Answers

1 This question asks candidates to explain the impact of human rights laws on South African law.

Before 1993, a system of parliamentary sovereignty existed in South Africa and the courts did not have the capacity to test the validity of legislation. Parliament adopted a whole range of discriminatory and degrading apartheid laws that violated the human rights and dignity of the majority of the country's citizens. This came to an end with the adoption of the South African Constitution in 1996.

Chapter 2 of the constitution comprises of a list of human rights, referred to as the 'bill of rights'. Legislation and executive conduct, which unjustifiably interfere with these rights may be declared unconstitutional. In essence, first-generation rights (civil and political rights) are protected. The first right mentioned is the right to equality before the law (s.9). After that, the rights to life, to dignity, to freedom and to personal privacy are guaranteed (ss.10–14). The traditional freedom rights are also listed: religious freedom, freedom of expression, freedom of movement and residence, and trade. Access to courts and information is guaranteed as well as fairness in administrative justice.

The constitution makes extensive provision for socio-economic rights, or the so-called second-generation rights. This includes the right to basic education, of access to adequate housing and of access to health care services.

The right to an environment that is not harmful to one's health or well-being is an example of a third-generation right. A duty is placed on the state to prevent pollution (amongst other things) for the benefit of present and future generations.

Children are also afforded special protection. Rights of children are guaranteed. This protection implies that socio-economic steps must be taken by government.

The will of parliament is now subject to the constitution. This means that laws of the central, provincial and local governments may be declared unconstitutional and may be removed from the statute books if they are in conflict with the constitution. The same applies to the rules of the common law: if a specific provision of the common law is in conflict with the constitution, the courts may declare it to be unconstitutional.

In the interpretation of a specific right the values of the new society must be promoted. These values are openness, democracy, freedom, equality and human dignity. The spirit of the constitution is characterised by openness, democracy, equality and freedom. The constitution has been described as a bridge between a previous dispensation of authoritarian government and a culture of openness and justification. It is also a bridge between a culture of discrimination and a culture of tolerance. The human rights laws thus have a very important influence on South African law.

2 This question requires candidates to distinguish between agency and contracts for the benefit of third parties.

In the case of agency, a person concludes a contract on behalf of another on the strength of the authority given to him. For example, where the principal authorises the agent to buy a motor vehicle from a third party, and, where the agent informs the third party that he contracts on behalf of a principal, the contract is concluded between the principal and the third party. No contract exists between the third party and the agent because it was not their intention to conclude a contract with one another. The agent is therefore not a party to the contract with the third party. Even if the agent does not disclose that he is acting on behalf of a principal (even though he had the authority to do so), the principal may step forward and claim from the third party. The third party may, likewise, once he becomes aware of the principal's existence, claim either from the principal or from the agent. This is known as the doctrine of the undisclosed principal. It is also possible that the agent represents to the third party that he is acting on behalf of a principal whilst having no authority from the principal. The third party may then hold the agent personally liable for damages. The contract for the benefit of a third party (*stipulatio alteri*) may be illustrated with the example where someone wants to enter into a contract on behalf of a company that has not yet been incorporated. With a contract for the benefit of a third party, a contract is made by a person (A) as principal, i.e. in his own right, with a second person (B) for the benefit of a third (C), who is perhaps not even yet in existence or is only to be identified at some later date. Once the third party (in our case the company) comes into existence or is identified, it can accept the benefit of the contract. If the company adopts the contract or accepts the benefit, the contract comes into existence between the company and the other contracting party (B). Whether the contract will operate with retrospective effect depends upon its terms. Prior to the acceptance by the company of the offer, the promisor (B) and the promoter or *stipulans* (A) are the only persons bound by the contractual tie. At that stage, the promisor is alone bound to the promoter, by his promise to make an offer to the company. Although the promoter is thus a party to the contract, he will incur there under only such obligations as he specifically undertakes. Until such time as the company comes into existence and accepts the offer, it acquires no rights in consequence of the agreement between the promoter (A) and the promisor (B).

