Answers

1 (a) The doctrine of precedent

Lesotho courts are bound by the doctrine of precedent. It means that when a court has to decide an issue, it looks to the previous decisions contained in earlier cases for guidance on how to deal with the present case. A decision given by one court has to be followed by other courts which are lower in the hierarchy in subsequent cases where facts are essentially the same. Decided cases of a higher court are seen as laying down a legal rule authoritatively and therefore must be followed.

Precedents are of two types: binding and persuasive. Whether a decision is a binding precedent for a court on a particular issue depends on the position of the court in the hierarchy of courts in the country. The Court of Appeal, for example, stands at the summit of the Lesotho court structure and its decisions are binding on all the courts in Lesotho, though the Court of Appeal itself is not bound by its own decisions.

It must be recognised that, in the wider context, the decisions of all courts, including the Court of Appeal, must be consistent with the fundamental freedoms and human rights set out in the Constitution.

The actual part of the previous decision that is binding is the *ratio decidendi* of the case; that is the legal rule, which led to the decision in the earlier case. The *ratio* is an abstraction from the facts of the case. Everything else is termed *obiter dictum* and, although of persuasive authority, does not have to be followed by the later court. As the *ratio decidendi* of any case is an abstraction from, and is based upon, the material facts of the case, this opens up the possibility that a later court may regard the facts of the case before it as significantly different from the facts of a cited precedent and thus, consequentially, it will not find itself bound to follow that precedent. Judges use this device of distinguishing cases on their facts where, for some reason, they are unwilling to follow a particular precedent.

There are numerous perceived advantages of the doctrine of precedent, amongst which are:

- Consistency.
- Certainty.
- Efficiency.
- Flexibility.

(b) Delegated Legislation

Statutes take the form of Acts of Parliament or delegated legislation. Delegated legislation is of particular importance in the contemporary legal context. Modern Acts of Parliament do not lay down detailed provisions. Instead, they tend to be of the enabling type, simply stating the general purpose and aims of the Act. Such Acts merely lay down a broad framework, whilst delegating to government ministers the power to make detailed provisions designed to achieve those general aims. A validly enacted piece of delegated legislation has the same legal force and effect as the Act of Parliament under which it is enacted; but equally and just as importantly, it only has effect to the extent that its enabling Act authorises it and it is always subject to abrogation or amendment by the enabling legislation made by Parliament.

The volume of delegated legislation in any year greatly exceeds the Acts of Parliament. Consequently, at least statistically, it could be argued that delegated legislation is actually more significant than primary Acts of Parliament in Lesotho.

Delegated legislation may come in the form of:

(i) Regulations made by government ministers under powers delegated to them by Parliament in the enabling legislation.
(ii) Bye-laws made by the local authorities (like Maseru Town Council) and other public bodies (like the Central Bank) under powers delegated to them by Parliament in the enabling legislation.
(iii) Rules made by the High Court and the Court of Appeal to regulate procedures in the court under the High Court Act 1978 and the Court of Appeal Act 1978 respectively.
(iv) Regulations made by the professional bodies to regulate the profession under powers delegated to them by Parliament in the enabling legislation. For example, the legal profession is regulated by the Law Society under an enabling legislation.

All forms of delegated legislation are invalid if they are *ultra vires* of the enabling legislation. It means that to be a valid delegation, the regulations must be made strictly within the limits and in accordance with the procedure prescribed by the enabling legislation. The invalidity of a delegated legislation may be challenged in the courts through an action for judicial review.

2 Exemption clauses may be incorporated into a contract by reference to terms and conditions in another document. In order for terms to be validly incorporated into a contract by reference, the following points are relevant:

(a) The document containing the reference must be a contractual document and not just a receipt or an invoice. Whether a document falls in this class depends on the prevailing commercial practice. Examples of such documents include: bill of lading, insurance policy, passenger tickets, railway tickets and other documents which are generally known to contain the terms of the contract. Invoices, receipts, laundry lists and others like it are less likely to be regarded as contractual documents: see *Chapelton* v *Barry Urban District Council* (1940).

(b) The existence of the exemption clause must be brought to the notice of the other party before or at the time the contract is entered into. Reasonable, not actual, notice is required. The party relying on the exemption clause need not show they actually brought the exemption clause to the notice of the contracting party, but only that they took reasonable steps to do so. The back of a hotel bedroom door was held not to be a suitable place for a notice referring to conditions, as the contract had already been made at the reception desk in *Olley* v *Marlborough Court* (1949). In *Thornton* v *Shoe Lane Parking Ltd* (1971), it has been held that the exemption clause contained in a ticket issued by an automatic car park barrier came too late; the contract was concluded a moment earlier when the plaintiff placed his vehicle on the spot which activated the barrier.

