Answers

1 The Constitution of Lesotho came into force in 1993. It establishes the three organs of the state, namely the legislature, the executive and the judiciary and defines their relationship *inter se*. It embodies the doctrine of separation of powers in a modified sense. The doctrine of separation of powers postulates that by keeping the three organs of state separate, political stability and freedom of individuals are enhanced. In Lesotho, the legislature and the executive are not really separate because the Prime Minister and all government ministers are the members of legislature as well. The judiciary, of course, is separate from the other two. The doctrine of separation of powers is essential to the role of the Constitution as a source of law and a protector of human rights.

An interesting South African case in this context is *State* v *Buzani Dodo* (2001). Buzani, 27, was found guilty of raping and murdering an elderly woman. The minimum sentence that was prescribed for the crime by the Parliament under the Criminal Law Amendment Act, 1997 was imprisonment for life, unless there were 'substantial and compelling circumstances' which justified a lesser sentence. The High Court at Grahamstown did not find any substantial and compelling circumstances, which would justify a lesser sentence.

The High Court found the provision on minimum sentence inconsistent with the doctrine of separation of power, and hence, unconstitutional. The court claimed that sentencing is pre-eminently the prerogative of the courts and that by prescribing the minimum sentence, it became a trial before a court in which the robes were the robes of the judge, but the voice was the voice of the legislature.

The Constitutional Court reversed the decision, saying that under the Constitution there is no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. It is no different in Lesotho. It is the function of the legislature to determine what conduct should be criminalised and punished. But this function of the legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.

The executive and legislative branches of state have a very real interest in the severity of sentences. The executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavy in regard to crimes of violence against bodily integrity and increases with the severity of the crime. The executive and legislative branches must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society.

But the legislature's powers are not unlimited. Since legislation is by its nature general, it will be improper for legislation wholly to exclude the function and power of a court to apply and adapt a general principle to the individual case. In the present case, the legislature did allow the court not to impose life imprisonment if there were 'substantial and compelling circumstances' that mandated otherwise. Had it not been so, the constitutional court may have reached a different conclusion.

Furthermore, the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportion to the crime. This would be inimical to the rule of law and the constitutional state. In the present case, the sentence prescribed is not 'grossly disproportionate'. But if legislature prescribed imprisonment for 14 years for simple theft, as was done by the Military Council through an Order in Lesotho, probably this would infringe the principle of separation of power.

In addition, there are checks and balances, which constitute an integral part of the separation of powers principle; they prevent one separate arm of the state from becoming too powerful in the exercise of the powers allocated to it. The most important check is an entrenched Bill of Rights enforceable through an independent judiciary. A Bill of Rights protects individual rights by limiting the power of the legislature.

Legislation in the field of penal sentencing does not, *per se*, infringe the separation of powers principle as between the legislature and the judiciary. Therefore, the provision on minimum sentence is not inconsistent with the separation of powers principle under the Constitution. Thus, if the legislature passed a law that obliged the judiciary to pass a sentence which amounted to 'inhuman or degrading' punishment under s.8 of the 1993 Constitution or which denied the right of the accused to a fair trial under s.12 of the 1993 Constitution, then it will be right for the judiciary to hold such a law invalid. An example of an 'inhuman or degrading' punishment might be life imprisonment coupled with daily lashing in the prison.

In *Swissborough case* (1994), it was pointed out that under s.118 of the Constitution, courts shall, in performance of their functions, be independent and free from interference. 'Free from interference' means free from interference from the other two organs – executive and legislature. If a legislation prevents a court from testing its consistency with the Constitution, then such a legislation infringes the principle of separation of powers and shall be invalid.

The separation of powers doctrine imposes on the three organs of the state a degree of overlapping responsibility, a duty of interdependence as well as independence, in the absence of which it would not be possible to govern a state effectively. Mandatory minimum sentences are not regarded as being inconsistent with the separation of power doctrine anywhere. In short, the 1993 Constitution does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons. Both the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences.

The 1993 Constitution sets up a Parliament, which consists of the King, a Senate and a National Assembly [s.54 Constitution 1993]. Parliament has power to make laws and to amend or repeal existing laws [s.70 Constitution 1993]. It is the supreme law-making body in Lesotho in the sense that there is no higher authority to make laws. But its law-making power is subject to the provisions of the Constitution, which means it cannot make laws which are inconsistent with the provisions of the Constitution. The only exception to this are provisions that deal with the amendment of the Constitution.

