Answers

1 This question requires a discussion of the meaning of common law in Lesotho and its place in corporate and business law matters.

By the phrase 'common Law of Lesotho' is meant the law that has been 'received' in Lesotho by virtue of s.2 of the General Law Proclamation 2B of 1884. The Proclamation was issued by the British in May 1884. It authorised the application in Basutoland the law of its colony at the Cape. The Cape Colony had, what is loosely described as, the Roman Dutch law. Section 2B of the General Law Proclamation of 1884 provided that, 'in all suits, actions or proceedings . . . the law to be administered (in Basutoland) shall as nearly as the circumstances of (Basutoland) will permit be the same as the law for the time being in force in the colony of Good Hope…'

Section 2 of Proclamation 2B is still the law. It was adopted by the Constitution of Lesotho after its independence in 1966 and also by the present 1993 Constitution [s.156(1)]. It could not have been otherwise in view of the numerous transactions that have taken place and continue to take place, particularly in the business sphere, in accordance with the principles of received law.

The law in what was the former colony of Good Hope is now broadly South African common law. Lesotho's common law is broadly similar to common law in South Africa with the difference that if what was common law in May 1884 has been superseded in various Cape provinces by a South African statute, courts in Lesotho would continue to apply the common law, in the absence of a repealing legislation in Lesotho. In that case, the common law of Lesotho would be different from the applicable common law in South Africa.

In the absence of relevant statutes, common law is an important source of law in Lesotho. In fact, much of the business law (contracts, sales, agency, property and delicts) is based on the 'received' common law. Corporate law, on the other hand, is primarily contained in the Companies Act, 1967. But even there, it is heavily supplemented by common law. The doctrine of *ultra vires*, indoor management, duties of directors, the liability of promoters, some of the duties of the auditors, etc are based on the common law.

2 This question examines the candidate's knowledge and understanding of the law regarding an advertisement.

An offer is to be distinguished from an invitation to offer. An invitation to offer is intended to elicit offers. It may be described as an invitation to others to begin negotiations. An invitation to offer, unlike an offer, has no legal force and any offer it elicits can be accepted or rejected without obligation. It is not always easy to determine whether a statement constitutes an offer or an invitation to offer but the legal distinction between them is of vital importance. An offer, if accepted, brings into being a contract which imposes obligations on the parties to it which can be legally enforced. This is not so in respect of an invitation to treat. In Britain, courts have laid down presumptions to guide them. Thus, display of goods in a self-service store is presumed to be an invitation to offer. In Roman Dutch law, it depends on the intention of the advertiser as objectively determined by the court.

In the problem, the legal question is whether the advertisement is making an offer or merely inviting offers. In *Bird* v *Sumerville* (1960) 4 SA 401, the court held that the 'publication of an advertisement offering goods for sale at a stated price is not an offer to all who may read it but merely an invitation to offer.' Advertisements for the sale of goods as in the problem scenario are generally regarded as indicating an intention of the advertiser to seek offers from the readers. In short, as an invitation to treat. The courts imply an intention to invite offers from the words of the advertisement for sale of goods. An advertisement, therefore, is not an offer but merely an invitation to treat.

3 This question tests the understanding of the candidates regarding the concept of contributory fault.

A delict is a wrongful act against an individual which gives rise to a non-contractual civil claim. Contributory fault is a defence, or partial defence, and is peculiar to the law of delict. The defendant can rely on the fault of the plaintiff as a partial, or sometimes even a complete defence, against the claim. If the defendant can establish that the plaintiff negligently or intentionally contributed to his own loss, he may avail himself of this defence.

Contributory fault refers to the conduct of the *plaintiff*. It limits the extent of the defendant's liability in an action for damages. In Lesotho, it is governed by the Apportionment of Damages Order, 1970. The Order provides, in effect, that where a plaintiff suffers damages, which is caused *partly* by his own fault and *partly* by the fault of the defendant, the damages recoverable by the plaintiff are to be reduced to such extent as the court may deem just and equitable having regard to the degree of the fault of the plaintiff in relation to the damage suffered. The court applies *sine qua non* test: would the harm to the plaintiff have occurred but for his own wrongful conduct?

For example, suppose Peter is driving the car in which Mary is also a passenger on the front seat. Law requires that the passengers in a car must wear seat belts. Mary is not wearing her seat belt when an accident occurs. Mary is thrown forward, hits the windscreen and suffers facial injuries. It is proved that had she been wearing the seat belt, there would have been no injuries to her face. Damages for the injury to her face would be reduced on the ground of her contributory fault in failing to wear the seat belt.