Reasonable notice also requires that the reference to the exemption clause must be adequate to draw the contracting party's attention to it. It means that very small blurred print is not appropriate. If the terms are printed clearly on the face of the document or, where they are printed at the back but it is clearly indicated on the face that there are terms at the back, this will probably suffice as reasonable notice. Ultimately, what is reasonable depends on the facts and circumstances of each particular case. In *Central South African Railways* v *McLaren* (1971), the plaintiff deposited his bag in the cloakroom of the Pretoria Railway Station for safe custody and was given a ticket on which the exemption clause was printed diagonally across the face of it. It was held the plaintiff had no notice of the exemption clause since the clerk had written over it in ink. As a general rule, the less obvious the contractual document, the more specific and positive must be the steps to bring the terms to the attention of the customer.

(c) The exemption clause may also be incorporated by reference to a previous course of dealing between the same parties, if it could be shown that the contracting party had expressly or tacitly agreed to vary the existing contract. In *Dyer* v *Melrose Steam Laundry* (1912), Mrs Dyer was held not to be bound by the conditions printed on the back of the laundry list. The contract was complete before the list was sent to her with her laundered articles. Though she had received a similar list on a number of previous occasions, it made no difference because she used the list simply to check whether all her laundry had been returned. There was no evidence that she ever read the conditions on any of the lists. If the Laundry could show that, in fact, Mrs Dyer knew of the conditions, then, of course, she would be bound by them because probably the court would hold that she had tacitly undertaken to contract with the laundry subject to the terms contained on the back of the list.

3 This question requires the candidates to explain the concept of 'wrongfulness' in the law of delict.

To be liable, the defendant must cause harm to the plaintiff wrongfully. The defendant's conduct is wrongful, if it infringes a legally-protected right or interest of another, for example, the right to reputation or the right not to be assaulted. For example, when Peter speeds down Kingsway at 160 km/hour and nothing happens, his act is not wrongful in delict, though it may be an offence for infringing the speed limit. It is not wrongful in delict because the act has not infringed a legally-protected right or interest of anyone.

Once it has been determined that there is an infringement of a legally-protected right or interest of another, then the courts inquire if it was *unreasonable* in the light of the facts and circumstances of the case. Courts often apply the test of *boni mores*, which is an objective test based on the criterion of reasonableness. Courts use *boni mores* and legal convictions of the community as meaning the same thing. 'Legal convictions of the community' is a poor English translation of the original *regsoortuiging van die gemeenskap*. A better translation is perhaps 'society's notions of what justice demands'. In this context, fundamental human rights and freedoms laid down in the Constitution may play an important role on a particular issue, such as the right of the press to publish freely matters it determines to be in the public interest as against the plaintiff's right to reputation and dignity. The concept of wrongfulness is policy-based and flexible to meet the demands of changing times and circumstances. To determine whether the defendant's conduct is reasonable, courts consider and balance the conflicting interests of the parties, their relationship to each other, the particular circumstances of the case, whether the harm was foreseeable, whether any superior legal right exists, constitutional values and any other appropriate considerations of social policy.

Liability for an omission

As a general rule, a person is not under a legal duty to protect another from harm even though they can easily do so. For example, if Mohapi sees a child drowning in the sea, he does not have to rescue the child even if he is a strong swimmer and can rescue the child. Of course, he has to do so if he is on duty as a lifeguard on the beach or if the child was his or in his custody. In that case, if he does not, it would constitute a breach of duty.

Breach of a duty involves (a) whether, in the circumstances, there was a duty upon the defendant to act reasonably towards the plaintiff, and (b) whether the defendant breached that duty.

In cases of failure or omission to act, liability follows only if the failure or omission to act was wrongful. Failure or omission to act is regarded as wrongful conduct when the circumstances are such that the failure or omission to act not only occasions moral indignation but also the legal convictions of the community require that such failure or omission be regarded as wrongful and the loss suffered be compensated by the person who failed or omitted to act positively. In short, the principle that wrongfulness is determined by the legal convictions of the community has been extended to omissions: see *Minister van Polisie* v *Ewels* (1975).

4 An agent, who has been expressly appointed, may have both express and implied authority. Both express and implied authorities are part of the actual authority of an agent. Express authority is conferred by the contract of agency under which the agent is instructed as to what particular tasks are required to be performed and is informed of the precise powers given in order to fulfil those tasks. If the agent subsequently contracts outside the ambit of their express authority, then they will be liable to the principal and to the third party for breach of warranty of authority. The consequences for the relationship between the principal and third party depends on whether the third party knew that the agent was acting outside the scope of their authority. For example, an

individual director of a company may be given the express power by the board of directors to enter into a specific contract on behalf of the company. In such circumstances the company would be bound by the subsequent contract, but the director would have no power to bind the company in other contracts.

