Answers

1 This question requires candidates to discuss the rules and presumptions used by the courts in interpreting statutes.

Statutory interpretation is used when the meaning of an Act must be determined. Words can be ambiguous or imprecise and then rules and methods must be used to interpret what the legislation seeks to achieve.

Interpretation starts with giving the language of the provision in question its ordinary grammatical meaning in the light of the text as a whole, as well as syntactical and structural pointers to its meaning. Recourse to authoritative dictionaries is a permissible and often helpful method available to the courts to ascertain the ordinary meaning of words, although provisions dealing with a specialist or technical field will be given suitable technical meanings. Definitions appearing in legislation must be given effect too.

As legislation is the product of an authority's decision to express itself through the choice of particular words and their combination in a particular way, further language based pointers of meaning are that:

- The legislator is acquainted with the manner in which legislation is interpreted;
- Words are not used unnecessarily, and are used with the same meaning throughout an enactment;
- General language must be construed generally so as to include all the particular instances which fall within its scope;
- The express inclusion of one situation results in the exclusion of that which is not mentioned;
- Where specific consequences are attached to a particular situation the contrary holds for the opposite situation;
- A general term at the end of a list of more specific ones refers to matters of the same kind.

The Interpretation Act 1957 is also of importance, since it lays down definitions of terms which apply in the absence of contrary indications of a statute.

Legislation must be interpreted in the light of the purpose which it is meant to achieve. This implies that legislation is intended to succeed in imposing obligations on people. Hence there are a number of presumptions about the law-maker's intention which are anchored in judgements about prerequisites for the legitimacy and effectiveness of legislation. Many of these have now been subsumed in the Constitution, either as substantive requirements for the validity of legislation, or as presumptions of interpretation. The main ones are:

- that the legislature does not intend absurd results;
- that the legislature does not intend harsh, onerous, unjust, unequal or discriminatory treatment;
- that the legislature is concerned only with future events and does not legislate retrospectively;
- that the legislature intends to advance the public interest;
- that the legislature does not intend to oust the jurisdiction of the ordinary courts;
- that the legislature intends to comply with its obligations under international law;
- that the legislature intends to enact valid legislation, especially to comply with the Constitution of South Africa;
- that the legislature does not intend to legislate extra-territorially.

The context of the legislation is often crucial. Attention to context is often a facet of investigations into the language used in a text of its purpose, as words may have different meanings in different contexts and the purpose of the legislation depends on the legal environment in which it was enacted. Here it must also be borne in mind that it is presumed that legislation does not alter the existing law more than it is necessary.

2 **(a)** Preference shares provide their holders with a preference over other shareholders to dividends, and/or return on capital on winding up. One needs to consult the memorandum of incorporation of the company, as well as the terms of issue of the preference shares, to find out in which respect they confer a preference on their holders. If the preference shareholders have the right to receive dividends first, this right is usually subject to a dividend being declared. In other words, if the company has not made any profit, or if the directors decide rather to use profits in the business than to declare them as dividends, the preference shareholders do not have a right to demand a dividend payment.

In return for the preferential rights to dividends, the right of preference shareholders to vote is usually curtailed in the memorandum of incorporation. However, even if the memorandum of incorporation provides that preference shareholders do not have the right to vote, the Companies Act provides that they have an irrevocable right to vote on any proposal to amend the preferences, rights, limitations and other terms associated with their shares.

There must always be at least one class of shareholders of the company who can vote at a meeting of shareholders and at least one class of shareholders who are entitled to the net assets of the company upon its liquidation. In other words, a company is not allowed to only issue preference shares which do not grant their holders the right to vote.

The following types of preference shares can be distinguished:

Cumulative preference shares: Holders enjoy a right of priority in respect of both arrear dividends and current dividends. If a dividend is not declared in a specific year, the shareholder's right to a dividend is carried over to the next year. When a dividend is declared the next year, the preference shareholder will have to be paid two years' dividends before the ordinary shareholders can receive their dividends.

