Answers

1 The question asks candidates to demonstrate their knowledge on the interpretation of laws by the local courts.

It has been stated that interpretation refers to the examination of a particular principle or provision of law with the purpose of ascertaining its meaning and/or applicability with regards to a given set of facts.

As opposed to the situation in Roman times where a judge could deliver judgement by returning a *non liquet* verdict, a member of the judiciary may not refuse to give a decision on the merits before him on the pretext that the relevant provisions of law are obscure.

Interpretation is said to be either doctrinal or authentic. Authentic interpretation is made in the law itself while doctrinal interpretation is that which is made by the judiciary, lawyers, text book writers and the like.

Doctrinal interpretation refers to the search for the spirit of the law through its provisions and hence through an in-depth understanding of the provisions. The functions of interpretation are the result of many factors but principally the stage of development which a given legal system has reached. In legal systems which are still in the period of formation, interpretation has mainly a creative function and one of the most extensive sources of the law itself. As soon as a codification is made, there is a period in which the interpretation role is rigid and restricted. This stage is followed by a third stage of comparative freedom where a balance is reached between the wording of the law and the underlying spirit of the law.

There have been several theories put forward on the interpretation of law which are based on two extremes, namely the will of the legislator and the social requirements at a given moment. The various theories put forward can be divided into four groups: (i) the traditional theory; (ii) the historical school; (iii) the German school of Frei Recht and (iv) the eclectic theory.

The traditional theory aims at the discovery of the presumed will of the legislator. It is the role of the legislator to draft the law and therefore the interpreter must aim to discover the legislator's will. This theory is based on an objective examination of the law itself and of its sources and is based on the following main rules:

(i) the first duty of the interpreter is to ascertain the grammatical and logical meaning of the law;
(ii) if a text is obscure, the interpreter must endeavour to discover the legislator's intention at the time of the enactment of the particular law;
(iii) if the law has omitted to deal with a particular case, it is still possible to find the legislator's intention by analogy with other provisions.

The main fault found with this theory is that the followers of this school of thought presume that the legislator had in mind all possible scenarios, which is not the case. There is therefore the risk that an artificial interpretation be adopted.

The historical school of thought came about as a reaction to the rigidity of the traditional school. This theory dictates that law is continuously evolving in accordance with the needs of society. One of the main proponents of this theory is von Savigny who analysed the four elements which he held lie at the basis of interpretation, namely: (i) the grammatical element; (ii) the logical element; (iii) the historical element and (iv) the systematic element. While the first two elements help in the initial discovery of the meaning of the law, the third element presents the law in its proper perspective while the last element correlates all the provisions together.

The third school of thought is the German school of Frei Recht, the theory of 'free law', of which one of the main early proponents was Von Ihering. This theory is based on utilitarian grounds where the text of the law is given a secondary position and where the judge or interpreter is authorised to interpret law in the way in which he thinks best to meet the justice of the case. However, on such a basis, certainty of law could be wiped out and the theory is therefore deemed impracticable.

Finally, the eclectic theory reconciles the various theories by deeming them complimentary to one another. While adhering to the text of the law, the interpreter must also be receptive to change in finding solutions to the case before him.

In dealing with the theories, mention has been made to different types of interpretation. From the point of view of origin, interpretation may be either authentic or doctrinal. On the other hand, doctrinal interpretation may be either grammatical or logical. As noted above, grammatical interpretation merely indicates the direct meaning of the words used. Therefore, words are to be understood according to their normal meaning, unless they are technical, in which case the technical meaning would prevail. Logical interpretation aims at discovering the legislator's will through the logical nexus of the ideas contained in the law and through its political and juridical reasons as well as through the examination of all the circumstances connected with the law.

Doctrinal interpretation may also be declarative, widening and restrictive. Declarative interpretation refers to the case when the wording of the law does not correctly express the intention of the legislator. Through this interpretation, the real meaning of the law is ascertained and declared. When the law is expressed more or less widely than that which is really meant, the need arises for restrictive or widening interpretation. However, before the latter may be employed, the interpreter must ascertain the existence of a divergence between the wording and real meaning intended by the legislator. With this in mind, he must examine the *ratio* of the law and if he determines that this is wider than the words actually employed, the interpreter must employ widening interpretation by applying the provision to cases which come within the *ratio* though perhaps not strictly adhering to the wording. On the other hand, when the wording of the law renders it also applicable to cases which do not fall within its *ratio*, the legal provisions should not be applied to those cases by reason of restrictive interpretation which narrows down the field of application of the law. Restrictive interpretation must, however, be applied with caution as otherwise the will of the interpreter will be substituted for that of the law.

It is also worth noting that there are several traditional maxims on doctrinal interpretation, some of which are detailed below. It is noted that many maxims are reflected in the provisions of the law.

(i) 'All the clauses of a contract shall be interpreted with reference to one another giving to such clause the meaning resulting from the whole instrument' (Article 1008 Civil Code) – therefore before attempting to interpret one particular provision, the interpreter must be cognisant of the main aim of the particular piece of legislation or branch of law;

(ii) 'When a clause is susceptible of two meanings, it must be construed in the meaning in which it can have some effect rather than in that which it can produce some' (Article 1004 Civil Code) – it cannot therefore be presumed that the law contains provisions which are redundant and therefore if one interpretation renders a particular provision superfluous, that interpretation must be discarded;

(iii) The existence of defects in law cannot be presumed and therefore that interpretation must be chosen which excludes *vitia* in legal provisions;

(iv) Exceptions should not be presumed unless clearly stated or implied in the law and if any exception is to be recognised, it must be interpreted and applied restrictively.

2 Subject to the rights of persons, if any, entitled to shares with special rights as to dividend, all dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect whereof the dividend is paid, but no amount paid or credited as paid on a share in advance of calls shall be treated as paid on the share. All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid; but if any share is issued on terms providing that it shall rank for dividend as from a particular date such share shall rank for dividend accordingly.

The directors are normally also entitled to deduct from any dividend payable to any member all sums of money, if any, presently payable by him to the company on account of calls or otherwise in relation to the shares of the company.

No dividend shall bear interest against the company.

The directors of both public and private companies may, from time to time, pay to the members such interim dividends as appear to the directors to be justified by the profits of the company. In such an event the approval of the shareholders for the payment of interim dividends does not appear necessary.

As dividend distributions must be justified by the profits, in deciding whether or not to recommend a dividend reference must be made to the company's annual accounts. However, one questions whether this also applies in the case of interim distributions. In the case of public companies, it is mandated by the Companies Act 1995 that interim dividend distributions should be always made with reference to the company's accounts. Thus, if the distribution is made during the course of the year, then, a set of interim accounts have to be drawn up to the date when the distribution is effected, such that the distributable profits of the company can be determined as at that date.

