Answers

1 This question requires candidates to explain the importance of the Constitution of South Africa as a source of law.

The Constitution is the most important source of law in South Africa; it is the supreme law of the Republic. The Constitution provides the legal foundations and framework for the three main components of the South African legal system: the legislative authority, the executive authority and the judicial authority. The Constitution establishes the specific state institutions that are responsible for each of these three functions, and it governs their composition, powers, operations and interrelationships. It thereby stipulates the mechanisms and procedures by which the sources of law are developed and applied. In these various ways, the Constitution exercises ultimate authority over the content and application of the law.

The Constitution also contains the Bill of Rights, which has had a major impact on every aspect of the legal system and has radically restructured the system of government. It introduced a new legal ethos designed to safeguard civil and political rights and promote social justice against a historical backdrop of political oppression and socio-economic inequality. The pursuit of dignity and equality lies at the heart of the constitutional value system and no area of law remained unaffected. In addition to the development of the common-law and customary-law principles and the interpretation of legislation, the Bill of Rights governs the validity of legislation as well as the application of legal rules.

The Bill of Rights applies to all law, and binds the legislature, the executive, and the judiciary, and all organs of state. It also binds natural and juristic persons to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. It is the cornerstone of democracy and enshrines the rights of all people and affirms the democratic values of dignity, equality and freedom. The state is obliged to respect, protect, promote and fulfil these rights. This provision is important, since the Bill of Rights is not merely a negative enforcement mechanism shielding subjects against the abuse of government power but also imposes a positive duty on the state to protect, promote and fulfil the entrenched rights. The Bill of Rights deals with both first and second generation rights. First generation rights include the right to equality, human dignity and life. Second generation rights include the right to housing, food and water. None of these rights are absolute. Rights can be limited in certain circumstances, but the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation must also take all relevant factors, like the importance of the purpose of the limitation and the nature and extent of the limitation, into account.

2 This question invites candidates to examine the various 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:

(a) Execution of the contract

The remedy of execution of the 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 of one of three possible orders, namely:

(i) 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.
(ii) 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.
(iii) 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.

(b) 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.

(c) 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.

3 This question requires candidates to define and explain the authority of an agent.

A person who wishes to conclude a contract does not have to do so personally. He or she may authorise someone to enter into a contract on their behalf, or in his or her name.

In other words, the concept of agency will arise if an agent concludes a juristic act on behalf of a principal with a result that a legal tie arises between the third party and the principal.

An agent has to have authority to conclude juristic acts on behalf of someone else. The authority given to the agent by the principal may be express, or it may be implied by the law, or in terms of the facts. Where no authority exists the lack thereof can be ratified. It can also be cured by way of estoppel.

The person relying on the authority must prove that it existed at the time when the act was concluded.

The most common source of authority for concluding a juristic act is express authority by the principal of his or her intention that the agent should act on his or her behalf. In certain cases a formal appointment would be necessary in the form of a written power of attorney, for example, to appoint a conveyancer.

Authorisation by way of an agreement does not have to be express, it can also arise tacitly. A tacit agreement is established based on the principal's conduct and attitude regarding the agent. Based on the principal's conduct the only reasonable inference which may be drawn is that the principal wishes the agent to act on his or her behalf.

In certain instances authority is implied by law and does not come about by way of an agreement. The agent's authority can be derived from his or her appointment in a particular office. For example, the guardian of a minor has authority to conclude juristic acts on behalf of the minor.

4 This question is in two parts. The first part asks candidates to explain what is meant by the 'no work, no pay' rule and, the second part, by dismissal based on incapacity.

(a) 'no work, no pay' rule

The primary duty of the employer is to remunerate an employee. Collective agreements may stipulate minimum remuneration standards. If the agreement does not provide for the payment of remuneration, then the court may either hold that there is no contract of employment or that the employer has a duty to pay a 'reasonable wage'.

In terms of the common law, the general rule is 'no work, no pay'. If the employee has not performed in terms of the contract, the employer does not have to pay the employee. In other words, the common law does not make provision for any form of paid leave. The Basic Conditions of Employment Act, 1997 does, however, provide for minimum conditions with regard to various forms of leave and does provide for payment during these periods.

