Answers

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

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 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.

2 **(a)** **Express terms**, are those terms that the parties incorporate into their contract by means of articulated declarations of intent. A term is articulated if it is expressed in so many words, whether in writing or orally.

(b) **Tacit terms** are terms which have not been expressed in words but are based on the parties' true intention, or their intention imputed by the law. It will, for instance, be based on the parties' true but unexpressed intention, where it had in fact been considered during negotiations but had seemed so self evident so as not to necessitate an expressed provision. An imputed tacit term will only be read into a contract if both parties overlooked or failed to anticipate the event in question. It is based on their assumed intent in respect of a given situation they had not bargained for.

A tacit term is read into a contract only if it is reasonable and if it is necessary in a business sense for the proper functioning of the contract. The test to determine whether a tacit term forms part of a contract, is to determine what the parties would have answered if, at the time of contracting the contract, someone were to ask then what the position in respect of a specific situation or problem would be. If both parties were to answer then the position is expounded in the alleged tacit term, the court would then read the tacit term into the contract.

(c) **Implied terms** are also terms which have not been expressed in words and can be incorporated into the contract by operation of law. When a contract has been classified as a particular type of contract, the law imputes certain consequences to the contract. For example, if it has been classified as a contract of sale, a guarantee against latent defects is included in the contract by operation of law. The guarantee against latent defects, therefore forms part of every contract of sale unless the parties specifically alter or exclude it.

Terms can also be implied by trade usage if it is so universally and notorious that a party's knowledge and intention to be bound by it can be presumed. The trade usage would have to be long-established, reasonable, uniformly observed and certain. Trade usage is a hybrid type of term as it can either be inferred by the courts as a tacit term, where the trade usage is known to both parties, or be recognised as an implied term in certain circumstances if one party cannot prove that the other party knew of the trade usage.

3 Compensation for damage suffered by a person can be recovered from another person only if there are legally recognised grounds for recovery. 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 the party suffering the damage. A delict is any unlawful culpable act whereby a person (the wrongdoer) causes the other party (the person injured) damage or injury to personality, and whereby the prejudiced person is granted a right to damages or compensation, depending on the circumstances. From this definition the following elements of a delict may be isolated, that is (a) an act, (b) unlawfulness, (c) fault, (d) causation, and (e) damage or injury to personality (harm). To be held liable for the harm which he or she has caused another, the wrongdoer's action must comply with all these requirements or elements.

Not all acts (including omissions) that are harmful to others are delicts. Before an act can be deemed to constitute a delict it must also (in addition to meeting the other requirements) be unlawful. An act or conduct is wrongful if it either infringes a legally-recognised right of the plaintiff or constitutes a breach of a legal duty owed by the defendant to the plaintiff. The legal duty may be imposed by statute or by operation of common law, in which case the imposition of the duty depends upon the particular circumstances of the case. The inquiry into whether the plaintiff's right has been infringed or the defendant has contravened a duty is objective in the sense that the defendant's state of mind, motives and the degree of care taken are not considered. The focus is on whether the infringement of the plaintiff's interest was in the particular circumstances objectively justifiable or unjustifiable.

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. Each of these is merely a different expression of the general criterion of reasonableness. To determine whether conduct is reasonable, courts must consider and balance the particular conflicting interests of the parties, the parties' relationship to each other, the particular circumstances of the case, whether the harm was foreseeable, whether any superior legal right exists, constitutional values and any other appropriate considerations of social policy. Proof of the existence of a recognised ground for justification, such as, for example, self-defence, conclusively demonstrates the reasonableness of the defendant's conduct. Grounds of justification that have been accepted as defences are therefore recognised expressions of the constant application of the test of reasonableness in particular situations.

4 In terms of the Close Corporations Act 1984 the constitutive documents of a close corporation consist of a founding statement and an optional association agreement.

The founding statement must be in the prescribed form (CK 1) and serves as the charter of the close corporation and sets out the corporate structure. It must be signed by or on behalf of every person who is to be a member of the corporation upon its registration. This document requires the following particulars:

(i) The full name of the corporation.
(ii) The principal business of the corporation.
(iii) The date of the end of its financial year.
(iv) The postal address to which all communication to the corporation may be sent (known as the registered office).
(v) The name and address of the corporation's accounting officer.
(vi) The full names and identity numbers and residential address of each member.
(vii) The size, expressed as a percentage, of each member's interest in the corporation.
(viii) Particulars of the contribution of each member to the corporation.

The members of a close corporation may in addition enter into a written association agreement regulating internal matters of the corporation not inconsistent with the provisions of the Act. Although it is advisable to enter into an association agreement, it is not a prerequisite for the formation or running of a close corporation. By utilising an association agreement the necessary flexibility, tailored to the needs of the particular undertaking, can be obtained.