Participating preference shares: After receiving their preference dividends, preference shareholders may be given the right to also receive normal dividends along with the ordinary shareholders or just after the ordinary shareholders.

Preferential right to capital on winding up: Preference shareholders could be given the preferential right to receive repayment of the capital they contributed to the company on its winding up. Additionally, they can be given the right to share in any surplus assets of the company upon its winding up after receiving their capital contributions, but this is the exception rather than the rule.

Convertible preference shares: The right to convert the preference shares to shares of another class after a certain date attaches to the preference shares.

(b) Ordinary shares constitute the equity share capital of the company; the amount of the dividend paid fluctuates in accordance with the profits of the company.

Ordinary shareholders usually receive dividends after the preference shareholders have received theirs. Ordinary shareholders also usually have the right to receive any surplus assets of the company after it has been wound up.

Normally ordinary shareholders will have the right to vote at meetings of shareholders. This right may be curtailed in terms of the Companies Act, so that one class of ordinary shareholders will not have the right to vote. However, there must always be at least one class of shareholders who have the right to vote and if there is only one class of shareholders, they must all have the right to vote.

(c) Deferred shares are issued to the founders of a company which entitle them to dividends only if the dividend amount exceeds a certain threshold and after the ordinary shareholders have been paid. In other words, deferred shareholders are last in line to receive dividends.

3 In this question candidates have to explain the meaning of causality and remoteness of damages as elements of a delict. Candidates should indicate that a delict is '…any unlawful culpable act whereby a person causes the other party damage or injury to personality, and whereby the prejudiced person is granted a right to damages or compensation depending on the circumstances.'

The five relevant elements are: an act, unlawfulness, fault, causation and damage or injury to personality.

(a) Causation should be present to qualify as a delict. The problem of causation involves the consideration of two different questions: whether any factual relation exists between the defendant's conduct and the harm sustained by the plaintiff; and whether, or to what extent, the defendant should be held responsible for the consequences factually induced by their conduct. Causation in delict comprises two fundamental elements: factual causation and legal causation. First, factual causation concerns a factual link between the act and the damage. The act of the wrongdoer caused the damage. Second, a single act can, however, lead to a number of harmful events and one will then have to determine which acts should in law give rise to liability for damage. This is known as legal causation. There needs to be a close enough relationship between the conduct and its consequences.

To determine whether there is a factual link the courts use the 'but-for' test. This is not really a 'test' but is rather a description of a thought process which entails that one mentally eliminates the wrongful conduct which one suspects was the cause of the harm and that one then asks what probably would have happened if the lawful conduct had been substituted for the conduct which had been eliminated. If the answer to this question is that the harm would have occurred in any event, the conduct in question is not a cause of the harm. If the answer is that it would not have occurred, the conduct complained of does constitute a cause. The answer to the question as to what probably would have happened must be based on the evidence before the court, which means that one establishes the existence of a causal link between the defendant's conduct and the harm with as much or as little difficulty as any other fact. The process of establishing causation involves determining probabilities. In this process statistics and percentages are often used, but that should not create the impression that a mere mechanical computation can establish causality: in the end the court has to make a judgement call as to whether another outcome would have been likely if the relevant conduct of the defendant had been different.