However, while the Companies Act 1995 provides guidance on the drawing up of interim accounts in relation to public companies, there is no guidance in this regard for private companies. Therefore, one can argue that the requirement for the drawing up of interim accounts to substantiate the distribution of an interim dividend is not mandatory on private companies. This notwithstanding article 197(3) of the Companies Act 1995 mandates that, prior to a dividend distribution, reference has to be made to relevant accounts that enable a reasonable judgement by the directors as to the amount of distributable profits available.

Accounts have to be drawn up to the date when the distribution is effected, such that the distributable profits of the company can be determined as at that date.

The board of directors of a company normally recommend the distribution of a dividend and make such recommendation to the shareholders. The shareholders would then have to approve the recommendation in general meeting. There appears nothing which prohibits the shareholders from recommending the distribution of a dividend notwithstanding the fact that they may not have received a recommendation from the directors.

In deciding to distribute a dividend the provisions found in the Companies Act 1995 in relation to the distribution of dividends must be adhered to. The Companies Act 1995 mandates that a company shall not make a distribution of dividends except out of profits available for the purpose, and that the company's profits available for distribution shall be its accumulated realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated realised losses so far as not previously written off in a reduction or reorganisation of issued share capital.

A dividend is a distribution to shareholders out of the company's profits. Dividends, therefore are the profits of the company divided amongst the shareholders in the proportion determined by the articles and, if the articles contain no provision in that regard, in proportion to their shares and in accordance with such rights as are conferred on the shares.

A public company is subject to an additional rule which may diminish but cannot increase its distributable profit as determined under the above rules. Thus, a public company may only make a distribution of dividends at any time:

(i) if at that time the amount of its net assets is not less than the aggregate of its called-up issued share capital and undistributable reserves; and

(ii) if, and to the extent that, the distribution does not reduce the amount of those assets to less than that aggregate.

No express power need be given by the memorandum or articles to pay dividends: such power is implied. It is, however, a basic and fundamental rule that no dividend must be paid otherwise than out of profits.

The company in a general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors. In any such case, it is up to the directors whether they will recommend the payment of any dividend and, if so, to specify the rate thereof and the members cannot insist on the payment of a dividend even when the profits are available. Thus, it is the responsibility of the directors to draw up the financial statements of a company and accordingly decide whether or not a dividend should be distributed at year end or even during the currency of the financial year end. However, in the case of the distribution or otherwise of an annual dividend, approval thereof shall rest with the shareholders in a general meeting.

Before recommending a dividend, the directors may set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments, other than shares of the company, as the directors may from time to time think fit. The directors may also without placing the same to reserve carry forward any profits which they may think prudent not to divide.

3 There are three principal effects of obligations, namely: (i) the principal effects, which refer to the necessity of performing accurately the obligations contracted; (ii) secondary or accessory effects, which consist in the obligation of making good the damages and paying interest in the case of non-performance, and the passing of risk and peril to the debtor in the case of default for delay; and (iii) subsidiary or auxiliary effects, which consist in certain rights attributed to the creditor in order to ensure and facilitate the execution of the obligation.

The secondary effects are those which arise out of breach of contract. It has been held that in order for these effects to come into being, three conditions must be fulfilled, namely: (a) non-performance of the obligation, either absolutely or with regard to the time fixed for its performance; (b) such non-performance must be imputable to the debtor, that is, he must have been either in *dolo* or *culpa*; and (c) such non-performance must be the cause of damages actually sustained.

Non-performance may be either proper or absolute non-performance within the time fixed (*mora* or default). Absolute non-performance for obligations of giving or of doing something is where performance is no longer physically possible or, though it be physically possible, it is no longer useful to the creditor. The latter is often a question of fact to be proven.

Mora is non-performance in relation to time which may only refer to obligations of doing or of giving something and one cannot imagine delay in obligations of forbearing to do, as the rules relative to *mora* presuppose that the performance of the obligation is still possible and useful. To ascertain default, the debt must be determinate, that is, certain not only to its existence but also with regard to its object and quantity, it must have fallen due and an intimation must have been made by means of a judicial act in the form required by law. Saving certain exceptions, the intimation would not be required where the obligation must be performed within a prescribed time limit.

When performance consists in the payment of a sum of money, damages shall consist in the payment of interest without the need of judicial intimation in the case of commercial transactions or in the cases prescribed at law.

The second condition is that non-performance must be imputable to the debtor and therefore must be either due to an act of his or to his will. In order for there to be a violation of obligations, non-performance must be due directly or indirectly to the debtor. Where there is direct imputability, the non-performance would be deemed fraudulent, while where it is indirect, the non-performance would be deemed culpable. In other cases it is accidental or fortuitous. In matters of non-performance, bad faith consists in the knowledge of committing an unlawful act, i.e. one has done or omitted to do something which, in order to perform the obligation, he should on the contrary have omitted or done.

Culpa is the omission of due diligence on the part of the debtor, owing to which he is not aware that his act or omission will cause the absolute or relative non-performance of his obligation, when, by exercising such diligence, he would have foreseen the consequences. If, however, notwithstanding such diligence, the debtor could not foresee the non-performance of his obligation, he cannot be held responsible for such non-performance. Article 1132 Civil Code provides a definition of due diligence: 'the degree of diligence to be exercised in the performance of an obligation, whether the object thereof is the benefit of only one of the parties, or of both, is, in all cases, that of a *bonus paterfamilias* as provided in article 1032.'

From the rule that non-performance must be imputed to the debtor, the following rules are derived:

(i) the debtor is responsible both for non-performance and for delay, even though he is not guilty of bad faith;

(ii) if non-performance or delay is due to a cause extraneous to the debtor, the debtor is not responsible and the loss occasioned by such non-performance is borne by the creditor. The obligation of the debtor is therefore extinguished due to the impossibility of its execution. However, the debtor may nonetheless be held responsible if by agreement the debtor has assumed all risks, or if in terms of law the risk is borne by the debtor or if the debtor is in *mora* or delay. The law lays down that a debtor who is in delay is also responsible for accidental and fortuitous events and the burden of proof that such loss is due to an accidental event lies with the debtor. If, however, the creditor accuses the debtor of *dolus* in order to claim a greater amount of compensation, it rests with the creditor to prove that the debtor acted maliciously.

The effects of non-performance and of delay are two: (i) they give rise to the obligation of the debtor, who is the defaulter, to make good the damages caused to the creditor through non-performance and delay. (ii) A special effect of *mora* is that the *periculum rei* rests with the debtor in default even though it was previously with the creditor.