(b) dismissal based on incapacity

A dismissal for incapacity is a no-fault dismissal. An employee may be dismissed for incapacity if he or she is incapable of doing the work for which he or she was employed, but there is no misconduct on the part of the employee.

Incapacity falls within two broad categories, namely poor work performance and ill health or injury. In terms of the Labour Relations Act 1995, a dismissal due to poor work performance will be fair if the employee failed to meet a required performance standard, the employee was aware or could reasonably have been aware of the required standard, the employee was given a fair opportunity to meet the required standard and dismissal was an appropriate standard for not meeting the required standard.

The employee must also be given an opportunity to improve and alternatives such as a transfer should be considered, if necessary.

If the incapacity is due to ill health or injury, the Labour Relations Act 1995 also provides guidelines to determine whether the dismissal was fair. One should consider whether the employee is capable of performing the work. If the employee is not capable, the extent of incapability should be determined. An adaption of the employee's work circumstances or duties should be considered or whether other suitable work is available.

When considering alternatives to dismissal, the nature of the job, the period of absence, the seriousness of the illness or injury, etc should be taken into account. There is, however, no duty on an employer to create jobs to accommodate incapacitated employees.

5 In this question candidates are required to explain the personal liability of members of a close corporation.

The Close Corporations Act, 1984 creates personal liability on members and certain other persons for the debts of the corporation in the event of a contravention of certain provisions of the Act.

Section 63 deals with the joint and several liability for the debts of the corporation in the event of specific contraventions.

Section 63 lists a number of provisions that will give rise to civil liability. Liability in terms of s.63 arises automatically from the contravention of the particular provision. The statutory liability of the offender does not, however, relieve the close corporation (CC) of its primary liability for the debt; the offender is now merely jointly and severally liable with the CC. The creditor in question can either sue the CC or the offender.

Joint and several liability will arise in the following instances:

(i) If the name of the CC is used in any way without the abbreviation 'CC' subjoined thereto.
(ii) If a member fails to deliver his or her initial contribution to the corporation.
(iii) If a juristic person or a trustee of an *inter vivos* trust purports to hold a member's interests in circumstances other than those contemplated in s.29 Close Corporations Act.
(iv) Where the corporation makes a payment or transfers property in respect of the acquisition of a member's interest, it must comply with s.39. Section 39 requires the prior written consent of every member for the payment and the maintenance of the solvency and liquidity of the corporation. If the payment is made in contravention of this section, every member who is aware thereof is liable for every debt incurred prior to the payment, unless the member can prove that he took all reasonable steps to prevent the payment.
(v) Financial assistance can only be given in terms of s.40 Close Corporations Act. This section requires the prior written consent of every member in respect of the assistance and the maintenance of the solvency and liquidity of the corporation. If such assistance is provided in contravention of s.40, then every member who was aware of the giving of the assistance, including the person who received it, will be liable for every debt incurred prior to the giving of such assistance, unless the member can prove that he took all reasonable steps to prevent the payment.
(vi) If a person takes part in the management of the corporation while being disqualified from doing so in terms of s.47(1)(b) or (c). The person will be liable for every debt incurred as a result of the participation in the management.
(vii) If the office of accounting officer is vacant for a period of six months, every member who at the time was aware of the vacancy and who is still a member is liable for every debt of the corporation incurred during the vacancy.

Section 64 deals with liability for reckless and fraudulent trading. If the business of the corporation was carried on with gross negligence or fraudulently, then the court may declare that any person who was knowingly a party to the carrying on of the business will be personally liable for debts and other liabilities as the court may direct. The test for recklessness is objective; the defendant's conduct is measured against the standard of conduct expected of the reasonable person. The test also has a subjective element where the reasonable person is placed in the same group or class as the defendant.

Section 65 deals with the abuse of corporate juristic personality. If the court finds that the incorporation of the corporation constitutes a gross abuse of its juristic personality, as a separate entity, it may declare the corporation is deemed not to be a separate entity relating to its rights, duties and liabilities.