(b) The existence of a relationship of factual causation between the defendant's conduct and the harm suffered by the plaintiff is not sufficient to establish the presence of a legally relevant causal connection. An additional theory, rule or test is required to determine whether the defendant's action was a legal cause of the plaintiff's harm. When a single wrongful act causes a number of different consequences, this element is employed to ensure that a defendant is not unfairly required to make good strange and unusual consequences. The purpose of legal causation or the question of remoteness of damage is to fix the outer limit of liability by determining whether or not a factual link between conduct and consequence should be recognised by law. As a matter of policy, persons are not called upon to make good all the harm which could be attributed to their wrongful conduct. In some instances the burden would be excessive. Policy dictates, therefore, that a sufficiently close connection should exist before persons are called upon to compensate others. The issue is a practical one: experience and good sense dictate where a line is to be drawn. The question of remoteness of damage is essentially one of limiting the boundaries of legal liability. Although the factual link exists between the conduct and the harmful consequences, courts must strike a proper and equitable balance between the interests of the wrongdoer and of the innocent victim, even if it does on occasion result in anomalies. In essence, therefore, the question of legal causation is not a logical concept concerned with causation but a moral reaction involving a value judgement and applying common sense, aimed at assessing whether the result can fairly be said to be imputable to the defendant. In reaching that conclusion, constitutional imperatives also play a part. The question of whether the harm is too remote is thus one which is asked when all the other elements of the delict have been established as a last check on the limits of the defendant's liability.

4 This question requires candidates to explain what is meant by 'offer and acceptance' in the context of contract law. Consensus or true agreement is the basis for every contract. Each party must have the serious intention to be contractually bound. Each party must declare his or her intention to create enforceable rights and duties. This is usually done through offer and acceptance.

(a) An offer is an undertaking, capable of acceptance, to be bound on particular terms. The person who makes the offer is the offeror; the person who receives the offer is the offeree. An offer sets out the terms upon which the offeror is willing to enter into contractual relations with the offeree. An offer may, through acceptance by the offeree, result in a legally enforceable contract. It is important, therefore, to distinguish what the law will treat as an offer from other statements which will not form the basis of an enforceable contract. For example, the offer must be capable of acceptance. Thus it must not be too vague and the intended obligations must be stated unequivocally and unconditionally, so that the rights and duties intended by the offer are determined or ascertainable. It is also essential to distinguish genuine offers from the following: a mere statement of intention; a mere supply of information or an invitation to do business (*Crawley* v *Rex* (1909)). An offer may be made to a particular person or to a particular group of persons, in which case it is only open for those persons to whom the offer has been made to accept it. Alternatively, an offer may be made to the world at large, in which circumstances it can be accepted by anyone (*Bloom* v *The American Swiss Watch Company* (1915)). Offers to the world at large are usually made in the form of advertisements.

(b) Acceptance is necessary for the formation of a contract. Once the offeree has assented to the terms offered, a contract comes into effect. Both parties are bound: the offeror can no longer withdraw their offer, nor can the offeree withdraw their acceptance. Acceptance does not have to be in the form of express words, as it can be implied from conduct. Although a person cannot accept an offer they do not know about, their motive for accepting it is not important as long as they know about the offer. Generally, acceptance must be communicated to the offeror. As a consequence of this rule, silence cannot amount to acceptance. However, acceptance need not be communicated where the offeror waived the right to receive communication. An offer may be revoked at any time before acceptance and once revoked, it is no longer open to the offeree to accept the original offer (*The Fern Gold Mining Company* v *Tobias* (1890)). In relation to unilateral contracts, revocation is probably not possible once the offeree has started performing the task requested. The quintessence of reaching consensus is that every party to the contract must have the serious intention to be contractually bound. This means that each of the parties must have the serious intention to create particular rights and duties. It also means that each party must intend to be legally bound to perform their duties and to hold the other party legally liable for rendering performance as promised in the agreement.

5 In this question candidates are required to explain business rescue proceedings.

Business rescue proceedings are defined in s.128(1)(b) Companies Act 2008 as 'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for: (i) the temporary supervision of the company, and the management of its affairs, business and property; (ii) a temporary moratorium on the rights of the claimants against the company or in respect of property in its possession, and (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

Business rescue proceedings can be initiated in two ways, namely: by a resolution of the board of directors to voluntarily begin the proceedings, if the board has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company; and an affected person may apply to a court at any time placing the company under supervision and commencing the business rescue proceedings.