For the existence of the obligation of making good compensatory or dilatory damages, the following conditions must exist:

(i) that there be non-performance or delay;
(ii) that such be imputable to the debtor; and
(iii) that the damages are real.

Damages are said to be liquidated either by agreement (conventional liquidation); by law (legal liquidation) or by a judgement (judicial). Conventional liquidation takes the form of an agreement, which foresees and determines the damages beforehand by means of a penalty clause or other similar clause. Legal liquidation arises in the case of dilatory damages in pecuniary obligations and the rate of interest fixed by law. Judicial liquidation is the most frequent of the three, where damage is made good by means of an equivalent sum of money determined by the courts assisted by experts. In most cases, indemnification by the forced execution of the obligation is not possible and therefore compensation is awarded. The law determines the amount of damages which the creditor may claim according to whether the debtor has failed to perform his obligation in *culpa* or in *dolus*, as one who has failed maliciously should pay larger compensation than one who is merely guilty in *culpa*. However, even though a debtor may have acted maliciously, he can only be held responsible for direct damages and not for indirect damages which are not the result of his actions or omissions alone.

Delay has the effect of burdening the debtor with the *periculum rei*, even though it may have been at the charge of the creditor. The debtor in delay remains obliged to pay damages even though the thing may have perished during the delay, unless he can prove that the thing would have equally perished if he had delivered the thing to the creditor without delay.

4 The Civil Code draws a distinction between contracts and quasi-contracts and between torts and quasi-torts. Candidates are required to explain the difference between each such institute.

An obligation is a bond as it binds one of the parties towards the other thus giving rise to the necessity of giving, doing, or not doing something. This necessity is a juridical one, in that, it is sanctioned by law and it attributes an action to the creditor in order to compel the debtor to fulfil that which he has bound himself to perform.

For the actual and concrete existence of an obligation, a cause, which gives rise to such obligation is necessary, in the same way as a mode of acquisition is necessary for the acquisition of any real right. It is held that there are five causes which give rise to obligations, namely the law, contracts, quasi-contracts, torts and quasi-torts.

The law is deemed to be the cause of every obligation, in that, if the law does not recognise an obligation which the parties want to create, the obligation would remain without effect. However, a distinction may here be made between those instances where the law is the immediate effect of a provision of the law, in that, the obligation is an immediate cause of the legal provision where the law imposes such obligation, or the mediate cause where an act is required to give rise to an obligation and the law merely recognises the effect of such act. Other than those obligations which are found in the law itself, those obligations arising out of a will for example, are also regarded as having the law for their immediate cause.

In terms of article 960 of the Civil Code, a contract is defined as an agreement or an accord between two or more persons by which an obligation is created, regulated or dissolved. A contract differs from other causes of obligations, in that, it is created by the free will of the contracting parties. On the other hand, a quasi-contract arises from a voluntary and lawful act of one of the parties, while a tort and quasi-tort arises from a voluntary but unlawful act of the debtor.

However, not every kind of agreement constitutes a contract but only that which constitutes, modifies or dissolves an obligation. Thus, even an agreement to dissolve an obligation is deemed to be a contract. Once two parties can agree to create an obligation they can also agree to dissolve such obligation.

A quasi-contract is defined under article 1012 of the Civil Code which provides that a quasi-contract is a lawful and voluntary act which creates an obligation towards a third party or a reciprocal obligation between the parties.

It has been contended that the above definition is the result of a misunderstanding. Quasi-contracts were often assimilated to contracts from the aspect of the agreement between the wills of the parties and therefore the obligations arising from quasi-contracts were based on the certain will of one of the parties and the presumed will of the other. However, this does not hold water, in that, in the case of negotiorum gestio the interested person finds himself bound without having done anything and the person who receives something which is not due certainly has no intention of binding himself to return it. It is therefore held that, in actual fact, the basis of the binding tie rather than a presumed intention is the utility or benefit which the person interested in the negotiorum gestio derives and the principles of equity in the erroneous payment of a debt as it would be unjust to allow a person to enrich himself to the detriment of another. Nonetheless, in regulating the two quasi-contracts the legislator refers to the now considered obsolete explanation of quasi-contracts.

There are two types of quasi-contracts, namely *negotiorum gestio* and *indebiti solutio*. *Negotiorum gestio* is the management of one or more affairs of another person assumed by a person without being bound to and without a mandate. On the other hand, *indebiti solutio* comes into being when a person, through a mistake, pays what is not due by him under any civil or natural obligation, either because there was never an obligation or because it was already extinguished or because he pays that which is due but not by him or because he pays that which is due but not to the person who receives it.

A tort and quasi-tort is an unlawful and unjust act, whether positive or negative, whether due to *dolus* or *culpa*, which causes damage to the person or to the property of another person. It is a cause of obligations as a person causing damage is bound to make good such damage to the injured party.

The concept of tort in civil law is different from that of crime. In crimes regard is had to the violation of the law and the consequent damage done to society, whilst in torts regard is had to the damage which is caused to the individual. Very often a crime is at the same time a tort or a quasi-tort but even then in such case the two actions are kept separate.

In dealing with torts and quasi-torts, a distinction is made between direct and indirect responsibility. The former is responsibility for one's own acts, which include both torts and quasi-torts according to whether the person causing the injury is in *dolus* or in *culpa*. Indirect responsibility, on the other hand, is responsibility for acts done by others or for damage caused by animals or any other object for which one is responsible.

5 The Employment and Industrial Relations Act 2002 vests the Minister with the right to issue regulations relative to the information to be given to employees on commencement of employment. Accordingly, Legal Notice 431 of 2002 entitled Information to Employees Regulations, 2002 provides for such information.

This Legal Notice shall apply to every paid employee of every employer as defined in the Act, but shall not apply to:

(i) employees who are employed for less than one month, or
(ii) employees who are employed for a working week which does not exceed a total of eight hours, or
(iii) employees who are employed to perform a specific defined task, on condition that the non-application is justified by objective considerations.

Where a written contract of employment has been signed between the employer and the employee, the employer shall deliver to the employee a signed copy of the agreement within eight working days from the date of the contract.

