Answers

1 This question requires candidates to explain what is meant by case law and the doctrine of precedent within the hierarchy of the South African courts.

The judgments of superior courts are one of the most important sources of the law. The doctrine of binding precedent lies at the heart of the South African legal system. The doctrine refers to the fact that within the hierarchical structure of the South African courts a decision of a higher court will be binding on a court lower in that hierarchy. When judges try cases they will check to see if a similar situation has come before a court previously. If the precedent was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should follow the rule of law established in the earlier case. A court is only bound by the *ratio decidendi* of a decision, that is, the legal principle laid down by a court in its decision, and which is necessary to decide for the purposes of the particular decision. Where a judge merely expresses an opinion on a legal principle, in passing, in other words it was not necessary to decide the issue, it is not binding.

(a) Every court is bound by the decisions of the superior court within its area of jurisdiction, unless the decision of the superior court is based on so obvious an error, such as failure to take into account a statutory provision, that there can hardly be any difference of opinion on the matter. Thus, a High Court, whether it is a full bench consisting of three judges, a bench of two judges or only of one, is bound by the decisions of the Supreme Court of Appeal; a bench of two judges is bound by a decision of the full bench, and a single judge by the decisions of a bench constituted in either of the two ways mentioned above.

(b) Every court is bound by the decision of a court of concurrent status within its own area of jurisdiction, unless it is convinced that the earlier decision was incorrect, even though the matter may permit a difference of opinion. Thus the Supreme Court of Appeal is bound by its previous judgments (even a bench of five judges by a bench of three), unless persuaded that the earlier judgment or line of decisions was wrong. A full bench of a High Court is similarly bound by an earlier full-bench decision, a bench of two judges by an earlier decision of a two-judge bench, and a single judge by an earlier decision of another single judge. A departure from an earlier decision, whenever it occurs, takes place only on very good grounds.

(c) One High Court is not bound to follow the decisions of another High Court, since they belong to different areas of jurisdiction. Hence, a single judge of the High Court in Johannesburg is not bound to follow the decision of the full bench of, for example, the High Court in Cape Town. Nevertheless, a court, no matter how it may be constituted, will not depart from the decision of another High Court without good reason, since a great deal of persuasive authority attaches to such a decision.

(d) Magistrates' courts are bound by the judgments of the Supreme Court of Appeal and the High Courts. If the judgments of the High Courts are conflicting, a magistrate should follow the decision of the High Court in whose jurisdiction it falls. In general, one magistrate does not necessarily follow the judgments of another magistrate.

One of the advantages of the doctrine is that it saves the time of the judiciary, lawyers and their clients for the reason that cases do not have to be re-argued. In respect of potential litigants it saves them money in court expenses because they can look to their attorney/advocate for guidance as to how their particular case is likely to be decided in the light of previous cases on the same or similar points. Once a legal rule has been established in one case, individuals can act with regard to the rule relatively secure in the knowledge that some later court will not change it.

The disadvantage of the doctrine is that the degree of certainty provided by it is undermined by the large number of cases that can be cited as authorities. This may include both reported and unreported decisions. The uncertainty is increased by the ability of the judiciary to select which authority to follow through distinguishing cases on their facts. There is also the danger that an unjust precedent may perpetuate previous injustices. An example of this is the long delay in the recognition of a general enrichment action in South Africa.

2 This question asks candidates to explain/discuss the main duties of an agent towards his principal. Agency is generally a contract between two persons, whereby one person (the principal) appoints and authorises another (the agent) to act on his behalf in concluding a transaction with a third person.

The duties of an agent depend primarily on the contract of agency. The duties of an agent are:

(a) Duty to perform the mandate
An agent is under a duty to perform his mandate fully and faithfully. If he fails to do so, he not only forfeits his commission but also becomes liable in damages to his principal. Generally, an agent may not delegate his authority to another agent. Delegation is only allowed where the principal has allowed it, either expressly or impliedly.