2 A contract is an agreement enforceable at law. An agreement is the foundation of any contract. The essence of an agreement is that two or more parties have agreed on the same matter in the same sense. Agreement refers to a meeting of minds of two or more parties. However, for legal purposes there must be proof of this agreement. What the parties have said and done will often be used to conclude if there has been an agreement. So long as the parties *appear* to have agreed on the terms of the contract, there is, in law, a contract even though the parties to that contract may not actually be in agreement.

This is because it is very difficult to prove what is going on inside a person's mind, whereas it is comparatively easy to establish whether or not they *appear* to have agreed, through examination of their external conduct. Evidence can be given to establish what was said, what the parties did and what documents were signed. The court places itself in the position of a reasonable person to find out if an *apparent* agreement was made. Accordingly, so long as the parties *appear* to have agreed on the terms of the contract, there is, in law, a contract, even though the parties to that contract may not actually be in agreement. What is important is the manifestation of their wills and not the expressed will.

This principle operates only in favour of a party whose understanding and actions have been those of a reasonable person. But it is not necessary to establish that the person taking advantage of the principle has suffered any prejudice. The justification for the principle is that without it trade and commerce would be very difficult. It is illustrated by the following cases.

In *Pieters & Co* v *Salomon* (1911) Berger owed debts to several persons including Salomon. Pieters & Co bought Berger's business and, at a meeting of Berger's creditors, promised to pay all of them, including Salomon, whatever Berger owed them. Berger owed Salomon £490 but Pieters & Co thought it was only £345, and in their own minds were agreeing to pay only that amount. When Pieters & Co refused to pay £490, Salomon sued them for breach of contract. The court had to determine whether Pieters & Co had bound themselves to pay £345 or £490. It was held that, when a man makes an offer in plain and unambiguous language which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him in good faith in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promisor are, in such circumstances, irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was not aware.

Pieters & Co's conduct to pay the full amount of debt was interpreted as an agreement to pay £490 to Salomon. The unexpressed, though real, intention of Pieters & Co was considered irrelevant. In objective approach, there is no true *consensus ad idem*. One party says, 'But I never agreed', to which the court replies, 'Quite so, but your conduct led the other party reasonably to believe you agreed, so you will be treated as if you had agreed.' The inquiry is concerned with the effect of one party's conduct upon the other as a reasonable person.

In *National and Overseas Distributors Corporation* v *The Potato Board* (1958) the defendants invited tenders for the construction of a steel shed. A number of parties, including the plaintiff, made offers. The defendants accepted somebody else's offer but, through an 'administrative error', a letter was sent to the plaintiff informing him that his offer had been accepted. The plaintiff, relying on it, immediately started preparations for the construction of the shed. Shortly afterwards, the defendants informed the plaintiffs of their 'mistake'. The plaintiff sued the defendants for breach of contract.

It was held that the defendants could not escape liability by proving they had posted the wrong letter. This followed from the objective approach to the creation of contracts which the law follows and which was explained in *Pieters & Co* v *Solomon*. The judge observed that 'no other approach would be consistent with fairness or practicality'.

To sum up, in order to decide whether a contract exists, one looks first for the true agreement of two or more parties, and because such agreement can only be revealed by external manifestations, one's approach must be generally objective.

3 Though offers are normally revocable, an offeror may expressly or impliedly make his offer irrevocable for a fixed time. This may be done unilaterally, for example by an offeror saying that his offer would remain open for acceptance up to a certain date. An irrevocable offer usually results in an option. An option is an offer to contract, whereby one party (the grantor) undertakes to keep an offer open for acceptance for a certain period by the other party (the grantee). In other words, in an option contract, the offeror expressly or impliedly makes his offer irrevocable for a fixed time. An option contract consists of two offers:

(a) An offer to enter into the main contract; and
(b) an offer to keep the offer (a) open for acceptance for a certain period.

A contract of option results if the offer (b) has been accepted. The offeror (grantor) is contractually bound to keep his offer open, and if he breaks this contract of option by disabling himself from performing it or by expressly or impliedly repudiating it, he is liable for damages for any loss that the grantee may suffer as a result. The grantee is also entitled to obtain an interdict restraining the grantor from breaking his contract of option.

In *Boyd* v *Nel* (1922), the defendants gave the plaintiff an option to purchase a farm by agreeing to keep their offer open for four months. Before the four months were over, the defendants allowed prospectors onto the farm, as a result of which the government proclaimed the farm as alluvial digging. Due to this proclamation, the defendant could not sell the farm to the plaintiff. In the meantime, the plaintiff had incurred expenses in preparation to buy the farm and sued for damages.

