Answers

1 Southern African Customs Union (SACU) is a regional arrangement between Lesotho, Botswana, Namibia, South Africa and Swaziland, which is incorporated into a treaty. Lesotho has been a member of SACU, and its predecessors since 1 July 1891. The present 2002 SACU treaty has been in force since 15 July 2004. The territories of the member countries constitute a Common Customs Area (CCA). Geographically, Lesotho is an enclave and is entirely surrounded by one single country, to wit South Africa. SACU agreement is, thus, of considerable significance to Lesotho.

Goods grown, produced or manufactured in Lesotho, or for that matter in any of the other member countries, or goods imported by any member country, move freely throughout the customs union area without the imposition of any tariff or restrictions. There are no rules of origin requirements. More than 95% of all imports into Lesotho and, if we exclude AGOA exports of clothing and apparel to the United States, then nearly 98% of all exports from Lesotho benefit by the SACU agreement. SACU agreement also ensures freedom of transport of goods within the customs union area. Traders and individuals do not need any import or export licence to buy and sell goods within the CCA. Regulations governing the movement of goods in the CCA are minimal. Payment for the goods and services is not a problem; the currencies of member countries are freely convertible into each other. Movement of capital within the customs union area is largely unrestricted. Commercial laws of member countries have a remarkable degree of uniformity. Cumulatively all these ensure free interchange of goods and services.

On the other hand, since businesses in Lesotho are relatively small, they find it difficult to compete with South African imports. A very large number of Basotho do their shopping in the markets of South Africa and bring in goods free of any tariff. This adds to the Lesotho businesses woes.

Lesotho's domestic market is small. The SACU agreement ensures access to the large market of South Africa and, thus, provides an incentive to businesses to invest in Lesotho, take advantage of its relatively low cost but highly skilled labour, and then sell their output in the mature market of South Africa. Unfortunately, it has happened only to a limited extent. Conversely, a large number of South African owned or supported businesses have been set up in Lesotho. SACU agreement allows them to import goods from South Africa free of all tariffs and then sell them in Lesotho. Lesotho, thus, has become more of a market for South African businesses.

One of the objectives of the SACU agreement is 'to facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States'. The revenues are shared in terms of a formula specified in the SACU agreement. The share of revenue that Lesotho obtains under the Agreement is substantial and constitute a very significant source of government revenue. However, the thrust of the Uruguay Round agreements and the increasing number of free trade areas agreements is to push the customs tariffs down. A free trade agreement with the EU is an example. SACU is negotiating free trade agreements with NAFTA (USA, Canada and Mexico) and others. They have the potential to reduce Lesotho's share of customs union revenue significantly.

The other objectives of the 2002 SACU Agreement are to promote conditions of fair competition in the Common Customs Area and to facilitate the development of common policies and strategies. Not much progress has been achieved so far, in these areas.

2 This question requires candidates to explain the rules relating to the acceptance and revocation of offers in the law of contract.

(a) Rules regarding acceptance of an offer

Acceptance is necessary for the formation of a contract. Once the offeree has accepted the terms offered, a contract comes into effect. Both parties are bound: the offeror can no longer withdraw his offer, nor can the offeree withdraw his acceptance.

Following are the rules regarding acceptance of an offer:

(i) Acceptance can only be made by the offeree, that is the person to whom the offer is made. The offeror intends to conclude the contract with the offeree, and not with someone else.

(ii) The offeree must have the serious intent to enter into a legally binding contract by his acceptance.

(iii) Acceptance must correspond with the terms of the offer. Thus, the offeree must not seek to introduce new contractual terms into his acceptance.

(iv) A counter-offer amounts to rejection of the offer. However, it is permissible for the offeree to make inquiries and seek more information.

(v) Acceptance must be clear, certain and unambiguous. Rules of interpretation can be applied to clarify an uncertainty or ambiguity.

(vi) The offeree may accept an offer orally, in writing or it may be implied through his conduct. However, if the law or the parties have prescribed certain formalities for acceptance, they would have to be complied with.

(vii) As a general rule, acceptance must be communicated to the offeror. Consequently, silence cannot amount to acceptance: see *Felthouse* v *Bindley* (1863). There are two major exceptions to this rule:

(1) Acceptance need not be communicated where the offeror has waived the right to receive communication. Unilateral contracts like offers for reward are an example. If Thabo has announced a reward for his lost dog, the acceptance is made by finding the lost dog. There is no need for the finder to inform Thabo beforehand that he is going to look for his dog.

(2) Where acceptance is communicated through post then it is complete as soon as the letter, properly addressed and stamped, is posted. The contract is concluded even if the letter subsequently fails to reach the offeror. However, the postal rule only applies where it is in the contemplation of the parties that the post will be used as the means of acceptance. The operation of the postal rule can be excluded by the offeror insisting that the acceptance is only to be effective on receipt.

(b) Rules regarding revocation of an offer

Revocation is the technical term for the cancellation of an offer and occurs when the offeror withdraws their offer. The rules relating to revocation are as follows:

(i) An offer may be revoked at any time before acceptance. Once revoked, it cannot be revived. Consequently, the offeree cannot purport to accept the original offer.

(ii) Revocation is not effective until it is actually received by the offeree. It is the responsibility of the offeror to ensure that. At the same time, communication of revocation may be made through a reliable third party. Once the offeree is aware of the withdrawal of the offer from a reliable third party, the revocation is effective and the offeree can no longer seek to accept the original offer.

(iii) A promise to keep an offer open is only binding where there is a separate contract to that effect. Such an agreement is known as an option contract.