6 This question requires candidates to explain and distinguish between shares and debentures.

The activities of a company are financed through the issue by the company of securities in the company (normally shares) or by borrowings by the company.

The proprietary interest that a person holds in a company is a 'share'. A share is defined in s.1 Companies Act 2008 as 'one of the units into which proprietary interest in a profit company is divided'. A share issued by a company is regarded as movable property. It is transferable in any matter as provided for in the Companies Act 2008, or any other legislation. A share does not have a label or indicator of value. Under the Companies Act 1973, it was possible to have shares with no label, known as 'no par value' shares and also 'par value' shares, that had a value, for example a 'R1 share'. The 'par value' did, however, often not reflect the true value of the share. The company's memorandum of incorporation (MOI) must set out the classes of shares and the number of each class that a company is authorised to issue. This is the company's 'authorised share capital'. The board may increase or decrease the authorised share capital. A share usually entitles its holder to attend shareholders' meetings, to share in dividend, if declared by the board, and to share in any assets of the company after it has been wound up.

Whereas the Companies Act 1973 mentioned 'debentures' as a form of issued company debt, the Companies Act 2008 refers to 'debt instruments' (see s.43). A 'debt instrument' is defined as: 'any securities other than shares of a company, irrespective of whether or not issued in terms of a security document, such as a trust deed; but does not include promissory notes and loans, whether constituting an encumbrance on the assets of the company or not.' 'Securities' as defined in s.1 include 'any shares, debentures, bonds, or other instruments…'

The issue of a 'debt instrument' by a company is a means of obtaining funds, other than by issuing shares. A 'debt instrument' also does not include 'promissory notes and loans'. The two most important methods of raising capital for a company are to issue equity securities or debt securities, of which the most common are debentures and bonds.

It should be noted that the definition of 'debenture' has never been finally settled in South African law, or in English law. The courts have indicated that there is no precise definition for a 'debenture' (see *British India Steam Navigation Co* v *Inland Revenue Commissioner* (1881)). In *Edmonds* v *Blaina Furnaces Co* (1887) it was held that a debenture is essentially a written acknowledgement of indebtedness, irrespective of its form, executed by a company. For now it is safe to assume that the terms 'debt instrument' and 'debenture' can be used interchangeably.

The holder of a debenture is a creditor of the company. The holder is a creditor of the company for the amount of the loan as well as the interest. The creditor's rights are defined in terms of the issue as well as the Companies Act. These terms of issue usually state that they are repayable at a fixed date at their nominal value. The issue can also state that a premium is payable on redemption in addition to the nominal value.

The duties of the company towards debenture holders can be secured or unsecured. A trustee will usually be appointed to hold security on behalf of the debenture holders. The trustee must be unrelated to the company or its officers and must be a person who, in the board's opinion, has the requisite knowledge and experience to carry out the duties of a trustee. If the company defaults

on its commitments to the debenture holders, the trustee will be able to enforce the security on their behalf, without the need for every debenture holder to institute action individually.

The board of directors can decide to issue debentures without the approval of the shareholders, unless otherwise indicated in the memorandum of incorporation.

In view of the above, the following distinction between shares and debentures can be made:

The shareholder of a company has the right to a share in the profits of a company (provided that a dividend is declared by the company) and a right to a share in the net assets of the company if it is wound up. However, a shareholder is also under a duty to abide by the company's MOI.

As a debenture is a debt instrument, the holder of a debenture has effectively loaned a sum of money to the company on certain terms. Accordingly, the debenture holder is entitled to repayment of the sum of money loaned to the company and is therefore a creditor of the company. A debenture is a document issued by a company acknowledging that it is indebted to the debenture holder in the amount stated therein (*Coetzee* v *Rand Sporting Club* (1918)). A debenture may be secured or unsecured. Debenture holders may have a right to attend and vote at general meetings and to appoint directors, and have special privileges regarding the allotment of securities, unless the MOI provides otherwise.

