
Answers

- 1 Legislation uses words and they need to be interpreted in order to give them meaning. Interpretation is a process by which courts determine the meaning of a statutory provision for the purpose of applying it to the situation before them. Lawyers too have to interpret statutes when advising their clients.

Rules of interpretation of statutes are essentially rules of logic or logical thought processes which the court will usually follow but is not obliged to follow. The judges have a fairly wide discretion in deciding how to apply the rules of interpretation to the situation at hand. But this discretion cannot be equated with arbitrariness.

There are, essentially, two contrasting views as to how judges should go about determining the meaning of a statute – the restrictive, literal approach and the more permissive, purposive approach, which is reflected in the mischief rule.

- (a) The literal approach

The literal approach is dominant in Lesotho's legal system. Within the context of the literal approach there are two distinct rules:

- (i) The literal rule

The first and foremost duty of a judge is to interpret a statute according to the ordinary, literal and grammatical meaning of the words which the legislature has used. This is so even though it produces an otherwise unjust or undesirable outcome, which may be contrary to what the Parliament intended.

The use of the literal rule is illustrated by the case of *Fisher v Bell* (1960). The Restriction of Offensive Weapons Act 1959 made it an offence to offer for sale certain offensive weapons including flick knives. The defendant had a flick knife displayed in his shop window with a price tag on it. In the law of contract, placing something in a shop window is technically merely an invitation to others to make offers. It is the customer who makes an offer to the shop when he proffers money for an item on sale. Under the literal meaning of offer, the shopkeeper had not made an offer to sell and so was not guilty of the offence. Accordingly, the defendant was not convicted because he had not offered the knives for sale. Parliament subsequently overruled this decision by amending the law to make clear that displaying a flick knife in a shop window was an offence.

- (ii) The golden rule

If applying literal rule leads to some absurdity or some repugnancy or inconsistency with the rest of the statute, golden rule permits a judge to modify the literal interpretation so as to avoid such a result.

For example, Official Secrets Act 1920 made it an offence for any person to be 'in the vicinity of' a military base. An unauthorised person was found inside the military base. The court held that he was guilty of the offence. It would have been absurd to hold a person guilty if he was in the vicinity but not if he was *inside* the military base. See *Adler v George* (1964).

It should be emphasised that the court is not at liberty to ignore, or replace, legislative provisions simply on the basis that it considers them absurd. Golden rule is only applied if there is some ambiguity in the words used in the statute so that out of the two apparently contradictory meanings, that interpretation is preferred which does not lead to absurdity. For example, suppose a statute makes it an offence to be in possession of certain substances. Interpreted literally, it would mean that even the policeman who took possession of such substances from an offender would be guilty of the offence. That would be an absurd result. The court, therefore, may use golden rule to interpret 'possession' to mean 'unlawful possession' or 'possession without lawful authority'.

- (b) The purposive approach (Mischief rule)

The purposive approach is typical of civil law systems. In these jurisdictions, legislation tends to set out general principles and leaves the fine details to be filled in later by the judges, who are expected to make decisions in furtherance of those general principles. Judges, where necessary, have the power to look beyond the words of a statute to find out the reason and purpose of its enactment. The meaning of the words in a statute are construed in the light of that purpose. This runs counter to the literal approach.

Lesotho courts, however, like the British courts, do not follow the purposive approach because the manner of drafting legislation in Lesotho is similar to Britain. Instead, they follow mischief rule which is a precursor of the purposive approach.

Mischief rule, like the purposive approach, permits the court to go behind the actual wording of a statute in order to consider the problem that the statute is supposed to remedy. However, in its application, it is limited by being restricted to using previous common law rules in order to decide the operation of contemporary legislation. Thus in the *Heydon's case* (1584) it was stated that to apply this rule a court has to consider what was the law before the statute was passed, what mischief or defect the statute intended to remedy and the reason for such remedy.

Thus another way to look at the above example where the statute made it an offence for any one to be in the vicinity of a military base is to consider the mischief the Act was designed to prevent. That mischief for which Parliament provided a remedy was to prevent unauthorised persons from being in the proximity of the military base as it was prejudicial to national security interests. Therefore by applying mischief rule not only the unauthorised persons near the installation but also those found *inside* would be guilty of an offence under the Act.