(iv) In relation to unilateral contracts, that is a contract where one party promises something in return for some action on the part of another party. Most scholars take the view that revocation is not permissible once the offeree has started performing the task requested. For example, if Peter announces a reward of R1,000 to anyone crossing a certain swimming pool at a certain time, he may not be able to revoke his offer once, say Mike, starts swimming to cross the pool.

3 This question requires candidates to explain the provisions of the Labour Code Order, 1992 relating to the statutory grounds covering fair dismissal.

An employee has a right not to be unfairly dismissed. If he is unfairly dismissed, he has a right to ask a reinstatement or claim compensation from the employer in the Labour Court. The burden of proof that the dismissal was not unfair is on the employer. He can only avoid paying compensation if he can discharge this burden to the satisfaction of the court. Section 66 of the Labour Code provides that an employee cannot be validly dismissed unless there is a valid reason in writing for termination of his employment.

Under s.66 of the Code a dismissal is fair if the reason for dismissal is connected with one or more of the following:

(i) Lack of capacity

‘Capacity’ has not been defined. In entering into a contract of employment, an employee impliedly warrants his ability to do the work he undertakes. It would definitely include cases where an employee fraudulently misrepresents he has the specific skills required by the employer.

Dismissal for incapacity is commonly referred to as ‘no-fault’ dismissal because there is no need to prove fault or culpability. Incapacity may be a result of poor health, or incompetence or could be implied from poor work performance. Before an employee is dismissed on the ground of poor performance, there has to be an objective standard of performance, of which the employee is aware and is given a fair opportunity to meet the required performance standard. In *Norbert Muzondo* v *St James Mission Hospital* (2002), Norbert was employed as a Senior Technical Officer at the Hospital. He was assigned the task of carrying our surveys, draw and design files for a project and knew that due performance of the tasks was crucial to the project. He was given four months to meet the required standard but he failed to do so. It was held by the arbitrator that his dismissal was valid.

(ii) Misconduct

Any serious misconduct such as wilful disobedience of an employer’s reasonable orders, reporting for work under the influence of alcohol on a regular basis, acting dishonestly and many others may justify dismissal on this ground. In *Lesotho Amalgamated Clothing* & *Textile Workers’ Union* v *Polytex Garments* (1995), the Labour Court declined to reinstate a worker who was found guilty of serious misconduct at the place of work. Some other examples: Polaki is employed by the QE II hospital as an ambulance driver. He was asked to bring an accident victim from a town called TY. Rather than going to TY directly, he decides to do some of his personal work. By the time he reaches TY, the accident victim is dead. Polaki can be validly dismissed.

Another example: Zolani is employed as an administrative assistant in a company. His employer asked him to type a few pages. He swore at the employer telling him he was not employed to do typing. Zolani was severely reprimanded for using foul language. A few days later, his employer again asked him to type a short memo. Zolani flew into a rage and swore at the employer in vile language. He can be validly dismissed on the ground of serious misconduct.

(iii) Operational requirements of the undertaking, establishment or service.

This covers both redundancy and retrenchment. An employer may wish to close his business down, say because it is not profitable or he may like to relocate the business, say to South Africa. This type of situation is covered by the Labour Code

under what it calls the operational requirements of the undertaking. The operational requirement of an undertaking may also cover job rationalisation leading to certain job losses. So long as the employer fairly selects the employees who should be made redundant or retrenched, he can dismiss them validly on this ground. The employee is not entitled to hearing if the dismissal is on this ground.

Let us take some examples. Suppose an industrial company runs a cafeteria for providing meals to its employees. The company decides that this can be done more economically by an independent contractor. The employees working in the cafeteria can be validly dismissed on the ground that the operational requirements of the undertaking no longer require them.

In *General Food Industries* v *Food & Allied Workers' Union* (2004), Genfood bought the ailing business of Premier Food Industries in 1998. In the 1999 wage negotiations, Genfood told the Union that since the wages at Premier Food were higher than the industry norm, it would have to retrench and outsource unless the Union reduced its wage demands. The Union refused and Genfood started retrenchment consultation with the Union. The business was profitable but outsourcing would reduce costs and be more flexible. The Union thought that Genfood was not entitled to outsource to reduce its wage bill and was unenthusiastic at the consultations. Genfood nevertheless retrenched a number of employees and outsourced the relevant services. The South Africa Labour Appeals Court held that an employer could dismiss workers for operational reasons, whether it was a struggling business or a profitable one, so long as it could show that all viable alternatives had been considered to limit retrenchments. Genfood, in this case, were genuinely prepared to consider all viable solutions to avoid outsourcing if the Union could offer suggestions that would have led to the same savings as outsourcing but the Union did not do so.

(iv) Any other ground where the employer 'having regard to all the circumstances', can establish that he 'acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment'.

This is an unspecified ground, a sort of catch-all provision, which allows an employer to dismiss an employee on a ground which is substantial and sufficient but which is not covered by any of the other three grounds discussed above. Examples could be refusal to accept necessary changes in terms of employment, conflicts of personalities and legitimate commercial reasons. It has to be emphasised that the above reasons are not sufficient in themselves to justify dismissal and under all instances the employer must act as would be expected of a 'reasonable employer'.

In *Labour Commissioner* v *Highlands Water Venture* (1996), the employee, an electrician, fell off a horse on a weekend at home and fractured one of his legs. It was put under plaster, which was removed only after two months. On returning to work, the employer conducted a disciplinary hearing for the prolonged absence and, at the end of the hearing, informed him that his services had been terminated because the nature of the job that he occupied was such that his position could not be kept open for two months. The Labour Court held that there ought to have been consultation with the employee before his dismissal and that consultation when he reported for work were not sufficient. The employers did not act reasonably. The Labour Court reinstated him so that adequate consultation could take place and if his position has become redundant, then a proper procedure for laying him off should be followed.