Where no written contract of employment has been signed between the employer and the employee, and/or where the written contract does not cover all or some of the information required to be notified to the employee by these Regulations, the employer shall be bound to give or send to the employee a letter of engagement or a signed statement within eight working days from the commencement of employment and which shall include the following information:

(i) the name, registration number and registered place of business of the employer and the identity card number, sex and address of the employee and the place of work (if there is no fixed place of work, it should be stated that the employee will be employed at various places together with the registered place of business and if there is no registered place of business, the domicile of the employer is to be stated);

(ii) the date of commencement of employment;

(iii) the period of probation;

(iv) normal rates of wages payable;

(v) the overtime rates of wages payable;

(vi) the normal hours of work;

(vii) the periodicity of wage payments;

(viii) in the case of a fixed term contract of employment, the expected or agreed duration of the contract period;

(ix) the paid holidays, and the vacation, sick and other leave to which the employee is entitled;

(x) the conditions under which fines may be imposed by the employer;

(xi) the title, grade, nature or category of the work for which the employee is employed;

(xii) the notice periods to be observed by the employer and the employee should it be the case;

(xiii) the collective agreement, if any, governing the employee's conditions of work; and

(xiv) any other relevant or applicable condition of employment.

If any of the above information is regulated by any law, regulation, national standard order, sectoral regulation order or collective agreement, the information may, where appropriate, be given in the form of a reference to the laws, regulations, orders or collective agreements governing that same information.

Where an employer engages a person under a contract for service as an outworker, he shall provide the employee with a signed statement showing:

(i) the name, registration number and registered place of business of the employer and the identity card number and address of the employee;
(ii) the rate to be paid for the work; and
(iii) any special conditions regulating the contract.

6 The existence of a partnership creates a juridical relationship between the partnership and the partners composing it. Such a relationship gives rise to various rights and duties of the partners against and towards the partnership and of the latter against and towards the former.

A partnership *en nom collectif* may be formed by two or more partners, operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of all the partners, provided that at least one of the partners shall be either an individual or a body corporate, which has its obligations guaranteed by the unlimited and joint and several liability of one or more of its members.

On the other hand, a partnership *en commandite* operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of one or more partners, called general partners, and by the liability, limited to the amount, if any, unpaid on the contribution, of one or more partners, called limited partners, provided that at least one of the general partners shall be either an individual or a body corporate, which has its obligations guaranteed by the unlimited and joint and several liability of one or more of its members.

Particular rights and obligations are vested in and undertaken by the unlimited partners of partnerships *en nom collectif* and the unlimited partners of partnerships *en commandite*.

The principal rights of these partners include:

(i) Insofar as the deed does not provide otherwise, each partner is entitled to take part in the management of the partnership's business, inspect the books and records of the partnership and generally supervise and control the partnership's affairs by such means as he considers appropriate;

(ii) A partner may maintain an action against the partnership, not only for the recovery of sums which he has disbursed on account of the partnership, together with interest, but also in respect of any obligations which he has contracted in good faith in the affairs of the partnership as well as in respect of risks inseparable from the management;

(iii) Every partner is entitled to share in the profits of the partnership. Where the deed of partnership does not fix the share of each partner's contribution to the partnership and with regard to a partner who has only contributed his personal services, his share of the profits shall be equal to that of the partner who has contributed to the partnership the least sum or portion. It is pertinent to point out, however, that a partnership may not distribute profits until it has made good all losses;

(iv) Every partner has the right to attend all meetings of the partnership and to vote thereat and, unless provided in the deed, every partner has one vote irrespective of the value of his contribution.

The principal duties of such partners include:

(i) Every partner owes the partnership all that which he has promised to contribute thereto within such time and upon such terms as may have been determined. In default, the partnership would have the right to bring an action against him for the performance of his obligations as well as for the payment of interest, and, where competent, for further damages.

    With regards to the contribution which is to be made by the partners, the law provides that unless specifically provided in the deed of partnership, things contributed to the partnership shall be deemed to have been transferred in full ownership. However, where any of the partners has contributed his own services only, the contributions made by the other partners shall, unless specifically provided in the deed of partnership, be deemed to have been made in usufruct;

(ii) A partner may not make use of the partnership property or take money from the partnership funds for his own private advantage without the consent of the other partners. Should he do so, the partner shall become a debtor of the partnership in interest where the partnership may also even have a right for damages against him. Where a partner takes funds from the partnership, unless he is the managing partner, he is presumed to have taken the funds for his personal advantage;

(iii) The partner who has agreed to contribute his skill to the partnership is bound to render an account of the profits made through the exercise of such skill, unless such skill is required in order to fulfil the purpose or object for which the partnership was set up, and unless all the other partners agree otherwise;

(iv) Every partner is held liable towards the partnership for any damage caused to the said partnership through his fault and he may not set off against such damage the profits derived by the partnership from the exercise of his skill in other affairs;

(v) A partner may not compete with the partnership. A partner shall not, in competition with the partnership and without the express consent of the other partners, carry on business on his own account or on account of others or be a partner with unlimited liability in another partnership. In default, the partnership may, at its option, either take action for damages and interest against the offending partner or demand payment of any profit made by him in violation of the aforesaid prohibition. The exercise of such rights is barred by a prescription period of two years from the date of the contravention;

(vi) Every partner must contribute his share of the losses sustained by the partnership, as opposed to sharing in the profits. Every partner's share of the losses is determined in the same manner as the share of profits is calculated. In most cases, this is fixed in the deed;

(vii) Every partner may, without the consent of the other partners, associate with himself a third party in his interest in the partnership. However, such partner may not be introduced into the partnership without the consent of the partners.

On the other hand, the rights and obligations of the limited partners are different. In fact in the management of the partnership, there are cases where the rights of the limited partners are limited, while in other cases, the limited partners are released from some of the duties of the general partners. The rights and duties of the limited partners include:

(i) Limited partners may not participate in the management and administration of the partnership unless so authorised by a special power of attorney;

(ii) Limited partners may inspect the books of account of the partnership;

(iii) Limited partners are not bound by the provisions of the law whereby the general partners may not, in competition with the partnership, and without the express consent of the other partners, carry on business on their own account or on account of others or be partners with unlimited liability in another partnership;

(iv) A limited partner shall in no case be bound to restore profits received in good faith;

(v) Unless the deed of partnership provides otherwise, a limited partner may assign his interest in the partnership. However, if the contribution of a limited partner is not fully paid up, any assignment of his interest in the partnership shall not have effect, with regard to the partnership, unless it is made with the consent of all the general partners;

(vi) Any changes in the deed of partnership which deprive limited partners of any of their rights shall require the unanimous consent of all the general partners and of all the limited partners, unless the deed of partnership provides otherwise.

7 The share capital in a limited liability company must be subscribed to by at least two members other than in the case of a single member company. Decisions of shareholders are either classified as extraordinary resolutions or ordinary resolutions.

Except where the Companies Act expressly requires powers to be exercised by the company in a general meeting, the division of such powers depends on the provisions of the company's memorandum and articles. Usually, however, the articles authorise the board of directors to exercise all the powers of the company which neither the said Act nor the express provisions of the memorandum or articles require to be exercised by the company in a general meeting.