(b) Duty to obey instructions
An agent must act strictly in accordance with the instructions of his principal so long as they are lawful and reasonable. He has no discretion to disobey them even if he honestly and reasonably regards them not to be in the best interests of the principal. An agent is not liable for any loss his principal may incur as a result of carrying out his principal's instructions. If, however, the agent fails to carry out the instructions, he is liable for any loss suffered by the principal.

(c) Duty to exercise care, skill and diligence
An agent must take reasonable care in carrying out his instructions and must display such skill as may be reasonably expected.

(d) **Duty to account**

The agent must record all transactions, payments, expenses and receipts in connection with the execution of his authority in order to give a proper account to the principal. The principal is entitled to inspect the records held by the agent.

(e) **Duty not to disclose information**

If during the execution of his authority an agent acquires secret information concerning his principal he may not disclose it to third parties. He may also not use such knowledge for his own purposes, either at the time of the execution of the authority or at any time thereafter.

(f) **Duty to act in good faith**

There is a relationship of good faith between the parties. An agent must at all time act in the exclusive interest of his principal and he may not act in a manner that a conflict arises between his own interests and the execution of his authority. The agent is thus not allowed to make any secret profits in the performance of his duties. If such unforeseen profits do materialise, he must hand them over to his principal. The agent is only entitled to the compensation as agreed upon, unless the principal gave him permission to make additional profits or otherwise renounced his right to such profits. The prejudiced principal is entitled to terminate the authority and to claim damages. The duty to act in good faith further entails that an agent may not accept a bribe in the execution of his assignment. If the agent accepts a bribe, then even if the principal suffers no loss, he is entitled to dismiss the agent, recover the bribe, or his actual loss (whichever is greater) from the agent and deny commission to the agent and repudiate any resulting transaction.

3 In this question candidates have to discuss the requirements for an offer and an acceptance to give rise to the formation of a contract. An offer and an acceptance will give rise to the formation of a contract only if certain requirements are satisfied. The contents of the offer and acceptance will show whether these requirements have been met. The requirements are as follows:

(a) The offer must have been made with the intention that the offer will be legally bound by mere acceptance thereof by the offeree. This express or implied intention of the offeror to be bound by the offeree's acceptance distinguishes a true offer from any other proposal. Thus an 'offer' made in jest cannot be accepted as it is not made with the intention of being legally binding upon the mere acceptance thereof. If the offeror's intention is not expressly articulated, it must be deduced from his declaration and the surrounding circumstances. The acceptance must also be made with the intention of being legally bound to the offer exactly as it is. Acceptance of an offer is unconditional acceptance of all the terms of the offer. Upon acceptance of the offer the parties are committed to the terms exactly as set out in the offer, without any addition to or omission of any terms and without any qualifications or reservations.

(b) The offer must be complete in the sense that it contains all the terms by which the offeror is willing to abide, as well as all the terms to which he wants to bind the offeree. This requirement flows naturally from the previous requirement as an incomplete offer cannot be accepted 'exactly as set out in the offer'.

(c) The offer as well as the acceptance must be clear and certain. Thus the intended obligations must be stated unequivocally and unconditionally so that the rights and duties intended by the offeror are determined or ascertainable. No contract can arise if the offer is vague or ambiguous, since one of the requirements for a contract is that the performance must be certain or ascertainable. The acceptance, too, must be clear and certain so that there is no doubt about the fact of acceptance. Even if the offer or acceptance is made tacitly or by conduct, the contents of the declaration of intention must be clear.

(d) Normally an offer and acceptance may be made in any manner: either expressly (in writing or orally) or tacitly by means of conduct (for example by the nod of the head, a movement of the hand or the handing over of money). In only a few situations does the law prescribe that the offer and acceptance must be made in a specific manner. For example, an offer and acceptance for the purchase of land must be in writing. If the offer stipulates that it must be accepted in a particular manner only, compliance with such requirement is imperative.

