Answers

1 This question requires candidates to discuss, in the context of human rights and freedoms in the Constitution of Lesotho, the doctrine of judicial review as it operates in Lesotho.

Constitution is the supreme law of Lesotho. It provides for a set of 16 fundamental human rights and freedoms. They are available to every person irrespective of race, sex, religious affiliation, nationality or social or ethnic origin. Any law, including received common law and customary law and any executive or private action, which is inconsistent with these fundamental human rights and freedom is null and void.

The doctrine of judicial review empowers the High Court to hold a law to be invalid. In the *Swissborough* case (1994), it was pointed out that the doctrine of judicial review applies in the following four circumstances:

(a) A law can be held to be invalid, in whole or in part, if it is inconsistent with the fundamental human rights and freedoms. In *Swissborough Diamond Mines (Pty) Ltd* v *Govt. of Lesotho and others* (1994), Swissborough were granted five mining leases with a right to prospect and mine for minerals on certain specified lands. The leases were revoked by the Revocation of Specified Mining Leases Order, 1992, which also provided, in effect, that the validity of such cancellation shall not be questioned by any court in Lesotho. Leases constituted incorporeal property and depriving Swissborough of their property conflicted with what is now s.17 of the Constitution dealing with the freedom from arbitrary seizure of property. Cullinan CJ observed that the High Court is the guardian of the Constitution and, more particularly, of the fundamental human rights and freedoms. The Revocation of Specified Mining Leases Order, 1992, was subject to the guarantees given in the Constitution. The High Court tested the validity of the Order against the provisions of the 1993 Constitution and found it to be inconsistent with s.17 and s.22 (the right to access the courts) of the Constitution and, consequently, held it to be void *ab initio*.

(b) A law can be held to be invalid if it is found to be so unjust and unreasonable 'so as to constitute an affront to senses' as being 'manifestly immoral'. Hitler's anti-jews laws or *apartheid* laws would fit in this category very well. Suppose a political party, using its overwhelming numerical strength in Parliament, chooses to amend the Constitution with a view to postpone holding of elections until such time that the Prime Minister and the cabinet so decide. Courts may hold such an amendment invalid as 'constituting an affront to senses.'

(c) A law can also be reviewed on the ground of procedural impropriety, which is the non-observance of the procedural requirements as laid down in the Constitution. For example, the Constitution does not allow the Parliament to pass laws without giving an opportunity to members to debate a Bill.

(d) Lastly, it was held in *Swissborough* case (1994) that the doctrine of separation of powers applies to Lesotho and s.118 of the Constitution guarantees that the courts shall, in performance of their functions, be independent and free from interference from legislature and executive. Under s.16(6) Human Rights Act, 1983, the State had the 'duty to guarantee the independence of the courts'. If a law prevents the court from testing its validity, it cannot be a valid law and must be struck down as void *ab initio*.

2 This question requires candidates to explain the postal rule and the circumstances when it does not apply.

(a) Where the offeror authorises the offeree to use post as a means of communication of acceptance, the rule is that once the offeree posts a letter of acceptance, properly addressed and stamped, to the offeror, acceptance is communicated and a contract arises as soon as the letter is posted, not when it arrives.

For example, in the English case of *Household Fire Insurance Co* v *Grant* (1874–80), the defendant applied for shares from the plaintiff company by post. The plaintiff company sent him a letter accepting his offer. The letter, though properly addressed and stamped, never reached the defendant. It was held that acceptance was complete on the posting of the company's letter. The court recognised that this rule might occasionally cause hardship, but explained that a party can always make the formation of a contract dependent upon the actual communication of acceptance.

Moreover, if a person receives no answer to a written offer, it is up to him to make inquiries. And if the rule were to be that a contract is not finally concluded until the letter of acceptance is actually received, the acceptor would never be entirely safe in acting on his acceptance until he, in turn, was told that his letter had been received. Expediency requires that the line be drawn somewhere.

This rule has been followed in South Africa in *Cape Explosives Works Ltd* v *S.A. Oil and Fat Industries* (1921). It has been finally settled by the appeal court in the case of *Kergeulen Sealing and Whaling Co Ltd* v *Commissioner for Inland Revenue* (1939). The law in Lesotho is no different.