7 This question requires candidates to explain the regulation of corporate governance in South Africa.

Companies exist within a framework which is set by the law, regulations, codes of best practice and the company's own constitutional structures. The governance of companies can be on a statutory basis, or as a code of principles and practices or even a combination of the two. The United States of America has chosen, for example, to codify a significant part of its governance in the Sarbanes Oxley Act (SOX). This regime is known as 'comply or else'. In other words there are legal sanctions for non-compliance. South Africa has a hybrid system of corporate governance, as some principles are self-regulatory principles in codes of best practice operating on an 'apply or explain' basis, whereas other corporate governance principles are dealt with in legislation.

The *South African King Report on Corporate Governance* (currently *King III* of 2009) is an example of a code of best practice. This *Code* is currently applicable to all entities regardless of the manner and form of incorporation and whether in the public, private or non-profit sectors. The *Code* operates on an 'apply or explain' basis. Companies should apply the principles or recommendations of best practice as provided for in the Report and if they do not, then they need to explain why they did not comply. It is the duty of the board to override a recommended good governance principle if the board is of the opinion that it is in the best interest of the company to do so. It is, however, important to distinguish between these self-regulatory principles and mandatory legislative requirements. The *King Report* distinguishes between statutory provisions, which are mandatory, and recommended governance principles and practices, which the board can override if it is in the best interests of the company.

Certain recommendations in the *King Report* are now also dealt with in the Companies Act of 2008. See, for example, s.94 dealing with an audit committee. If a specific principle is also in legislation, then applicable companies will have to comply with the legislation and will not merely be able to 'explain' why they did not 'apply' the recommended principle.

Listed companies also have to comply with the *King Report* in terms of the Johannesburg Stock Exchange Listing Requirements. If a listed company did not follow the recommendations in the *King Report*, it should be clearly indicated why the recommended practices were not followed and that it was in the best interests of the company not to follow it.

8 This question requires candidates to consider the liability of auditors based on a breach of the duty of care.

In carrying out his statutory duties an auditor must not act negligently. He must perform his work with a reasonable degree of care and skill.

This duty must be in line with standards that will meet the present day circumstances, including modern conditions of business (see *Pacific Acceptance Corporation Ltd* v *Forsyth* (1970)).

An auditor usually stands in a contractual relationship to the company which appoints him as such. In the performance of his duties to the company in terms of his contract, the auditor must act with reasonable care and skill. If the auditor acts without reasonable care and skill, he is liable to the company for any damages suffered by the company. The company will usually be able to choose between suing its auditor for breach of contract or in delict, as the same conduct on the part of the auditor is usually actionable on either of these two grounds. In an action for damages against the auditor for breach of contract, the company will have to prove the contractual relationship, the breach of contract complained of, that the auditor acted fraudulently or negligently in breaching the contract and the loss it suffered as a result of that breach. In the case of breach of contract, damages are computed on the basis that the injured party should be placed as nearly as possible in the same position as he would have been had the contract been properly executed (*NItalic* v *Benjamin* (1972)). If, for example, the auditor neglected his duties and thus failed to detect the fraud of an employee of the company, the company should be placed in the position that it would have been in, had the auditor duly complied with his duties.

In *Thoroughbred Breeders' Association* v *Price Waterhouse* (2001), the audit contract was not reduced to writing but it was tacitly agreed that the audit would be conducted in accordance with the generally accepted auditing standards and with due professional care required of an auditor in public practice. The audit failed to discover the theft of a promissory note by one of the company's

financial managers and that several substantial sums of cash had not been deposited for long periods. The company knew that the financial manager had a criminal record, but never disclosed this to the auditor. Damages were claimed from the auditor on the grounds that if he had performed his duties, the thefts perpetrated by the financial manager would have been uncovered and further thefts by him would have been prevented. The Supreme Court of Appeal found that the auditor was negligent and therefore had committed breach of contract. There was also factual causation between the breach of contract and the loss suffered by the plaintiff. The loss suffered by the plaintiff was also not too remote as it flowed naturally and generally from the breach. Furthermore, the court found that the fact that the plaintiff appointed a person with a criminal record such as the financial manager in a senior position may amount to carelessness, but that this carelessness was not the sole cause of the plaintiff's loss. The plaintiff's loss was caused by the auditor's negligence. Because the plaintiff's claim was based on breach of contract, there was no room for an apportionment of loss between the parties. The auditor was thus held liable for the loss suffered by the plaintiff.