The most important differences between agency and the contract for the benefit of a third person are:

(a) The promoter or *stipulans*, in contradistinction to the agent, has no authority from the principal.
(b) After the conclusion of the agreement for the benefit of a third person, no immediate contract exists between the promisor and the third party, whereas in agency a contract immediately exists between the principal and the third party.
(c) It is a requirement of agency that the principal must have existed at the time of the agreement. After all, the principal must have given the agent the necessary authority. This is not a requirement in the case of a contract for the benefit of a third party.
(d) The promoter or *stipulans* does not conclude the agreement in the name of the third party, whereas the agent concludes it in the name of the principal. The promoter or *stipulans* acts in his own name but for the benefit of the third party.

3 In this question candidates are required to discuss the meaning and consequence of an acceptance.

An acceptance is a clear and unambiguous declaration of intention by the offeree, unequivocally assenting to all the terms of the proposal embodied in the offer. The offeree's intention to accept the offer may be expressly stated (for example, 'I accept your offer'), or it may be tacitly indicated (for example, where the offer is made in the presence of the offeree and the offeree nods his head). Silence cannot ordinarily be treated as acceptance. The offeror may thus not force a contract on the offeree by sending unsolicited goods through the post with a stipulation that, unless the offeror hears to the contrary within a certain time, he will assume that the offeree has agreed to buy the goods.

Acceptance will give rise to the formation of a contract between the offeror and the offeree, only if certain requirements are fulfilled:

(a) The acceptance must be a complete and unqualified assent to every element of the offer and there can only be a valid acceptance where the whole offer and nothing more or less is accepted. This is the so-called 'mirror image rule'. If the offeree's acceptance is conditional or contains new terms or leaves out original terms, then there is no clear acceptance and no consensus was reached. A qualified acceptance constitutes a counter-offer, which the original offeror may accept or reject. An ambiguous acceptance also does not qualify as a valid acceptance.

(b) The acceptance must be by the person to whom the offer was made. Where an offer is addressed to unspecified persons, such as the general public or a class of the public, it may be accepted by any member of the public, or any member of that class. Where it is addressed to a specific person or persons, it may be accepted only by that person or group of persons. In *Bird* v *Sumerville* (1961) it was held that where there was an offer to sell a farm to A, such an offer could not be accepted by A and B jointly. The court pointed out that although the offeror would not have been prejudiced by both A and B buying the property, the offeror never intended that his offer could be accepted by both and that he was therefore not bound by the contract of sale.

(c) The acceptance must be a conscious response to the offer. A person cannot accept an offer if he is unaware of it. This is especially relevant to offers of reward. In *Bloom* v *American Swiss Watch Co* (1915) a company offered a reward to anyone who provided information leading to the arrest of thieves who had stolen jewellery from the company. Bloom furnished such information while ignorant of the offer of reward. The court held that he could not recover the reward because until he knew of the offer he could not accept it and 'until he accepted it there could not be no contract, for a contract requires that there should be consensus of two minds, and if the one did not know what the other was proposing, the two minds never came together'.

(d) The acceptance must be in the form prescribed by the offeror. As initiator of the contracting process, the offeror is entitled to prescribe any method of acceptance as he sees fit. If the offeror does so, no other form of acceptance will suffice. The offeror may, however, authorise a particular method of acceptance without thereby intending to prescribe it as the only acceptable method (for example, 'Please let me know by return post whether these terms are acceptable to you'). 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.

4 This question requires candidates to discuss dismissal of an employee for misconduct.

The alleged misconduct of an employee is one of the most common grounds for justifying a dismissal. A dismissal related to the employee's conduct or behaviour implies that the employee is at fault in one way or another. Misconduct includes acts such as repeated absence from work, assault or fighting in the workplace, dishonesty, damage to property, intoxication or drug use, fraud or falsification of records, the disclosure of confidential information, sexual harassment of co-employees, unauthorised use of company property, sleeping on duty, a lack of punctuality, insolence or insubordination.

Proof of the misconduct is essential. The employer will have the burden of proof, on the balance of probabilities, that the particular employee was guilty of the alleged contravention of a workplace rule. If the employer can prove that there is a valid reason to dismiss the employee, the reason must also be fair in the circumstances and the employer must follow a fair procedure. In other words there must be both substantial and procedural fairness.