(b) The postal rule does not apply unless the offeror authorised the offeree – expressly or impliedly – to use the post. The justification for the postal rule seems to be that the offeror by his authorisation to use post takes the risks associated with postal system like delay or even loss of mail altogether. Where there is no such authorisation the rule does not apply. For example, in the case of *Sneiman* v *Volkersz* (1954), the defendant made a verbal offer to the plaintiff. The offer was to remain open until 15 February. On 15 February, the plaintiff posted a letter to the defendant accepting his offer. This letter was received three days later. The defendant refused to perform saying that the acceptance came after the date had expired. The plaintiff argued that according to the postal rule of communication, acceptance was effective as soon as the letter of acceptance was posted and in this case that was 15 February. It was held since the offeror had not authorised the offeree to communicate by post, the postal rule did not apply.

The postal rule does not apply if the postal services are disturbed and are not operating normally. The postal rule does not apply to instantaneous means of communication like telephone, telex and fax. However, it does apply to telegrams, which are treated like posted acceptance.

If an offeree, after posting a letter of acceptance, changes his mind and retracts his acceptance by a speedier mode of communication, say by phone or fax, such retraction is of no effect. See *A to Z Bazaars (Pty) Ltd* v *Minister of Agriculture* (1974). This decision has been criticised by Christie who suggests, in line with the opinion of English scholars, that it should be possible to withdraw posted acceptance by a faster communication like fax or phone that reaches the offeror before, or at the same time, as the posted acceptance. Similarly, if the offeree posts a rejection of the offer and thereafter attempts to accept it by a speedier means of communication, which reaches the offeror before the posted rejection, the withdrawal of rejection should hold because the offeror does not suffer any prejudice thereby.

3 This question requires candidates to explain a condition about an uncertain future in a contract.

A condition is an uncertain future event upon which the operation and consequences of the whole contract is dependent upon. It relates to something in the future, that is the occurrence, or non-occurrence, of a specified future event. There is already a contract between the parties, but the duty to perform is dependent on the happening or not of the particular event.

Conditions are either suspensive or resolutive. A suspensive condition suspends the operation and consequences of the contract, or some of them, until the occurrence or non-occurrence of an uncertain future event. A contract, which is subject to a suspensive condition, is a valid and binding contract from the moment of its conclusion, and neither party can resile from it. What may be suspended by the condition is 'the resultant obligation or its exigible content'. For example, Thabo promises Lerato to pay her R100 if she passed the examination in the first division. The obligation to pay R100 is suspended by the condition that Lerato must first pass the examination in the first division. Assuming the contract to be valid and binding, Thabo cannot withdraw from it at will.

In the case of a resolutive condition, the contract, subject to such a condition, is immediately binding, but the effect of the condition is that its continued operation is dependent upon the occurrence or non-occurrence (usually the latter) of a future uncertain event. In other words, if the resolutive condition is fulfilled the contract becomes null and void retrospectively from the very beginning. For example, X sells his house to Y and the contract provides that if X receives a higher offer in the next seven days, the sale to Y will lapse. Prior to receipt of an offer of a higher price, both parties must perform the contract. If no higher price is offered, the sale to Y becomes fully binding as if the resolutive condition did not exist. However, if there is a higher offer, the sale to Y becomes null and void from the beginning and restitution must follow on both sides. In our earlier example, suppose Thabo pays Lerato R100 on condition that if she failed to pass the examinations in the first division, the amount would have to be returned. That is a resolutive condition.

Whether a condition has been fulfilled or not requires a careful interpretation of the contract to determine if the event actually happened is the event described in the contract. If the contract fixes a time limit and a condition precedent is not fulfilled within that time, the contract falls away. If the condition is resolutive, the contract becomes unconditional. If the contract does not mention a time limit, it will be presumed that the parties intended a reasonable time for the fulfilment or non-fulfilment of the condition. What is a reasonable time shall depend on the facts and circumstances of each case.

The fulfilment or non-fulfilment of a condition precedent operates retrospectively. It means that the contract becomes valid or invalid with effect from the date of the contract. It is because of this that the parties must restore to each other any property or money they delivered to each other if the condition is not fulfilled. However, rights acquired in good faith by third parties prevail over the rights of the parties against each other. Fulfilment of a resolutive condition also operates retrospectively, with the effect that the contract is deemed never to have existed, and any property or money handed over must be restored.