Implied authority is the actual authority, which the principal has consented by implication, that the agent should have. It extends the scope of express authority. Third parties are entitled to assume that agents holding a particular position have all the powers inherent with their position. In *Goldblatt's Wholesale (Pty) Ltd* v *Damalis* (1953), it was stated that, if an agent has the express authority to manage the business of the principal, he has the implied authority as well to do all the things, which are reasonably incidental to carrying on that type of business. For example, he may purchase goods on credit and give bills of exchange in respect of such purchases. However, he does not have the implied authority to sell the business because it is not incidental to the ordinary conduct of the business. Directors of companies can also bind their companies on the basis of implied authority. In *Hely-Hutchinson* v *Brayhead Ltd* (1968), although the chairman and chief executive of a company acted as its *de facto* managing director, he had never been formally appointed to that position. Nevertheless, he purported to bind the company to a particular contract. When the other party to the agreement sought to enforce it, the company claimed that the chairman had no authority to bind it. It was held that, although the director derived no authority from his position as chairman of the board, he did acquire such authority from his position as chief executive and, thus, the company was bound by the contract he had entered into on its behalf as it was within the implied authority of a person holding such a position.

Implied authority is determined objectively:

– from the conduct of the principal as reasonably understood by a third party, for example, by the course of dealing or continuation of the agency relationship with the knowledge of the principal after it has been terminated.

– from what is usual, normal or customary in a particular trade, business or profession. So long as what the agent does in the exercise of such authority is reasonable and lawful, the principal will be bound. However if it is unreasonable, the principal is bound only if he consents to it.

Ostensible (or apparent) authority arises where a person makes a representation to third parties that a particular person has the authority to act as their agent without actually appointing them as their agent. In such a case, the person making the representation is bound by the actions of the ostensible agent. The principal is also liable for the actions of the agent where they are aware that the agent claims to be their agent and yet do nothing to correct that impression. While implied authority arises from an agreement, it is the law that vests an agent with ostensible authority. Ostensible authority may arise also where a principal has previously represented to a third party that an agent has the authority to act on their behalf. Even if the principal has subsequently revoked the agent's authority, they may still be liable for the actions of the former agent unless they have informed third parties who had previously dealt with the agent about the new situation.

There is a strong resemblance between implied and ostensible authority and this may sometimes cause confusion. The conduct of the parties, for example, could be a source of both implied and ostensible authority. But the two processes are, nevertheless, separate and distinct. In the one instance an actual authority is inferred from the conduct of the parties; in the other, though there was no actual authority, the principal is prevented from relying on its absence to the prejudice of a person whom by their actions or their attitude they have misled.

The ostensible authority gives rise to what is called the *agency by estoppel*. The effects of such an agency may be observed in two types of cases. First of all, there may be no relationship of principal and agent at all, but by virtue of the doctrine of *estoppel*, such a relationship is created. Second, and more often, there may be a relationship of principal and agent but the authority of the agent may be limited. If the agent exceeds his authority, the doctrine of *estoppel* may operate to bind the principal on the ground that the ostensible authority of the agent supplemented and broadened the scope of their actual authority as to cover the unauthorised acts of the agent. An example of the former is *Freeman & Lockyer* v *Buckhurst Park Properties (Mangal) Ltd* (1964). There a certain director had never been appointed a managing director, yet he acted as such with the clear knowledge of the other directors and entered into a contract on behalf of the company. The company was held liable on the contract: a properly appointed managing director would have been able to enter into such a contract and the third party was entitled to rely on the representation of the other directors that the person in question had been properly appointed to that position.

5 Compared to the Companies Act 1967, the Companies Act 2011 makes it easier and simpler to form a company in Lesotho. To begin with a woman married in community of property is entitled to form a company without her husband's consent. In Lesotho's customary and common law, women married in community of property are regarded as legal minors even if they are 21 or older. This rule has been explicitly withdrawn by s.5(2) Companies Act 2011.

In order to incorporate under the Companies Act 2011, a company must have a name. The promoter is free to choose any name provided it is not identical to any registered name in the registers, directories and records of the names of companies in Lesotho. The promoter must affirm in the application for incorporation that this is indeed so. If a promoter wishes to choose a name that is identical to the name of another company, then their written consent must be secured and attached with the application.

If the name under which the company proposes to carry on its business is different from the registered name of the company, then it has to be disclosed as well in the application. The application must disclose if it is a private or public company and must state that the liability of the members is limited. A public company must contain the word 'Limited' (or 'Ltd') at the end of its name and a private company, the words 'Proprietary' or its abbreviation 'Pty' and 'Limited' or its abbreviation 'Ltd'.