(e) An offer must be addressed either to a particular person or persons, or in general to unknown person or persons. If the offer has been addressed to a particular person or persons it can be accepted only by that person or those persons. If A makes an offer to B to buy B's farm, the offer can be accepted only by B or someone authorised to act on his behalf. If an offer is addressed to an unknown person or persons the offer must be addressed in such a way that it is nevertheless ascertainable to whom the offer was addressed. Such an offer may be accepted by anyone falling within the group to which the offer was addressed. An example of an offer addressed to unknown persons is the promise of a reward or a prize. In this instance the person who promises the reward or prize makes a public offer that he will give a reward or prize to any member of the public, or to any member of a particular group, who performs a specific task in a specific manner.

(f) An offer is only completed once it has been communicated to the offeree and an acceptance is completed when it has been communicated to the offeror.

4 This question requires candidates to analyse the remedies that may be available to innocent parties when they suffer as a consequence of a breach of contract. The legal remedies at the disposal of the innocent party are execution of the contract, cancellation of the contract and damages. The availability of the respective remedies is determined by the nature and seriousness of the breach of contract that has been committed, and also by the terms of the contract.

The principal remedies for breach of contract are:

– Execution of the contract
The remedy of execution of contract is the obvious remedy for breach of contract, since it attempts to achieve the same result as was intended originally by the parties, or a result that is as close as possible to that. Execution of contract can comprise one of three possible orders, namely:

  – An order for specific performance. This order is one where the court commands a contracting party to render the performance he has undertaken to render. In most cases the court has a discretion to order specific performance. However, the court will refuse to order specific performance if the order will affect the defendant unreasonably harshly or where the order will be inequitable.
  – An order for reduced performance. In certain circumstances the court will order a contract party to render a reduced performance. This can happen if the other contract party has rendered performance, but his performance is defective or incomplete.
  – A prohibitory interdict. Should a party do something he may not do in terms of the contract, or threaten to act in this manner, the other party may apply for an interdict to end or prevent such conduct.

– Cancellation of the contract
Cancellation is an abnormal and drastic remedy for breach of contract, because the consequence is that the parties do not accomplish that which they originally agreed upon. It is a general principle that persons should be bound by their contracts and that the remedy of cancellation should not be available in every case of breach of contract. The parties can expressly agree in their contract that one or both of them will be entitled to cancel the contract if the other party commits breach of contract. The cancellation clause will then determine under which circumstances the remedy will be available. If the contract does not contain a cancellation clause, the innocent party will be entitled to cancel the contract only if the breach of contract is material, that is, of a serious nature.

– Damages
The claim for damages is a so-called combination remedy, as it is usually combined with either a claim for specific performance or for cancellation of the contract. The purpose of such a claim for damages is to place the injured party in the position he would have been in had the breach not taken place. The underlying idea of the remedy of damages is that the innocent party's patrimony should not be allowed to be diminished by the defendant's breach of contract, and that the innocent party should, by means of payment of damages, be placed in the position he would have been in had the contract indeed been carried out.

5 **(a)** In this question candidates are required to explain when a person's conduct will be judged to have been 'wrongful'.

The mere fact that a person has caused another to suffer damage is insufficient to found delictual liability. Further requirements must be satisfied before delictual liability can follow. Furthermore, not all acts (including omissions) that are harmful to others are delicts. Before an act can be deemed to constitute a delict it must also (in addition to meeting the other requirements) be 'unlawful' or 'wrongful'. An act is wrongful when it infringes the rights of another, for example where somebody is defamed or assaulted. An act is also wrongful if the wrongdoer owed the person prejudiced a duty to take care and this duty is breached, for example, in the case of a policeman who omits to prevent criminal action against another.

Grounds of justification are special circumstances which convert an otherwise wrongful act into a lawful act: an act which at first glance infringes the right of another proves on closer scrutiny to be lawful when the defendant can rely on some particular circumstance which justifies his act. If, for instance, a person sinks a borehole on his property and as a result thereof, a neighbour's water supply dries up, it would seem that the neighbour's right of ownership has been infringed. However, since such a person has exercised his own right to drill a borehole the act is not wrongful.