The doctrine of fictional fulfilment applies in these circumstances. A condition is deemed fulfilled as against a person, who deliberately prevents its fulfilment with a view to avoid the contractual obligation. For example, if the suspensive condition consists of obtaining a loan and the particular person fails to apply for a loan, it will be regarded as having been granted: see *MacDuff & Co* v *Johannesburg Consolidated Investment Co Ltd* (1924).

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

A delict is a form of wrongful conduct. It is a civil wrong. In law, a delict has been defined as a wrongful and blameworthy conduct, which causes harm to another person either in the form of monetary (patrimonial) loss or harm in the form of an infringement of a personality right. The injured party has a right to compensation if five elements of a delict are present: (a) harm, (b) wrongfulness, (c) fault, (d) causation, and (e) damage or injury to personality.

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

Once it has been determined that there is an infringement of a legally-protected right or interest of another, then the courts inquire if it was unreasonable in the light of the facts and circumstances of the case. Courts often apply the test of *boni mores*, that is whether according to the legal convictions of the community (or legal policy), the causing of the harm was not justified in the circumstances of the case. The *boni mores* test is an objective test based on the criterion of reasonableness. Courts use *boni mores*

and legal convictions of the community as meaning the same thing. In fact, legal convictions of the community is a poor English translation of the original *regsoortuiging van die gemeenskap*. A better translation is perhaps 'society's notions of what justice demands'. In this context, fundamental human rights and freedoms laid down in the Constitution play an important role when courts are confronted with determining the legal convictions of the community on a particular issue, like the right of the press to publish freely matters it determines are in the public interest as against the plaintiff's right to reputation and dignity. The concept of wrongfulness is policy-based and flexible to meet the demands of changing times and circumstances. To determine whether conduct is reasonable, the courts consider and balance the conflicting interests of the parties, their relationship to each other, the particular circumstances of the case, whether the harm was foreseeable, whether any superior legal right exists, constitutional values and any other appropriate considerations of social policy.

A number of well-known grounds of justification has been developed that serve to exclude the wrongfulness of the defendant's conduct. Self-defence, necessity, consent to injury, voluntary assumption of risk and provocation are some of the examples. Grounds of justification that have been accepted as defences are recognised expressions of the application of the test of reasonableness in particular situations.

5 This question asks the candidates to explain the meaning of actual authority and ostensible authority.

(a) Actual authority

An agent, who has been expressly appointed may have both express and implied authority. An agent, whose appointment has been implied, has only implied authority. Both express and implied authority are part of the actual authority of an agent. Express authority is conferred by the contract of agency and is usually in writing.

Implied authority is the actual authority, which the principal has consented, by implication, the agent should have. It is possible, indeed in some instances necessary, to read into the agent's express authority a certain implied authority. In *Goldblatt's Wholesale (Pty) Ltd* v *Damalis* (1953), it was stated that if an agent has the express authority to manage the business of the principal, he has the implied authority as well to do all the things, which are reasonably incidental to carrying on that type of business. For example, he may purchase goods on credit and give bills of exchange in respect of such purchases. However, he does not have the implied authority to sell the business because it is not incidental to the ordinary conduct of the business. Nor does he have authority to enter into compromises with the creditors of the business.

Implied authority is determined objectively,

(i) from the conduct of the principal as reasonably understood by a third party.
(ii) from what is usual, normal or customary in a particular trade, business or profession. So long as what the agent does in the exercise of such authority is reasonable and lawful, the principal will be bound. However, if it is unreasonable, the principal is bound only if he consents to it.

(b) Ostensible authority

Ostensible (or apparent) authority arises when the alleged principal makes a representation, often by conduct, to a third party that a person is authorised to act on his behalf (even though he may not be) and the third party relies upon that representation. The 'principal' is said to 'hold out' the person represented as his agent and to have authority to act on his behalf.

There is a strong resemblance between implied and ostensible authority and this may sometimes cause confusion. The conduct of the parties, for example, could be a source of both implied and ostensible authority. Solomon J in *Strachan* v *Blackbeard & Son* (1910) pointed out that the two are, nevertheless, separate and distinct. In the case of implied authority, an actual authority is inferred from the conduct of the parties; in the case of ostensible authority there is no actual authority, but the principal is prevented from relying on its absence to the prejudice of a person whom by his actions or his attitude he has misled.