A general meeting is one at which, if properly convened and duly constituted, resolutions binding the company and all its members may be passed. A general meeting is, therefore, distinguished from meetings of classes of members, which may only pass resolutions binding on the particular class concerned.

Decisions at general meetings are taken by way of resolutions. Resolutions may be of two kinds, ordinary and extraordinary resolutions. In terms of Article 135 Companies Act, which deals principally with resolutions taken in public companies, a resolution is an extraordinary resolution where two conditions are complied with. The said conditions are, namely, that:

(i) the resolution has been taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extraordinary resolution and the principal purpose thereof has been duly given; and

(ii) it has been passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting and at least 51%, or such other higher percentage as the memorandum or articles may prescribe, in nominal value of all the shares entitled to vote at the meeting.

If one of the aforesaid majorities is obtained, but not both, another meeting shall have to be convened within 30 days in accordance with the provisions for the calling of meetings to take a fresh vote on the proposed resolution.

At the second meeting, the resolution may be passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting. However, if more than half in nominal value of all the shares having the right to vote at the meeting is represented at that meeting, a simple majority in nominal value of such shares so represented shall suffice.

However, in the case of a private company, a resolution shall nonetheless be deemed an extraordinary resolution where the following two conditions are complied with, namely, that:

(i) the resolution has been taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extraordinary resolution and the principal purpose thereof has been duly given; and

(ii) it has been passed by a number of members having the right to attend and vote at any such meeting holding in the aggregate not less than 51% in nominal value of the shares conferring that right or such other higher percentage as the memorandum or articles may prescribe.

As a rule, one may state that any question, whether it comes within the meaning of ordinary or special business, may be determined by an ordinary resolution except where an extraordinary resolution is required. Decisions which the law provides require extraordinary resolutions include decisions to alter the memorandum and articles of association of a company except in the case of alterations excluded under Article 79; decisions whereby a company acquires its own shares; decisions whereby class rights are varied; decisions to change the currency in which the share capital is designated; decisions to voluntarily wind up a company or to have the company wound up by the court; decisions to nominate and remove a liquidator; decisions to convert a commercial partnership; and decisions relating to the amalgamation and division of companies.

On the other hand, an ordinary resolution is one which is passed by a member or members having the right to attend and vote holding in the aggregate shares entitling the holder or holders thereof to more than 50% of the voting rights attached to shares represented and entitled to vote at the meeting, or such other higher percentage as the memorandum or articles may prescribe.

It is also pertinent to note that where decisions are consented to by all the shareholders of a company and such consent is expressed by all in writing, the percentages required for the passing of ordinary and extraordinary resolutions, as detailed above, and the need to hold a meeting are of no relevance. Thus, a resolution signed by all the shareholders for the time being entitled to receive notice of and attend and vote at general meetings shall be considered as valid and effective as if the same had been passed at a general meeting duly convened and held.

8 **(a)** A minor who reaches the age of 16 may be emancipated to trade and hence also be a shareholder of a limited liability company. In this case, he shall be deemed to be a major with regard to obligations contracted by him for the purpose of his trade and he can therefore also charge, alienate or hypothecate his property without further formality. Once John reaches the age of 16, he may be emancipated to trade and subject to the authority of the court be authorised to carry out acts of trade and also hold shares in a company. Until such time, the shares must be held by a court-appointed curator on his behalf.

(b) Capacity to contract is one of the essential internal requisites of a valid contract. Although all persons may be subjects of rights, there are persons who are incapable of exercising them, either because of a natural cause or because of a legal cause, the latter also being based on natural grounds.

There are therefore two kinds of capacity and incapacity: natural and legal. Natural capacity and incapacity are based on the concourse or absence of those elements which are required by nature. Legal capacity and incapacity are determined according to whether the individual is endowed not with those other elements which are required by law but on rational and natural grounds. The rule is that the capacity of contracting is presumed because, generally speaking, all persons are capable and incapacity is the exception. It follows that only those who are incapable are so either by nature or by law, and that the causes of disability cannot be extended beyond these limits.

The conditions of natural capacity include: (i) intelligence required for him to give his consent knowingly [or as Article 968 Civil Code provides, does not have the use of reason] and this form of incapacity therefore refers to minors under the age of seven, persons of unsound mind, whether interdicted or not and whether their insanity is habitual or temporary; and (ii) the liberty whereby he can independently choose between willing and not willing to enter into a contract, in which case such person is deemed naturally incapable of contracting.

Legal causes of incapacity are those specifically provided for at law. These are provided for under Article 967 Civil Code and include: (i) minority; (ii) interdiction or incapacitation; (iii) generally, all those to whom the law forbids certain contracts.

A person is considered a minor until he is 18 years old and is considered incapable of contracting as long as he remains a minor. However, the degree of incapacity varies according to the age of the person.

If a person is under nine years of age, any contract he enters into is null, that is, the incapacity is absolute. In terms of Article 968, any contract entered into by a person who has not the use of reason, or is under the age of seven years is null. If he is between 9 and 14 years of age, then a contract entered into by such person is only valid insofar as it relates to obligations entered into by the other person in his favour. The obligations undertaken by the child are null. Thus it is called 'a lame contract' and the minor can institute an action in court to rescind the contract if it has been executed. Whereas if he is called upon to perform the contract, he can plead the legal exception of minority. The other contracting parties cannot take these courses of action.

During the third stage, that is between 14 and 18 years of age (the age bracket John falls within), the law distinguishes between whether the child is subject to paternal authority or tutorship. In the first case, he remains in the same condition in which he was during the second stage (between the age of 9 and 14) and in the second case, he is, as a rule, deemed capable of contracting but he can impugn the contract, whatever it is, on the grounds of lesion. However, the consent of the court is required for such a child to alienate or hypothecate immovable property. Accordingly, the purchases which John made are not valid as they created an obligation on his part to pay the supplier.

What also has to be considered is whether the purchases were made by John in his name or on behalf of the company. It appears that the purchases were made by John in his capacity as a shareholder of the company. Normally, the legal representation of a company is vested in the directors or duly appointed legal representatives and not in the shareholders. One would therefore have to verify this against the statutory documents of the company.

(c) As seen above, the transactions entered into by John can be deemed lame contracts and can be impugned on the basis of minority.

However, if this were not the case, one ought to consider if John's father could impugn the contracts of purchase on the basis of the fact that the supplier sold items which formed part of a discontinued line of goods.