In order to establish whether the dismissal for misconduct is substantially fair, the Labour Relations Act 1995 set out guidelines, and any person who is called upon to determine whether a dismissal is fair or unfair should consider the following issues:

– Whether a rule regulating conduct in, or of relevance to, the workplace existed.
– Whether the rule was contravened by the employee.
– Whether the rule was valid and reasonable.
– Whether the employee was aware, or could reasonably be expected to have been aware of the rule.
– Whether the rule has been applied consistently by the employer.
– Whether the dismissal is the appropriate sanction for the contravention of the rule.

If the employer is able to establish that the employee did contravene a valid and reasonable rule, which the employee knew about and which had previously been, and still is, applied to all employees in the same way, it is possible that the employee is guilty of misconduct. Whether the dismissal is the appropriate sanction will depend upon a number of factors, such as the gravity of the misconduct, the length of service and previous disciplinary record of the employee, the nature of the job and the circumstances of the infringement itself. The employer should also ensure that the sanction of dismissal is applied consistently.

The dismissal must also be procedurally fair. The essence of a fair procedure is that the employee has a right to defend himself. Implicit in this right is that the employer must conduct an investigation into the misconduct and that the employee is given an opportunity to state a case in response to the allegation. The employee must be told of the allegation in a language that he understands, allowed sufficient time to prepare the response, and be given assistance if he desires it. If the employee is to be dismissed, he should be given a reason for the dismissal and reminded of any rights he may have.

5 In this question candidates are required to explain the meaning of a delict.

A person can suffer damage or loss by reason of many causes. The factors causing loss or damage may be contained in natural disasters or in human actions. The fundamental premise in law is that damage or harm rests where it falls; that is, each person must bear the damage he suffers. Compensation for damage or loss suffered by a person can be recovered from another person only if there are legally recognised grounds for recovery. If, for example, a person has suffered a loss due to the acts of another, that other person may be compelled by law to make good such damage or loss. The law of delict lays down what is required for an act causing damage to qualify as a delict and what remedies are available to any party suffering the damage.

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. A delict is any unlawful culpable act whereby a person (the wrongdoer) causes the other party (the person prejudiced) damage or injury to personality, and whereby the prejudiced person is granted a right to damages or compensation, depending on the circumstances. The following elements of a delict may be isolated:

(a) **An act.** An act is any voluntary human conduct, but it need not be a wilful act. This means that only a human being can act in the eyes of the law. It also means that any human conduct, whether a positive act or the failure to do something (an omission), which at the time of the relevant activity was capable of being exercised under control of the will is, legally speaking, an act.

(b) **Unlawfulness.** 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 be unlawful (in addition to meeting the other requirements). An act is unlawful when it infringes the rights of another. An act is also unlawful if the wrongdoer owed the person prejudiced a duty to take care and this duty has been breached. Conduct is wrongful or unlawful if it is unreasonable, in other words when, in the light of all the circumstances, the defendant is expected to behave in a manner which will not harm the plaintiff. Courts also refer to concepts such as the *boni mores*, the prevailing conceptions in a particular community at the given time or the legal convictions of the community.

(c) **Fault.** An unlawful act does not necessarily entail liability for the wrongdoer; the wrongdoer must also be at fault. A wrongdoer is at fault if he has acted intentionally or negligently. The criterion the law uses today to establish whether a person has acted negligently is the criterion of the ordinary or reasonable person. A wrongdoer is therefore negligent if the reasonable person, had he found himself in precisely the same position as the wrongdoer, would have foreseen harm to another with such a degree of probability that, in the light of the circumstances, he would have refrained from the act or would have carried out the act in another way, or would have taken further precautions before acting.

(d) **Causation.** A wrongdoer can be held liable only for consequences that he legally caused. Causation involves the consideration of two different questions: whether any factual relation exists between the defendant's conduct and the harm sustained by the plaintiff; and whether, or to what extent, the defendant should be held responsible for the consequences factually induced by his conduct. Causation in delict comprises of two fundamental elements: factual causation and legal causation.