(b) The grounds of justification usually mentioned are by no means fixed in number, but merely represent the most pertinent circumstances generally found to give rise to the question whether the infringement alleged by the plaintiff can be justified by the defendant's claim that the act was not wrongful because he in fact had the right to perform the act. The following grounds for justification are usually distinguished:

(i) Necessity
Necessity exists when a person is through external forces placed in such a position that the person's (or that of another's) legitimate interests can only be protected through a reasonable infringement of the rights of another. For example, if a ship can be saved in a storm only by casting the cargo overboard, the owner of the cargo has no action for damages against the crew responsible for such an act.

(ii) Self-defence
Self-defence exists when a person, in a reasonable way, defends himself against an actual or imminent unlawful attack by another to defend his own or another's legally acknowledged right. This differs from necessity in that it is a defence against an unlawful threat or attack; from this it follows that it must be an act directed against a human act for only a human can act unlawfully.

(iii) Consent

Where a person legally capable of expressing his will gives consent to injury or harm, the causing of such harm will be lawful. Consent takes two forms: consent to injury, and consent to the risk of injury. In the case of consent to injury, the injured person consents to specific harm such as a medical operation. In the case of consent to the risk of injury, the injured person consents to the risk of harm caused by the other person's conduct. This would be for example the injuries sustained during a rugby match.

Consent may be given either expressly or tacitly. However, not every consent to injury is valid since the consent must not be contrary to good morals (permission given to someone to chop off a person's arm, for example conflicts with good morals). Consent which is not given freely is also invalid.

(iv) Statutory authority

A person does not act unlawfully if he performs an act (which would otherwise be wrongful) while exercising a statutory authority. Two requirements apply: firstly, the statute must authorise the infringement of the particular right concerned, and secondly, the conduct must not exceed the bounds of the authority conferred by the statute.

(v) Provocation

Provocation exists when a person is provoked or incited by another's words or actions to cause harm to the other. As a general rule, provocation is not a complete defence when verbal provocation has been followed by physical assault. However, defamatory or insulting allegations made during an argument in retaliation to provocative verbal conduct may be justified and, if provocation takes the form of physical assault, it may in fact constitute a complete defence against an action on the basis of the subsequent retaliatory physical assault. Two requirements must be met: firstly, the provocative conduct itself must be of such a nature that a reaction thereto is reasonable and therefore excusable. Secondly, the conduct of the provoked person must constitute an immediate and reasonable retaliation against the body of the other person. The action of revenge therefore must not only follow the retaliation directly, but must be objectively reasonable as well.

6 This question asks candidates to consider the doctrine of separate personality, one of the key concepts of company law. Candidates are also required to discuss the consequences of separate personality.

Whereas South African law treats a partnership as simply a group of individuals trading collectively, the effect of incorporation is that a company once formed has its own distinct legal personality, completely separate from its members. The doctrine of separate personality is an old one, but the case cited in relation to separate personality is: *Salomon* v *Salomon & Co Ltd* (1897). Salomon had been in the boot and leather business for some time. Together with other members of his family he formed a limited company and sold his previous business to it. Payment was in the form of cash, shares and debentures. When the company was eventually wound up it was argued that Salomon and the company were the same, and, as he could not be his own creditor, his debentures should have no effect. Although early courts had decided against Salomon, the House of Lords held that under the circumstances, in the absence of fraud, his debentures were valid. The company had been properly constituted and consequently it was, in law, a distinct legal person, completely separate from Salomon. It should be noted that, contrary to what some text-books state, the Salomon case did not establish the doctrine of separate personality. It merely permitted its application to one-man companies.

A number of consequences flow from the fact that corporations are treated as having legal personality in their own right.