It was held that, according to the terms of option agreement, the plaintiff was entitled to have the full period to consider if he should buy the farm or not. He was entitled to expect that the defendant would keep himself in a position to fulfil his promise. The defendant was, therefore, in breach of contract and the plaintiff was awarded damages.

An option holder can obtain an interdict preventing the option grantor from disposing of the property or otherwise destroying the option, or he can claim damages for breach of the option contract. But the grantee of an option will only succeed if it can be shown, on a balance of probabilities, that he would have exercised the option but for the breach. In *Sommer* v *Wilding* (1984), Wilding gave Sommer an option to buy 50% shares in Wilding's company within 12 months. Due to a disagreement, Wilding cancelled the option after only a few weeks. Sommer sued Wilding, claiming the profits he would have made had he exercised the option. However, since Sommer could not establish that he had the capacity to exercise the option, his claim failed.

4 The law of delict, as it operates presently in Lesotho, finds it difficult to impose liability for pure economic loss. There is no general duty in law to prevent pure economic loss from happening to others. Courts are reluctant to impose delictual liability for pure economic loss because it may allow plaintiffs to claim losses from defendants of unascertained amounts for an unascertained period in unascertained situations.

Pure economic loss could be caused by negligent misrepresentations, as well as by negligent conduct. As regards negligent misrepresentations the leading case is *Administrator, Natal* v *Trust Bank* (1979), where Rumpff. CJ laid down the law thus: In every case, the court must determine if there was a legal duty on the defendant not to make a misstatement to the plaintiff. And, whether the defendant, in light of all the circumstances, exercised reasonable care, *inter alia*, by checking the truth of the representation. If there is no legal duty, then the requirement of wrongfulness would be missing and no action in delict would lie.

In this case, the administrator wrote to Bijo that his property was going to be expropriated in public interest and referred to him, in their letter, as the registered owner of a certain property. In fact, Bijo was not the owner of that property. Nevertheless, Bijo approached Trust Bank, showed them the letter and asked them to claim compensation from the administrator, which the bank did and the administrator paid a sum of R6,800. Bijo collected the amount and disappeared. The administrator claimed that Trust Bank had negligently misstated that Bijo was the registered owner and claimed compensation. It was held that Trust Bank did not have any legal duty not to ask for compensation for Bijo; they were entitled to rely on the letter from the administrator himself referring to Bijo as the registered owner. Under the circumstances, Trust Bank did not act wrongfully.

A legal duty to furnish correct information would lie if the defendant knew, or subjectively foresaw, that the plaintiff would rely on it. In short, the defendant's legal duty, and the consequent liability, is restricted to plaintiffs whose identity is known to him. Only in such cases, if the defendant furnishes incorrect information, does he act wrongfully. In addition, to be liable in delict, he should have also acted negligently, that is, he should not have acted the way a reasonable person would have acted in similar circumstances.

As regards negligent conduct causing pure economic loss, it is more complex. In *Coronation Brick (Pty) Ltd* v *Strachan Construction* (1982), the defendants' workers negligently severed the electric cables while driving a bulldozer. The defendants knew the exact location of cables and also knew that the cables supplied electricity to the plaintiffs, a brick manufacturer. It took 27 hours to repair the cables and restore electricity to the plaintiffs. As a result, bricks could not be made and the plaintiffs sued to recover their losses. It was held that 'on balance the defendants' conduct does incite moral indignation and offends against the legal convictions of the community. The attitude of the community to the defendants' conduct would be, 'but for heaven's sake, you knew precisely where the cables were; you knew that if they were cut the plaintiff would suffer a substantial loss of income. Surely there was a legal duty on you to take measures to avert the loss'. The legal convictions of the community demand that the conduct of the defendants' and its driver, if he had been duly warned, be branded wrongful and that the damage suffered be made good.

Various factors play a role in determining the reasonableness of the defendant's conduct. The most important factor, that may even be decisive, is whether the defendant knew or subjectively foresaw that his negligent conduct would cause harm to the plaintiff. It is the subjective foreseeability, rather than reasonable foreseeability of causing damage to the plaintiff that determines the existence of legal duty in law. The notion of reasonable foreseeability has given rise to the concept of 'duty of care' in English law which is alien to the notion of wrongfulness in Roman-Dutch law of Lesotho.