It is now possible to form a one person company. A single person alone can lodge an application for incorporation of a company with the Registrar of Companies. This brings the law in line with what prevails in the region and around the globe generally.

The requirement of the memorandum of association has been dispensed with. Section 7(3) Companies Act 2011 provides that, on incorporation, a company shall have the capacity and power to carry out any commercial activity or activities so long as it has the requisite licence for it. The doctrine of *ultra vires* which restricted a company to activities stated in the objects clause of the memorandum no longer limits the companies in Lesotho. If *Ashbury Railway Carriage & Iron Company* v *Riche* (1875) arose now, the company would have no problem buying and selling railway carriages, as well as entering into a contract for the construction of a railway line. However, the application for incorporation still has to state the main purposes/intended businesses of the company but they in no way limit the capacity and powers of the company. The application must state the month and year it intends to start its business.

Articles of association prescribing rules and regulations for the management and operations of the company must be filed with the application and signed by each promoter. A set of model articles have been developed by the Registrar of Companies and it is open to the companies to adopt all or any of the model articles. However, if no articles are registered, then the model articles automatically apply as the articles of the company. The model articles are not statutory and can be modified by the Registrar from time to time if the business environment so requires.

The application must state the authorised share capital of the proposed company. The requisite stamp duty must be paid. Unlike the Companies Act 1967, the authorised share capital need not be divided into so many shares having a certain nominal value. Shares that are issued under the Companies Act 2011 need not have a nominal or par value. A company may have some shares with rights, privileges, limitations and conditions different from the regular shareholders. If that is the case, it must specify them in the application for incorporation.

The application must state the maximum number of directors the company wishes to have. At the minimum, a private company must have at least one and a public company at least two directors. The consent of those who have agreed to be the directors must be attached with the application.

Last, every company must have a registered office and an address for service. Both may be the same or different. The full address and contact details need to be included in the application. The application itself must be signed by the subscriber or subscribers, as the case may be.

After receipt of the completed application for incorporation with all the supporting documents of the company, the Registrar registers the company and issues a certificate of incorporation. The certificate identifies the company by its name and serial number at the registry. Section 9 provides that a company upon incorporation becomes a legal person in its own right, separate from its shareholders and continues its existence until removed from the register of companies.

6 Section 2 Companies Act 2011 defines a director as meaning 'a person occupying the position of a director of the company by whatever name called'. The point of such a tautological definition is to emphasise the fact that it is the person's function rather than their title that defines them as a director and makes them subject to all the rules of company law that apply to directors. The director's function is to take part in making decisions by attending meetings of the board of directors. Anyone who does that is a director whatever he or she may be called.

It is possible that someone who in reality exercises control over a company's decision-making might seek to evade their responsibilities and potential liabilities as a director. For example, they could attempt to do this by appointing some other people as nominal directors without themselves being formally appointed to the board of directors. They would, nonetheless, exercise control over the business. It was in order to regulate such potential activity by those who exercise control over companies from behind the scenes, that the concept of the 'deemed director' or what English law calls 'shadow director' was introduced. Thus s.56(1) Companies Act 2011 provides that 'director' in relation to a company *includes* a person who exercises or is entitled to exercise or who controls or who is entitled to control the exercise of powers which would be exercised by the board. Section 56(3) provides that if the articles require a director or board to exercise or refrain from exercising a power in accordance with a decision or direction of the shareholders, a shareholder taking part in making such a decision or direction is deemed to be a director in relation to that decision or direction.

A 'director' also includes a person who has been directly delegated by the board a power or duty that the board exercises, or who exercises the power or duty with the consent or acquiescence of the board.

If the articles of a company confer a power on the shareholders which would otherwise be exercised by the board, then a shareholder who exercises that power or who takes part in deciding whether to exercise that power is deemed to be a director in relation to the exercise of that power.

However, it should be noted that a person is not to be deemed a director simply for the reason that the directors act on advice given by him or her in a professional capacity. Thus, neither accountants nor lawyers are made liable on the simple basis that they provide advice which the board of directors may act on.

7 (a) Constructive dismissal

The Labour Code 1992 does not use the phrase constructive dismissal but provides in s.68(c) that dismissal includes a resignation by an employee 'in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer's breach of a term of the contract'. The section essentially affirms the common law position.

Constructive dismissal occurs where the employer repudiates the contract by committing a breach which goes to the root of the contract. In a constructive dismissal, the employer is willing to continue the employment but the employee is not. Examples of constructive dismissal are:

- Unilateral reduction in pay of the employee [*Industrial Rubber Products* v *Gillon* (1977)].
- A complete change in the nature of the job, such as demotion [*Ford* v *Milthorn Toleman Ltd* (1980)].
- Change in the employee's place of work, when the contract of employment does not give the employer the right to make this change.