The board will have to follow the following procedure: the board may take a resolution (by majority vote) to put the company in business rescue. The resolution must be filed with the Commission to become effective within five business days of filing the notification, they must notify every affected person (i.e. every shareholder, creditor, registered trade union representing employees and unrepresented employee). A business rescue practitioner must be appointed within five days of filing the resolution and notify all affected persons within two days after such filing. The following requirements must be met: the board must have reasonable grounds to believe that company is financially distressed and there appears to be a reasonable prospect of rescuing the company. In terms of s.128(1)(f), a company is financially distressed if it is reasonably unlikely to be able to pay all its debts as they become due in the next six months or reasonably likely to become insolvent.

The applicant must serve a copy of the application on the company and the Companies Commission and notify each affected person of the application. Each affected person has a right to participate in the hearing of the application.

In terms of s.131(6), an application for business rescue proceedings can be made after the commencement of liquidation proceedings. The application for business rescue will have the effect of suspending liquidation proceedings until the court has adjudicated upon the application or if business rescue proceedings end.

The court may also grant an order for the commencement of business rescue proceedings, if it is proven that the company is financially distressed or the company has failed to pay over any amount due in terms of a contract or public regulation in respect of its employees or it is just and equitable to do so for financial reasons. In terms of s.128(1)(f), a company is financially distressed if it is reasonably unlikely to be able to pay all its debts as they become due in the next six months or reasonably likely to become insolvent. The court should be further persuaded that there is a reasonable prospect for rescuing the company. See s.131(4).

If a court decides to make an order for the commencement of the business rescue proceedings, then it can also make a further order for the appointment of an interim business rescue practitioner. If a company has been placed under supervision, it must notify each affected person within five business days of the date of the court order.

The application for business rescue must be brought by an affected person being a shareholder or creditor of the company or any registered trade union representing employees. If any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

6 In this question candidates had to explain the 'stakeholder inclusive' approach and indicate how it is dealt with in the King III Report on Corporate Governance (2009).

It is generally accepted that modern companies cannot ignore their social responsibility. Social responsibility is based upon the concept of good citizenship. A company has a duty to society beyond that of an ordinary citizen due to its power and size and the benefits associated with its status as a separate legal entity, and should therefore recognise its social role. The unique South African context, including the best interests of its citizens and the mandates of the Constitution, cannot be ignored.

In terms of the 'stakeholder inclusive' approach, the board of directors should also consider the legitimate interests and expectations of stakeholders other than shareholders. This should be considered when acting in the best interests of the company. What the 'best interest' of the company is should be determined on a case-by-case basis. In terms of this approach, the interests of shareholders will not always receive priority. The interests of the shareholders or any other stakeholder should receive predominance if it is in the best interests of the company, collectively. This approach is therefore in line with the so-called 'triple-bottom line' approach which embraces not only financial performance, but also imposes social responsibility on companies. This approach or line of thinking embraces various factors when applied in respect of the management of a company. Social, economic and environmental concerns shape the triple-bottom line approach. The social aspect embraces relationships with stakeholders other than the company's shareholders. The economic aspect of this approach concerns financial and non-financial aspects of the business of the company. The environmental aspect relates to the effect on the environment caused by the products or services of the specific company.

The King II Report on Good Corporate Governance referred to the acknowledgment of the interests of various stakeholders or the 'triple-bottom line' approach. The current King III Report emphasises the 'stakeholder inclusive' approach to governance, meaning that the board should consider the legitimate expectations of all stakeholders. The shareholders (collectively) are still the most important beneficiary of directors' fiduciary duties, but social, economic and environmental concerns should also be considered. By considering these factors, the shareholders will usually benefit in any event. The best interests of the company are therefore paramount and determined on a case-by-case basis. This should be determined with the company as a responsible corporate citizen in mind.

7 This question focuses on ordinary and special resolutions in the context of company law.

Matters which have to be discussed at a meeting are called resolutions and are voted on by shareholders. Some matters can be dealt with by way of an ordinary resolution whereas special resolutions are needed for others. The board of directors may propose a resolution to be determined by the shareholders (see s.65(2) Companies Act (CA) 2008). The Act also gives wide powers to the shareholders to propose resolutions.