(a) Limited liability. No one is responsible for anyone else's debts unless they agree to accept such responsibility. Similarly, at common law, members of a corporation are not responsible for its debts without agreement. However, registered companies, i.e. those formed under the Companies Act, are not recognised by law unless the shareholders agree to accept liability for their company's debts. In return for this agreement the extent of their liability is set at a fixed amount. In the case of a company limited by shares the level of liability is the amount of the nominal value of the shares held.

(b) Perpetual existence. As the corporation exists in its own right, changes in its membership have no effect on its status or existence. Members may die, be declared insolvent or insane, or transfer their shares without any effect on the company. As an abstract legal person the company cannot die, although its existence can be brought to an end through the winding up procedure.

(c) Business property is owned by the company. Any business assets are owned by the company itself and not the shareholders. This is normally a major advantage in that the company's assets are not subject to claims based on the ownership rights of its members. It can, however, cause unforeseen problems as may be seen in *Macaura* v *Northern Assurance* (1925). The plaintiff had owned a timber estate and later found a one-man company and transferred the estate to it. He continued to insure the estate in his own name. When the timber was lost in a fire it was held that Macaura could not claim on the insurance as he had no personal interest in the timber which belonged to the company.

(d) The company has contractual capacity in its own right and can sue and be sued in its own name. Contracts are entered into in the company's name and it is liable on any such contracts. The extent of the company's liability, as opposed to the members, is unlimited and all its assets may be used to pay off debts.

(e) The rule in *Foss* v *Harbottle* (1843). This states that where a company suffers an injury, it is for the company, acting through the majority of the members, to take the appropriate remedial action. Perhaps of more importance is the corollary of the rule which is that an individual cannot raise an action in response to a wrong suffered by the company.

7 This question requires candidates to discuss the rule in *Turquand's* case.

The rule in *Turquand's* case states that a person dealing with a company is entitled to assume, in the absence of facts putting him on inquiry, that there has been due compliance with all matters of internal management and procedure required by the articles of association. The rule, which is also known as the internal management rule, takes its name from the decision in the English case of *Royal British Bank* v *Turquand* (1856). Here the constitution of C company empowered the directors to borrow such amounts as from time to time were authorised by a general resolution of the company. Two of the directors signed a bond whereby the company acknowledged itself to be bound to the Royal British Bank for an amount of £2,000. When the bank sought to recover this amount from the company, it was pleaded that there had been no general resolution by the company authorising the borrowing of the said amount. In the course of rejecting this defence, Jervis CJ held: 'We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done'.

Thus, where an outsider contracts with an agent of the company and it appears from the articles (or any other public documents of the company) that the agent has authority to enter into the particular transaction on behalf of the company where the transaction in question depends on compliance with some internal formality in the company which enjoys no publicity (for example the passing of a general resolution by the general meeting), the outsider is entitled to assume that the internal formality has been complied with and that the company would be bound by the contract entered into by its agent.

An outsider cannot rely on the *Turquand* rule if he knew that the person purporting to act on the company's behalf was in fact acting beyond his authority, or if the circumstances are such as to put him on inquiry (*Wolpert* v *Uitzigt Properties (Pty) Ltd* (1961)). When a managing director, for example, exercises his implied authority his acts must still always be within the ordinary ambit of his powers. What these parameters are will depend on the facts and circumstances of each case, but it has been held that the following acts would not usually fall within the ordinary ambit of the powers of a managing director: (i) using the credit of the company (for example by signing a deed of surety to bind it) for a loan of money to himself for private purposes (*Gordon* v *Swan Stabilo SA (Pty) Ltd* (1979)); (ii) altering the company's mandate to a bank in regard to the signatures required on bank documents (*Big Dutchman (SA)* v *Barclays National Bank* (1979)); (iii) concluding, without further reference to the board, a sale of a major asset of the company (*Novick* v *Comair Holdings Ltd* (1979)).