One of the internal requisites which must be present for a contract to be deemed valid is consent. The consent of the parties entering into a contract is of essence and without which a contract cannot be said to be concluded validly. Consent is the will between the contracting parties to create, regulate or dissolve an obligation. For consent to exist, two acts of volition must exist, namely the promise of one party and the acceptance of the other.

Furthermore, both parties must be agreeing to the same thing for consent to be valid. Thus, there must be identity between the acts of volition of the contracting parties.

Finally, there must be concourse between these wills. Therefore, a proposal does not bind the person making it but can be withdrawn unless accepted by the other party. The defects of an act of volition, whether with reference to a contract or to any other voluntary act, are error, fraud and violence.

Fraud may be relevant to the case under consideration. Fraud is deemed to be that artifice, deceit or simulation which is made use of by one of the contracting parties in order to deceive the other and to induce him to enter into the contract. In order that it may be deemed to invalidate consent, the fraud: (i) must consist in fraudulent artifices or machinations; (ii) must be grave and (iii) must be determining and practiced by the other party. Fraudulent artifices are all those means which are made use of with the knowledge that they are false and which are apt to make an individual mistake one thing for another. Could one allege that the supplier was fully aware that the products were discontinued but did not inform John?

Dolus is grave when the machinations are such as to operate on a reasonable person, and they must exceed that sort of simulation which is usual in commerce and which is therefore allowed. *Dolus* is determining when it has such an influence on the mind of the contracting party as to deceive him and induce him to consent, when, without these artifices, he would not have consented. If the *dolus* is not apt to have such an effect, it is known as accidental *dolus*. It does not appear that *dolus* was exercised by the supplier.

While one can state that error could have vitiated John's consent, one must recall that the sale was concluded by John who was still a minor at the time and also was not authorised to act for and on behalf of his father's business.

9 **(a)** The memorandum of association of a limited liability company provides for the activities a company can undertake. A company, through its directors, must carry out activities falling within the provisions of the objects clause and should it wish to extend its activities, it must amend its objects clause accordingly. It appears that the shareholders are unaware of the activities which the director is undertaking on behalf of the company, in which case, the director will not be able to amend the company's statutory documents as any such action requires the consent of the shareholders.

In terms of law, the directors are responsible to manage a company and unless their powers are restricted in any manner, they shall be fully empowered to undertake any activity for and on behalf of a company. Furthermore, in terms of article 137 Companies Act, 1995, where a company undertakes activities beyond its objects, the third party shall be bound by such acts provided that the latter acted in good faith and therefore did not know that the act fell outside the objects of the company.

The mere fact that the statutory documents of a company are public does not prove that the third party was aware of its contents or that he/she checked them before entering into a transaction with the company. Therefore Daniel could not in terms of the company's memorandum of association carry out the activities he was persuing and the fact that he continued to do so may result in the shareholders taking action against him for any losses the company may have suffered as well as exercising their right of removal.

(b) A director may be appointed for life or may be appointed for a specific period of time. Such is usually provided for in the articles of association of the company. Therefore, on death and on the expiration of the term of office, a person shall no longer hold the post of director. It would be therefore interesting to see whether Daniel's appointment was time-barred. However, it is important to point out that the appointment of a director may be terminated during his term of office by the shareholders exercising their right to remove a director.

In terms of s.140 Companies Act, a company may remove a director before the expiration of his period of office by a resolution taken at a general meeting of the company and passed by a member or members having the right to attend and vote thereat, holding in the aggregate more than 50% in nominal value of the shares represented and entitled to vote at the meeting. Any director so removed shall be entitled to receive notice of the intended resolution and to voice his opinion at the intended meeting. Thus, on receipt of a notice of an intended resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.

The power of removal vested in the hands of shareholders is said to strike a balance between the directors' powers of management on the one hand, and the shareholders' powers of control on the other. Thus, provided the directors exercise their powers of management in the best interests of the company as a whole, they will not suffer interference from the shareholders who will be content to leave the running of the company to them. However, if the shareholders are dissatisfied with the conduct of the company's affairs as in the case under consideration where the director is carrying out activities which were not decided upon by the shareholders and most probably without the shareholders being aware that the director is so undertaking these activities, they can exercise the ultimate power of control by the removal of the directors.

The extent to which this power may be exercised was the subject of an important judgement in the UK. In *Bushell* v *Faith*, (1970), the House of Lords had to determine the validity of a clause in the articles which provided that in respect of any resolution to remove a director from office, any shares held by that director would carry the right to three votes per share. As in this case there were three shareholders who each held one-third of the shares, it was obvious that this clause was intended to make it impossible for the other shareholders to exercise their right to remove the director, who held one-third of the shares; the court nonetheless held it to be valid. The reasons given in favour of this decision were namely that in accepting the said clause, the shareholders were intentionally excluding the right of removal, and also by the insertion of the said clause, the shareholders were merely qualifying what was necessary to pass an ordinary resolution and was therefore not strictly limited to a resolution for the removal of a director. It is to be noted that the wording of our local provision was directed at removing the possibility of a company including a similar clause in its articles. It is, however, felt that our provision does not fully neutralise the possibility of removing the right of removal of directors from the hands of the shareholders, as in the case where the articles provide that for the purposes of this provision, certain shareholders will not have voting rights.

In relation to the right to remove a director, also to be considered is whether shareholders have to give a reason for such removal and whether he can be removed for no reason at all or for an unjust cause. The law does not in any instance provide that a removal must be for a just reason but for whatever the reason, even if for no reason at all, a director who has been removed from his post has certain legal rights which he can exercise. Thus, a director who has a fixed contract of service with the company has the right to claim half his salary for the unexpired period of service and can also claim damages or compensation under the Companies Act for the termination of his office as director or any other termination also coming about as a result of such termination. Therefore if the shareholders exercise their right and remove Daniel, the latter may still have the right to claim payment if any was due.

(c) In terms of the Companies Act, the company secretary shall be responsible for keeping:

- the minute book of general meetings of the company;
- the minute book of meetings of the board of directors;
- the register of members;
- the register of debentures; and
- such other registers and records as the company secretary may be required.

In addition, the company secretary is to ensure that proper notices are given of all meetings; and is to ensure that all returns (as for example, the annual return which is to be filed with the Registrar of Companies on an annual basis) and other documents of the company are prepared and delivered to the Registrar in accordance with the requirements of the Companies Act. Therefore, the fact that Daniel's sister entered into contracts on behalf of the company is clearly *ultra vire*s her powers.

10 (a) When preferential or other special rights are attached to a class of shares, it is important to ascertain whether and in accordance with which procedure these rights can be varied.