The operation of ostensible authority principle may gives rise to two consequences: (i) Its operation may lead to the creation of a relationship of principal and agent. (ii) It may operate to supplement and broaden the scope of his agent's actual authority and cover his unauthorised acts.

Let us illustrate it by an example. Suppose a person authorises his domestic help to make purchases for him on credit from a shopkeeper and duly pays the accounts as they come by. Subsequently, he revokes the authority of his servant in this regard. However, the servant continues to make purchases on his master's account from the shopkeeper as before to his knowledge. In such a case, the shopkeeper may hold the master liable on the ground of servant's ostensible authority.

6 This question requires candidates to explain the ways in which company directors can be appointed and the ways in which they can be removed from office.

(a) Appointment of directors

All companies are required to have directors. In the case of public companies, there must be at least two directors, whilst in the case of private companies, there must be at least one [s.140(1) Companies Act (CA). 1967]. Until such time as the directors have been elected, every subscriber to the memorandum is deemed to be a director of the company [s.140(3) CA. 1967].

Section 142(4) Companies Act 1967 requires the names of the first directors to be included in Form J and submitted to the Registrar of Companies. Where the company has adopted Table A articles of association, these first directors are required to retire at the first annual general meeting (AGM) after incorporation but may stand for re-election.

Subsequent directors are elected by the shareholders by ordinary resolution in a general meeting. Section 145 CA. 1967 requires that directors in a public company should be elected individually. Two or more persons cannot be elected as directors by a single resolution at the general meeting. The only way to avoid the application of this rule is to pass first a single resolution without any vote against it to permit election of directors in a block. Contravention of s.145 invalidates the appointing resolution.

Casual vacancies are usually filled by the board of directors co-opting someone to act as a director. It makes sense as it will be inconvenient and expensive to convene a general meeting of the shareholders just for filling a casual vacancy. Such casual appointments hold only until the next AGM, when shareholders would have an opportunity to consider their re-election.

(b) Removal of directors

Directors may be removed in number of ways:

(i) Retirement

Table A provides that one-third of the directors, who have been longest in office, must retire at each AGM. If a retiring director chooses not to stand for re-election, or if he stands but is not re-elected, his appointment comes to an end. In practice, they stand and are usually re-elected.

(ii) Removal

Under s.146 CA. 1967, a director can be removed by an *ordinary* resolution at any time. A special notice of 28 days has to be given of the intention to propose such a resolution.

The power to remove a director under s.146 cannot be taken away or restricted by any provision in the articles or any agreement between the company and a director. It is possible, however, for the effect of the section to be avoided in small companies by the use of weighted voting rights: see *Bushell* v *Faith* (1969).

(iii) Disqualification

The articles of association usually provide for the disqualification of directors on the occurrence of certain events.

Table A provides in article 87 that the office of a director shall be vacated if,

1. he ceases to be a director due to lack of qualification shares required by the articles of the company, or
2. he becomes insolvent or makes any arrangement or composition with his creditors generally, or
3. he becomes of unsound mind, or
4. he resigns his office by notice in writing to the company, or
5. he has been absent for more than six months without permission of the directors from board meetings held during that period. Thus, absence due to sickness may disqualify a director, or
6. he becomes disqualified by virtue of s.144 or s.299.

Under s.144 Companies Act 1967 following are disqualified from being appointed a director of a company:

1. A body corporate,
2. A minor or any other person under a legal disability,
3. An unrehabilitated insolvent without the leave of the court,
4. Any person who has been convicted and sentenced either to imprisonment without the option of a fine or to a fine exceeding R100 for one of the following: theft, fraud, forgery, uttering a forged document or perjury,
5. Any person removed from an office of trust by the court on account of misconduct without the leave of the court,
6. Any person who is disqualified as a director in terms of an order of a court under the Companies Act 1967.