Section 65(7) and (9) Companies Act 2008 provide for two types of resolutions which may be taken by shareholders, namely ordinary resolutions and special resolutions. An ordinary resolution is defined as a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in s.65(8)… and a special resolution as: in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage as contemplated in s.65(10) at a shareholders meeting; or by holders of the company's securities acting other than at a meeting, as contemplated in s.60; or in the case of any other juristic person, a decision by the owner or owners of that person, or by another authorised person, that requires the highest level of support in order to be adopted, in terms of the relevant law under which that juristic person was incorporated.

Thus, for ordinary resolutions more than 50% of the votes exercised, and for special resolutions, at least 75% of the voting rights exercised are required. A company is allowed to stipulate a higher percentage for approval of an ordinary resolution (except for the removal of a director) or a different percentage (i.e. higher or lower) for special resolutions in its memorandum of incorporation, on condition that there must always be a difference of at least 10% between the highest percentage required for an ordinary resolution and the lowest percentage for any special resolution.

A special resolution is required at least for (see s.65(12)) the amendment of the memorandum of incorporation; to approve the voluntary winding-up of a company and to approve proposed fundamental transactions.

A special resolution may also be required for other transactions as stipulated in the memorandum of incorporation.

8 This question asks candidates to analyse the problem scenario and to consider whether the parties concluded a valid partnership.

The law sometimes requires compliance with specific formalities for the conclusion of a specific type of contract. Those formalities must then be complied with for the contract to be enforceable. The law, however, prescribes no general formalities regarding the formation of a partnership agreement. The agreement may be concluded in writing or orally or even tacitly. The parties to the contract may, however, agree amongst themselves that certain formalities have to be complied with, for instance that the contract must be put in writing and signed by the prospective parties before it will be binding. In this particular question there is no mention of such an agreement and we can thus conclude that the oral agreement would be in order.

It is often necessary to ascertain whether a specific contract is truly a partnership. Sometimes this question can be complicated by the fact that the parties may deliberately try to conceal the nature of their agreement. However, the court must look at the true intention of the parties and not that which they profess the agreement to be. The courts have developed a set of standards against which it can judge the nature of the agreement and these are called the *essentialia* of the partnership. The *essentialia* relate to those features which are unique to the partnership agreement and which distinguish it from other types of agreement. The agreement must be entered into with a clear intention of creating a partnership (see *Pezutto* v *Dreyer* (1992)). If the parties intended to establish a partnership and the *essentialia* are present, the contract is clearly a partnership agreement.

The three essential elements of a partnership are that each partner must contribute towards the partnership, the partnership must have the making of profit as its object, and the business of the partnership must be carried on for the joint benefit of the partners. Some argue that a fourth requirement should also be mentioned, namely that the contract between the parties should be a legitimate contract. This is, however, a general requirement for all contracts and not innate to partnership agreements (see *Bester* v *van Niekerk* (1960)).

– **Profit as object**
  The main object of the parties must be to procure patrimonial benefit. This benefit is usually referred to as 'profit'. Patrimonial benefit, however, is much wider than the narrow accounting definition of 'profit', because it also includes the avoidance of a financial loss or the reduction of expenses. If the parties to the enterprise are not interested in making a profit but have another objective, such as the advancement of culture or sport, no partnership is formed. It seems if the object of the partnership in question is to make a profit.

– **Business to be carried on for joint benefit**
  The nature and extent of the business which a partnership can carry on is widely divergent. A partnership may, for instance, be aimed at the completion of a single transaction, for example, a specific building project. After completion of that project the partnership usually dissolves, unless the partners agree to the contrary.