Other factors that may play a role are: whether practical steps could have been taken by the defendant to avert the economic loss and, if so, how expensive would they be in proportion to the loss the plaintiff suffered; whether the wrong complained of would lead to an overwhelming potential liability to an indeterminate number of plaintiffs and similar other considerations of public policy.

5 At common law, a partnership is not a legal entity. It does not have an existence apart from the individuals constituting it. It cannot have assets and liabilities. Its debts are legally the debts of the partners, and as far as third parties are concerned, the 'assets' of the partnership are indistinguishable from the assets of its partners. A partnership is no more than a complicated contractual arrangement between individuals as to the joint employment of their resources; the 'partnership debts' are, in law, the debts in *solidum* of all the partners: see *Michalow NO* v *Premier Milling Co Ltd* (1960). Partners are jointly and severally liable, each for the whole of the debts of the partnership, provided the debts were incurred with the authority of the partnership, and in its name.

In the absence of special rules of procedure, a creditor 'of the partnership' would be entitled to sue any individual partner for payment of the whole debt. If he failed to recover it in full, he would be entitled to sue the other partners one by one. Any partner unable to meet the claim would be liable to have his estate sequestrated. In that case, his trustees would be entitled to sue the other partners for *pro rata* payment of the debts of the insolvent member. Some of them may, as a result, become insolvent and the trustees of those estates would be entitled to claim the return of payments resulting from undue or voidable preferences. The chain reaction and counter-reaction of insolvency and litigation would go on and on until all the creditors have been paid in full or until all classes of creditors have found equitable dividend levels. Such a process of liquidation and distribution will be very cumbersome and costly. Therefore, the law of procedure and the law of insolvency have substituted for them practical, though wholly artificial, rules.

The rule of practice does not allow an individual partner to be sued personally on a partnership debt while the partnership is in existence. A creditor must proceed against the partnership and its assets are used to pay for partnership debts in the first place. Only when they are found to be inadequate is a creditor allowed to proceed against the private assets of an individual partner: see *Muller* v *Pienaar* (1968).

But this rule does not apply if a partnership has been dissolved. A creditor of a dissolved partnership can sue the members of the partnership jointly and severally for the partnership debt. He can execute the judgements on the assets of an individual partner or partners, as the case may be: see *Lee* v *Maraisdrif (Edms) Bpk* (1976).

The law of insolvency interacts with the law of partnership as regards liability of an ordinary partner for the debts of his partnership. If the court sequestrates the estate of a partnership, it must simultaneously sequestrate the estate of every ordinary partner. The simultaneous sequestration raises a problem. Some of the debts of the individual partners may be personal, others may be due to their being members of a partnership, the so-called partnership debts. How to allocate the assets of a sequestrated estate between private debts and partnership debts? Common law would have ignored this distinction because, under common law, a partnership is not a legal entity. But 'partnership estate' remains as a separate estate from the estates of the individuals and by precluding 'partnership creditors' from preferring their claims against the individual estates. Initially they have to look for payment to the partnership estate only. The creditors of the individuals are similarly precluded from proving claims against the 'partnership estate'. Only after all the creditors of an individual partner have been paid in full is the residue, if any, in his estate transferred to the partnership estate for the benefit of the partnership creditors and *vice versa*. It is for this reason that separate accounts are prepared by the trustees of the partners and the partnership.

This departure from the common law is more than a mere theoretical modification. An example illustrates the possible extent of its practical effect. A partnership having no assets and one or more creditors is sequestrated; the partners are able to pay all their private creditors in full, but nothing is left for transfer to the partnership estate. At common law, the partnership creditors' claims would rank concurrently with the unsecured private creditors' claims and would be provable in the estates of all the partners. They would be entitled to a substantial dividend in fact. But the partnership creditors would receive no dividend at all.

This result can only be justified on the hypothesis that those who deal with, and grant credit to, a partnership do so in reliance on the partnership assets only. Therefore, they must be taken to have looked, throughout their dealings with it, on the partnership as a separate entity. This, of course, is a fiction.

6 The real power within a company lies with the board of directors. Article 79 of Table A states clearly that the business of the company shall be managed by the directors. Moreover, directors are in regular contact with each other and are more organised than the shareholders. In many cases, they do have effective control over the proxy-voting machinery. Shareholders in a large company are scattered and disorganised. Consequently, they are rarely in a position to mount a successful challenge to the authority of their directors. In practice, most shareholders are happily content to leave the management to their directors. The general meeting retains ultimate control, but only through its powers to amend the articles and to remove the directors and substitute others more to its taste.