The employee has to establish that a repudiatory breach occurred, that he or she left because of it and did not waive the breach, for example, by remaining in the employment for too long. Constructive dismissal requires proof that there indeed has been a repudiatory breach going to the root of the contract. This is not easy to prove. South African courts have held that a constructive dismissal is not 'inherently unfair'. Not every unreasonable conduct attracts s.68(c) Labour Code; the nature of the unreasonable conduct must be such as to amount to a repudiatory breach of the employment contract to the satisfaction of the court. Furthermore, the remedy of reinstatement is usually denied in cases of constructive dismissal unless the employer is a large company which can place the employee in a different position.

In Lesotho, where the incidence of unemployment is very high, resigning a job because of the unreasonable conduct of the employer is far from a practical solution. Employees in such conditions would put up with unreasonable conduct by the employer, rather than risk leaving the job and then sue in a labour court for damages on the ground that the resignation was provoked by the unreasonable conduct of the employer.

(b) Summary dismissal

Summary dismissal is dismissal without notice. Section 63(2)(d) Labour Code 1992 allows an employer to dismiss an employee where there is a serious misconduct of such a nature that it would be unreasonable for the employer to continue to employ them during the notice period. Under s.79(2) Labour Code 1992 an employee dismissed fairly for serious misconduct is not entitled to severance payment either. The expression 'misconduct' has not been defined in the Code. Therefore, common law can be used to define misconduct.

At common law, whether an employee's conduct amounts to a serious misconduct will depend on the individual circumstances of each case. Dishonesty – theft, fraud, bribery, embezzlement and the like – drunkenness on duty, gross negligence or incompetence, wilful disobedience of lawful orders, revealing the trade secrets of the employer, persistent idleness, competing with the employer in the same line of business and serious absenteeism have been held as instances of misconduct. In *Lehlohonolo Khoboko* v *Lesotho Building Finance Corpn* (1994), it was held that calling the managing director 'a madman/lunatic with a gun which he exercised in a dangerous manner' was an instance of serious misconduct. The Labour Court has held, more than once, that going on an illegal strike amounts to a misconduct [*Lesotho Haps Development Co* v *Employees of the Lesotho Haps Development Co* (1995)].

In certain circumstances, misconduct outside the contract of employment may justify summary dismissal if there is a sufficient and clear nexus between such misconduct and the employer's business, or if the misconduct is such that it seriously impairs the ability of the employee to carry out his duties in a satisfactory manner. For example, if an employer runs a private girls' school and one of the teacher employees regularly has sex with some of the female students outside the working hours with the result that the reputation of the school and thereby earnings of the employer suffer precipitously, it may justify summary dismissal.

It is common to suspend an employee for serious misconduct on full pay pending the outcome of disciplinary action. It is possible, however, to suspend an employee without pay as a penalty or corrective measure. In *National Union of Metalworkers* v *Delta Motor Corporation* (2003), one of the workers disregarded an instruction given by his supervisor. He was suspended without pay for one day as a disciplinary measure. It was challenged by the Union as an unfair labour practice and also on the ground that no disciplinary hearing was held prior to the suspension. It was held in South Africa by the Commission for Conciliation, Mediation and Arbitration that insubordination in many circumstances can even justify dismissal and the employer had, in fact, been lenient. It further held that an employer cannot be expected to hold a formal disciplinary hearing every time an employee breached a rule. Suspension without pay is an alternative to dismissal in cases of serious misconduct.

In certain circumstances gross incompetence or serious neglect by an employee may also justify a summary dismissal. In an unreported Tanzanian case, an employee was specifically directed to put lubricating oil in a machine every 30 minutes to prevent overheating. After some time, he felt bored and went away to get a few cans of beer. When he returned, the motor had been burnt due to lack of oil. His summary dismissal was held justified under the circumstances.

In *Tesekuoa Tsekoa and Others* v *General Manager, Lesotho Flour Mills and Others* (1988), all the workers of Lesotho Flour Mills went on strike in support of their claim for salary increments in line with the review of salaries in the Civil Service. The entire labour force was summarily dismissed on the ground, *inter alia*, that they had wilfully disobeyed the lawful instructions of the employer to return to work. The High Court decided against the workers and the decision was confirmed by the Court of Appeal. Disobedience of an employer's lawful order can justify summary dismissal only when such disobedience is sufficiently serious and amounts to a repudiatory breach. In *Lesotho Flour Mills'* case, there was evidence that the striking workers posed a serious threat to the safety of the plant and machinery and some of its regular customers.