The main reason for the rule is business efficiency. It would be expecting too much of a third party to have to go through all the company's internal detail. Business would slow down. The rule mitigates the harsh effects of the doctrine of constructive notice: ever since *Ernest* v *Nicholls* (1875) it has been accepted that anyone dealing with a company is deemed to be fully acquainted with the public documents of that company, which include its memorandum and articles.

8 This question requires candidates to analyse the problem scenario from a perspective of partnership law. In particular it needs to be considered whether the partnership would be bound by the contract.

According to the general rules of agency, a partnership will be liable in terms of a contract which a person concludes on behalf of the partnership if that person had the necessary authority to conclude that agreement on behalf of the partnership. Authority is essentially the power to perform binding legal acts on behalf of another. Authority can be given explicitly, orally or in writing or even tacitly, for example by conduct.

However, in terms of the principle of mutual mandate each partner has the power to bind the partnership in transactions which fall within the scope of the partnership business. This power of partners to represent each other in partnership business is one of the *naturalia* of the partnership. As this power is a natural consequence of a partnership and not an essential element, partners can vary it amongst them, for instance, by limiting a particular partner's power of representation. The mutual mandate of partners is restricted by the scope of the partnership business. A partner has this power to represent the partnership only in respect of those transactions, which fall within the ordinary scope of the business which the partnership carries on. Whether a specific act or transaction falls within the scope of the partnership business, is a factual question. The answer depends on the nature and purpose of the partnership concerned and the rules of general commercial usage. If, for example, the partnership is carrying on a property development business, the purchase of land will normally fall within the scope of its business, but not the purchase of airplanes or yachts. None of the partners in that partnership will be able to buy airplanes or yachts on behalf of their partnership in terms of their mutual mandate. However, this does not mean that such a partnership will never be able to buy airplanes or yachts. The question as to the scope of the partnership business is only relevant to establish the ambit of the partners' mutual mandate. Partners are entitled to give a partner explicit authority to conclude a contract that falls outside the ordinary scope of business.

A third party who wishes to hold the partnership liable for a contract which was concluded by a partner does not need to prove that the partner had the necessary power to conclude the agreement on behalf of the partnership. The third party must simply prove that the specific contract fell within the usual scope of the partnership business. The partnership will be liable in terms of the contract irrespective of whether the partner in fact had the necessary authority. A third party who wants to rely on this principle must be *bona fide*, that is to say, he must not have been aware that the partner was acting without the necessary power of representation.

If a partner concluded an agreement outside the scope of the partnership business and without the necessary authority and the agreement is acceptable to his co-partners, the partners can ratify the agreement. Ratification confers legal validity on the act of the partner with retroactive effect. The contract therefore acquires legal force as if the partner had the necessary authority when the agreement was concluded.

Applying the general law to the problem scenario, one can conclude as follows: Carol as an outsider would probably be able to prove that the drawing of plans would fall within the usual scope of the partnership business and that even though Andrew never had the authority to contract, the partnership should be liable because of Andrew's mutual mandate to represent the partnership.

9 This question requires candidates to analyse the problem scenario. Although the question appears to be tricky, it deals with an every day occurrence where the transfer of land is achieved by making use of the corporate personality of a close corporation. If Fred is the only member of Eland CC, Fred is in a position analogous to that of a sole owner of the property itself even though in law the property belongs to Eland CC. It is legally permissible to 'transfer' ownership in this way and it would thus be possible to avoid paying the transfer duties applicable to the transfer of land.

Candidates must also consider the validity of the mortgage bond. It was a rule of common law that companies were not allowed to buy their own shares. Any such purchase was treated as a contravention of the capital maintenance rules (*Trevor* v *Whitworth* (1887)). This rule was extended with a statutory prohibition of financial assistance by a company for the purchase or subscription of its own shares: s.38 of the Companies Act 1973 thus provides that no company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company. In this regard it has been held that where a company passes a bond over its assets to raise money for the purchaser to pay for its shares or to secure the purchase price, financial assistance is present that falls foul of the provisions of s.38 (*Karoo Auctions* v *Hersman* (1951)).