The Companies Act 1967 envisages that powers are conferred on the directors collectively as a board and they can only be exercised at a board meeting. However, Article 108 of Table A provides that the directors may entrust to, and confer upon, a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit. It further states that either collaterally with, or to the exclusion of, their own powers, the directors may from time to time revoke, withdraw, alter or vary all or any such powers. A managing director may be appointed on terms that he shall only perform such duties as are from time to time assigned to him by the board and that he shall conform to their orders and instructions. This is a common practice.

However, the wording of article 108 of Table A with its express reference to a delegation 'to the exclusion of their own powers', appears to imply that the directors may effectively divest themselves of their own powers in favour of the managing director. If the service agreement with a managing director purported to confer exclusive powers upon him without expressly reserving a right of supervision, then the board may not exercise those powers during the subsistence of the agreement. In such a case, the managing director is substituted for the directors, and it is he who runs and administers a company.

The general meeting has inherent powers to remove both directors and the managing director. The board too can remove the managing director from the appointment which it has conferred upon him. When that happens, then there is a third organ of power in the person of the managing director. If the committees of the directors have been delegated powers, then they may be an organ of power as well.

7 This question requires candidates to explain the meaning and effect of 'winding up' in company law.

(a) On incorporation, a registered company becomes a legal entity in its own right, having existence apart from its member shareholders. The company has not only separate, but perpetual existence, in that it continues irrespective of changes in its membership. Winding up is the process whereby the life of the company is brought to an end and its assets realised and distributed to its members and/or creditors.

(b) The rules governing winding up are detailed in the Companies Act 1967 and the exact nature and procedure depends on the type of winding up involved and depends on the solvency of the company at the time winding up commences.

Voluntary winding up

The object of a voluntary winding up is that the company and its creditors are left to settle their affairs without coming to court. A company may be wound up voluntarily,

(i) By an ordinary resolution, if the company was set up for a limited period and that period has expired, or an event has occurred on the happening of which the articles mandated winding up of the company.
(ii) By a special resolution in any other circumstances [s.209 Companies Act 1967].

When a company has passed a resolution for voluntary winding up, it must, within 14 days, advertise the fact in the Gazette and notify the Master of the High Court, Registrar of the Companies and, if it has any immovable property in Lesotho, the Registrar of Deeds [s.210 Companies Act 1967].

There are two kinds of voluntary winding up:

(i) Members' voluntary winding up, when the company is solvent. The general meeting appoints the liquidator, who is responsible to the members [s.215 Companies Act 1967].
(ii) Creditors' voluntary winding up. The appointment of the liquidator, and the liquidation process itself, is controlled by the creditors to a large extent [s.219 Companies Act 1967].

Voluntary winding up by members

This takes place when the directors of the company are of the opinion that the company is solvent and is capable of paying off its creditors. They have to furnish to the Master of the High Court a sworn statement, supported by an auditor's certificate, that the company has no liabilities.

If this is not the case, then adequate security, to the satisfaction of the Master of the High Court, for the payment of the debts of the company within a period of not exceeding 12 months from the commencement of the winding up must be furnished before the company meets to pass a special resolution for winding up [s.213 Companies Act, 1967]. The members' voluntary winding up confers certain advantages. By s.215 Companies Act 1967 the liquidator is appointed, and his remuneration fixed, by the members in a general meeting. This way, the directors and members may appoint one they trust.

Voluntary winding up by creditors

This takes place when the company is insolvent when it decides to wind it up. The essential difference between this and the former type of winding up is that, as the name implies, the creditors have an active role to play in overseeing the liquidation of the company. The company must summon a meeting of the creditors for the day, or the next day, following the day on which the company meeting convened for the passing of the winding up resolution is to be held [s.219(1) Companies Act 1967]. A liquidator may be nominated both by the creditors and the members. But in case of a difference, the one nominated by the creditors becomes the liquidator unless a court orders otherwise.

Compulsory winding up

This is a winding up ordered by the court under s.173 Companies Act 1967. Although the section provides for seven distinct grounds for such a winding up, the most important is that the company is unable to pay its debts. Section 172 Companies Act 1967 provides that if a company with a debt exceeding R100 fails to pay it within three weeks of receiving a written demand, then it is deemed to be unable to pay its debts. Section 174 Companies Act 1967 states who may apply to the court to have a company wound up and includes the company itself, members and creditors.