  Each partner must be entitled to procure patrimonial benefit from the partnership. Each partner must be entitled to share in the net profits (the amount by which the gross income exceeds the expenses and losses) of the partnership. The proportion in which this will be shared can be freely arranged by the partners. Parties can also agree that a partner will only share in the profits if the net profit exceeds a stipulated profit margin. If the agreement is concluded on the basis that the profit will accrue exclusively to some of the parties to the contract or that some of the parties will be wholly excluded from profit sharing, the relationship does not constitute a partnership. A partnership can also not be established on the basis that one party is to receive all the profits while the other parties have to bear all the losses. However, this requirement does not imply that the partners must receive equal shares in the profit. A disproportionate division is valid, as is an agreement that a party will only share in the profit if the net profit exceeds a stipulated profit margin.

  Ann, Ben and Chris will share in the profits and losses equally. This requirement has therefore been met.

– **Contribution**
  Each partner must make a contribution to the partnership or give a binding undertaking to make a contribution. The contribution may, for instance, be money, corporeal or incorporeal things (for instance copyright), expertise or labour. A contribution can also consist of a combination of different types of contributions, for example, labour and money. There is no specific restriction on the type of contribution which must be delivered as long as it has commercial value. The nature of the contributions may also differ from partner to partner. The contribution must be exposed to the risk of the undertaking. If a person makes a contribution on condition that it will be returned to them even if the enterprise fails, that contribution will not meet the requirement of the *essentialia*.

  Ann contributes R15,000 to the enterprise on the understanding that R10,000 will be repaid to her. Her contribution is thus R5,000 and this is the amount which is subject to the risk of the undertaking. If the full amount of her contribution were to be repaid to her that would not have qualified as a contribution because she would then have been a creditor of the enterprise.

  Ben's contribution is in the form of labour and this will qualify as a valid contribution.

  Chris's contribution consists of his expertise (and also of labour) which can also qualify as a contribution. A contribution can also consist of a combination of different types of contributions.

  It would thus appear that the agreement is a partnership.

9 This question asks candidates to analyse the problem scenario and to advise Dennis accordingly.

The legal difficulty, of course, is that a company cannot enter into a binding contract until it has become incorporated, and it is not bound by any contract made on its behalf prior to incorporation. The legal consequences of the above propositions are that a company, when formed, is not bound by a contract even if the third party had conferred some benefit under the contract. In *Kelner* v *Baxter* (1866), a contract was entered into supposedly on behalf of a company, but before it was actually registered. Although goods were supplied by the third party under the contract, it was held that the company could not be held liable under the contract, as it had not been in existence at the time the contract was entered into. The parties who had purported to act as its agents were liable on the contract but the company itself was not held responsible. Furthermore, the company cannot ratify the agreement at common law even after it has become incorporated.

Section 21 Companies Act 2008 regulates the position concerning pre-incorporation contracts. In terms of this section, a person may enter into a written agreement in the name of, or purport to act in the name of, or on behalf of an entity which is yet to be incorporated. A pre-incorporation agreement is defined in s.1 and s.21(1) as 'an agreement entered into before the incorporation of a company by a person who purports to act in the name of, or on behalf of, the company, with the intention or understanding that the company will be incorporated, and will therefore be bound by the agreement'. There are no formal requirements to conclude a s.21 contract, except that it has to be in writing.

Within three months after the date on which the company was incorporated, the board of directors may completely, partially or conditionally ratify or reject the pre-incorporation contract (s.21(4)). If the board does not ratify or reject the pre-incorporation contract within three months after the date on which the company was incorporated, the company will be regarded as having ratified the agreement or action (s.21(5)). If the pre-incorporation contract has been ratified, actually or deemed, the agreement is enforceable against the company as if the company had been a party to the agreement at the time when it was made. The liability of the person who purported to act on behalf of the company is discharged to the extent that it is so ratified (s.21(6)). The promoter may also be discharged from liability where the company, once incorporated, enters into an agreement on the same terms as the pre-incorporation contract or in substitution for it. If the company is not incorporated, then the promoter is jointly and severally liable with any other such person for liabilities in the pre-incorporation contract, or if after incorporation the company rejects any part of the agreement. If the promoter is liable for total or partial rejection of the contract, the promoter may claim against the company for any benefit it has received or is entitled to receive in terms of the agreement (s.21(7)).