The strict rules of company law in respect of capital maintenance have never applied to close corporations. Close corporations have rather worked on the principle of solvency and liquidity as a safeguard for its creditors. In terms of s.40 of the Close Corporations Act of 1984 a corporation may give financial assistance (whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise) for the purpose of (or in connection with) any acquisition of a member's interest in that corporation by any person. However, such financial assistance may be granted only if

– the written consent of every member of the corporation has previously been obtained authorising the specific assistance;
– the corporation's assets, fairly valued, will exceed all its liabilities after the assistance has been given;
– the corporation is able to pay its debts as they become due in the ordinary course of its business; and
– the assistance will not in the particular circumstances render the corporation unable to pay its debts as they become due in the ordinary course of business.

Section 40 of the Act avoids the difficulties encountered by the application of s.38 of the Companies Act. Businessmen may often need a corporation's financial assistance to acquire a member's interest in the corporation. It is thus possible for a corporation to mortgage its assets as security for a loan advanced by a person wishing to buy the member's interest: *Peters & others NNO* v *Schoeman & others* (2001). Furthermore, it is even possible to apply for the conversion of a private company into a close corporation to overcome the problems of s.38 of the Companies Act provided that the proper steps for such conversion are followed.

Applying the general law to the problem scenario, one can conclude that the transaction would indeed be valid.

10 This question requires candidates to analyse the problem scenario and discuss the provisions of the company law that apply to the proposed transaction.

The proposed transaction will be a contract of sale between a company (Hancock) and one of its directors (Garry). The members of the company must be concerned that the director does not abuse his position as director to derive an unacceptable benefit from the deal. The proposed transaction also relates to an asset that constitutes the greater part of Hancock's business.

Section 228 of the Companies Act of 1973 provides that the directors of a company shall not have the power, save by a special resolution of its members, to dispose of the whole or the greater part of the undertaking of the company. The special resolution must furthermore relate to the specific proposed transaction. Previously an ordinary resolution by the general meeting was required, but currently a special resolution is required. The failure to obtain the special resolution renders the transaction voidable.

At common law a director is subject to fiduciary duties requiring him to exercise his powers *bona fide* and for the benefit of the company. An important aspect of the fiduciary duty of directors is that they must not put themselves in a position where their duties and personal interest conflict. The general principle of the South African law as stated by Innes CJ in *Robinson* v *Randfontein Estates Gold Mining Co* (1921) is that where one man stands to another in a position of confidence involving a duty of trust, he is not allowed to place himself in a position where his interests conflict with his duty.

The generally applicable rule is that a director can only enter into a contract with the company if the articles of the company permit it or if it is approved by the company in a general meeting. Otherwise the contract can be avoided by the company. The voidability of the contract can be overcome either by the articles permitting contracts between a director and the company or by obtaining the approval of the contract at a general meeting after full disclosure. For this reason it has become usual in practice to include an exclusion clause in the articles authorising directors to enter into contracts with their company under certain circumstances. The legislature has, however, intervened to prevent the granting of too generous relief from the obligation of disclosure. These measures are to be found in ss.234–241 of the Companies Act. These sections are designed to ensure that a director with a direct or indirect material interest in the more important contracts of his company discloses full particulars of his interest. The declaration of interest must be made at or before the meeting of directors at which the question of entering into or confirming the contract is first considered; in addition the declaration, if given in writing, must be read out to the meeting unless each director present states in writing that he has read the declaration. Failure by a director to disclose his interest in these types of contract constitutes an offence and the contract may be voidable, while the profits may be recoverable from the director. All declarations of interest must be recorded in the minutes of the relevant meeting of the board of directors. A register of these declarations with the particulars concerned must also be kept at the registered office and must be open for public inspection. The auditor of the company must satisfy himself that the declaration of interest has been recorded and that the register has been kept.

1 This question seeks to examine candidates' knowledge of case law and precedent within the context of the hierarchy of the courts.