- 2 (a) It is competent to enter into gratuitous obligations in Lesotho because the English doctrine of consideration does not apply in Lesotho. Lesotho follows Roman-Dutch common law. Thus, if John promises Sandy an extra R2,000 if he finishes the construction of the house on time, the promise may be binding and enforceable at law. So if Sandy does finish the construction on time, John may be legally obliged to pay him an extra R2,000.

In *Conradie v Rossouw* (1919), it was held by Wessels AJA that a good cause of action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established, and that there is no need for consideration to be present in an enforceable promise. Since then, so long as there is *justa causa* for the promise it will be binding. It is now firmly established that *justa causa* is not the same thing as consideration. *Causa* means the ground or reason for the contract, that which brought it about, and the idea behind *justa* is that this ground or reason must not be illegal or immoral or impossible nor must the contract be made jokingly. In short, the idea of *consensus* is the basis of contractual liability in Lesotho.

- (b) An offer is terminated by rejection. Any attempt to accept an offer on terms not contained in the original offer amounts to a counter-offer and a rejection of the offer. An offeree who makes such an attempt cannot later accept the original offer: See *Hyde v Wench* (1840).

Therefore, when a person makes a counter-offer for a lesser purchase price or payment in instalments, he would be rejecting the original offer. However, the seller may accept the counter-offer and then a contract will result.

Therefore, any one making a counter-offer takes a risk that if it is not accepted by the offeror, he will not be able to revive the original offer. If he does not wish to take that risk, he must not make a counter-offer.

However, an offer is not rejected merely by inquiring from the offeror whether he would be prepared to vary his terms. In *Stevenson, Jacques & Co v McLean* (1880), the defendant offered to sell iron to the plaintiffs, who inquired whether they might take delivery of the iron over a four month period. The defendant regarded it as a counter-offer and sold the iron to another party. It was held that the plaintiffs' inquiry was 'meant only as an inquiry', as a request for more information and, therefore, was not a counter-offer. The distinction between a counter-offer and a request for information (inquiry) is a fine one and ultimately, it is for the courts to determine *objectively* if the offeree *intended* to inquire or counter-offer.

One has to be very careful when seeking information, for example, if the offeror would accept a lesser amount or payment in instalments. One has to use words which makes the intention very clear that a counter-offer is not being made, only clarifications or further information about the offer is being sought. For example, Tom may tell the seller, 'I am interested in your offer and I am considering it. In the meantime, I would appreciate if you could please clarify if the price is negotiable or payable in two instalments?' It is likely that the court may not regard that as a counter-offer.

- 3 The relationship between employer and employees is known as a contract *of* service (employment contract), while that between an employer and independent contractor is known as a contract *for* services. Let us take an example. Suppose Thabo employs a secretary, Mary, to do his typing. The contract between Thabo and Mary is a contract *of* service. However, if Thabo gets his typing done by Florence, a self-employed typist, then the contract between Thabo and Florence is a contract *for* services. Florence, in our example, is an independent contractor.

Thus, employees are those who work under a contract *of* service. Those who work under a contract *for* services are independent contractors. They are not employees, but are self-employed.

It is not always easy to identify who is and who is not an employee. This was particularly so in the past when a person, whether employed or self-employed, would simply receive money from the employer. This is still the tendency in Lesotho in the case of small employers, especially in the so-called informal sector. In such situations it may not always be easy to distinguish an employee from an independent contractor.

It is essential, though, to distinguish between the two categories because important legal consequences flow from the placing of a person in one or other of the categories. For example, employees are protected by the Labour Code 1992 and the common law, in various ways in relation to their employment, but similar protection is not available to the independent contractors, who, in other words, are self-employed. Moreover, an employer is vicariously liable to pay damages to persons injured by his employee's negligence if the injuries were inflicted during the course of employment. However, an employer is not vicariously liable for injuries caused by an independent contractor to others.

Since the distinction has legal consequences, courts have developed a variety of tests for distinguishing the two:

- (i) The control test

The test assesses whether the employer has the right to control the manner of doing the work of his employees, whether he 'cannot only order or require what is to be done, but how it shall be done'. Control of the employee by the employer was in the past regarded as the hallmark of the contract of employment. It is still appropriate with respect to domestic, agricultural or manual workers. However, the main shortcoming in the control test is its lack of subtlety. Highly skilled employees such as doctors, computer scientists, accountants and the like can hardly be controlled by their employers, exercising as they do, independent, specialised, professional discretion. This meant that, under the control test, they were deemed to be self-employed rather than employees and, consequently, be personally liable for any negligence in their performance, rather than their employer which employed them and paid a salary.