It is important to note that the common law is not excluded by s.21. The alternative options, namely the contract for the benefit of a third party, trust, delegation or cession, are still possible. Since there are no formal requirements for a s.21 pre-incorporation contract (except that it has to be in writing), it can be difficult to determine which construction was used. This is important because personal liability does not follow automatically in terms of the common law, as in s.21.

Dennis, Jack and Lucy needed a specific building to meet the needs of their new business. They needed a building which is big enough and in a suitable location. Whilst driving one afternoon they found a place which suits their needs perfectly. Due to the fact that their company has not yet been incorporated, they cannot sign a lease agreement on behalf of the company. Section 21, as explained above, has, however, solved this problem as it provides for the conclusion of pre-incorporation contracts, subject to the fulfilment of the requirements. The person signing the contract, in other words Dennis, does, however, face the risk of being held personally liable, as explained above. Personal liability is not excluded by s.21.

It is therefore possible for Dennis, based on s. 21, to conclude a contract, and more specifically a lease agreement, even though the company has not been incorporated yet.

10 This question requires candidates to consider the validity of the exclusion clause as well as certain aspects of the parol evidence rule.

Mandy, the owner of the optometrist practice, cannot terminate the contract as the exclusion (also known as an exemption) clause protected the seller from liability. By signing the agreement, Mandy had agreed to all the terms included in it even though she had not read them. A signatory may avoid liability only if it can be shown that the signature was induced by misrepresentation or fraud. There does not seem to be any evidence of misrepresentation or fraud in this scenario. Furthermore, if the exclusion clause in the agreement is very clear, comprehensive and unambiguous there is no reason why Mandy should not be bound by it. That is a matter of interpreting the wording of the particular contract.

The fact that the agreement is reduced to writing brings the parol evidence rule (also known as the extrinsic evidence rule or the integration rule) into operation, irrespective of whether the eventual document is the outcome of extensive negotiation or consultation, or whether it is a standard-form contract which the consumer signed without even having looked at its terms.

The effect of this rule, with its many exceptions, entails the following: (a) if a contract is in its entirety reduced to writing, the written document is the exclusive memorial of the contract between the parties; (b) generally no evidence, oral or otherwise, may be advanced to alter or to add or to subtract from or to the document; and (c) the purpose of the written contract is to prevent uncertainty and evidence contradicting the written document will frustrate this purpose.

However, if a written document incorrectly reflects the preceding oral agreement or the true intention of the parties due to an oversight or a mistake, the parties can claim the correction or rectification of the written document in order to reflect their agreement correctly. The person claiming rectification must prove that the parties had a particular intention and that the document does not reflect it correctly. It is not necessary to prove a preceding valid contract. It is only necessary to prove that the parties reached agreement previously and that the ensuing written contract reflects it wrongly. For this reason, rectification is possible where the law requires formalities for the contract to be valid. The contract may, however, only be rectified if it is *prima facie* valid. Rectification can thus not be used to validate a clearly invalid contract. It would, however, be quite difficult for Mandy to prove that the contract did not reflect their agreement correctly due to a mutual error by both parties.

The effect of the parol evidence rule is that the parties are limited to the 'four corners' of the written contract. They may not go beyond the written document in order to alter the contract. Mandy would thus not be able to cancel the contract and would be bound by the exclusion clause.

The Consumer Protection Act 2008 may, however, be applicable. The purpose of the Act is to promote and advance the social and economic welfare of South African consumers. Section 49 is also of specific relevance; any term in a contract which purports to limit in any way the liability or risk of a supplier must be drawn to the attention of the consumer. Section 20 also deals with the right of a consumer to return goods.