When a company is the subject of a compulsory winding up order, no court action can be started or continued against it without the approval of the court. The process of liquidation is, in essence, the same as that in the case of the insolvency of a natural person.

8 This question requires candidates to distinguish contracts of service from contracts for services and then apply them to the problem scenario.

Employees work under a contract of service. Mark started as an employee of Fancy Graphics Ltd. Those who work under a contract for services are independent contractors. They are not employees, but are self-employed. The employment contract is tightly regulated by the Labour Code 1992 and, in the problem scenario, subjects Fancy Graphics Ltd to a number of duties as regards Mark as their employee. Furthermore, ultimate liability is of Fancy Graphics Ltd for breach of contract or liability in delict that may arise as a result of the actions of Mark, as their employee, in the course of his employment. Therefore, Fancy Graphics Ltd are likely to reduce their overall costs should Mark's legal status change from an employee to an independent contractor.

The Labour Code 1992 does not provide clear rules to distinguish between an employee and an independent contractor. As a result, over the years, the courts devised various tests to distinguish between employees and independent contractors.

Control test

The earliest test was the control test. The test assesses whether the employer has the right to control the manner of doing the work of his employees, whether he 'cannot only order or require what is to be done, but how it shall be done'. The test is still appropriate with respect to domestic, agricultural or manual workers. But highly-skilled employees such as doctors, computer scientists, accountants and the like can hardly be controlled by their employers, exercising, as they do, independent, specialised, professional discretion. The consequence of that, at least under the control test, was that they were deemed to be self-employed rather than employees, and patients, for example, who had suffered as a consequence of negligence would only be able to sue the doctor rather than the Ministry of Health, which used their services. Such weakness in the control test led to the courts developing a more subtle test.

Organisation test

The organisation or integration test shifted the emphasis from the degree of control exercised over an individual to the extent to which the individual was integrated into the business of their putative employer. Based on this test, a doctor employed by the Ministry of Health would be an employee because he is an integral part of the machinery of the Ministry even though the Ministry does not control his work. But the organisation test does not resolve all doubts. It does not say how much integration must exist before a person is truly part of an organisation, and what degree of integration is necessary. It was, however, an improvement over the control test.

The multiple test

The response on the part of the courts was the development of the multiple, or economic reality, test. The emphasis is not on relying on any single test such as control or organisation but to look at the whole arrangement between a worker and his employer and deduce from that their real intention. The court may, for example, consider whether the worker is an integral part of the business of the employer, whether the employer provides tools and equipment for doing the job, who pays the wages and how are they paid, whether the employer deducts PAYE or pension contributions from the wages and the like. In South Africa, the multiple test is used on the basis of what the courts call 'dominant impression'.

To sum up, all three tests are useful. The greater the degree of control or supervision, actual or potential, over the employee the more is the likelihood that the court would find it an employment situation (*locatio conductio operarum*). In applying the test the courts do accept that the degree of control varies depending on a particular situation and in some cases it may be considerably more limited than others. The independent contractor situation is covered by *locatio conductio operis* where the worker retains his own discretion regarding the mode and the time and manner of doing the task undertaken. The organisation and multiple tests can be helpful in the case of professionals and technically skilled employees.

Applying the multiple test, it is more than likely that Mark would be treated as an employee. It is true that he is described as self-employed, but it should be recognised that the label applied does not by itself define the relationship: see *Market Investigations* v *Minister of Social Security* (1969). Looking at the problem scenario, since Mark would have to pay tax on the amount received from Fancy Graphics Ltd, it might indicate that he is self-employed. But the most significant factor would appear to be the degree to which Fancy Graphics Ltd controls him. Mark has to work for Fancy Graphics Ltd and cannot work independently on his own account for any other person or business. This is likely to convince the court that he is an employee, rather than an independent contractor. Fancy Graphics Ltd, therefore, should consider deleting the clause that obliges Mark to work exclusively for them, if they want to alter the status of Mark to that of an independent contractor.

9 The general rule is that the offeree must inform the offeror that he has accepted the offer. However, the rule that acceptance must be communicated before it becomes effective is intended for the benefit of the offeror in that he ought to know whether his offer has been accepted. The offeror may, if he wishes, dispense with this requirement of notification, either expressly or impliedly.

(a) While an offeror can dispense with the requirement that the acceptance be communicated to him, he cannot frame his offer in such a way that a contract will come into existence unless the non-acceptance is communicated to him. The offeror cannot subject the party to whom an offer is made that he should spend time, effort and expense to communicate non-acceptance of the offer to him. No contract has been formed. Uncle John was not entitled to presume acceptance unless he heard to the contrary from his nephew, Milton. The silence of Milton does not amount to acceptance of the uncle's offer.