(e) **Damage.** By damage patrimonial damage is meant. A person suffers damage if as a result of another's act his estate becomes smaller than it would otherwise have been. To determine whether a person has suffered damage as a result of a delict the present condition of his estate must be compared with what it otherwise would have been. If the present condition of the estate is less favourable, the person has suffered patrimonial damage.

6 This question requires candidates to discuss the fiduciary duties owed to a company by a director.

The fiduciary duties owed by directors are basically similar to those applying to any other fiduciary relationship. The basis on which a director is held liable by his company for a breach of his fiduciary duty is the general principle that a person standing in a fiduciary relationship to another commits a breach of trust if he acts for his own benefit or to the prejudice of that other, the cause of action is neither delictual nor contractual but one based on breach of trust (*Robinson* v *Randfontein Estates Gold Mining Co Ltd* (1921)). As fiduciaries, directors owe particular duties to their companies. The duty is owed to the company as a distinct legal person and not the shareholders of the company. The common law duties of directors are of two types – their general duty to exercise due care and skill in carrying out their functions as a director of the company and their fiduciary duties, which require that in acting as directors they act in good faith for the benefit of the company, properly exercising their powers as directors, and avoiding conflicts of interest. The duties are as follows:

(a) **The duty to act *bona fide* in the interests of the company.**
In effect this means that directors are under an obligation to act in what they genuinely believe to be the interest of the company. A director must consider the affairs of the company in an objective manner. They must therefore not contract as directors to act in a certain manner. Their actions must not only be honest, but in the interests of the company. In discharging this duty, directors will need to consider the various conflicting interests within the company. They do not discharge this duty simply by acting in the interests of the majority shareholders. However, directors are usually given very wide general powers

by the articles of the company and the courts are usually unwilling to judge on the merits or demerits of business decisions made by the directors, in the absence of dishonesty. The practice of appointing a director as nominee representing certain shareholders or other interests within the company is legally recognised but such a nominee is nonetheless obliged to exercise his discretion without being fettered.

(b) **The duty not to act for any collateral purpose.**
This may be seen as a corollary of the preceding duty in that directors cannot be said to be acting *bona fide* if they use their powers for some ulterior, or collateral, purpose. Directors are given their powers to use in the best interests of the company, and those powers must not be used for any other purpose. For example, directors should not issue shares to particular individuals in order merely to facilitate, or prevent, a prospective take-over bid (*Howard Smith* v *Ampol Petroleum* (1974), *Hogg* v *Cramphorn* (1967)). The breach of such a fiduciary duty is, however, subject to ratification (*Bamford* v *Bamford* (1970)).

(c) **The duty not to permit a conflict of interest and duty to arise.**
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 general meeting. Otherwise the contract can be avoided by the company. This equitable rule is strictly applied by the courts (*Regal (Hastings)* v *Gulliver* (1942), *Sibex Construction (SA) (Pty) Ltd* v *Injectaseal CC* (1988)). In *Regal* the directors of a company owning one cinema provided money for the creation of a subsidiary company to purchase two other cinemas. After the parent and subsidiary companies had been sold at a later date, the directors were required to repay the profit they had made on the sale of their shares in the subsidiary company on the ground that they had only been in the situation to make that profit because of their positions as directors in the parent company. It is not necessary to prove an actual conflict of interest, merely the possibility of such a conflict, and the rigorous nature of this principle may be seen in *Atlas Organic Fertilizers (Pty) Ltd* v *Pikkewyn Ghwano (Pty) Ltd* (1981).

7 (a) Shares
A share has been defined as 'the interest of a shareholder in the company measured by a sum of money, for the purposes of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders…' (*Borland's Trustees* v *Steel* (1901)).