Reasonable employers should follow the Code of Good of Practice in relation to the way they discipline and dismiss their employees. The Code lays out that employers should follow a fair procedure. When the reason is valid and the procedure is fair, subsequent dismissal will be termed 'fair dismissal'. Thus redundancy, *per se*, may not provide a justification for fair dismissal, unless the employer had considered all possible alternatives to dismissal before the dismissal is effected and has followed a proper redundancy scheme, which includes objective criteria for deciding who should be made redundant.

4 This question is in two parts. The first part asks candidates to state the advantages of the registration of a partnership in terms of the Partnership Proclamation, 1957. The second part requires them to explain when a partnership can be dissolved by the operation of law.

(a) The registration of a partnership confers several advantages on a partnership. They are enumerated below:

(i) A registered partnership needs a deed, the minimum contents of which has been set out in s.5 of the Proclamation. This is a potentially litigation limiting device. It helps if partners agree on some of the most fundamental aspects of their relationship in advance.

(ii) A registered partnership has been conferred certain attributes of legal personality by s.4 of the Proclamation. This allows the registered partnership,

- to sue and be sued in its own name,
- to hold property or assets in its own name,
- to hold certificates of allotments of rights to occupy land provided the majority of the partners are citizens of Lesotho and are Basotho in the opinion of the responsible Minister,
- to hold deeds relating to immovable property provided the majority of the partners are citizens of Lesotho and are Basotho in the opinion of the responsible Minister,
- to be dealt with as if it were an entity distinct from the partners under any law that requires or authorises the partnership to be so dealt with. For instance, a registered partnership can open a bank account and obtain insurance of its property in its own name.

(iii) An unregistered partnership is unable to sue third parties. Nor can partners sue each other. This is a serious disability. Section 28 of the Proclamation confers these rights only on a registered partnership.

(iv) Only through a registered partnership, can any one partner limit his liability under the Proclamation.

(v) It is not easy for an unregistered partnership to obtain a trading licence, which is necessary to do any trading in Lesotho.

(b) A partnership may be dissolved by the operation of law under the following circumstances:

(i) Insolvency: A partnership is dissolved by the sequestration of the estate of the partnership or by the sequestration of the private assets of a partner. When the estate of a partnership is sequestrated, the estate of each of the partners – other than a sleeping or limited partner – has to be simultaneously sequestrated. However, if a partner undertakes to pay the debts of the partnership in full within a period determined by the court and offers adequate security for the payment, then the estate of such a partner will not be sequestrated [Partnership Proclamation, 1957, (PP) s.7(1)].

(ii) Supervening impossibility or illegality: If the purpose of the partnership becomes illegal or impossible to achieve, the partnership is dissolved. For example, if X and Y, each owning a cow, enter into a partnership agreement to sell the milk and one of the cows dies, or if the two agree to make furniture and the partner with the skill to make the furniture is incapacitated or if the business of the partnership is destroyed by fire or the trading licence has been withdrawn by the government for good, the partnership is dissolved.

(iii) Death of a partner: Unless there is an agreement to the contrary, the death of any of the partners has the effect of dissolving the partnership. A partnership agreement may validly provide for its continuance for the benefit of the estate of the deceased. If the deceased partner by his will has authorised such a continuance, then it will not be dissolved. If there is no such authorisation in the will, the courts cannot order a continuance.

It is also possible to provide in the partnership agreement that the business shall be carried on by the surviving partners. They will purchase the interest of the deceased partner upon his death. Partners can enter into a so-called buy-and-sell agreement involving an undertaking among the partners each to sell his interest to the survivors and an undertaking by the survivors to buy the deceased's interest. For this purpose the partners may take out a joint life policy or, each partner may take out a policy on his own life and cede it to the other partners, the survivors being obliged to pay the proceeds to the deceased's estate in part or full payment of the deceased's interest.

Under the Partnership Proclamation 1957, the partnership deed must specify the procedure that would be followed on the death of any of the partners [PP s.5(q)].

(iv) Partner becoming an alien enemy: It may be treated as a supervening event which makes it impossible for the partnership relationship to continue. However, such a partner does not forfeit his rights after the dissolution either to his partner or to the State; only his ability to enforce them is suspended so long as he is an alien enemy.

(v) Mental illness: When a partner is declared mentally ill under the law by the court, the court may also order dissolution of the partnership or make such order it deems just.

5 The first part of this question requires candidates to discuss that a company has a separate legal *persona*. The second part of the question asks candidates to state the exceptions to the principle that a company has a separate *persona*.

(a) Company as a separate legal *persona*

Under the Companies Act, 1967, once a company has been issued with a certificate of incorporation by the Registrar, it acquires legal personality and becomes a legal person in the eye of the law.

A company is composed of shareholders. However as a legal entity, it is distinct from the shareholders. In an English case, all the shareholders died while holding a general meeting due to German bombing in World War II, yet it was held that the company survived the death of all its shareholders. A company has a perpetual succession until it is wound up.

Salomon v *Salomon & Co Ltd* (1897) established this principle authoritatively. In that case, it was held by the House of Lords that Salomon & Co in law was a different person altogether from the shareholders. Though it ran the same business as was run by Salomon, and, as before, it was managed by Salomon, yet Salomon & Co and Salomon were not one and the same person. The company was a person separate from its shareholders.

Since a company is a legal person, it has rights and duties. This has practical consequences:

Firstly, the shareholders do not own the company nor do they own its property. It is the company and the company alone which owns all its assets. The shareholders have no proportionate proprietary rights therein. Only when a company gets liquidated or wound up, the shareholders are entitled to share in the assets of the company. This facilitates the transfer of shares.