Bulk Buy Ltd can institute an action on the basis of a breach of contract. The set of facts *in casu* is similar to the facts in the decision of *Thoroughbred Breeders' Association* v *Price Waterhouse* (2001). In *Thoroughbred Breeders* the auditor also failed to discover theft by the financial manager. It was argued that had the auditor performed his duties, the theft would have been uncovered and the company would not have suffered and further thefts would have been prevented. The Court held that the auditor was indeed negligent in the performance of his duties. In the *Thoroughbred Breeders* case the financial manager had a criminal record, but did not disclose that to the auditor. The court held that notwithstanding this the company's loss was still caused by the auditor's negligence. The court also held that there was factual causation between the breach and the loss suffered by the company. Nothing is mentioned of a criminal record of the financial manager in the set of facts *in casu*. When determining whether ABC Inc acted with the necessary care and skill, the court will work with the reasonable degree of care and skill, by taking modern business conditions into account (see *Pacific Acceptance Corporation Ltd* v *Forsyth* (1970)). It therefore seems that the company should be able to succeed with an action based on the breach of contract by ABC & Co.

Buy Bulk Ltd can also base its action for damages against the auditor in delict. In such a case, all the elements of delictual liability must be proved before the auditor can incur any liability. These elements are: an act, unlawfulness, fault, causation and damage or injury to personality (harm). The common law delictual action arises based on the duty of care that the auditor has due to his relationship with the client. Damages recoverable in an action based on delict are calculated on the basis of what is needed to place the client in the position he would have been in, had it not been for the delict.

Apportionment of damages between the auditor and client is possible in the case of a delict; this is not the case in an action based on breach of contract.

It would seem as if Bulk Buy Ltd may have an action against its auditors either on the basis of breach of contract or in delict.

9 This question requires candidates to discuss whether a valid contract has been established between Irene and Jan.

The law prescribes certain requirements for the conclusion of a valid contract. There must be consensus between the parties. Each party must have the serious intention to create rights and duties to which each party will be legally bound. Each party must have the capacity to act. The agreement must be legally possible. It must also be physically possible. If formalities are prescribed, they must be observed.

From the set of facts, it is clear that a number of requirements are not met. First, with regards to the fact that there must be consensus between the parties. Consensus can only be reached if the parties have the intention to be contractually bound, if they have a common intention and if they make their intention known by means of a declaration of intention. Where parties merely have the intention to reach an understanding or to make an arrangement based on good faith, their arrangements will only give rise to a 'gentleman's agreement' and not to a binding contract. For example, if friends make an arrangement to meet at a restaurant there is normally no intention to be legally bound to each other. At most, they are morally obliged to attend. The situation is obviously different if two people agree that the one will sell his or her car to the other for a specified sum of money. In this case, the parties do intend to create a legal obligation, which entitles them to performance and obliges them to perform.

A statement made jokingly or merely to highlight the good qualities of the object of the agreement (puffing) is generally not made with the intention to create legally enforceable rights.

The intention is declared by way of an offer and acceptance. 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 that 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.

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.

In this case, compliance with this requirement can be questioned. Irene and Jan informally met at a restaurant. Irene merely told Jan about her financial problems and that she was considering selling one of her horses. Jan then offered to buy the horse. It is not clear from the facts if they reached consensus on this. Also it can be argued that Irene never made an offer, she merely supplied Jan with information during an informal discussion. It is therefore not clear from the facts whether Irene had the intention to be contractually bound. The offer is also not complete as it is not clear and certain. The statement made by Irene is vague, there is no information provided on the identity of the horse as well as the purchase price.

10 This question requires candidates to discuss the existence of close corporations now that the Companies Act 2008 is in operation. Candidates should further explain the position with regards to converting a close corporation to a company.