A close corporation acquires legal personality and corporate status by its registration in terms of the Act. Registration itself is effected by the Registrar of Close Corporations in Pretoria, where a register of the names and registration numbers of, and the statutory prescribed documentation concerning the close corporations are kept. Application for registration is made by lodging with the Registrar:

(i) a duly completed founding statement in prescribed form with proof of payment of the prescribed fee;
(ii) if the founding statement has been signed by someone else on behalf of a member, a power of attorney by such member authorising the person to sign the form;
(iii) the written consent of the accounting officer to his or her appointment;
(iv) a copy of the form indicating the approved name reservation for the corporation.

Upon registration of the founding statement the Registrar must assign a registration number to the corporation and issue a Certificate of Incorporation to the corporation. This certificate is conclusive evidence that all the requirements for incorporation have been complied with.

5 This question requires candidates to analyse the liability of various partners for partnership debts.

Prior to the amendment of the rules of court, litigation by and against the partnership was a cumbersome process. As the partnership is not a legal entity, the suit had to be brought against all persons who were partners when the cause of action arose. This procedure is still available but the rules of court now provide for an alternative and more practical method. It is primarily due to the rules of procedure that under the present legal dispensation, partners are co-creditors and co-debtors in respect of the rights and obligations of the partnership during the existence of the partnership. A partner is, therefore, not entitled to institute an action for the recovery of a debt owed to the partnership on his own. That action must be brought by all the partners jointly. The contrary also holds true: should the partnership be in default, the creditor is not entitled to sue a single partner for the debt but may only institute an action against all the partners jointly (*Muller* v *Pienaar* (1968)).

After dissolution of the partnership, the legal position changes. The partners then become joint and several co-debtors in respect of any of the unpaid debts of the partnership. A creditor of the partnership can then claim the whole amount from any of the

partners individually. The creditor acquires this right upon the dissolution of the partnership, that is to say before liquidation of the partnership estate has been completed (*Lee* v *Maraisdrif (Edms) Bpk* (1976)). If that partner pays more than his or her proportional share of the debt, the partner may recover the excess payment from his former partners. The partners remain, however, ordinary co-creditors in respect of the claim of their former partnership. An action against a debtor of the former partnership must, therefore, be instituted jointly.

The partners and the third party are entitled to alter the above rules by agreement. They may for instance agree that the partners will be jointly and severally liable to the third party for specific debts during the existence of the partnership.

Usually, only ordinary partners will be liable for partnership debts. Extraordinary partners, such as silent partners and partners *en commandite*, will not incur liability to third parties as long as they refrain from acting as ordinary partners.

6 In theory, the ultimate control over a company's business lies with the members in a general meeting. The Companies Act requires a special resolution for most of the major decisions to be taken by a company. Although the Act does not recognise conduct by unanimous assent, this method of taking decisions is recognised by common law.

(a) Special resolutions

The requirements for a valid special are that the notice convening the meeting must give 21 clear days' notice in writing of the meeting and must state the intention to propose a special resolution, the terms and effect of the resolution and the reasons for the resolution.

The resolution must be passed at a general meeting at which members holding in the aggregate at least one quarter of the total votes of all members entitled to vote at a general meeting are present in person or by proxy. If less votes are present or represented at this meeting, the meeting must be adjourned to a day not earlier than seven days and not later than 21 days after the date of the meeting when those present will constitute a quorum. On a vote by a show of hands the resolution must be passed by at least three quarters of the number of members entitled to vote on a show of hands at the meeting and who are present in person or by proxy.

A special resolution must be lodged with the Registrar of Companies within 30 days after it was passed. Any special resolution not so lodged within six months will lapse and be void. Once a special resolution has been registered every member becomes entitled to a copy of the resolution on request.

(b) Conduct by unanimous assent

Despite the general rule that corporate decisions are to be taken at properly constituted meetings of the company and not by separately obtaining the individual assent of members, numerous South African and British decisions recognise that a company can perform certain acts validly without any meeting being held, provided that all members were fully aware of what was being done and unanimously assented thereto.

For example, the principle of unanimous assent enabled the Appellate Division to hold in *Gohlke and Schneider* v *Westies Minerale (Edms) Bpk* (1970) that the members by their unanimous assent, as evidenced by a contract signed by all of them, could validly appoint a director to the board without any formal meeting being held. In coming to this conclusion the court relied on a number of decisions where widely different acts were regarded as the acts of the company simply because all the members assented thereto.

Apparently no restrictions in addition to those applicable to formal resolutions apply, except of course that all members must be unanimous in their assent and must be fully cognisant of what they have assented to. As in the case of a formal resolution an illegal result cannot be obtained validly through unanimous assent. It may be open to doubt whether authority to litigate can be construed on the basis of unanimous assent of a company's shareholders.