(ii) Organisation or integration test

The organisation or integration test shifted the emphasis from the degree of control exercised on an individual to the extent to which the individual was integrated into the business or organisation of their employer. The test was propounded by Lord Denning in the case of *Stevenson, Jordan & Harrison Ltd v Macdonald & Evans Ltd* (1952). He stated that 'one feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for business, is not integrated into it but is only accessory to it'. Based on this test, a surgeon employed by the Ministry of Health would be an employee because he is an integral part of the machinery of the Ministry even though the Ministry does not control his work.

However, even the integration test is not without problems. For example, it does not say how much integration must exist before a person is truly part of an organisation.

(iii) The multiple, or economic reality test

In recent times courts have leaned more towards what has been described as the multiple test. The emphasis is not on relying on any single test such as control or organisation but to look at the whole arrangement between a worker and his employer and deduce from that their real intention. The court may, for example, consider whether the worker is an integral part of the business of the employer, whether employer provides tools and equipment for doing the job, who pays the wages and how are they paid, whether the employer deducts PAYE or pension contributions from the wages and the like.

This test was first established in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968). In that case, drivers purchased their own lorries under hire-purchase arrangements sponsored by Ready Mixed Concrete. These lorries then were maintained and insured by the drivers themselves. However, they had to be painted in the company colours and exclusively used for the company's business. The method of payment was based on the number of deliveries performed by the drivers or their men.

Applying multiple test the court held that the drivers were not employees but independent contractors and, therefore, their employers were not required to pay payroll tax in respect of them. The court considered all the facts. Some, like that the lorries had to be in the company colours and could only be deployed on the company's business, pointed toward a contract of service but the overwhelming number of factors indicated an independent contractor situation.

To sum up all the three tests are useful. The greater the degree of control or supervision, actual or potential, over the employee the more is the likelihood that the court would find it an employment situation. In applying the test courts do accept that the degree of control varies depending on a particular situation and in some cases it may be considerably more limited than others. In an independent contractor situation the worker retains his own discretion regarding the mode and the time and manner of doing the task undertaken. Organisation and multiple tests can be helpful in the case of professionals and technically skilled employees. In Lesotho, multiple test would be used on the basis of what the courts have called 'dominant impression'. See *Smit v Workmen's Compensation* (1979).

Lastly, sometimes statutes provide their own definitions of the term 'employee'. Such definitions are applicable only to instances which fall within the scope of a particular legislation. Labour Code, 1992, for instance, defines an employee to mean any person who works in any capacity under a contract with an employer in either an urban or a rural setting, and includes any person working under or on behalf of a government department or other public authority (s.3).

4 (a) Except in relation to specifically exempted companies, such as those involved in charitable work under s.23 Companies Act 1967, the name of the company must always contain the word 'Limited' (or 'Ltd') to show that the liability of its members is limited. If it is a private company 'Pty Ltd' must form part of its name. [s.10(1)(i) Companies Act 1967]. Promoters select the name they wish to have for the company to the Registrar. The Registrar may refuse to register a company by a name:

- (i) which is identical with the name of another company, or
- (ii) which so nearly resembles the name of another company 'as to be calculated to deceive' (that is, likely to deceive) unless that company is in liquidation and signifies its consent to the registration of the new company with that name, or
- (iii) which is likely to mislead the public or to cause offence to any person, or
- (iv) which is suggestive of blasphemy or indecency [s.21(3) Companies Act, 1967].

In the last two cases (iii) and (iv) the Minister may direct the Registrar to register a company with such a name.

There are restrictions on the use of certain words in the name of a company. The words imperial, crown, royal, King, Queen, Regent, Government, Empire, state, commonwealth, dominion, United Nations or any other similar words cannot be used in the name of a company without proper authorisation. The reason is that such words may suggest that the company enjoys the patronage of one or the other. Under the Industrial Property Order, 1989, trade names and trademarks which are registered or otherwise well-known in Lesotho cannot be expropriated and a company may not use them in its name because it may be harmful to legitimate business interests of other parties and also detrimental to public [s.21 Companies Act 1967].