As a rule, the articles of association provide for the variation of class rights. Regulation 3 of Part 1 of the First Schedule to the Companies Act, 1995 provides that if at any time the share capital is divided into different classes of shares, the change of any shares from one class into another or the variation of the rights attached to any class (unless otherwise provided by the terms of issue of the shares) may be made with the consent in writing of the holders of three-fourths of the issued shares of that class, and the holders of three-fourths of the issued shares of any other class affected thereby, or by an extraordinary resolution passed at a separate general meeting of the holders of the issued shares of that class and of any other class affected thereby. This regulation is usually incorporated in the articles of most companies. However, any such similar provision in the memorandum or articles is subject to the rules provided for under s.116 Companies Act, 1995.

Section 116 Companies Act, 1995 provides that if the memorandum or articles contain a provision authorising either the change of any shares in the company from one class into another, or the variation of the rights attached to any class of shares in the company, such change or variation shall be subject to the consent of a specified proportion of the holders of the issued shares of that class and of any other class affected thereby, or to the sanction of a resolution passed at a separate meeting of the holders of those shares and of the holders of any other shares affected thereby.

However, if in pursuance of the said provision, the shares are changed from one class into another or the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than 15% either of the issued shares of that class or of any other class affected thereby, being persons who did not consent to or vote in favour of the resolution for the change or variation, may, by writ of summons filed within 21 days of the consent or the resolution, demand that the change or variation shall not have effect. If the court is satisfied that the change or variation would unfairly prejudice the holders of those shares, the class of which is being changed or the rights of which are being varied, or the holders of any other class of shares affected thereby, it shall disallow the change or variation.

Thus the provisions of s.116 Companies Act are rendered applicable through the adoption of the regulation referred to above, as detailed in the First Schedule or as adopted. Should this Regulation be excluded and no provision to the same effect be inserted in the articles, then it appears that class rights can only be varied after the memorandum or articles are amended to provide for the variation of class rights.

Therefore, unless the memorandum or articles of MML provide for the variation of class rights and the procedure detailed above is followed, the class rights of none of the classes of shares can be varied or in any way altered.

(b) Although *prima facie* the rights carried by all the shares in the company rank *pari passu*, that is, the shareholders participate in the benefits of membership equally, the memorandum or articles may authorise the company to divide its shares into different classes having the same or different rights.

Where the capital of a company is divided into different classes, these classes have distinguishing descriptions. Thus, whereas the more simple descriptions are, for example, 'ordinary shares' and 'preference shares', more complicated descriptions can be used, such as 'redeemable preference cumulative shares'. The rights attaching to these shares can be gathered from the terms of issue which normally reproduce the relevant provisions of the memorandum or articles.

The most important classes of shares which a company may issue are ordinary and preference shares. As their name implies, preference shares carry some preferential rights in relation to other classes of shares, particularly ordinary shares. Although these preferential rights may be different types, they usually relate to the right to receive a fixed rate of dividend in preference to the other classes of shareholders, or the right to receive a proportionate part of the assets of the company on winding up. Furthermore, these rights may be further sub-divided into cumulative or non-cumulative rights.

The rights of preference shares are usually contained in the memorandum, the articles, or their terms of issue. In *Scottish Insurance Corp Ltd* v *Wilsons & Clyde Coal Co Ltd* (1949), it was held that where the memorandum or articles clearly lay down the rights of the preference shares as to accumulation and participation as regards the dividend, those rights are *prima facie* exhaustive, that is, no further rights can be implied. Palmer, however, opines that if the memorandum lays down rights which are *prima facie* exhaustive but which the articles further elaborate upon, then such further rights are effective. However, to eliminate doubts, it would be opportune if the rights are set out as precisely and as exhaustively as possible in the memorandum or articles.

Luke held 200 cumulative redeemable non-voting preference shares.

The principal right of preference shares is that of receiving a fixed percentage of the distributable dividends in preference to the other shareholders. In the case of Luke's shares, the percentage has been fixed at 10%. As against debenture holders, preference shareholders are only entitled to their preferential treatment if the company has distributable profits. If there are no such distributable profits, the preference shareholder will not get anything unless he has a cumulative right. Moreover, in most cases it is not enough that the company has distributable profits as, in actual fact, the dividend must first be declared. A UK text writer says that while the existence of a distributable profit is a *sine qua non* condition for the shareholders' right to a preference dividend, the position is different with respect to the declaration of a dividend. In fact, the memorandum or articles may provide that whenever distributable profit is available or exceeds a certain sum, it shall be distributed as a preference dividend up to the amount to which the preference shareholders are entitled.

Preference shares, as are Luke's shares, can also carry the right for cumulative dividends. Dividends are said to be cumulative where if no dividend is declared in a year, or if declared they do not cover the fixed rate, the outstanding balance shall be carried forward and shall be paid out of the profits of subsequent years when the profits are available. In the case of non-cumulative preference shares, the outstanding balance will not be carried forward during subsequent years and, thus, any preference dividend which is not paid is lost and cannot be claimed. Furthermore, on winding up, the holders of cumulative preference shares will only be entitled to the arrears of the dividends if these have actually been declared or if the memorandum, the articles or the terms of issue specifically so provide.

A further characteristic of Luke's shares is that they can be redeemed. Regulation 2 of the First Schedule, in particular, provides that subject to s.115 Companies Act 1995, any preference shares may, with the sanction of an ordinary resolution, be issued on the terms that they are, or at the option of the company are liable, to be redeemed on such terms and in such manner as the company before the issue of the shares may by extraordinary resolution determine.

It is important to note that such redemption is only possible if permitted by and under the provisions of s.115. This provides that where a company, duly authorised by its memorandum or articles, issues preference shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder, such shares shall only be redeemed out of those profits of the company which would otherwise have been available for dividend, or out of the proceeds of a fresh issue of shares made for the purpose of the redemption. In the latter case, the company shall have the power to issue shares up to the nominal value of the preference shares to be redeemed as if those preference shares had never been issued. Furthermore, the terms and the manner of redemption must be laid down in the memorandum or articles of the company; the shares being redeemed must be fully paid up and the terms of redemption must require full payment on redemption; the premium, if any, payable on redemption must be provided for out of the profits of the company or out of the company's share premium account before the shares are redeemed, and where shares are redeemed other than out of the proceeds of a fresh issue, there shall, out of profits, which would otherwise have been available for distribution as dividend, be transferred to the capital redemption reserve, a sum equal to the nominal amount of the shares redeemed. In this latter case, the provisions relating to the reduction of the issued share capital of a company shall, except as provided in s.115, apply as if the capital redemption reserve were paid up share capital of the company. It is submitted that all five conditions must concur for the shares to be validly redeemed.

