is one exception to the rule in *Royal British Bank vs Turquand*. It is entrenched under Section 140(4) of the Companies Act which makes limitations to the directors' authority binding only on a third party who is aware of it: *Howard v Palent Ivory Manufacturing Co.* The exception is to the effect that the rule in *Turquand Case* shall not apply if the person dealing with the company knew or ought to have known of the non-compliance of the company's rules of internal management. The exception covers or affects only insiders or those who hold positions in the company. The exception excludes shareholders and even director not responsible for or who does not take part in the conclusion of the transaction: *Hely Hutchnson v Bayhead Ltd*.

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