Secondly, the debts of the company are the company's debts and not those of its shareholders. Thus, shareholders, however wealthy, are not personally liable for the debts of their company. Their liability is limited to the amount unpaid, if any, on their shares. If the estate of one or more shareholders is sequestrated, it does not lead to liquidation of the company. Similarly, if the company is liquidated, it will not lead to sequestration of the estates of the shareholders.

Thirdly, the profits of the company belong to the company and not to the shareholders. Only after the company has declared a dividend may the members, in accordance with their rights as defined in the articles of the company, claim that dividend.

Fifthly, it is the company which decides, in accordance with its articles, who should represent it. They are usually the directors. Shareholders cannot, by virtue of their membership, act on behalf of the company.

Sixthly, a company, though a person in the eye of the law, has a limited existence. The objects clause of its memorandum of association determines the boundary of its existence. The *ultra vires* rule prevents a company from engaging in activities that fall outside its objects. In *Ashbury Railway Carriage* & *Iron Company* v *Riche* (1875), it was held that even if every shareholder of the company had said, 'That is a contract which we desire to make, which we authorise the directors to make, to which we sanction the placing of the seal of the company', the company would not thereby be authorised to make that contract because that would have been *ultra vires* the objects of the company.

(b) Exceptions to company as a separate legal *persona*

The principle of separate corporate personality is a cornerstone of company law. Salomon's case cast a veil between a company and its members. Most of the time the veil is opaque through which one cannot see who the members are. However, exceptionally, in some instances, both the legislature and the court disregard the corporate personality and look to the 'realities' behind it with a view to impose liability on the shareholders, rather than the company, usually in the interest of the public. This approach has come to be known as 'lifting the veil' of corporation. Whether and when the corporate veil should be lifted is a decision that is taken exceptionally; to take it lightly or liberally may destroy in the most fundamental way the very foundation on which the edifice of company law stands.

Following are the situations when the corporate veil can be lifted:

(i) The court may go behind the veil of incorporation in time of war and look at the nationality of its shareholders to determine if it should be regarded as an 'enemy': see *Daimler Co Ltd* v *Continental Tyre and Rubber Co Ltd* (1916).

(ii) The corporate veil may be disregarded if the company is used as a means to perpetrate a fraud: see *Re Darby, ex p Brougham* (1911) and *Cape Pacific Ltd* v *Lubner Controlling Investment (Pty) Ltd and others* (1995).

(iii) The separate existence of a subsidiary cannot be used as a device to evade a director's fiduciary duties to the holding company: see *Robinson* v *Randfontein Estates Gold Mining Co Ltd* (1921).

(iv) The veil can be lifted to prevent the deliberate evasion of a contractual obligation: see *Gilford Motor Co* v *Horne* (1933).

(v) In *Ebrahimi* v *Westbourne Galleries* (1973), it was held that where a private company is founded on the basis of a personal relationship between its members, the court may order its winding up on the ground that it was just and equitable to do so if that personal relationship has soured badly, or if one member persistently acted inequitably. Many small companies are, in reality, quasi-partnerships and would qualify to take advantage of this ruling. In such cases courts may lift the veil of incorporation to discover the substance and reality of the association rather than its form as a company.

(vi) Lifting the corporate veil under the Companies Act, 1967: It has always been recognised that the 'legislature can forge a sledge-hammer capable of cracking open the corporate shell'. Under the Companies Act, 1967 there are a number of circumstances where the veil can be lifted. Examples where this may occur are: where in the course of winding up or judicial management of a company, it appears that any business has been carried on with intent to defraud creditors or for any fraudulent purpose, the courts may declare that any persons, including present and past directors, who were knowingly parties to the fraud shall be personally responsible for the debts of the company (s.275 CA); the directors and officers of a company can incur personal liability to holders of bills of exchange, promissory notes, cheques or orders for money or goods when purporting to act on behalf of the company where the name of the company is not publicised as required. (s.86(4) CA)

6 This question asks candidates to explain the clauses that are required to be contained in a company's memorandum of association.

Every company is required to submit a memorandum of association to the Registrar of Companies. The memorandum is the basic constitution of the company and deals with the company's external relationship with the outside world. It must contain clauses dealing with the following five matters:

(i) Name clause contains the name of the company.

(ii) Objects clause, which states the purpose for which it was created. As from 1 March 1985, the objects of a company must be divided into main objects and other objects. The main objects must be described in 'detail and clearly'. Since the plural expression main objects has been used, it would appear that a company may have more than one main objects. The 'capacity' of the company is determined by the main objects and the Act states that included in that capacity are 'unlimited objects ancillary to the main objects in so far as they are necessary or reasonably incidental to achieve the main objects'. The ancillary objects thus must have relevance to the main objects. A company, therefore, has the capacity to carry out such businesses as fall within the scope of the main objects or ancillary objects.

(iii) Limited liability clause, which states that the liability of the members is limited. What it means is that in the event of a company being unable to pay its debts, a member cannot be called upon to contribute more than the nominal value of his shares. He need pay nothing, if his shares are fully paid up. If they are not, he need pay only such amount as remains unpaid on the shares.

(iv) Authorised share capital clause, which sets out the maximum share capital that the company is authorised to issue, the number of shares into which it has been divided and the value of each of the share. e.g. 'The share capital of the company is R5,000 divided into 5,000 shares of M1 each'. The authorised capital cannot be less than R1,000. The capital clause

can be altered later on and the amount of authorised capital increased. That will require an ordinary resolution [s.63 CA]. However, if the authorised capital is to be reduced, it requires a special resolution and confirmation by the court [s.67 CA].