Mandy signed a contract and thus agreed to its terms. There is no evidence in these facts of any misrepresentation or fraud. Furthermore, if the exclusion clause in the agreement is very clear, comprehensive and unambiguous there is no reason why Mandy should not be bound by it. There is no indication that this is not the case.

From the above and the facts provided it is clear that Mandy will not succeed. She will be bound by the contract.

1 This question asks candidates to discuss the rules and presumptions used by the courts in interpreting statutes.

6–10 A thorough answer will explain the various rules and methods of interpretation with reference to the general rules and the Constitution.

0–5 A less complete answer, perhaps lacking in detail or unbalanced in that it does not deal with some of the aspects of the question.

2 In this question candidates are expected to explain various classes of shares, namely preference shares, ordinary shares and deferred shares.

8–10 Thorough treatment of all the aspects of the question.

5–7 Thorough treatment of the majority of the aspects.

2–4 Some, but limited, knowledge of the topic.

0–1 Little or no knowledge of the topic.

3 This question deals with the law of delict. Candidates have to explain the meaning of causality and remoteness of damages. The question is divided into two parts, worth 4 and 6 marks respectively.

8–10 A thorough explanation and discussion of this element.

5–7 Some awareness of the area but lacking in detailed knowledge.

2–4 Some, but limited, discussion of this element.

0–1 Little or no discussion of causality as an element of a delict.

4 This question deals with the law of obligations. Candidates have to explain what is meant by offer and acceptance. The question is divided into two parts, worth 5 marks each.

8–10 Thorough to complete answers, showing detailed understanding of all or certainly most of the principles involved.

5–7 A clear understanding of the topic, perhaps lacking in detail. Alternatively, an unbalanced answer showing good understanding of one part but less in the others.

2–4 Some knowledge, although not clearly expressed, or very limited in its knowledge and understanding of the two concepts.

0–1 Little or no knowledge of the topic.

5 This question tests the understanding of candidates of business rescue proceedings.

6–10 A good explanation of the requirements and procedure for business rescue proceedings.

3–5 Some awareness of the area but lacking in detailed knowledge.

0–2 Little or no knowledge of the topic.

6 This question deals with corporate governance and specifically with the 'stakeholder inclusive' approach and how this is dealt with in the King III Report on Corporate Governance (2009).

8–10 Thorough treatment of all the aspects of the question.

5–7 Thorough treatment of the majority of the aspects.

2–4 Some, but limited, knowledge of the topic.

0–1 Little or no knowledge of the topic.

7 This question requires candidates to discuss ordinary and special resolutions in the context of company law.

6–10 Clear understanding and explanation of these resolutions.

0–5 Some understanding of the concepts. Lower band answers will show little or no knowledge of the area.

8 This question requires candidates to analyse a problem scenario and determine whether a valid partnership has been established.

8–10 Clear analysis of the problem scenario – recognition of the issues raised and a convincing application of the legal principles to the facts.

5–7 Sound analysis of the problem – recognition of the major principles involved and a fair attempt at applying them. Perhaps sound in knowledge but lacking in analysis and application.

2–4 Unbalanced answer perhaps showing some appropriate knowledge but weak in analysis or application.

0–1 Very weak answer showing little analysis, appropriate knowledge or application.

9 This question deals with the conclusion of a pre-incorporation contract.

8–10 Thorough to complete answers, showing detailed understanding of all, or certainly most, of the principles involved as per s.21 Companies Act 2008. Good answers will also refer to relevant case law. Application of the principles to the facts in question is necessary.

5–7 A clear understanding of the topic, perhaps lacking in detail. Limited application of the principles involved to the facts in question.

2–4 Some knowledge, although not clearly expressed, or very limited in its knowledge and understanding of the essential elements necessary to form a valid partnership.

0–1 Little or no knowledge of the topic.

10 This question deals with exclusions clauses.

8–10 Thorough treatment of all the aspects of the question.

5–7 Thorough treatment of the majority of the aspects.

2–4 Some, but limited, knowledge of the topic.

0–1 Little or no knowledge of the topic.