Section 52 Companies Act of 1973 requires a company to state the types of shares into which the share capital of the company is divided, namely whether the shares are of a fixed amount (par value) or whether they are fixed in number (no par value). A par value share has an indicator of value (its nominal value); a no par value share carries no such indicator. It is generally only at the inception of a company that the nominal value of a par value share bears any realistic relationship to its true value. In the case of a long established company it may be a completely deceptive indicator of value and is merely an indication of the minimum amount to be received by the company upon issue. The amount represented by par value and no par value shares constitutes what the shareholder is required to contribute to the assets of the company. There are furthermore ordinary shares, preference shares and deferred shares. Ordinary shares carry the greatest risk but in recompense receive the greatest return. Ordinary shareholders are entitled to attend company meetings and to vote on proposed resolutions. Preference shares may have priority over ordinary shares in respect to dividends and repayment. They may carry a fixed rate of dividend and may be issued on the basis that they may be bought back later by the company, although companies may now purchase their own ordinary shares, and are no longer restricted to buying redeemable shares. Deferred shares usually come into consideration for a dividend after a prescribed minimum dividend has been paid to ordinary shareholders.

(b) Debentures
The issue of debentures is the method most generally used by a company for obtaining long-term loan funds, which merely entails that the amount to be borrowed is divided into smaller units. This had the effect that smaller amounts are obtained from more lenders. For the lender it has the benefit that the debenture is more easily transferable than, for example, the total amount loaned. No comprehensive definition of debenture has yet been formulated. The Companies Act itself contains no true definition and merely states that 'debenture' includes debenture stock, debenture bonds and any other securities of a company, whether constituting a charge on the assets of the company or not (s.1). It follows that a debenture embraces all debt issues whatever the name, by a company, and that the statutory provisions governing debentures cannot be avoided by calling the debt issue by another name, for example notes, bonds or loan stock.

Debentures differ from shares in the following respects. A share represents a complex of rights and duties which flows from the special legal relationship between the shareholder and the company. A debenture holder is only a particular kind of creditor. A shareholder participates in the profits of the company, which are available for distribution in the form of dividends, which must first be declared before he enjoys any right thereto. A debenture holder on the other hand receives interest at a predetermined rate and which is payable at fixed times, irrespective of whether the company earns sufficient profits. A debenture does not confer voting rights. The payment of interest on debentures can, in contrast with the payment of dividends, confer certain tax benefits to the company.

A company may create and issue debentures only if so authorised by its memorandum or articles (s.116). No debenture or debenture certificate may be issued unless the conditions of the debenture are stated thereon (s.126). Debentures must be described as secured or unsecured, and provision is made for the encumbering of property as security for debentures (s.117 and s.125).

8 This question invites candidates to decide whether Andrew can claim against Betta Security CC for losses sustained.

An exemption clause is a term in a contract, which tries to exempt or limit the liability of a party in breach of the agreement. In this particular instance the exemption clause forms part of the form that Andrew had to complete to confirm the installation of the alarm. The question is thus whether the exemption clause forms part of the contract between the parties. Whether a contract is concluded in a particular instance must be determined in accordance with the rules relating to contracts in general.

If there is direct evidence that Andrew agreed or appeared to agree to the terms, he will be bound, either on the basis of true consensus or on the basis of a reasonable reliance on consensus by the issuer of the form. The situation becomes more difficult, however, when the other party to the contract denies that he was aware of the terms embodied in the form or receipt and there is no evidence to the contrary. To deal with such an eventuality, South African courts have adopted a set of practical rules evolved by the English courts for these so called 'ticket cases'. These 'rules' are expressed as a two-tiered process embodying three questions. The first step is to inquire whether the customer knew that there was writing on the form and whether he knew that the writing contained terms of the contract. If so, the customer is bound by the writing. If, however, one of these questions is answered in the negative, a further question is posed, namely whether the contractant, who issued the document, took reasonable steps to bring the terms to the notice of the other party. If he did so, the writing constitutes a term or terms in the contract. In so far as the courts tend to apply the questions as strict rules, it will hardly be possible in every specific case to give a satisfactory theoretical explanation for ensuing liability. In *Brink* v *Humphries & Jewell (Pty) Ltd* (2005), for example, the court looked at the outlay of the form and the size of the print of a particular clause to conclude that the particular form 'was a trap for the unwary and that the appellant was justifiably misled by it'. In the absence of actual consent, the question is essentially whether, in the light of the nature and appearance of the document in question as well as the parties' conduct, it was reasonable for the party relying on the clause to assume that the other party assented to the clause, or was prepared to be bound by the terms of the document whatever they were. This depends especially on the steps taken to bring the existence of the clause to the other's attention, the sufficiency of the steps depending on the nature of document, the clause in question, as well as its presentation and the particular circumstances of the parties.