7 This question requires candidates to distinguish an independent contractor from an employee for the purposes of employment law.

In most cases it is clear to the parties and to outsiders whether or not a worker is an 'employee' for purposes of falling under the scope of labour legislation. There are situations, however, where it becomes more difficult to distinguish between an employee and an independent contractor. This distinction is important because only employees are protected in terms of the Basic Conditions of Employment Act of 1997 and the Labour Relations Act of 1995. In order to claim unfair dismissal in terms of the Labour Relations Act, the dismissed person will first have to show that he or she was indeed an 'employee' and, as such, protected against unfair dismissal. If he or she cannot do so, they have no contractual remedies at their disposal.

A contract with an independent contractor could be characterised as a contract whereby one person hires another person to do a specific job or specific piece of work. The object of the contract with an independent contractor is the performance of the specified work or the production of a specified result. It is the product or the result of the labour which is the object of the contract, rather than the labour itself, as in the contract of employment. The element of control is very different in the independent contactor relationship.

Due to the difficulty in identifying the contract of employment in borderline cases, three tests have been used to try to distinguish between an employment contract and other contracts which involve the provision of work:

The **control test** was based on the element of control, which at one time was regarded as the most important aspect of the employment contract. According to this test, the presence of control points to the existence of an employment relationship.

However, in an environment where many 'employees' are highly skilled and often act independently of the employer (doctors, captains of ships and pilots for example) the courts have tended to concentrate on the employer's right to control rather than actual control.

The **organisation test** asks whether the worker is part and parcel of the organisation of the employer. This test has been considered too vague, and it has been dismissed by the courts.

The courts today use the so-called **multiple or dominant impression** test. This test looks at the employment relationship as a whole, rather than looking at a single factor, such as control or integration. Some of the important factors which courts have found relevant are: the employer's right to select who will do the work; the power to discipline and dismiss; the employee's obligation to work for a given time and for certain hours; whether remuneration is paid for time worked or for a particular result; whether remuneration is paid on a commission basis; whether the employer provides the employee with tools, equipment and office space; and whether the employer has the right to utilise the employee's labour potential as it sees fit. The court weighs up all these and other factors to decide whether or not the dominant impression is that the person in question is an employee.

8 This question requires candidates to analyse the problem scenario from the perspective of contract law paying particular attention to the question of invitation to do business.

As a general rule, the South African law accepts that a contract is concluded when consensus is reached between two or more parties. The usual way of reaching consensus is through offer and acceptance. An offer is a declaration made by one person (the offeror) in which he or she indicates an intention to be contractually bound by the mere acceptance of the offer, and in which the person sets out the rights and duties he or she wishes to create. An acceptance is a declaration by the person to whom the offer was addressed (the offeree) through which it is indicated that he or she agrees with the terms of the offer exactly as expounded in the offer.

To constitute an offer, the declaration must set out the essential and material terms of the envisaged contract to such an extent that the mere acceptance will render the consequences of the contract certain. In practice, declarations contained in advertisements for the sale of goods or for the purchase of land will often fail to meet the requirement of setting out the essential and material terms of the envisaged contract and will for this reason usually not qualify as offers. Even if a declaration sets out the detail of the proposed relationship with sufficient certainty, it will only constitute an offer if it is made with the intention that the offeree should have the power to create a contract by accepting it.

In *Crawley* v *Rex* (1909) it was held that an advertisement in a shop window for the sale of a product did not amount to an offer and was thus not capable of being accepted. In *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists (Southern) Ltd* (1953) an English court held that the display of goods in a self-service shop did not constitute an offer by the shopkeeper, but that the customer made an offer to purchase by presenting the selected articles for payment. The South African courts will probably follow this decision. In the final analysis the legal effect of declarations by advertisements and the display of goods with or without price tags in a self-service setting or otherwise, depends on the intention with which a particular declaration is made, its content and, in exceptional cases, its form.

In the light of the above one can conclude that Andrew would probably not be able to insist that Bernie sell him the binoculars for R400, as the display did not constitute an offer. If Andrew can prove that the display was made with the intention that he should have the power to create a contract, he may succeed.

9 This question requires candidates to consider the various issues relating to the purchase of shares by a company itself and the maintenance of share capital.

It was a rule of common law that companies were not allowed to buy their own shares. Any such purchase was treated as a contravention of the capital maintenance rules (*Trevor* v *Whitworth* (1887)). This rule was extended with a statutory prohibition of financial assistance by a company for the purchase or subscription of its own shares: s.38 of the Companies Act thus provides that no company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company.