(v) Association clause which merely states that the subscribers to the memorandum wish to form a company and agree to take the shares listed against their names. In Lesotho, women married in community of property would require the consent of their husband before they can subscribe to a memorandum. Underneath this clause are the names, addresses and description of each subscriber and the number of shares subscribed by each of them. Each of them must sign in the presence of at least one witness, who too must sign and provide his address.

7 This question asks candidates to explain when the members may wind up their company voluntarily and state the legal consequences of such a winding-up.

(a) The Companies Act, 1967 provides for two kinds of voluntary winding up: members' voluntary winding up and creditors' voluntary winding up.

Members' voluntary winding up takes place under two circumstances:

(i) when the directors of the company furnish to the Master of the High Court a sworn statement, supported by an auditor's certificate, that the company has no liabilities, or

(ii) if it is not so, then the directors furnish such security as the Master of the High Court may consider adequate to meet the debts of the company within 12 months from the date of the special resolution for voluntary winding up. The director can be reimbursed by the company in respect of reasonable expenses incurred by him in furnishing such security [s.213 CA].

The members' voluntary winding up confers certain advantages. By s.215, the liquidator is appointed by the members in a general meeting and his remuneration fixed. The directors and members may appoint one they trust.

All other cases of voluntary winding up are regarded as creditors' voluntary winding up. The company must give at least seven days' notice of the meeting at which the resolution for voluntary winding up is to be proposed. It must be published in the Gazette and at least one newspaper circulating where the registered office or principal place of business of the company is situated [s.219(2) CA]. In addition, the company must summon a meeting of the creditors for the day, or the next day, following the day on which the company meeting is to be held [s.219(1) CA]. Not only a meeting called without due notice is invalid but both the company and the directors are guilty of an offence and can be fined [s.219(5) Companies Act, 1967].

In creditors' voluntary winding up, a liquidator may be nominated both by the creditors and the members. However, in the case of a difference, the one nominated by the creditors becomes the liquidator unless a court orders otherwise.

(b) By s.212, when a company is wound up voluntarily, the company ceases to carry on its business except that is necessary for the beneficial winding up. However, the corporate state and corporate powers continue until the company is dissolved. By s.215(2), in the case of members' voluntary winding up, the directors of the company cease to have any authority without the sanction of the company in a general meeting or the liquidator. In a creditors' voluntary winding up it is the creditors and not the company in a general meeting, which may sanction the continuance of the directors.

The liquidator administers and takes control of the company's business and assets [ss.185,188,215(2) and 220(1) CA]. The legal status of a liquidator is difficult to define. In some ways his functions are analogous to the directors, whose function he assumes on appointment. Thus, he is a fiduciary agent of the company and a trustee of its property. However, the property of the company does not vest in him. The company continues to have its separate legal identity and owns all its property. When a liquidator makes a contract, it is on behalf of the company. He also has special statutory duties and is in a fiduciary relationship also to the creditors. The basic function of a liquidator is to realise company's assets and then distribute them, firstly to pay the costs of winding up, then amongst the creditors to pay their debts and finally, to distribute the surplus, if any, among the members.

8 This question requires candidates to analyse the problem scenario from the perspective of the law of delict paying particular attention to the requirement of wrongfulness, fault and causation.

An employer is vicariously liable in delict for the harm caused by his employee to the person or property of a third party. The harm must have been caused wrongfully. The conduct of the defendant is considered wrongful if it constitutes breach of a duty owed by the defendant to the plaintiff, which is recognised by law for the purpose of liability. Breach of duty involves (a) whether, in the circumstances, there was a duty upon the defendant to act reasonably towards the plaintiff, and (b) whether the defendant breached that duty. The reasonableness test for determining wrongfulness is objective and the courts view the matter from the point of view of a reasonable bystander and do take into account public policy considerations.

A wrongful act is not enough to impose liability on the wrongdoer; he must also be at fault. A wrongdoer is at fault if he acted intentionally or negligently. The foreseeability test is employed to determine *culpa* (negligence). *Culpa* arises if the defendant (i) foresaw the reasonable possibility of harm to the plaintiff resulting in patrimonial loss and, consequently, requiring him to take reasonable steps to guard against such occurrence and (ii) yet he failed to take such steps: see *Kruger* v *Coetzee* (1966).

We should begin by asking whether it was reasonable for Tsogo Holdings to foresee that a regular patron, like Mike, at the resort could be a danger to another patron? Tsogo Holdings asked security guards to prevent people from entering the resort with anything

that may endanger the security of other patrons. As a regular visitor, Mike must have been known to the security guards. There was no good reason to suspect Mike. In any event, he was asked if he had any such thing and he indicated he had none. In terms of the holding in *Pretoria City Council* v *de Jager* (1997), Tsogo Holdings was only obliged to take reasonable steps to guard against foreseeable harm to resort visitors. This requires a consideration of all the facts and circumstances of the case. Just because the harm which was foreseeable did occur does not mean that the steps taken were necessarily unreasonable. Considering that some 20,000 persons visit the resort during a weekend, and that a facility such as a resort should be consumer-friendly, it would be unreasonable to require Tsogo Holdings to body-search each and every patron. If there were reason to be suspicious of a particular person the position may have been different. However, that is not the case here. Public policy considerations do not require that a business must body-search each and every person entering the business premises. In short, Tsogo Holdings did not have a legal duty to protect a person in the position of Shan against persons in the position of Mike. Tsogo Holdings did take reasonable steps to prevent harm to their patrons.

A wrongdoer is liable only for the consequences he has legally caused. Causation has two elements: factual causation and legal causation. Factual causation relates to the question as to whether the defendant's wrongful act was a *cause* of the plaintiff's loss. It is determined by applying *conditio sine qua non* test or the 'but for' test. If the wrongful act is not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. If there was factual causation, then a second enquiry arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss. If not, the loss is considered too remote and is not recoverable. This is sometimes called 'legal causation' and policy considerations based on reasonableness, fairness and justice play a role in its determination: See *International Shipping Co (Pty) Ltd* v *Bentley* (1990).