Under s.299 a court may make an order disqualifying a person from being a director for such period as may be specified in the order. An order may be made:

1. against a person, where he is convicted before the High Court of any offence connected with the promotion, formation or management of a company, or
2. against a person, if in the course of winding up or judicial management of a company, it appears that he has been guilty of,
   (a) any offence under s.275 which makes the directors personally liable if they were knowingly parties to the carrying on of the business of the company with intent to defraud creditors or for any fraudulent purpose. It does not matter whether they have been convicted or not, or
   (b) any fraud in relation to the company, or
   (c) of any breach of his duty to the company.

7 This question requires candidates to consider the role of the auditors in relation to companies in the context of corporate governance.

The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. In Lesotho, corporate governance is still largely governed by what is in the Companies Act, 1967.

Auditors have an important role to play in this regard: they are appointed to ensure that the interests of the shareholders in a company are being met. Their key function is to produce independent and authoritative reports confirming, or otherwise, that the accountancy information provided to shareholders is reliable.

Powers and duties

The auditors have the right of access at all times to the company's books and accounts, vouchers and securities of the company. They are entitled to require from the company's officers such information and explanations as they think necessary for the performance of their duties as auditors. It is a criminal offence for an officer of the company to provide false information or explanations knowing it to be false under s.296. However, it is not an offence for an officer to *fail* to provide any information or explanation that the auditors required of them. Neither is there any requirement in law for the directors to ensure that all relevant information, which they are aware of or could ascertain, has been disclosed to the company's auditors. This anomaly needs to be remedied. Furthermore, auditors in Lesotho do not have a right to require information and explanations from people other than the officers of the company. For example, employees of a company are not subject to the auditor's authority. Auditors are entitled to receive notices and other documents in connection with all general meetings, to attend such meetings and to speak when the business affects their role as auditors (s.126(3) CA 1967).

Auditors are required to make a report to the shareholders on the accounts examined by them, and on every balance sheet, every profit and loss account and all group accounts laid before the company in a general meeting during their tenure of office [s.125(1) CA 1967]. They are specifically required to report on the following matters:

(a) whether they have examined or satisfied themselves with respect to the securities, and examined the books of accounts and the vouchers of the company;

(b) whether they have obtained all the information and explanations, which to the best of their knowledge and belief were necessary for the audit;

(c) whether, in their opinion, proper books of accounts are kept by the company and proper returns adequate for the audit were received from branches not visited by them;

(d) whether the company's balance sheet and profit and loss account are in agreement with the books of account and returns;

(e) whether, in their opinion, to the best of their information and according to the explanations provided to them the company's accounts give the information required by the Companies Act 1967 in the required manner and give a true and fair view of the state of affairs and profit and loss of the company as at the end of its financial year;

(f) whether, in their opinion, in the case of group accounts of a holding company, such group accounts have been properly prepared in accordance with the Companies Act 1967 so as to give a true and fair view of the state of affairs and profit and loss of the company and its subsidiaries.

The auditors in Lesotho are not required to state whether the information in the directors' report is consistent with the accounts audited by them. Nor are they required to state whether the requirements concerning disclosure of information about directors and officers' remuneration, loans and other transactions have been met. Their report is not required to include any statement on matters such as the valuation of non-cash consideration for share allotment by a public company. These omissions have negative implications for good corporate governance.

In *Caparo Industries plc* v *Dickman* (1990), it was held that, when auditors prepare their report on the accounts, they owe a duty of care to the shareholders of the company, but only so far as to allow them to exercise proper control over the company. This duty did not extend to members as individuals and potential purchasers of shares. Thus, the *onus* was clearly on the appellants in these circumstances to make their own independent inquiries, as it was unreasonable to rely on the auditors' report. This case seems to establish that auditors role in establishing good corporate governance may not benefit potential purchasers of the company as yet.

8 This question requires candidates to analyse the problem scenario from the perspective of the law of contract. They are expected to discuss rules relating to invitation to treat, offer and option contracts.

(a) Sam and Thabo

The label on the windscreen of the Toyota indicating its sale price to be R11,000 did not amount to an offer. It was no more than an invitation to treat. Sam did not make an offer to sell the car to those attracted by the labelled price. In other words, Sam was inviting others to make an offer.

In *Crawley* v *Rex* (1909), it was held that the mere fact that a shopkeeper advertised the price at which he wished to sell the goods was not an offer to the public to enter the shop and purchase goods at the advertised price. Nor was a contract constituted when a member of the public came in and tendered the price mentioned in the advertisement. The advertisement amounted simply to an announcement of his intention to sell at the price he advertised.