In *National Union of Retail & Allied Workers* v *Sotho Development Corporation* (1996), the company dismissed two of its workers following a disciplinary hearing where they were found guilty as charged. This led all the workers going on an illegal

strike, demanding the reinstatement of their two dismissed colleagues. Management tried to talk to the workers several times that the dismissed workers could challenge their dismissal before the Labour Court if they so wished, rather than resorting to an illegal strike. Eventually, the management gave them an ultimatum that, if they chose not to return to work, they should consider themselves suspended. The Labour Court upheld their dismissal that, under the circumstances, failure to return to work was a repudiation of their contract of employment.

8 This question tests candidates' understanding of the way in which contractual agreements are entered into, and the consequences of entering into such agreements. In particular, it asks candidates to distinguish between offers and invitations to treat, offers and counter-offers and also to consider options.

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 ordinarily refers to a meeting of minds of two or more parties. The offer sets out the terms upon which the offeror is willing to enter into a contract with the offeree. If the offeree accepts those terms, then a legally enforceable contract results.

It is important, however, to distinguish offers from the invitation to treat. The latter is an invitation to others to make offers. The person extending the invitation is not bound to accept any offers made to them. Common examples involving invitations to treat are:

– a public advertisement. The classic case in this area is *Crawley* v *Rex* (1909), in which a shopkeeper advertised the sale of a particular brand of tobacco at a cheap price. The shopkeeper declined to sell tobacco to Crawley. It was held that the advertisement for sale amounts simply to an announcement of his intention to sell at the price he advertises. It is not an offer.

– the display of goods on the shelf of a self-service shop. The classic case is *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists* (1953). The defendants were charged with breaking a law which required that certain drugs could only be sold under the supervision of a qualified pharmacist. It was held that they were not guilty as the display of goods on their shelves was only an invitation to treat. In law, the customer offered to buy the goods at the cash desk where the pharmacist was stationed.

The advertisement in the Daily News offering rare stamps for sale is an invitation to treat. It is not an offer. It is Mohapi who made an offer to buy three of the stamps he selected for a total price of R5,000.

Acceptance is necessary for the formation of a contract. Once the offeree has agreed to the terms offered, a contract comes into effect. Both parties are bound, and can enforce the terms of the contract through the courts. But if the offeree rejects the offer, then the offer comes to an end and cannot be revived by retracting the rejection. The counter-offer is treated as an implicit rejection of the original offer.

A valid acceptance must correspond with the terms of the offer. An offeree cannot unilaterally alter the terms of the offer. The effect of any such alteration is to bring the original offer to an end, and once again the offeree cannot accept the original offer: see *Hyde* v *Wrench* (1840).

A counter-offer must not be confused with a request for information or inquiries. This does not end the offer, which can still be accepted after the new information has been elicited.

Sam made a counter-offer of R7,000 for the three stamps. This amounts to a rejection of Mohapi's offer of R5,000.

Where a promisor agrees to keep an offer open for a period, it may result 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 an option contract, the offeror expressly or impliedly makes his offer irrevocable for a fixed time. In the problem scenario, Mohapi told Sam he needed time to think about his offer to sell the three stamps for R7,000 over supper and Sam granted Mohapi an option to keep his offer open until then. It means that Sam made a binding promise to Mohapi not to sell the three stamps and wait for Mohapi's return. However when Mohapi returned to buy the stamps, he found that Sam had already sold them to someone else. Sam should have waited until the expiry of the time limit. Mohapi may, therefore, be able to take proceedings for damages against Sam for breach of the option contract, although this does not affect the validity of the contract made with the subsequent customer.

9 This question requires candidates to analyse the problem scenario from the perspective of Chaba and Napo's potential liability under the Companies Act 2011.

Best Greengrocers Ltd are insolvent and under s.125(2) Companies Act 2011 can be put into liquidation by the court on application by the Registrar of Companies, the company itself, any of the shareholders, any of the directors or creditors of the company. The realisable value of the company's assets is only R10,000 while the debts are R100,000. The sole question is whether Chaba and Napo are liable to contribute R90,000 to meet the liabilities of the company.

At common law, the duties owed by directors to their company and the shareholders and creditors of that company were notoriously lax. Indeed, the Companies Act 1967 did not have any provision regarding the duties of the directors. The Companies Act 2011 seeks to provide for them in order to provide a measure of protection for those concerned.

Duty of care and skill

Common law did not place any great burden on directors in this regard. Damages could be recovered against directors for losses caused by their negligence but the level of such negligence has to be, in a business sense, gross. The classic statement is to be found in *Re City Equitable Fire Assurance Co* (1925), which established three points:

(i) in determining the degree of skill to be expected, the common law applied a subjective test and established no minimum standard;

(ii) the duties of directors were held to be of an intermittent nature and, consequently, directors were not required to give continuous attention to the affairs of their company;

(iii) in the absence of any grounds for suspicion, directors were entitled to leave the day to day operation of the company's business in the hands of managers and to trust them to perform their tasks honestly.