In terms of the Companies Act close corporations are permitted to continue to exist, but no new close corporations may be formed since the Act came into force (see Schedule 3, item 2(1)). The Act came into force on 1 May 2011. No new close corporations may therefore be formed after that date. One of the purposes of the Act is to create an effective and simplified regime for forming small companies. This will be based on the characteristics of the Close Corporations Act 1984, which renders it unnecessary to allow for new close corporations to be formed.

Since close corporations may continue to exist, the Act makes provision for the co-existence of close corporations and companies. Various amendments are therefore made to the Close Corporations Act in terms of Schedule 3 to the Companies Act. These amendments include amendments to the transparency and accountability of close corporations. Close corporations now have the option to opt into the transparency and accountability provisions in Chapter 3 of the Companies Act. Chapter 6 of the Companies Act, dealing with business rescue proceedings, will now also apply to close corporations.

Thus, close corporations will continue to exist now that the Companies Act is in operation, but subject to the amendments provided in Schedule 3. Members of a close corporation may, however, decide that it would be better to convert to a company.

Schedule 2 to the Companies Act deals with the conversion of close corporations to companies. An existing close corporation may, in terms of the Companies Act, convert to a company at any stage. A Notice of Conversion has to be filed in the prescribed manner and form and be accompanied by:

(i) a written statement of consent approving the conversion of the close corporation signed by members of the corporation holding, in aggregate, at least 75% of the members' interest in the corporation;
(ii) a memorandum of incorporation consistent with the requirements of this Act; and
(iii) the prescribed filing fee.

After the conversion every member of the close corporation is entitled to become a shareholder of the company. The shares held by each shareholder do not have to be proportionate to the members' interests in the converted close corporation.

On the registration of a company converted from a close corporation:

(i) the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company;
(ii) all the assets, liabilities, rights and obligations of the close corporation vest in the company;
(iii) any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, and any other thing done by or in respect of the close corporation, is deemed to have been done by or in respect of the company;
(iv) any enforcement measures that could have been commenced with respect to the close corporation in terms of the Close Corporations Act, for conduct occurring before the date of registration, may be brought against the company on the same basis, as if the conversion had not occurred; and
(v) any liability of a member of the corporation for the corporation's debts, that had arisen in terms of the Close Corporations Act and existed immediately before the date of registration, survives the conversion and continues as a liability of that person, as if the conversion had not occurred.

1 This question asks candidates to explain the importance of the Constitution as a source of law in South Africa.

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.

2 In this question candidates are expected to explain what remedies are available for breach of contract.

8–10 Comprehensive discussion of the various remedies.

5–7 Reasonable treatment or a less comprehensive treatment of the remedies.

0–4 Very weak answer, with a limited explanation of the remedies.

3 This question deals with agency law. Candidates have to define and explain the authority of an agent.

8–10 A thorough explanation and discussion of authority.

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

2–4 Some, but limited, discussion of the authority of an agent.

0–1 Little or no discussion of the authority of an agent.

4 This question is in two parts. The first part asks candidates to explain what is meant by the 'no work, no pay' rule and, the second part, by dismissal based on incapacity.

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 as regards personal liability of members of a close corporation.

6–10 A good explanation of the personal liability of members of a close corporation. Candidates should refer to all three categories of possible personal liability.

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

0–2 Little or no knowledge of the topic.

6 This question requires candidates to explain and distinguish between shares and debentures.

6–10 Clear understanding and explanation of debentures and shares. Reference to case law as well as the Companies Act 2008 will place the answer in a higher category.

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

7 This question deals with regulation of corporate governance in South Africa.

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.

8 This question requires candidates to analyse a problem scenario with regards to the law of delict, contract and specifically professional negligence. Candidates have to consider the liability of auditors based on a breach of the duty of care. It should be noted that candidates would not be expected to discuss the *Thoroughbred* case or the apportionment of damages in detail. A good discussion of this will, however, be credited.

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 valid contract. Candidates need to refer to the requirements for a valid offer and acceptance, the intention to be bound by the contract, as well as certainty of performance.

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.

10 This question deals with the existence of a close corporation after the effective date of the Companies Act 2008 as well as the conversion of a close corporation into a company.

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.