Consequently, Thabo is not in a position to force Sam to sell the car to him at R11,000.

(b) Sam and Edward

Edward was willing to purchase the car for the correct price of R110,000 but he needed a week's time to obtain bank finance. Sam could have given him the time by undertaking not to sell the car for a week. This would have resulted in an option and, if accepted by Edward, an option contract. Such an undertaking is legally binding in Lesotho.

However, in the problem scenario, there is no indication that Sam gave that undertaking to Edward. Consequently, Sam was free not to accept Edward's offer to buy the car after obtaining the bank finance.

Sam was entitled to accept David's offer and sell the car to him. David got a good title to the car.

In short, neither Thabo nor Edward have any remedy against Sam in the law of contract.

9 This question requires candidates to consider various issues relating to the issuing of shares by companies and the potential liability of a shareholder for acquiring partly-paid shares.

Under s.10(1)(iv) Companies Act 1967, the memorandum of association of every company limited by shares must state the amount of share capital with which a company proposes to be registered and the division thereof into shares of a fixed amount. The fixed value in this context means the par value of a share. The capital, thus stated, is the nominal capital. Nominal value of a share is the face value of a share and represents the extent of a shareholder's potential liability: see *Borland's Trustees* v *Steel* (1901).

There is no requirement that a company should require its shareholders to immediately pay the full value of the shares. The proportion of nominal capital that has been issued is called issued capital. The proportion of the issued capital that has been paid by the shareholders in full is called the paid up capital. If a shareholder has not paid for his shares in full and made only a part payment, then the company has an outstanding claim against the shareholder. It is possible for a company to resolve that it would not call upon the shareholders to pay the unpaid amount on their shares. However, even in that case, if the company cannot pay its debts from existing assets, the liquidator can call upon the shareholders to pay up on their partly-paid shares.

Consequently, there was nothing wrong in Shaka Ltd issuing 100,000 partly paid shares to Milton, but the remaining, unpaid part, can always be called upon if the company requires it to pay off its debts.

All this is further strengthened by rules that prevent companies from issuing shares at a discount. In *Ooregum Gold Mining Co* v *Roper* (1892), the company was in need of money and its shares of £1 nominal value were trading at 12·5p. In an honest attempt to refinance the company, it was resolved by the company to issue preference shares of £1 each at only £0·25 each and to credit the balance of £0·75 as paid-up. When the company went into liquidation, the holders were asked to pay a further £0·75. Lord Halsbury pointed out that the shareholders' liability is limited to the amount unpaid upon the shares. This makes it impossible for a company to depart from the rule and any expedient that is used to absolve the shareholders from the amount unpaid on their shares is contrary to the Companies Act.

Applying these principles to the problem scenario, Milton cannot avoid liability to pay up to the full value of the shares he has taken in Shaka Ltd. Thus, in relation to the 100,000 shares, he will be liable to pay a maximum of R25,000 (R0·25 x 100,000). The extent of his liability will depend on the actual debts owed by Shaka Ltd but cannot exceed the nominal value of the shares.

10 This question requires candidates to discuss the concept of constructive dismissal and then apply it to the problem scenario.

A contract can be terminated by a party if the other party has repudiated his fundamental obligations. This principle also applies to the contracts of employment. In this context, a fundamental obligation is a material or major term of the contract. If the employer repudiates the contract by committing a breach, which goes to the root of the contract, it is called a constructive dismissal. In a constructive dismissal, the employer is willing to continue the employment but the employee is not.

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

Sharp has to establish that there indeed has been a repudiatory breach going to the root of the contract. He has to prove that his employer's conduct – in refusing him an advance against his salary for the month and his request for a loan – amounted to a repudiatory breach of contract, which entitled him to resign. Sharp was not contractually entitled to ask for an advance or a loan from his employer. The employer could, if it so wished, accede to his request, or refuse his request. In the circumstances, there is no repudiatory breach of any term of employment contract that Sharp can point to.

To sum up, Sharp is unlikely to succeed if he decided to institute a legal action against his employer for constructive dismissal. *Western Excavating Ltd* v *Sharp* (1978) is a case where the facts were very similar and a similar decision was given by the court.