The Companies Amendment Act of 1999 radically changed the capital maintenance rule and the perceived protection it afforded creditors. Section 85 now provides that a company may, if authorised by its articles, approve the acquisition of its own shares by special resolution. A company may only acquire its own shares if there is *reasonable belief* that the company is, or would after the acquisition be, able to pay its debts as they fall due in the ordinary course of business (the 'liquidity test') *or* that the consolidated assets of the company would after the acquisition exceed its consolidated liabilities (the 'solvency test'); s.85(4) of the Companies Act of 1973. A company may, if authorised in the articles, approve the acquisition of its issued shares by special resolution. Furthermore, the approval can be a general approval that will be valid until the next annual general meeting (unless it is revoked by a special resolution before then), or a specific approval for a particular acquisition (s.85(1)–(3)). Shares that are acquired by the company itself will be cancelled and will become authorised but unissued shares. The shares so acquired will reduce the share capital of the company.

If a company proposes to acquire shares, it must distribute an 'offering circular', as prescribed in the Act, to all the shareholders holding shares of the class that the company proposes to acquire, and also lodge a copy of the circular with the Registrar of companies. The circular must contain at least the prescribed information and must, in general, state the terms and reasons for the

offer (s.87(1)). The offering circular is subject to the same provisions in the Act pertaining to civil liability for a prospectus. This is to ensure the integrity of the information contained therein (s.87(3)). If the company receives reaction on the offering circular for the acquisition of a number of shares that is greater than the number of shares the company intends to acquire, the company must as near as possible acquire the shares *pro rata*, except when the shares are listed on a stock exchange (s.87(4)). An offering circular is not required if it is dispensed with in terms of the special resolution in terms of s.85(3) or if the shares of the company are listed on a stock exchange (s.87(2)).

Applying the foregoing to Crafty Construction's situation it is possible for the company to purchase Frank's shares, provided they follow the procedure and requirements outlined. As there are only three shareholders involved, it would be possible to dispense with offering circular by means of the special resolution.

10 This question deals with the fiduciary duties of a director as well as position where a director has a material interest in a contract.

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

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

Applying the general law to the problem scenario, one can conclude as follows:

(i) Henry owes a fiduciary duty to Incredible Industries to avoid a conflict of interest between his duties and his personal interests.
(ii) Henry (or his wife) will only be able to contract with the company if the articles of the company expressly provide that they may.
(iii) Henry must make a full disclosure of his interest in the contract in terms of the Companies Act.

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

6–10 A thorough answer will explain the bill of rights that is contained in the constitution and consider the interpretation of the common law in the light thereof. 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 8–10 Thorough explanation of the meaning of the terms generally together with the three types of terms with appropriate examples.

5–7 Reasonable treatment of terms generally and one or even two of the types of terms, or a less complete treatment of all the elements.

0–4 Very unbalanced answer, focusing on only one aspect of the question and ignoring others, or one which shows little understanding of the subject matter of the question.

3 8–10 Thorough explanation of the meaning of wrongfulness with appropriate references to examples and the grounds for justification.

5–7 Reasonable explanation of the meaning of wrongfulness, but perhaps lacking in detail.

0–4 Very unbalanced answer, lacing in detailed understanding.

4 8–10 Answers will show a thorough understanding of the registration process, listing the documents required, and will make reference to the consequences of incorporation.

5–7 A sound understanding of the area, although perhaps lacking in detail.

2–4 Some understanding of the area but lacking in detail, perhaps failing to deal with the Certificate of Incorporation.

0–1 Little or no knowledge of the area.

5 8–10 Thorough analysis of the liability of partners with an explanation of the rules of procedure with reference to appropriate cases.

5–7 Reasonable treatment of the topic, or less complete treatment or no reference to cases.

0–4 Very unbalanced answer, focusing on only one aspect of the question and ignoring others, or one which shows little understanding of the subject matter of the question.

6 8–10 A good treatment of the two types of resolutions with reference to decided cases, probably, although not necessarily, with reference to statutory provisions.

5–7 A sound understanding of the area, although perhaps lacking in detail.

2–4 Some understanding of the area, but lacking in detail, perhaps failing to deal with one of the resolutions.

0–1 Little or no knowledge of the area.

7 8–10 A complete answer, demonstrating an understanding of the distinction between an employee and an independent contractor with reference to the various tests to determine this.

5–7 An accurate recognition of the issues relating to the distinction, but perhaps lacking in detail.

2–4 An ability to recognise some, although not all, of the issues, or perhaps recognition of the area of law but no attempt to apply the law.

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

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

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

10 8–10 Good analysis of the scenario with a clear explanation of the law relating to the fiduciary duties of directors, with detailed reference to case law and to statutory provisions.

5–7 Some understanding of the situation but perhaps lacking in detail or reference to the statutory provisions.

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