8–10 Answers will provide a full analysis of the question area, detailing the hierarchical structure of the system.

5–7 Answers in this band will show an understanding of the problem area and will at least attempt to offer a critical understanding of the doctrine.

2–4 Answers will be less complete, probably unbalanced, focusing only on the court structure for example.

0–1 Extremely poor answers that shows either no or very little knowledge of the area.

2 Candidates are expected to demonstrate a thorough knowledge of the duties that an agent has towards his principal.

8–10 Full and accurate account of the duties of an agent. Clear statement of the governing principles of relevant law with perhaps some examples.

5–7 Reasonable treatment or a less comprehensive treatment of the subject matter of the question.

0–4 Very weak answer, focusing only on some of the duties, or one that shows little understanding of the question.

3 This question deals with the law of contract. Candidates must discuss the requirements for an offer and acceptance to give rise to the formation of a contract.

8–10 A thorough understanding of the issues involved. It is likely that the best answers will make use of examples to illustrate the requirements.

5–7 A clear understanding of the topic but lacking in detail.

2–4 Some, but limited, understanding of the issue.

0–1 Little or no understanding of the topic.

4 This question also deals with the law of contract. It requires candidates to analyse the remedies available for breach of contract.

8–10 Thorough to complete answers, showing detailed understanding of all or certainly most of the remedies available, perhaps with examples of cases.

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 various remedies.

0–1 Little or no knowledge of the topic.

5 This question is in two parts and asks candidates to explain when the conduct of a person would be judged to have been 'wrongful' in a delictual action. The question will be marked as a whole.

8–10 A complete answer, highlighting and dealing with all the appropriate rules of the legal issue.

5–7 A clear understanding of the law but perhaps lacking in detail or unbalanced in only dealing with one of the grounds for justification.

2–4 Some, but limited understanding of the law.

0–1 Little or no knowledge of the topic.

6 This question asks candidates to consider the doctrine of separate personality, one of the key concepts of company law. It also requires consideration of the consequences of incorporation.

8–10 A thorough and complete answer, explaining the meaning of and effect of separate personality. It is likely that cases will be cited as authority although examples will be acceptable as an alternative.

5–7 Lacking in detail in some or all aspects of the topic. Unbalanced answer that focuses only on some of the particular issues.

2–4 Some but limited knowledge of the topic. Perhaps uncertain as to meaning or lacking in detailed explanation or authority.

0–1 Little or no knowledge of the topic.

7 This question asks candidates to discuss the rule in *Turquand's* case.

6–10 Answers in this band will effectively define the rule in *Turquand's* case, state the rationale and discuss the exceptions. Satisfactory use of relevant case law.

0–5 Inaccurate attempt to define the *Turquand* rule. Inadequate discussion of the exceptions with little knowledge.

8 This question requires candidates to analyse a problem scenario that raises issues relating mainly to partnerships but which also involves agency law.

8–10 Clear analysis of the problem scenario – recognition of the issues raised and a convincing application of the legal principles to the facts. Appropriate case authorities may be cited, but are not necessary if the principles are understood.

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 an every day occurrence where the corporate personality of a close corporation is used to transfer 'ownership' of property.

8–10 A thorough analysis of the scenario focusing on the appropriate rules of law and applying them accurately. It is extremely likely that cases will be cited in support of the analysis.

5–7 A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with some issues.

2–4 Some, but limited, understanding of the law or completely lacking in application.

0–1 Little or no knowledge of the relevant law.

10 This question asks candidates to analyse the problem scenario and discuss the provisions of company law.

8–10 A complete answer, highlighting and dealing with all of the issues presented in the problem scenario. It is most likely that cases and statutory provisions will be referred to, and they will be credited.

5–7 An accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation.

2–4 An ability to recognise some, although not all, of the key issues and suggest appropriate legal responses to them. A recognition of the area of law but no attempt to apply that law.

0–1 Very weak answer showing no, or very little, understanding of the question.