The Companies Act 2011 attempts to bridge the gap. Section 63(2) requires that directors must exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account the nature of the business of the company, the nature of the decision taken, the position of the director and the nature of the responsibilities undertaken by the director. Section 63(1) requires that a director, when exercising powers or performing duties, must act in good faith and on reasonable grounds in the interests of the company.

For breach of these duties, the directors are severally and individually liable to the company, its shareholders and *any other person* for any loss suffered by them. The reference to 'any other person' would include creditors of the company. It may be noted that the liability of the directors does not depend on their being dishonest. If it appears that, at some time before the start of the winding up, a director knew, or ought to have known, that there was no reasonable chance of the company avoiding insolvent liquidation, then unless the directors took every reasonable step to minimise the potential loss to the company's creditors, they may be liable to creditors for any loss suffered by them as a result of their actions. In deciding what directors ought to have known, the court is likely to apply an objective test, as well as a subjective one. Section 63(2) establishes a minimum standard by applying an objective test which requires directors to have the care, diligence and skill which may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company.

The manner in which incompetent directors will become liable to contribute to the assets of their companies was shown in *Re Produce Marketing Consortium Ltd* (1989), which courts in Lesotho may make use of. In that case, two directors were held liable to pay compensation from the time that they ought to have known that their company could not avoid insolvent liquidation, rather than the later time when they actually realised that fact. The court stated in that case, that the appropriate amount that a director is declared to be liable to contribute is the amount by which the company's assets can be discerned to have been depleted by the director's conduct. The fact that there was no fraudulent intent is not of itself a reason for fixing the amount at a nominal or low figure, for that would amount to frustrating what, it is submitted, seems Parliament's intention in adding s.63 to the Companies Act 2011.

It remains to determine from which date Chaba and Napo should be held responsible for the debts of the company. It would seem there was no real prospect of the company avoiding insolvent liquidation as early as January 2009. Consequently, they will be personally liable for any debts accrued by the company after that date, which in the problem scenario comes to R90,000.

The realisable assets of the company are worth R10,000. As Chaba and Napo will be required to contribute R90,000 to the assets of the company as a consequence of their continued unwise trading, it follows that there is a total of R100,000 to meet the debts of the creditors. Consequently, all of the creditors will receive 100% in payment of their debts.

10 The problem scenario relates to the authority of a partner to bind the firm, the position of third parties in such transactions and the right of a partner to renounce a partnership.

The relationship between a partnership and third parties is governed by the law of agency. Partners are agents of each other. The agency of a partner for his co-partners arises by implication of law as soon as the relationship of partnership is established. In *Potchefstroom Dairies & Industries Company Ltd* v *Standard Fresh Milk Supply Co* (1913) TPD 506, De Villiers JP observed that a partner has not only the powers of an agent but he is also a surety for his fellow partners for they are all liable jointly and severally. Not only is a partner an agent but he has the double character of agent and principal in one and the same transaction. When a partner makes a contract with a third party, he acts as an agent for his other partners and as a principal for himself. He can bind the partnership if he acts in the name of the partnership and within the scope of the partnership business. In the problem scenario, there is little doubt that what Ming has ordered relates to the business of the partnership.

In *Goodrickes* v *Hall & another* (1978), a partner instructed a firm of attorneys to obtain a liquor licence for the restaurant that the firm ran, fully knowing that his other partner was against it. It was held that the firm was bound to pay the account of the attorneys, even if that partner had been expressly prohibited on that behalf as long as what was done was in furtherance of the partnership business and fell within the scope of the partner's implied or ostensible authority. No partnership can shelter behind private arrangements that are unknown to the third parties.

The basis of this rule is the protection of *bona fide* third parties against prejudice they may suffer as a result of private internal arrangements not known to them. Another justification for the rule can be found in the principle of estoppel. The partners may be estopped from denying to a *bona fide* third party that the contracting partner did not have the requisite authority to enter into a binding contract on behalf of the partnership.

In the problem scenario, Tom did not know that Ming was prohibited from ordering materials from him. It was an internal limitation and would not affect Tom unless he knew it. Tom is, therefore, entitled to claim and receive R15,000 from the partnership and, failing that, from Chou and Ming. The partners are liable for the debts of the partnership jointly and severally to an unlimited extent.

It is not clear from the facts of the problem if the partnership was registered or not. However, as far as Tom is concerned, it does not matter because under s.28 Partnerships Proclamation 1957, a creditor is free to enforce his claim against both registered and unregistered partnerships.