The offeror can prescribe the mode of communication of acceptance to him. In such a case, the courts have taken the view that either the offeree should communicate the acceptance in accordance with the prescribed mode or use another mode which is as advantageous to the offeror as the prescribed mode. Ultimately, it all depends whether the offeror wanted performance *forma specifica* or if performance *per aequipollens* would suffice.

(b) If the cow, Kajal, was set aside by Milton but uncle John refused to pay, then John may be sued for breach of contract. The reason is that the offeror is entitled to prescribe the mode of communication of acceptance. 'Keeping silence' could be one such mode. Applying it to the problem scenario, John can be said to have waived the requirement that the acceptance be communicated to him. Once the offeree, Milton, acts as directed, a contract comes into existence. Therefore, uncle John is legally obliged to purchase Kajal, since the nephew, Milton, set aside Kajal but felt no need to communicate his acceptance in accordance with the wishes of his uncle.

10 This question requires the candidates to discuss a number of matters relating to the conduct and business of company meetings.

(a) The first part of the question deals with the statutory requirements which need to be satisfied in order to call a meeting of shareholders to change the authorised share capital and the name of the company. This part also requires a discussion of the required resolutions to give effect to the proposed changes.

The directors of Smart Furniture Ltd will have to call an extraordinary general meeting to effect the changes. Table A, regulation 49, allows the directors to call an extraordinary general meeting, whenever they think fit.

Where a special resolution is to be proposed in an extraordinary general meeting, a minimum of 21 days of notice must be given by virtue of s.100 Companies Act 1967. Regulation 50 of Table A provides that the day on which the notice is given, or deemed to be given, and the day on which it is received, are not included in the notice period. Under regulation 129, where notice of the meeting is sent by post, it is deemed to have been given 48 hours after posting.

Under s.63 Companies Act 1967, an alteration to the capital of a company, if allowed by the company's articles, requires passing an ordinary resolution in a general meeting. Regulation 44 of Table A states that a special resolution is required for this purpose. However, whenever there is a conflict between the substantive section of the Companies Act 1967 and the Table A regulation, it is the Act which prevails. Therefore, directors can be advised that an ordinary resolution would be enough to alter the capital of their company. An ordinary resolution has not been defined in the Companies Act 1967 but it is generally understood to be a resolution which is passed by a simple majority: See *Bushell* v *Faith* (1970).

To change the name of a company, a special resolution is required [s.106 Companies Act 1967]. A special resolution is passed in a general meeting by a three-quarter majority of members present and voting in person or by proxy.

In the problem, since the business of the general meeting includes the change of name which requires a special resolution, 21 days of notice of the meeting must be given. The notice must be sent to every member who is entitled to attend and vote at the meeting. The notice must provide the date, time and place of the meeting and indicate the general nature of business that is proposed to be transacted at the meeting. This enables the members to determine whether or not to attend the meeting in person or send a proxy.

(b) The last part of the question requires advising a majority shareholder (Sam) who wishes to remove four directors of the company.

In order to get this resolution onto the agenda of the meeting, Sam can make use of s.106 Companies Act 1967. This section enables members holding at least 5% of the total voting rights to give notice to the company of the intention to move a resolution at a forthcoming annual general meeting. The requisition can also require the company to circulate to members any statements of not more than 1,000 words relating to the proposed resolution. A copy of the requisition requiring notice of a resolution to be given must be deposited at the registered office of the company at least six weeks before the annual general meeting at which the resolution is to be moved. The directors of the company can require Sam, by virtue of s.106 Companies Act 1967, to deposit with the company a sum which is reasonably sufficient to meet expenses of the company in giving effect to the requisition. It is the duty of the company to give appropriate notice to all the members entitled to have notice of the meeting.

By virtue of s.146 Companies Act 1967, a company may, by ordinary resolution, remove a director before the expiry of the director's period of office. However, special notice of the resolution must be given to the company by the member proposing removal. This requires the following procedure:

(i) notice of the intention to propose the resolution must be given to the company at least 28 days before the date of the meeting at which the resolution is to be discussed.

(ii) in their notice of the forthcoming general meeting, the directors must give the members of the company notice of the proposed resolution. The members must receive at least 21 days notice of this resolution. [s.107 Companies Act 1967]

These requirements are mandatory and if they are not satisfied, a resolution for the removal of a director cannot be moved.