(b) A company cannot use a name, or a very similar name, which is already in use by an existing business. The other business could be a company or a partnership business or even one owned by a sole trader. The other business may be able to sue for the delict of passing off. The remedy of passing off has been developed by the courts to prevent one person from using any name which is likely to divert business their way by suggesting that their business is actually that of some other person or is connected in any way with that other business. The remedy of passing off, thus, enables people to protect the goodwill they have built up in relation to their business activity.

For a successful passing off action the complainant must show:

- (i) That it is established in business under that name or has some other right to its use;
- (ii) That the company being sued is conducting business in such a way as to infringe the complainant's right to the use of the name;
- (iii) That this is likely to cause damage to the complainant's business.

Unless the complainant is a very well-known person or company, the action is usually only available where the two companies are in a broadly similar line of business operating in the same or overlapping geographical areas. If the complainant's action is successful, the court will grant an interdict to stop the new company using the name. Damages are also available if infringement persists and there is, of course, the risk of legal costs.

In *Volkscas Bpk v Barclays Bank* (1952), Volkscas Bank was prevented from using the name SA Nasionale Handelsbank because of the reasonable possibility of confusion with the National Bank which was used by the Barclays Bank. Similarly Hotel Watsonia was prevented from conducting business at the place where the Hotel Ansonia was doing so. (*Feinberg v Watson* (1937))

5 (a) Section 2 Companies Act 1967 provides that 'company' means either a company limited by shares or a company limited by guarantee.

Any seven or more persons associated for a lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of Companies Act 1967 in respect of registration, form an incorporated company. Such a company may,

- (i) either be a company limited by shares, in which the liability of the members is limited to the amount, if any, unpaid on the shares respectively held by them, or
- (ii) a company limited by guarantee, which requires a licence granted by the Minister responsible for trade and industry. In such a company, the liability of the members is limited by the memorandum to such an amount as the members may undertake to contribute to the assets of the company in the event of its being wound up. [s.10, Companies Act 1967]

In case of a company limited by shares, the capital clause in its memorandum of association must provide that the share capital of the company is divided into shares of a fixed amount. This fixed amount determines the maximum liability of a shareholder in the event of the liquidation of the company. Were the shares fully paid up, the shareholder will incur no further liability should the company be wound up.

Companies limited by shares must have a minimum of R1,000 as issued and paid up share capital. No such rule applies to guarantee companies. They also need a trading licence to start operating.

In the case of a company limited by guarantee, the members' liability to contribute is determined by the amount of guarantee specified in the memorandum. The amount of guarantee may not be increased or reduced. Typically, the kind of company which is limited by guarantee is one which does not engage in commercial activities. Unlike a company limited by shares, the liability of a member to make payment under the guarantee arises only when the winding up of the company has commenced. In the case of a company limited by shares a shareholder may be required to pay any amount outstanding on his shares, at any time during the lifetime of the company. Guarantee companies are not required to have a minimum capital and do not need a trading licence as they are essentially non-commercial.

(b) The Companies Act 1967 makes an important distinction between public and private companies. The Act does not define what a 'public company' is. A 'private company', however, is defined to mean a company which by its articles:

- (i) restricts the right to transfer its shares; and
- (ii) limits the number of its members to 50 excluding employees or ex-employees; and
- (iii) prohibits any invitation to the public to subscribe for any shares or debentures of the company [s.30 Companies Act 1967], and
- (iv) has the words (Pty) Ltd at the end of its name.

There are a large number of detailed differences between public and private companies, the most important of which are as follows:

- (i) A private company has to raise its share capital through a private offer of shares and debentures. Any attempt to offer shares to the public may result it being declared a public company by default.
- (ii) A private company need not file a statement in lieu of prospectus to obtain a certificate to commence business.
- (iii) Directors of public companies, other than the first directors, must be voted into office individually at a general meeting, while two or more directors of a private company may be voted into office by a single resolution.
- (iv) Private companies require only one director; public companies require a minimum of two.
- (v) Proxies in a public company need not be a member, while they must be in a private company.
- (vi) Private companies alone can use the written resolution procedure to pass resolutions.
- (vii) Private companies alone can make loans to their directors without the approval of the shareholders in a general meeting.

Thus, generally speaking, any limited liability company which is not a private company is a public company.

- 6 (a) It is not an easy task to define exactly what the nature of a share is. Section 2 Companies Act 1967 defines a share to mean 'a share in the share capital of a company'. A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with s.4 Companies Act 1967.