Furthermore, preference shares redeemed under s.115 shall be treated as cancelled on redemption, and the amount of the company's issued share capital shall be diminished by the nominal value of those shares accordingly. However, it is to be noted that a redemption of preference shares by a company shall not be taken as reducing the amount of the company's authorised share capital.

Luke's preference shares are also non-voting. Therefore, in virtue of such shares, Luke shall not be entitled to exercise any additional voting rights and decision-making rights in the company.

(c) Shares may, unless otherwise provided in the memorandum or articles of the company or under the conditions of issue of those shares, be pledged by their holder in favour of any person as security for any obligation. The pledge of shares must be done by means of an instrument in writing entered into between the pledgor and the pledgee. However, in the case of a private company, shares may not be pledged unless the memorandum or articles of the company specifically so provide.

In order to place the pledge into effect, notice thereof must be delivered by the pledgor or the pledgee to the Registrar of Companies for registration within 14 days of the granting of the pledge. The company whose shares have been pledged shall also be notified of the pledge in writing within the said period and the company shall record that fact in the register of holders of the respective shares. The pledge shall be effective in relation to a third party only after the registration by the Registrar.

During the existence of a pledge of shares, any transfer or other assignment, made by the pledgor, whether by onerous or gratuitous title, of the pledged shares shall be null and void, unless it is made with the consent of the pledgee.

In the event of a default under the agreement of a pledge and upon giving notice by judicial act to the pledgor and the company, the pledgee shall be entitled to: (i) dispose of the shares which are pledged in his favour; or (ii) appropriate and acquire the shares himself, in settlement of the debt due to him or of part thereof.

The value of the shares may be established by agreement between the pledgor and the pledgee. In case of disagreement, the fair value for the sale or appropriation of the shares shall be determined by a certified public accountant or a certified public accountant and auditor appointed by the Civil Court, First Hall, on the application of the pledgee.

The pledgee shall, in selling the shares, be obliged to seek the best price being not less than their fair value. In the event that a buyer cannot be found for the shares at their fair value, the pledgee shall apply to the court for the shares to be sold at less than their fair value as aforesaid, subject to such conditions as the court may deem fit.

Furthermore, in the case of a pledge of shares in a private company, the pledgee shall be obliged, prior to the exercise of the right to dispose of the shares or to appropriate them, to offer the shares to other shareholders of the company in accordance with any pre-emption rights relating to the transfer of shares as laid down in the memorandum or articles of that company, and, failing such pre-emption rights, to all the other shareholders of the company in proportion to their holdings. In either case, the shareholders shall be entitled to purchase the shares at the fair value. Such offers shall be kept open for at least ten working days. In the exercise of these rights, the pledgee shall only sell or appropriate such number of shares as are needed to raise sufficient proceeds to repay the debt due. All remaining shares shall be released to the pledgor.

In the pledge agreement, the parties may agree on the person or persons who shall exercise all the rights belonging to the holder of the shares including voting rights and the right to receive dividends and interest payments. If the agreement does not make provision for such matters, all rights pertaining to a holder of shares shall, for the duration of the pledge, be exercised by the pledgor. Furthermore, unless the pledgor and the pledgee have otherwise agreed in the pledge agreement and notice thereof has been given to the company, dividends or interests payments due on shares which are pledged shall, during such time as the pledge is registered in the register of holders of the respective shares, be paid by the company to the pledgee.

Notice of termination of the pledge must also be delivered by the pledgee to the Registrar within 14 days of the termination of the pledge. The company, shares in which have been pledged, shall also be notified in writing of the termination of the pledge within the said period and the company shall record that fact in the register of holders of the respective shares.

This marking scheme is given as a guide to markers in the context of the suggested answer. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well reasoned conclusions are provided. This is particularly the case for essay-based questions where there will often be more than one definitive solution.

1 The question asks candidates to demonstrate their knowledge on the rules followed by the courts in interpreting legislation.

6–10 Answers will provide a thorough explanation of the rules adopted by the local courts.

3–5 Answers in this band will provide less detail than the answers earning marks in the higher band.

0–2 Poor answers giving very little detail on the subject matter.

2 The question asks candidates to demonstrate their knowledge on the rules to be followed for the distribution of a dividend.

6–10 Answers will provide a thorough explanation of the procedure.

3–5 Answers in this band will provide less detail than the answers earning marks in the higher band.

0–2 Poor answers giving very little detail on the subject matter.

3 This question requires candidates to explain the effects of a breach of contract.

6–10 Thorough explanation of the various effects.

0–5 Weaker answers showing little or a scanty explanation of the effects.

4 This question deals with contracts and quasi-contracts, torts and quasi-torts in terms of the provisions of the Civil Code.

8–10 Full details given on both contracts and quasi-contracts, torts and quasi-torts with particular reference to the provisions of the Civil Code on the matter.

5–7 Reasonable treatment of the question giving less detail than in the above band.

0–4 Incomplete answer giving little detail of what contracts and quasi-contracts, torts and quasi-torts are and no reference being made to the statutory provisions.

5 The purpose of this question is to test the candidates' knowledge on the regulations under employment law dealing with the information which must be given by an employer to his employees in lieu of a contract of employment. Marks will be awarded depending on the level of detail given.

6 The question deals with partnership law and the rights and duties of partners of a commercial partnership in terms of the Companies Act 1995.

5–10 Thorough explanation of all the various rights and obligations of the partners.

0–4 Weaker answers providing less detail on the said rights and obligations as detailed at law.

7 This question seeks to test the candidates' knowledge on the decisions taken by the shareholders of a limited liability company. The question deals with both ordinary and extraordinary resolutions.

7–10 Answers must make specific reference to the relevant provisions of law with regards to both types of decisions and provide a clear explanation.

4–6 A sound understanding of the subject area of decision-making, although perhaps lacking in detail.

0–3 No or very little knowledge of the subject area.

8 This question tests the candidates' knowledge on two aspects of contract law, namely capacity and consent as requisites for a valid contract.

7–10 Candidates awarded such marks will have a sound knowledge of these requisites but applying their knowledge to the given facts in sufficient detail.

4–6 Candidates demonstrate less ability to apply their knowledge to the facts.

0–3 Candidates demonstrate poor knowledge of the subject area covered.

9 The question deals with company officers and their duties.

7–10 Candidates earning these marks will deal with the duties of directors, their termination and the role of the company secretary.

4–6 Reasonable information given on all parts of the questions.

0–3 Very brief answers given with little detail.

10 The question deals with three important aspects of company law: variation of class rights, pledging of shares and preference shares. Marks will awarded on the basis of the candidates' ability to relate the provisions of the Act on these aspects of law to the questions posed but also on their ability to put forward arguments supporting their conclusions.