It is now firmly settled that an exemption clause can protect against liability for a 'fundamental breach' of contract. Apart from this, the governing principle is that the courts will not enforce agreements judged to be contrary to public policy, which depends on whether a contractual provision, in view of its extreme unfairness or other policy considerations, conflicts with the interests of society. This has very rarely been shown to the courts' satisfaction. It is clearly established that this rules out a clause seeking to exclude liability for fraud, but liability may be excluded for employees' dishonest conduct from which their employer does not profit and even for a party's own 'wilful default'. Inequality of bargaining power is not in itself a ground for nullifying exemption clauses, nor does the principle of good faith operate as an independent criterion. The Constitution provides considerable potential for cutting down a range of permissible exemption clauses. Thus far the courts have not moved very far in that direction.

If one applies the law to the problem scenario it seems unlikely that the exemption clause would not be valid and enforceable. Andrew would probably not succeed with his action for damages.

9 This question requires candidates to analyse the agreement between the parties and then determine whether this agreement constitutes a partnership.

A contract of partnership should comply with all the requirements of a valid contract. This requirement is not peculiar to a partnership contract only, but applies in respect of any other contract. The law sometimes requires compliance with specific formalities for the conclusion of a specific type of contract. Those formalities must then be complied with for the contract to be enforceable. The law, however, prescribes no general formalities regarding the formation of a partnership agreement. The agreement may be concluded in writing, or orally, or even tacitly. The parties to the contract may, however, agree amongst themselves that certain formalities have to be complied with, for instance that the contract must be put in writing and signed by the prospective parties before it will be binding. In this particular question there is no mention of such an agreement and we can thus conclude that the oral agreement would be in order.

Each partner must contribute something or undertake to contribute something to the partnership. In general there are no specific restrictions on the type of contribution that must be delivered as long as it has commercial value. This contribution may be capital, services, knowledge or skill. The contribution must be made unconditionally and it must be subjected to the risk of the partnership business. A person, who makes a contribution to the partnership business on condition that it must be repaid to him irrespective of the success of the enterprise, is a creditor of the partnership and not a partner.

Each of the partners must be entitled to procure patrimonial benefit from the partnership. In practice this requirement usually entails that each partner must have the right to share in all the profits of the business of the partnership. If the agreement is concluded on the basis that the profit will accrue exclusively to some of the parties to the contract or that some of the parties will be excluded from profits sharing the relationship does not constitute a partnership. A partnership can also not be established on the basis that that one party is to receive all the profits while the other parties have to bear all the losses. Such a type of agreement is called a 'leonine partnership' and is not a valid partnership.

However, this requirement does not imply that the partners must receive equal shares in the profit. A disproportionate division is valid as is an agreement that a party will only share in the profit if the net profit exceeds a stipulated profit margin. Although such a partner will not share in the profit when the profit margin is not exceeded, he at least has a right to share in it when the business of the partnership improves. It is sensible for partners to stipulate expressly in their agreement the proportion in which profit is to be divided. If the partners did not stipulate the proportion they will normally share in the profit in accordance with their initial

contribution, and, if that cannot be determined, they will share equally. It is also a natural consequence of a partnership that the partners share in the losses of the partnership. In the absence of an agreement to the contrary, the rule is that the partners are liable to share the net loss in the same proportion that they would have divided the profit.

If we analyse the facts of the question we may make the following conclusions:

– Cathy contributes R10,000 to the enterprise on the understanding that R5,000 will be repaid to her. Her contribution is thus R5,000 and this is the amount that is subject to the risk of the undertaking. If the full amount of her contribution were to be repaid to her that would not have qualified as a contribution because she would then have been a creditor of the enterprise. Cathy also makes a loan of R5,000 to the partnership. It is permissible for a partner to receive interest on a loan to the partnership.