A share denotes that its holder has a claim on the share capital of the company but does not refer to a right of ownership in any part of the assets of the company. A company is a separate legal person in law and property held in its name belongs to it and it alone.

The share certificate on the other hand is a tangible document evidencing the legal relationship existing between the company and the shareholder. In his capacity as a party to this legal relationship there accrue to the shareholder (i) rights, mainly the right to dividends when they have been declared and the right to participate in a distribution on liquidation; and (ii) duties, mainly to honour the provisions of the articles. On the strength of membership of the company, certain powers and rights such as the right to vote at meetings and to receive notices also originate.

- (b) A company may issue preference shares, if authorised by its articles [s.60(1) Companies Act 1967]. The articles may make provision for the issue of the following specific types of preference shares:

- (i) Cumulative preference shares. These are the most common type of preference shares. Under a rule of construction adopted by the courts, preference shares are *prima facie* regarded as cumulative. Only if the terms of issue clearly deny this right to preference shareholders are their shares treated as non-cumulative.

They have the right to the payment of dividends for the current and preceding financial years before the declaration of dividends in respect of any other class of shares – usually ordinary shares – for the current financial year can be made. This right entails that if in a given year or years no dividends are declared, the arrear and current preference dividends have priority at a subsequent dividend distribution before a dividend can be declared in respect of any other class of share. The requirement that dividends must first be declared before they can be claimed has the result that even the holders of cumulative preference shares have no preference on liquidation in respect of arrears, but undeclared dividends. Where the conditions of issue are silent on the point the general presumption is that preference shares are cumulative.

- (ii) Participating preference shares. Participating preference shareholders are entitled to both the fixed percentage preference dividend, as well as, to a share of the residual distributable profits.

- (iii) Convertible preference shares. They carry the right, usually after a stated date, to be converted into ordinary shares.

- 7 This question requires candidates to consider the important role of the company secretary in relation to the operation of companies.

The essence of corporate governance is to ensure that companies are properly run and that their officers are accountable and subject to control. This is accomplished by setting up a corporate governance structure which distributes the rights and responsibilities among the different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. Whilst it is usual to focus on directors when considering the idea of corporate governance, company secretaries also have an important function to perform in relation to the proper conduct of company affairs.

Every public company must have a secretary [s.140(1) Companies Act 1957]. If a company has more than one director, one of them can be a secretary. However, Companies Act 1957 provides that anything required to be done by a director and the secretary must not be done by the same person acting as both [s.140(4)]. The secretary is one of the officers of the company.

Private companies are not required to appoint company secretaries, although they still can do so if they wish.

Appointment

The Companies Act 1957 does not prescribe the qualifications that a company secretary must have. The procedure of appointment of a company secretary is to be provided in the articles of association of a company. Article 109, Table A merely provides that a company secretary is to be appointed by the board of directors of the company. No duty is cast on the board to ensure that the company secretary has the requisite knowledge and experience to discharge their functions. In the context of corporate governance, this seems to be a serious deficiency.

Duties

The duties of company secretaries are set by the board of directors and, therefore, vary from company to company, but as an officer of the company, they are responsible for ensuring that the company complies with its statutory obligations. Broadly he is the principal administrative officer of the company. He attends to the correspondence, keeps financial records, sends out notices on behalf of the company and generally ensures that the documents of the company are in order, that requisite returns are made to the Registrar of companies and that company's registers are properly maintained. He attends the meetings of the shareholders and the board of directors and takes care of the minutes and deals administratively with the resolutions of the company. He ensures the flow of necessary information within the board of directors and its committees. He may be asked from time to time to provide advice and guidance to the board and its chair on all matters relating to corporate governance. In short, he ensures that the company adheres to all the legal rules governing its operations. Articles generally authorise him to countersign cheques and provide that the company's seal is to be affixed in his presence. The Act also provides that a share certificate can be signed by a director and a secretary. In short, his is a position of trust and confidence. Consequently he owes fiduciary duties to the company he serves.