Since on leaving the resort Mike would have been entitled to the return of his knife in any case, and could then harm Shan, the omission of the guards to body search Mike was not legally connected to the incident that injured Shan. In other words, the loss suffered by Shan in law is too remote and cannot be recovered from Tsogo Holdings.

Note: The facts in the problem scenario are not too dissimilar to *Tsogo Sun Holdings (Pty) Ltd* v *Qing-he Shan* (2006), where the SA Appellate Court reached a similar conclusion.

9 This question deals with a number of inter-related issues like the authority and duties of an agent and consequences for their breach.

(1) Advice to Hypervama

Hypervama is Mr Smith's principal. A principal is only bound by acts of his agent that are within the authority granted by the principal to the agent. If an agent acts in excess of and beyond his authority, the principal is not bound unless he chooses to ratify what the agent did.

An agent must perform his mandate strictly in accordance with the authority given to him by the principal. The authority of an agent may be express or implied from the agreement or implied by law. In certain circumstances, agency may rise where there has been no authority, for example by estoppel or by ratification. The problem does not deal with ratification or authority implied by law; so they will not be discussed further.

The scope of actual authority of an agent arises from the agreement he makes with the principal. It could be expressed in writing or words. It may be implied from the agreement. In terms of such a contract – also called the mandate of the agent – the principal authorises the agent to act on his behalf. Sometimes, the express authority of an agent is impliedly supplemented to do what is necessary for executing the mandate effectively. The source of both express and implied authority is the agreement between the principal and the agent. The principal, however, may place limitations on the extent of the agent's authority and the agent is bound to respect them.

In the problem, Mr Smith is the buying manager of the Hypervama Supermarket. He has express authority to order goods for the Supermarket. However, his authority has been expressly limited; goods exceeding R20,000 can only be ordered on the basis of purchase orders signed by the finance director.

So when Mr Smith orders butter, without a purchase order signed by the finance director, worth R100,000 'to impress his boss' and to avoid the 'New Year rush', it is outside his express authority.

However, the express authority of an agent can be impliedly supplemented in order for an agent to carry out his mandate effectively. However, it is done only where such authority is necessary, in the business sense, to give efficacy to the mandate of the agent, to achieve the end desired by the principal. In *Mullin (Pty) Ltd* v *Benade Ltd* (1952), it was stated that:

'You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties 'what will happen is such a case?' they would have replied, 'of course, so and so. We did not trouble to say that; it is too clear.'.'

Every agent has implied authority to employ all the usual and necessary means for effectively executing the mandate given to him by the principal. But such implied authority is limited to the purpose of the business for which the agent was appointed.

Applying these principles to the problem at hand, it can be clearly seen that Mr Smith did not have any express or implied authority to purchase any goods the value of which exceeded R20,000, for the Hypervama Supermarket when the finance director was around to sign a purchase order. However what about a situation when the finance director was not around to sign a purchase order, the Supermarket needed to replenish its ordinary business lines like butter and, in the considered

opinion of the buying manager, any delay in the purchase could harm the interest of his principal, to wit the Hypervama Supermarket? In the problem, the Supermarket was running short of butter, New Year was approaching, the finance director who had the authority to sign the purchase order was overseas and could not be contacted, and any delay in the purchase of butter could be risky in view of the looming orders for the New Year rush. Under these circumstances, if someone had said to the parties 'what will happen in such a case?', they would have replied, 'Of course, under the circumstances, the buying manager would have the implied authority to purchase goods on normal business lines in reasonable quantities. Also the parties did not express it in so many words because it was all too obvious.' In short, it can be said that the Hypervama Supermarket and Mr Smith impliedly agreed that Mr Smith would have authority to order goods under the circumstances set out in the problem. The question still remains whether butter worth R100,000 could be regarded as an order for a reasonable quantity. The answer would depend on the turnover figures for the butter, which are not given and so, it can be assumed, that the order was indeed for a reasonable, not extravagant, quantity. See *Kahn* v *Leslie and Son* (1928) for a supporting case.

At the same time, as a buying manager, Mr Smith's mandate was not only to order goods but also to ensure that the goods supplied were in what lawyers call 'merchantable condition', that is marketable. When Mr Smith ordered butter for the Hypervama Supermarket, it was his duty to make sure that the butter delivered was indeed in marketable condition. However Mr Smith did not check the condition of the butter before accepting delivery and signing the delivery note. The butter had melted and it could be easily discovered. Mr Smith failed to do so. An agent has a duty to exercise such care, skill and diligence which a 'reasonably prudent man' would exercise in similar circumstances. Mr Smith failed to exercise this care, skill and diligence when accepting delivery of butter worth R100,000. For breach of this duty, Mr Smith will be liable to his principal, namely the Hypervama Supermarket.

To conclude, in the circumstances set out in the problem, Mr Smith had implied authority to order butter for the Hypervama Supermarket without a signed purchase order but he failed to exercise the requisite care, skill and diligence his mandate required when accepting delivery of butter and for this he is liable to his principal, that is the Hypervama Supermarket.

(2) Advice to the Butter Company

The Butter Company can rely on Mr Smith's implied authority, implied warranty of authority, as well as on his ostensible authority.

Generally speaking, an agent is not personally liable on the contract he makes on behalf of his principal. However if he contracts as agent without authority, he may be personally liable to the third party contracting with him. It is no answer or defence for an agent to say that he acted for the benefit of his principal.