In the problem, it is mentioned that Chou, who contributed capital, does not take an active part in the running of the partnership business. This would not make him a limited partner. A limited partnership requires that the liability of the limited partner is clearly agreed to. This is not the case here. Consequently, the partnership, and the two partners, Chou and Ming, if need be, would be liable to pay Tom the full amount of R15,000.

By ordering building materials from Tom costing R15, 000, Ming is in breach of his duty to observe the partnership agreement honestly. He bought building materials from Tom knowing that no purchases were to be made from him. Ming's actions have destroyed the mutual trust and confidence which is the foundation of any partnership. Chou, therefore, would be justified to renounce the partnership and unilaterally terminate the relationship on the ground that Ming's conduct in breaching the agreement wilfully has resulted in loss of confidence and that it would not be possible for them to work together. In short, the partnership can be dissolved.

Fundamentals Level – Skills Module, Paper F4 (LSO)
Corporate and Business Law (Lesotho) **June 2013 Marking Scheme**

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 the importance of the doctrine of precedent and delegated legislation in Lesotho.

(a) 3–5 marks Full detailed explanation of the doctrine. Examples used to highlight answers.

0–2 marks Sound understanding but perhaps no examples. Inadequate answers would show limited knowledge only.

(b) 3–5 marks Full detailed explanation of the rules on delegated legislation.

0–2 marks Sound understanding but incomplete discussion of rules. Inadequate answers would show limited knowledge only.

2 This question requires candidates to explain how exemption clauses may be incorporated into a contract by reference.

6–10 marks Very good knowledge of how exemption clauses may be incorporated into a contract by reference and the legal issues, with reference to appropriate case law

0–5 marks Limited knowledge only about the topic.

3 This question tests candidates' understanding of the concept of 'wrongfulness' in the law of delict.

6–10 marks A thorough treatment of the rules relating to 'wrongfulness' with illustrative examples or cases.

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 explain and distinguish between actual and ostensible authority of an agent.

6–10 marks Clear explanation of the difference with supporting cases or examples.

0–5 marks Some, but limited, knowledge of the difference. Lower band answers would lack understanding of the difference.

5 This question invites candidates to explain the procedure for the formation of a company in Lesotho.

6–10 marks Full understanding and explanation of the topic.

0–5 marks Some knowledge of the topic but lacking in detail. Lower band answers would show very little, if any, understanding of the topic.

6 This question tests the understanding of the candidates as regards the meaning of the term 'director' under the Companies Act 2011.

6–10 marks Complete explanation of the term.

0–5 marks Reasonable, but less than full, explanation of the term. Lower band answers would be unbalanced, merely dealing with a partial explanation or demonstrating no real understanding of the nature of the question.

7 This question is in two parts. The first part requires candidates to explain constructive dismissal. The second part requires them to explain summary dismissal.

(a) 3–5 marks Good explanation of the concept of constructive dismissal with examples or cases.

0–2 marks Little or no understanding of the concept.

(b) 3–5 marks Good explanation of the concept of summary dismissal with examples or cases.

0–2 marks Little or no understanding of the concept.

8 This question requires candidates to demonstrate their understanding of the way in which contractual agreements can be entered into, and the consequences of entering into such agreements.

8–10 marks	Answers will demonstrate a thorough knowledge of the law generally, together with a clear analysis of the problem scenario and a deployment of the appropriate legal principles.
5–7 marks	Answers will be generally sound in relation to the law but may be lacking in analysis or application.
2–4 marks	Answers will demonstrate some knowledge of the law relating to the question but not to the degree expected of a reasonably satisfactory answer. They may be weak in analysis and/or application.
0–1 mark	Little or no understanding of the law relating to the question. Extremely weak in terms of analysis and application.

9 This question requires candidates to consider and explain a problem scenario which raises issues relating to directors' common law duty of care and skill, but more importantly their statutory duties as required under s.63 Companies Act 2011.

8–10 marks	A thorough analysis of the problem scenario and a clear treatment of all of the matters raised in the question.
5–7 marks	Good analysis and application of the law, although perhaps limited in appreciation of all the aspects of the scenario.
3–4 marks	Recognition of the areas covered by the question, but lacking in detailed analysis.
0–2 marks	Little or no analysis or knowledge of the subject of the question.

10 The problem scenario relates to the authority of a partner to bind the firm and the position of third parties in such transactions.

8–10 marks	Thorough answer showing a clear grasp of the legal principles and their application to the facts of the problem. Reference to relevant cases expected.
5–7 marks	Good treatment of all the parts of the question including a fair application of the legal rules to the facts.
3–4 marks	Good treatment of at least one part of the question and reasonably fair treatment of the other.
0–2 mark	Unbalanced answers will be sketchy and show poor understanding of the topic.