Powers

Lord Denning in *Panorama Developments (Guildford) Ltd v Fidelis Fabrics Ltd* (1971) observed that a company secretary is a very important person nowadays. 'He is an officer of the company with extensive duties and responsibilities. This appears not only in the (Act) but also in the role he plays in the day-to-day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company's business. So much so that he may be regarded as held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts connected with the administrative side of a company's affairs such as employing staff, and ordering cars and so forth. All such matters now come within the ostensible authority of a company's secretary. Thus a secretary normally has express or implied authority to make representations and enter into such contracts on behalf of the company as fall within the day-to-day running of the company.'

In this case Bayne, the secretary of the defendant company hired cars from the plaintiff, ostensibly for the business of the company. But he fraudulently used them for his own purpose. Nevertheless, the company was held bound by the contracts signed by the secretary to pay the hire charges because in regard to administrative matters, the secretary has ostensible authority to sign contracts on behalf of the company. The hiring of cars was part of the administrative functions.

Over time the company secretary has graduated as an organ of the company. Though appointed by the directors, he is not their servant. He has substantial authority in the administrative sphere derived directly from the articles and the Act. In the performance of his statutory duties, he will be within his right to resist interference from the members, board of directors or managing director. He has no role in determining corporate policy or in managerial decision-making but he has to ensure that the policy and managerial decisions are implemented.

- 8 An agreement is the foundation of any contract. Agreement ordinarily refers to a meeting of minds of two or more parties. However, for legal purposes there must be proof of this agreement. What the parties have said and done will often be used to conclude if there has been an agreement. So long as the parties *appear* to have agreed on the terms of the contract, there is, in law, a contract even though the parties to that contract may not actually be in agreement.

This is because it is very difficult to prove what is going on inside a man's mind, whereas it is comparatively easy to establish whether or not he *appeared* to have agreed through examination of his external conduct. Evidence can be given to establish what was said, what the parties did and what documents were signed. The court places itself in the position of a reasonable man to find out if an *apparent* agreement was made. Therefore, so long as the parties *appear* to have agreed on the terms of the contract, there is, in law, a contract even though the parties to that contract may not be actually in agreement. What is important is the manifestation of their wills and not the expressed will.

This principle is called the principle of quasi-mutual assent and, it must be emphasised, operates only in favour of a party whose understanding and actions have been those of a reasonable man. The justification for the principle is that without it trade and commerce would be very difficult.

In the problem scenario, Thabos & Co made an offer in plain and unambiguous language to pay Berger's creditors any amount Berger owed them in full. Salomon, as a reasonable person, accepted the offer in good faith. This resulted in a binding agreement between the two. Any unexpressed reservations hidden in the mind of Thabos & Co are, in such circumstances, irrelevant. They cannot be heard to say that when they made their offer they meant to pay Salomon not R5,000 but only R3,500, and of which Salomon was not aware.

The court is likely to interpret from Thabos & Co's conduct and the surrounding circumstances that Thabos & Co promised to pay Salomon the full amount of the debt, which was R5,000 and not R3,500 to Salomon. In *Pieters and Co v Salomon* (1911), where facts were more or less similar, a similar conclusion was reached by the court.

- 9 This question can be divided into three distinct sections.

The first element of this question requires a consideration of Nana's situation with respect to his potential liability. Partnerships cannot provide their members limited liability, unless the partnership has been registered as a limited partnership under the Partnership Act 1957.

The situation in the problem scenario indicates that the partners have not gone through the appropriate procedure for the establishment of a limited partnership. As a result, as far as outsiders are concerned, Nana is fully liable for any debts of the partnership and could be required to pay more than his agreed maximum payment of R100,000. Nana would, however, be entitled to rely on the internal partnership agreement to limit his liability within the partnership. This would mean that although he could be liable to outsiders beyond the R100,000, he would be able to claim reimbursement of any payments made above that limit from the other two partners, assuming that they were in a position to make such a payment.

Viru has clearly used his powers for an unauthorised purpose. Unfortunately for the other partners, they cannot repudiate his transaction with the bank. As a trading partnership, all the partners have the implied authority to borrow money on the credit of the firm and the bank is under no duty to investigate the purpose to which the loan was to be put. As a result the partnership cannot repudiate the debt to the bank and each of the partners will be liable for its payment. However, Viru will be personally liable to the other partners for the R10,000 and as a further consequence of the breach of his fiduciary duty not to act in any way prejudicial to the partnership business, the partnership could be wound up.