– Dube is responsible for the administrative work. His contribution consists of labour and this will qualify as a contribution. In terms of the principle of mutual mandate each partner has the power to bind the partnership in transactions that fall within the scope of the partnership business. This power of partners to represent each other in partnership business is one of the natural consequences of a partnership and partners can alter it amongst themselves, for instance by limiting a partner's power of representation.

– The agreement as with regard to the sharing of profits is valid as long as the partner has the prospect of sharing in the profits. This will depend on the particular facts.

It would thus appear that the agreement does constitute a valid partnership.

10 This question requires candidates to consider the personal liability of a member of a close corporation for the debts of the corporation.

Close corporations are created by registration under the provisions of the Close Corporations Act 1984. A close corporation is in law a legal entity that is quite distinct from that of the personality of its members. The doctrine of separate personality is an ancient one, although the clearest expression of it can be found in the famous case of *Salomon* v *Salomon & Co Ltd* (1897). Generally speaking, a member of a close corporation is not liable for the debts of the close corporation. A member's liability is limited to the amount that he paid for member's interest. The close corporation itself is always fully liable for its own debts; in the event that the close corporation's assets are insufficient to meet its debts it will be put into liquidation and will be dissolved.

However, the corporate structure of a corporation can be abused. The courts have recognised this in the past. In *Lategan* v *Boyes* (1980) it was suggested that the courts 'would brush aside the veil of corporate identity time and again where fraudulent use is made of the fiction of legal personality'. In the case of *Orkin Bros Ltd* v *Bell* (1921) the directors of a company were held personally liable to a seller, who sold goods to a company at the insistence of its directors when they knew the company to be in insolvent circumstances and that it was totally unable to pay for the purchase, and it appeared that the sole purpose of the transaction was to diminish the personal liability of the directors under a contract of suretyship. This was held to constitute a fraud on the seller and he obtained judgement against the directors personally. It has, however, been pointed out that the true basis of the court's decision was actually that when directors order goods, there is an implied representation by them that they believe that the company will probably be able to pay for them, so that if they actually know that there is no such likelihood, they commit fraud. In *Cape Pacific Ltd* v *Lubner Controlling Investment (Pty) Ltd* (1995) the Supreme Court of Appeal confirmed that where fraud, dishonesty or other improper conduct is found to be present the need to preserve the separate corporate identity must be balanced against policy considerations that arise in favour of piercing the corporate veil. The court also pointed out that if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or in logic why its separate personality cannot be disregarded in order to fix the individual or individuals responsible with personal liability. As in most areas of law that are based on the application of policy decisions it is difficult to predict when the courts will ignore separate personality. What is certain is that the courts will not permit the corporate form to be used for a clearly fraudulent purpose or to evade a legal duty.

Section 64 Close Corporations Act may also be used to impose personal liability. This section provides that if it appears that any business of a corporation was carried on recklessly, with gross negligence or fraudulently, the court may declare that any person who was knowingly a party to the carrying on of the business in such a manner will be personally liable for such debts or other liabilities of the corporation as the court may direct. The section also provides that the court may give such further orders as it considers proper for giving effect to and enforcing such liability. The application may be brought by the Master, any creditor, member or the liquidator of the corporation. The carrying on of business in such a manner is also declared a criminal offence, apart from any other criminal liability resulting from such conduct.

The test for recklessness is objective because the defendant's conduct is measured against the standard of conduct of a notional reasonable person. However, the test also has a subjective element because the notional reasonable person is placed in the same group or class as the defendant and endowed with his knowledge or means to knowledge. In the application of the test for recklessness the court also takes into regard factors such as the scope of operations of the corporation, the role, function and powers of its members as well as the financial position of the corporation. A corporation will normally be trading recklessly if it continues to incur debt when reasonable businessmen in the position of the members of that corporation would believe that there is no reasonable prospect of the creditors receiving payment when due (*Ozinsky* v *Lloyd* (1995)). If the debt is incurred dishonestly, for instance without an intention to repay it on the due date, the conduct would normally constitute fraudulent trading. In *L & P Plant Hire BK* v *Bosch* (2002), the Supreme Court of Appeal held that, as far as reckless trading is concerned, the aim of s.64 is to protect creditors against the prejudice caused by the alleged recklessness. A creditor can therefore only proceed in terms of s.64

if the alleged reckless conduct has a negative effect on his claim against the close corporation. If the close corporation can, in spite of the reckless trading, still meet the creditor's claim, the creditor cannot rely on s.64.