When Mr Smith ordered butter from the Butter Company, he was doing so on behalf of the Hypervama Supermarket. The parties to the contract were the Butter Company and the Hypervama Supermarket. Mr Smith was not a party to this contract. Therefore, any claim that the Butter Company may have for the R100,000 butter will have to be directed to the Hypervama Supermarket. Since, as explained earlier, Mr Smith had implied authority to order butter from the Butter Company, the contract was binding on his principal, namely the Hypervama Supermarket.

Furthermore, an agent may be personally liable for breach of implied authority of warranty. This liability exists even if the agent acts in good faith or under an honest, but mistaken, belief that he has the authority under the circumstances to contract on behalf of the principal. The legal principle is that anyone who professes to contract as an agent impliedly warrants that he has the authority to make that kind of contract unless he disclaims such authority or the third party knows that the agent does not have the authority.

So when Mr Smith ordered butter from the Butter Company for the Hypervama Supermarket as its buying manager, he impliedly warranted to the Butter Company that he had the authority to purchase butter on behalf of the Hypervama Supermarket. The Butter Company did not know that Mr Smith was expressly prohibited to order goods value of which exceeded R20,000 without the purchase order signed by the finance director. This implied warranty made Mr Smith personally liable to the Butter Company for the butter should the principal (Hypervama Supermarket) refuse to pay.

Lastly, the Butter Company can rely on the ostensible or apparent authority of Mr Smith as well.

Havenga, a scholar, explains: 'If a principal has culpably created the false impression that another person has the authority to conclude certain legal transactions on his behalf, and the third party then acts to his detriment on the strength of that impression, then that principal can be prohibited by law from denying the authorisation. He is then bound to the transaction as if he had indeed authorised the agent to conclude it.' In such a case, the agent is said to have ostensible authority to enter into certain contracts and the principal is simply prevented from denying the ostensible authoirty of the agent.

The ostensible authority does not arise from an agreement. If a principal employs someone in a certain capacity and it is generally recognised that servants or agents employed in that capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his ostensible authority. The principal is bound even though he never, expressly or impliedly, authorised the servant or agent to do these acts. The agent's authority flows from the fact that persons employed in the particular capacity in which he is employed normally have authority to do what he did. See *Reed* v *Sager's Motors (Pvt) Ltd* (1970).

Thus, the Butter Company could argue that Mr Smith was the buying manager of the Hypervama Supermarket, that buying managers of supermarkets normally have the authority to purchase goods on behalf of the supermarket and there was nothing suspicious when Mr Smith ordered butter for the supermarket. Therefore, it was indeed within the scope of the ostensible authority of Mr Smith to order butter from a supplier like the Butter Company and that this authority flowed from the fact that

Mr Smith was employed as a buying manager and the fact that buying managers usually have authority to purchase goods for the business of which they are buying managers. The fact that Mr Smith was prohibited to purchase the goods without a signed purchase order was irrelevant because the Butter Company was not aware of it. The result will be that Hypervama Supermarket will be prevented from denying the authority of Mr Smith to order butter on its behalf.

In short, the Butter Company has a good case to claim R100,000 from Hypervama Supermarket.

10 This is a problem question on the *ultra vires* rule. Your task is to decide which, if any, of the transactions are *ultra vires*.

(a) The purchase of paints and pigments from Bright Chemicals

This type of transaction is not specifically provided for by the objects clause. However, under the doctrine of implied powers, it would be upheld as valid if it were reasonably necessary or incidental to the main object of manufacturing and retailing bikes: see *Attorney-General* v *Great Eastern Railway Co* (1880). The paint could certainly be used to paint the bikes.

However, the ultimate use to which the paints and pigments are put, namely packing and selling them in small tins in retail is not authorised by Bikes (Pty) Ltd's objects clause. However, unless Bright Chemicals have actual notice of the fact that the company has changed its business, it will be able to assume that its managing director, Alfred, is properly exercising the powers of the company and has ordered paints and pigments for painting the bikes.

Therefore, it is likely that Bright Chemicals will be able to rely on Alfred's ostensible authority to bind the company and be in a position to enforce the contract for the supply of paints and pigments.

(b) The purchase of machinery from Best Manufacturers

This contract is not specifically provided for by the company's objects clause and it is unlikely to be upheld as an implied power because it cannot really be said to be incidental to the company's *intra vires* business of manufacturing and retailing bikes. Consequently this contract would seem to be beyond the company's legitimate activities and, therefore, *ultra vires*: see *Re Jon Beauforte (London) Ltd* (1953).

(c) The loan from New Bank

If the activity authorised by a clause is capable of being 'pursued in isolation as the sole activity of the company', then the clause is regarded as an object of the company. Powers, on the other hand, are 'by their very nature incapable of standing as independent objects, which can be pursued in isolation as the sole activity of the company'. Borrowing is a power and can hardly ever be an object of a company. Borrowing is not an end in itself and must be for some legitimate purpose of the company: See *Re Introductions Ltd* (1969). Consequently, New Bank has loaned the money to the company in pursuance of a power.

The problem states that the bank loaned the company money to finance the new venture. Therefore, it would seem that the bank had knowledge of the fact that the company had changed its business. This should be enough to put the bank on enquiry and place an obligation on them to verify that the loan was for an *intra vires* activity. Borrowed money was used to finance an *ultra vires* activity. The bank was supposed to know the company's memorandum and could easily see that it was *ultra vires*. It is unlikely it will succeed in recovering its money even if the transaction was ratified by all shareholders: see *Ashbury Railway Carriage* & *Iron Company* v *Riche* (1875).

An *ultra vires* transaction is void *ab initio*. Therefore, the usual rules that follow a void transaction follow. Since the company had R5,000 in its bank account, it would be deemed to have spent them first. If the bank account of Bikes (Pty) Ltd has any money left, the New Bank may be able to trace and claim it. If New Bank's money is used to purchase an asset which can be traced and identified, the bank may claim that asset as well.