This marking scheme is given only as a guide to markers in the context of suggested answers. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well-reasoned answers are provided. This is particularly the case for essay type questions where there may often be more than one way to write an answer.

1 This question requires candidates to discuss, in the context of human rights and freedoms in the Constitution of Lesotho, the doctrine of judicial review as it operates in Lesotho.

6–10 Thorough explanation of the doctrine of judicial review as elaborated in the *Swissborough* case. Lower band answers will show some understanding of the doctrine but will lack the detailed knowledge. Alternately, they may be missing out important issues.

0–5 A less than complete answer, probably unbalanced, focusing only on one of the aspects of the doctrine. Lower band answers would be poor and would show either no or very little knowledge of the doctrine.

2 This question requires candidates to explain the postal rule and the circumstances when it does not apply.

6–10 Thorough explanation of the postal rule and the circumstances when it does not apply. Relevant examples and cases would earn extra credit. Lower band answers will show some understanding of the rule but will lack the detailed knowledge.

0–5 Answers will show little understanding of the rule. Lower band answers would be poor and would show either no or very little knowledge of the rule.

3 This question requires candidates to explain a condition about an uncertain future in a contract.

6–10 Thorough discussion of the concept 'condition' – both suspensive and resolutive – as a term of contract including relevant examples to explain its working.

0–5 Reasonable treatment of the concept generally. Lower band answers will show little or no understanding of the concept.

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

6–10 Thorough explanation of the concept of wrongfulness and how it is applied in practice.

0–5 Reasonable treatment of the concept generally. Lower band answers will show little or no understanding of the concept or subject matter of the question.

5 This question asks the candidates to explain the meaning of actual authority and ostensible authority.

6–10 A clear concise explanation of the two terms with some examples.

0–5 Higher band answers would show a clear understanding of the terms and provide examples. Lower band answers would show very little understanding of what is actually meant by the two terms.

6 This question requires candidates to explain the ways in which company directors can be appointed and the ways in which they can be removed from office.

6–10 A thorough to complete answer explaining the ways in which company directors are appointed and ways in which they can be removed from office. Higher band answers would provide correct references to provisions of the Companies Act, 1967.

0–5 Some but limited knowledge of the topic. Perhaps uncertain as to the various ways in which directors may be appointed or removed. Lower band answers will show very little or no understanding whatsoever.

7 This question requires candidates to consider the role of the auditors in relation to companies in the context of corporate governance.

6–10 A comprehensive discussion of the role of auditors in the context of corporate governance. Higher band answers would point out the weaknesses in the law.

0–5 Reasonable treatment of the topic generally. Lower band answers will show little or no understanding of the subject matter of the question.

8 This question requires candidates to analyse the problem scenario from the perspective of the law of contract. They are expected to discuss rules relating to invitation to treat, offer and option contracts.

(a) Advice to Thabo.

3–5 A thorough analysis of the scenario focusing on the invitation to treat and applying it accurately. Higher band answer would make reference to *Crawley* or some other relevant case.

0–2 Very weak answer showing no, or very little, understanding of the question.

(b) Advice to Edward

3–5 A thorough analysis of the scenario focusing on the rules relating to option contract and applying them accurately.

0–2 Very weak answer showing no, or very little, understanding of the question.

9 This question requires candidates to consider various issues relating to the issue of shares by companies and the potential liability of a shareholder for acquiring partly-paid shares.

8–10 Accurate analysis of the principles relating to the issue of partly-paid shares by a company. Reference to the rule that prevents a company from issuing shares at a discount. Higher band answer would refer to the *Ooregum* case. A clear and accurate attempt to apply the relevant principles to the problem scenario is required.

5–7 Correct identification of the principles and a fairly accurate attempt to apply them.

2–4 Identification of at least some of the principles and an attempt to apply them to the problem scenario. Towards the bottom of this range of marks, there will be major shortcomings in identification or application of relevant legal rules.

0–1 Very weak answers, which might recognise the concept but show no ability to identify the correct principles and their application to the problem as set out.

10 This question requires candidates to discuss the concept of constructive dismissal and then apply it to the problem scenario.

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.

3–4 Unbalanced answer perhaps showing some appropriate knowledge but weak in analysis or application.

0–2 Very weak answer showing little analysis, appropriate knowledge or application.