In relation to the second point raised by Sam, under regulation 53 of Table A, a quorum for meetings is fixed at three members present in person. Without a quorum the meeting cannot proceed to business. Clearly, if the directors fail to attend the meeting it will be inquorate. In that case, Sam can make use of s.101 Companies Act 1967. Under s.101, the court may, where it is impractical to call or conduct a meeting, direct that one member present in person or by proxy shall be deemed to constitute a meeting. The court can make such an order on the application of any member or director.

This marking scheme is given only as a guide to markers in the context of suggested answers. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well reasoned answers are provided. This is particularly the case for essay type questions where there may often be more than one way to write an answer.

1 This question requires candidates to explain and discuss the doctrine of separation of powers embodied in the Constitution of Lesotho 1993 in a modified sense.

6–10 marks	Fully detailed explanation of the doctrine with supporting cases or examples.
0–5 marks	Limited knowledge of the topic, perhaps lacking in detail or cases/examples. Lower band answers would exhibit very limited or no knowledge of the topic under consideration.

2 This question requires candidates to explain how courts determine that an agreement has been reached between two parties.

6–10 marks	A thorough to complete answer, explaining the objective and subjective approaches with cases or examples.
0–5 marks	A limited understanding, or incomplete answer.

3 This question tests candidates' understanding of the option contracts.

6–10 marks	A thorough treatment of the rules relating to option contracts and providing case support.
0–5 marks	Recognition of the areas covered by the question, but lacking in detailed analysis. Lower band answers would provide little or no analysis or knowledge of the subject of the question.

4 This question requires candidates to state and discuss the circumstances when pure economic loss can be recovered in the law of delict.

6–10 marks	Thorough explanation when pure economic loss can be recovered in the law of delict. Supporting cases or examples are expected.
0–5 marks	Some, but limited, knowledge of the rules relating to recovery of pure economic loss in the law of delict.

5 This question requires the candidates to discuss the liability of an ordinary partner for the debts of the partnership registered under the Partnership Proclamation 1957.

6–10 marks	Thorough discussion of the liability of an ordinary partner for the debts of the partnership.
0–5 marks	Reasonable treatment of the topic. Poor answers will be unbalanced and show very little knowledge of the area.

6 This question requires candidates to discuss the legal position of the managing director in a company.

6–10 marks	Thorough explanation of the rules that determine the legal position of a managing director in a company.
0–5 marks	Some, but limited, knowledge of what the relevant rules are.

7 This question is in two parts. The first part requires candidates to explain what winding up is. The second part requires them to distinguish between voluntary and compulsory winding up.

(a)	0–2 marks	Good explanation of the meaning of the concept of 'winding up'. Lower band answers would demonstrate little or no understanding of the concept.
(b)	5–8 marks	Good understanding of the distinction between voluntary and compulsory winding up.
	0–4 marks	Reasonable understanding of the distinction between voluntary and compulsory winding up. Lower band answers would show limited or no understanding of the distinction.

8 This question asks candidates to distinguish contracts of service from contracts for services and to apply it to the problem scenario.

8–10 marks	A thorough treatment of all of the rules, perhaps placing them in their historical context, regarding the distinction between contract of services and contract for services, together with the ability to analyse the problem scenario by applying the rules.
5–7 marks	Knowledge may be less detailed or analysis less focused, but overall a satisfactory answer.
3–4 marks	Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
0–2 marks	Very weak answers that might recognise what the question is about but show no ability to analyse or answer the problem as set out.

9 The key issue in this question relates to the mode of acceptance of an offer. The question is in two parts.

8–10 marks	A thorough knowledge of the rules relating to silence as a mode of acceptance, together with the ability to analyse the problems contained in the question.
5–7 marks	Candidates will exhibit a sound knowledge of the relevant law together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
3–4 marks	Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
0–2 marks	Very weak answers that might recognise what the question is about but show no ability to analyse or answer the problem as set out.

10 This question asks the candidates to describe the various ways of calling an extraordinary general meeting and apply it to the problem scenario. The question is in two parts. Both parts are very much related.

8–10 marks	Thorough treatment of all the parts of the question.
5–7 marks	Thorough treatment of one part of the question and a reasonably fair treatment of the other.
3–4 marks	Reasonably fair treatment of both the parts of the question.
0–2 marks	Unbalanced answer, demonstrating no real understanding of the nature of the question.