Timothy's purchase of hair relaxers was also clearly outside of the express provision of the partnership deed. Nonetheless the partnership would be liable as the transaction is likely to be held to be within the implied authority of a partner in the sports goods business. Once again, Timothy, the partner in default of the agreement, would be liable to the other partners for any loss sustained in the transaction.

As regards any partnership debt owing, that is clearly within the ambit of the partnership and all the members are liable on it.

If the partnership cannot pay the outstanding debts then the individual partners become personally liable for any outstanding debt. Partnership debts are joint and several. One or more or all of the partners can be sued for the debt once it has been demanded from the firm, and those who have to pay have a right of reimbursement against the firm and their fellow partners. Once the debts owed to outsiders have been dealt with, only then the internal financial relationships of the partners amongst themselves will be dealt with according to the partnership deed.

- 10** This question raises issues relating to the duties owed by the directors to their companies and the consequences of any breach of such duties. Directors have a fiduciary relationship with their companies and their duties flow from it.

Directors have three duties: the duty to act *bona fide* in the best interests of the company as a whole, the duty to exercise their powers for a proper purpose and the duty not to allow his personal interests to conflict with his duties to the company.

Two particular issues emerge from the problem scenario. The first relates to the facilitation fee that Samuel has taken from Graphics Ltd and the second relates to the use of the power to allot weighted shares to prevent their company from being takeover by Marico Ltd.

Samuel's facilitation fee

The rule that directors should not allow a conflict of interest to arise has been strictly enforced by the courts and it can be clearly stated that directors are forbidden from entering into any arrangement which would involve, even the possibility of, a conflict between their personal interests and the interests of their company. The simplest statement of the rule is that directors are not permitted to profit personally from their position without full disclosure and the prior approval of the company. See *Regal (Hastings) v Gulliver* (1942).

There can be no clearer instance of a conflict of interest than the situation of a director taking a bribe. Applying the foregoing to Samuel, it can be argued that no matter how the payment is referred to, it is nonetheless a benefit from Graphics Ltd to induce Samuel to use his influence as a director to ensure the award of the contract to them. It is a bribe nevertheless. As a result, Samuel has breached his fiduciary duty to Karibo Ltd and not only will he be liable to be dismissed from the board by a simple majority vote (Companies Act 1957, s.146), but he shall also be required to pay any money received from Graphics Ltd to Karibo Ltd.

The allotment of weighted shares

The common law rule is that directors' powers should be used only for the purposes for which they were conferred. This rule is known as the 'proper purposes doctrine' and was developed by the courts in order to ensure that directors use their powers for the purpose for which those powers were given to them and not for some extraneous or collateral purpose. The latter are regarded improper purposes in this context. Decided cases on this point have related to the exercise by directors of their power to issue new shares in an attempt to assist or, alternatively to prevent, potential take-over bids for their companies. Thus in *Howard Smith v Ampol Petroleum* (1974), two shareholders holding 55% shares in the company made it known they would not allow any takeover attempt to succeed. The directors issued new shares to a company which wished to make a takeover bid with the intention to nullify the 55% blocking power of the two shareholders. The company did not need fresh capital otherwise. It was held that this was an abuse of the directors' powers and a breach of their duty to act *bona fide* in the interests of the company. As a result, the issue of shares was set aside. See also *Hogg v Cramphorn Ltd* (1966).

Another aspect of this general fiduciary duty is that directors must not act in such a way as will fetter the exercise of their discretion in relation to decisions that affect the operation of the company. Normally it is left to the directors to determine their actions and courts would not question it unless it is shown that they did not behave as honest men of business might be expected to act under the circumstances. For example, if directors enter into a contractual agreement with some outsider to use their vote in a particular way at board meetings, it would normally be regarded a clear breach of their fiduciary duty. Now suppose directors enter into a contract on behalf of the company, which they genuinely consider to be in the company's best interests. As a part of the deal, they also bind themselves to vote in favour of any subsequent resolutions necessary to achieve the successful completion of the contract. This may not be regarded as a breach at all.

Applying the above to the facts of the problem, it is clear that the board of directors have breached the duty in that they have used their power to allot shares, not for the primary purpose of raising capital for their company, but for the ulterior purpose of blocking a possible takeover. This could be taken care of by a subsequent general meeting ratifying the directors' actions. However without that ratification, Thomas could apply to the court to have the share allocation declared invalid. In that case, if any subsequent general meeting is called to ratify the improper use of the directors' powers, the directors would not be permitted to vote.