(d) Payment to Hope

In *Re Horsely* & *Weight Ltd* (1982), one of the objects in the company's memorandum was, *inter alia*, to grant pensions to employees, ex-employees, directors and ex-directors. A pension policy was taken out by the company acting under its object for Mr Horsely, who was a director and about to retire. It was attacked on the ground that the object was no more than a power and can only be exercised in circumstances in which a grant of a pension will benefit the company's business. The court, however, held that the 'objects of a company do not need to be commercial; they can be charitable or philanthropic; indeed they can be whatever the original incorporators wish, provided they are legal. Nor is there any reason why a company should not part with its funds gratuitously or for non-commercial reasons if to do so is within its declared objects'.

Payment to Hope fell within the scope of clause (c) of the memorandum. Following *Re Horsely* & *Weight Ltd* it is capable of being an object. On that interpretation, payment to Hope would seem to be valid. If a clause was properly construed to be an object then Alfred has validly exercised his power despite the fact that no tangible benefit will accrue to the company.

However, if clause (c) is construed as a power, it will have to be shown that it was for the benefit of the company as a whole. Shareholders are usually the best judge of the interests of their company and their judgement is usually accepted by the court. Alfred, as a managing director, certainly has an ostensible – if not actual – authority to make a payment to Hope. If need be, he has to ask the shareholders to ratify his action to remove any doubt.

This marking scheme is given as only 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 asks the candidates to explain the significance of the Southern African Customs Union (SACU) for business in Lesotho.

6–10 Answers in this band will provide a good to complete answer demonstrating a clear understanding of the significance of the SACU for business in Lesotho.

0–5 A less complete answer, somewhat unbalanced and answering correctly only part of the question. Or, an answer that demonstrates some but little coherent, understanding of SACU.

2 This question requires candidates to explain the rules relating to acceptance and revocation of an offer in contract law. The marks allocated for each part are equal and candidates are required to deal with both parts equally, although where appropriate markers will be at liberty to add one mark from either part to reward particularly good answers in the other part.

6–10 A good to complete answer dealing with most if not all of the rules relating to acceptance and revocation of offers. It is expected that cases or examples will be provided and these will be rewarded.

0–5 A less detailed answer, perhaps recognising what the question relates to but lacking in detailed knowledge of the rules.

3 This question requires candidates to explain grounds upon which dismissal of an employee may be regarded as fair under the provisions of the Labour Code Order, 1992.

6–10 A good explanation of the grounds upon which dismissal may be fair. It is expected that cases or examples will be provided and these will be credited.

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

0–2 Little or no knowledge of the area.

4 This question is in two parts. The first part requires candidates to state the advantages of the registration of a partnership in terms of the Partnership Proclamation, 1957. The second part requires them to explain when a partnership can be dissolved by the operation of law.

(a) 3–5 A clear enumeration of the advantages of the registration of a partnership under the Partnership Proclamation.

0–2 Unbalanced to very unbalanced answer, focusing on only some of the advantages and ignoring the others, or one which shows little understanding of the subject matter of the question.

(b) 3–5 A clear enumeration of the grounds on which a partnership can be dissolved by operation of law.

0–2 Unbalanced to very unbalanced answer, focusing on only some of the grounds, or one which shows little understanding of the subject matter of the question.

5 This question is in two parts. The first part requires candidates to explain that in law a company is distinct from its shareholders. The second part asks them to state the exceptions to the principle that a company is distinct from its shareholders.

(a) 3–5 A clear explanation of the principle of separate corporate personality and its consequences.

0–2 An unbalanced answer, perhaps only dealing with one element of the question and ignoring the others, or one which shows little understanding overall.

(b) 3–5 A clear enumeration of the exceptions to the corporate *persona* principle. It is expected that cases or examples will be provided and these will be credited.

0–2 Unbalanced to very unbalanced answer, focusing on only some of the exceptions or one which shows little understanding of the subject matter of the question.

6 This question asks candidates to explain the clauses that are required to be contained in a company's memorandum of association.

8–10 A thorough to complete answer explaining the clauses that are required to be contained in a company's memorandum of association.

5–7 Reasonable treatment of the area generally.

0–4 Very unbalanced answer, lacking in understanding of the question as a whole.

7 This question asks candidates to explain when the members may wind up their company voluntarily and state the legal consequences of such a winding-up. Though the question is divided in two parts to indicate to candidates the weighting they should apply in answering the question, the candidates may answer the two parts in one whole answer. Where appropriate, markers will be at liberty to add one mark from either part to reward particularly good answers in the other part.

6–10 Thorough to good treatment of the topic. Clearly setting out the circumstances in which members may wind up the company voluntarily as well as the consequences of such winding-up.

0–5 Reasonable to weak answer, perhaps showing some knowledge but incomplete understanding of the topic generally. Lower band answers will be unbalanced and will show very little or no understanding.

8 This question asks candidates to analyse the problem scenario in terms of the rules relating to the law of delict and, in particular, advise Shan if he has a valid claim against Tsogo Holdings.

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

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

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

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

9 This question asks candidates to analyse the problem scenario and advise Hypervama Supermarket and the Butter Company. It deals with a number of inter-related issues like the authority and duties of an agent and consequences for their breach.

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

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

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

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

10 This question asks candidates to apply the *ultra vires* rule to the four transactions in the problem.

8–10 A good analysis of all the four scenarios with a clear application of the *ultra vires* rule.

5–7 Some understanding of the legal rules applicable to scenarios but perhaps lacking in detail.

0–4 Weak answer lacking in knowledge or application, with little or no reference to the legal rules.