Section 65 Close Corporations Act may also provide a remedy for the creditors. In terms of this section a court may be called upon to find that the incorporation of the corporation or any act by or on behalf of it constitutes a gross abuse of its juristic personality as a separate entity. If such abuse is found, the court may declare that the corporation is deemed not to be a juristic person regarding the rights, obligations or liabilities of the corporation or of any of its members or of any person specifically referred to in such an order. The court may also give such further orders as it may deem fit so as to give effect to its declaration. Courts may disregard the separate existence of a close corporation or company if the distinction between the corporate entity and its controllers is being fraudulently, dishonestly or improperly abused to the unfair advantage of the controllers. The courts have, for instance, been willing to consider disregarding a close corporation's legal personality where a natural person who is subject to a restraint of trade, uses the close corporation as a front to engage in activity that is prohibited by the agreement in restraint of trade *Le'Bergo Fashions CC* v *Lee* (1998).

If the creditors can prove that Errol did in fact act recklessly or fraudulently, he may be personally liable for the debts of Frankfurter CC.

1 This question asks candidates to explain the impact of human rights law on the South African law.

6–10 A thorough answer will explain what human rights law entails and will refer to the bill of rights that is contained in the constitution. For full marks, reference should be made to the three generations of human rights.

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

2 In this question candidates are expected to distinguish agency from the contract for the benefit of a third party.

8–10 Full and accurate account requirements that have to be met for the establishment of the agency relationship and an explanation of the differences between agency and a contract for the benefit of a third party. 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 requirements, or one that shows little understanding of the question.

3 This question deals with the law of contract. Candidates must explain the meaning and consequence of an acceptance.

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

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 deals with employment law. It requires candidates to discuss the dismissal of an employee for misconduct.

8–10 Thorough to complete answers, showing detailed understanding of all or certainly most of the principles involved. Candidates should give examples of misconduct by employees.

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 concept of unfair discrimination.

0–1 Little or no knowledge of the topic.

5 This question tests the understanding of candidates as regards the concept of a delict.

6–10 A good explanation of the concept of a delict with all its elements. It is expected that examples will be provided and these will be credited.

3–5 Some awareness of the area but lacking in detailed knowledge. Candidates may also fail to discuss all the elements for a delict or name only one or two of them.

0–2 Little or no knowledge of the topic.

6 This question requires candidates to discuss the common law fiduciary duties that a director owes to the company.

8–10 Thorough treatment of all aspects of the question. Case law should be mentioned as well as the rationale for the rules.

5–7 Thorough discussion of most of the various fiduciary duties but lacking in detail or case law.

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 The two parts of this question each have 5 marks available.

6–10 Clear explanation of each of the two instruments together with some consideration of what distinguishes them.

0–5 Fair knowledge of the meaning of each of the two forms, perhaps lacking in detail of the distinctions between the two.

8 This question invites the candidate to decide whether Andrew has a claim against Betta Security CC for losses sustained. This question requires candidates to analyse a problem scenario from the perspective of the law of contract and to apply that law appropriately.

8–10 Clear analysis of the problem scenario – recognition of the issues raised and a convincing application of the legal principles to the facts. It is extremely likely that cases will be cited in support of the analysis and/or application.

5–7 A fairly 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. Or, a recognition of the area of the law but no attempt to apply that law.

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

9 With this question candidates are required to evaluate the problem and then determine whether a valid contract of partnership came into existence.

8–10 A thorough analysis of the scenario focusing on the appropriate rules of the law of partnership and applying them accurately. Here it is important that the general principles should be set out accurately.

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 deals with the general principles of separate corporate personality.

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 and case law will be referred to.

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.

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