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

- 1** This question requires candidates to explain and distinguish between the literal rule, golden rule and the mischief rule. Candidates may simply produce a global answer considering the interpretation rules and will be marked according to the content provided.
- 6–10 marks Full detailed explanation with supporting cases or examples.
0–5 marks Limited knowledge of the topic, perhaps lacking in detail or cases/examples. Lower band answers would exhibit very limited or no knowledge of the topic under consideration.
- 2 (a)** This question requires candidates to explain what a gratuitous promise is and how it is treated in Lesotho.
- 3–5 marks A thorough to complete answer, defining the term and explaining the circumstances in which a gratuitous promise may be binding, generally supported with authority.
0–2 marks A limited understanding, or incomplete answer.
- (b)** This question tests candidates' knowledge about the distinction between counter-offer and an inquiry.
- 3–5 marks A thorough treatment and clear understanding of the difference between the counter-offer and inquiries. Reference to relevant case law expected in higher band answers.
0–2 marks A fair understanding of the area but lacking in detail. Lower band answers would exhibit some or no understanding.
- 3** This question asks candidates to explain the common law rules used to distinguish between contracts of service and contracts for services.
- 6–10 marks A thorough treatment of all of the rules, and certainly providing case support.
0–5 marks Recognition of the areas covered by the question, but lacking in detailed analysis. Lower band answers would provide little or no analysis or knowledge of the subject of the question.
- 4** This question is in two parts. The first part requires candidates to explain the limitations on the use of company names and the second part the remedy of 'passing off'.
- (a)** 4–6 marks Thorough explanation of what the rules relating to company names are.
0–3 marks Some but limited knowledge of the rules relating to company names.
- (b)** 2–4 marks Good explanation of what the rules relating to 'passing off' in delict are. Reference to relevant cases expected.
0–1 mark Little if any knowledge of the concept.
- 5** This question is divided into two parts, and each part is allocated marks. Each part will be marked separately on its own merits.
- 6–10 marks Thorough treatment of the topic providing clearly the differences.
0–5 marks Reasonable treatment of the differences. Poor answers will be unbalanced and show very little knowledge of the area.
- 6** This question is divided into two parts, and each part is allocated marks. Each part will be marked separately on its own merits.
- (a)** 3–5 marks Thorough explanation of what the nature of a share is.
0–2 marks Some but limited knowledge of what the nature of a share is.
- (b)** 3–5 marks Good explanation of the various types of preference shares a company may issue.
0–2 marks Little if any knowledge of the types of preference shares a company may issue.

- 7** This question requires candidates to consider the company secretary in the context of the idea of corporate governance.
- 6–10 marks Thorough treatment of all the aspects of the question including in the context of corporate governance.
- 0–5 marks Reasonable, but less than full, treatment of some aspects of the question. Lower band answers would be unbalanced merely dealing with a limited number of aspects of the question or demonstrate little or no understanding of the nature of the question.
- 8** This question refers to the formation of an *apparent* agreement which is binding in law.
- 8–10 marks Candidates will exhibit a thorough knowledge of the law relating to the formation of an agreement together with the ability to analyse the problems contained in the question.
- 5–7 marks Candidates will exhibit a sound knowledge of the law relating to the formation of an agreement together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
- 3–4 marks Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
- 0–2 marks Very weak answers that might recognise what the question is about but show no ability to analyse or answer the problem as set out.
- 9** The key issues in this question relate to the powers, authority and liability of partners.
- 8–10 marks Candidates will exhibit a thorough knowledge of partnership law together with the ability to analyse the problems contained in the question.
- 5–7 marks Candidates will exhibit a sound knowledge of partnership law together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
- 3–4 marks Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
- 0–2 marks Very weak answers that might recognise what the question is about but show no ability to analyse or answer the problem as set out.
- 10** This question deals with issues relating to the directors' duties, in particular, the duty not to accept benefits that conflict with their duty to their company and their duty to use their powers for a proper purpose only.
- 8–10 marks Candidates will exhibit a thorough knowledge of the law as set out in the relevant decisions together with the ability to analyse the problems contained in the question.
- 5–7 marks Candidates will exhibit a sound knowledge of the law together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
- 3–4 marks Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
- 0–2 marks Very weak answers that might recognise what the question is about but show no ability to analyse or answer the problem as set out.