The relative degree of fault of the plaintiff and defendant is assessed *separately* by the court to determine a ratio of the respective faults. The criteria the courts use to apportion the damages is the reasonable person's test for negligence. Suppose the court determines that Sam is 30% at fault on the basis of deviation from the standard of a reasonable person, and the electrician is 60%

at fault on the same basis, then the ratio of respective fault is 30:60 and the plaintiff would recover 66·66% of the total damage the court would otherwise award. Since the fault of the plaintiff and defendant are assessed *separately*, so it does not necessarily follow that if the plaintiff is at 30% fault, the defendant has to be 70% at fault.

Voluntary assumption of risk is a ground of justification that *negates* wrongfulness. However, in regard to contributory fault, voluntary assumption of risk is a ground that *cancels* fault. Here the plaintiff is well aware of the danger. Yet he wilfully exposes himself to the risk of being injured. In such a case, the blame in the form of contributory intent attaches to him and the fault of the defendant is cancelled thereby. For example, suppose Thabo sets fire to his house negligently. Peter, knowing the risk, rushes inside the burning house to retrieve his jacket and is injured in the process. Thabo's fault in this case is cancelled by Peter's contributory intent. Law also requires that Peter's conduct must be *consciously unreasonable*, which in this case it is. But suppose Peter rushes in to save a baby's life and gets injured in the process. In that case, Peter's conduct is not *consciously unreasonable* and blame in the form of contributory intent will not attach to him.

Suppose Suzanne takes her seat as a passenger in the sidecar of Eddy, knowing fully well that Eddy is very intoxicated and is incapable of driving the motorbike safely. An accident occurs and Suzanne suffers serious injuries and Eddy is killed. Suzanne claims damages from Eddy's estate. If you regard Suzanne as guilty of contributory fault under the 1970 Order, she would get damages but only as much as the court deems just and equitable. If you take the position that Suzanne voluntarily assumed the risk of injury or acted with contributory intent, then Suzanne would not get any relief. In the former case, wrongfulness is absent; in the latter her contributory intent cancels Eddy's negligence. In the actual case, the court found Suzanne guilty of contributory intent. Voluntary assumption of risk (contributory intent) and contributory negligence are not the same. Suzanne freely assumed the risk of injury, with full knowledge of danger. This is not a negligent but an intentional exposure to risk. If Suzanne *should* have been aware of the risk, but was not, then there is no contributory intent but only contributory negligence. (Based on *Lampert* v *Hefer* (1955) 2 SA 507.)

4 This question invites candidates to discuss rights of an employee and the obligations of an employer, who is closing down his business.

(a) Under the Labour Code Order, 1992, 'operational requirements' of the business could be a valid reason for a fair dismissal [s.66(1)(c)]. The expression 'operational requirements' has not been defined in the statute. Generally speaking, dismissal as a result of the operational requirements is a no-fault dismissal. The dismissal is not related to the conduct of the employee, but rather to the requirements of the business. Operational requirements include requirements based on the economic, technological, structural or similar needs of the employer. The most common form of dismissal on account of operational requirement is retrenchment. This may occur when an employer wishes to restructure his business or when his business cannot run profitably for economic reasons. In such a case, the employer is not in a position to continue to provide employment to his employees: the restructuring may require that some employees are dismissed. An employee can be fairly dismissed when the business is closing down.

The dismissal for operational requirements must be substantively fair. It must have been made for sound reasons and in good faith. When a business is being closed down, it is usually assumed that this is being done for good reasons and in good faith. In practical terms, an employee may find it difficult to challenge good faith or the fact that the employer is closing down his business for reasons that are not sound.

(b) The Labour Code provides for procedural fairness. An employer is obliged by s.69 of the Labour Code Order 1992, to provide his employees reasons for their retrenchment in writing. He must do so either before dismissing the employee, at the time of his dismissal, or within four weeks of the dismissal. Failure to do so attracts a fine. Furthermore, if reasons for dismissal have not been given in writing, or if the reasons given are incorrect, the employee has a right to ask the Labour Court to 'declare the reasons for the dismissal', and award him, in addition to any other relief, two weeks' wages. Furthermore, an employee could ask the Labour Court or the arbitrator to regard his dismissal 'unfair' and award him 'just and equitable compensation' under s.73(2) of the Labour Code Order, 1992. The employee may also be entitled to severance pay, if he has completed more than one year of continuous service with the employer, at the rate of two weeks' wages for each completed year of continuous service with the employer.

5 This question asks the candidates to explain the process of appointment of auditors in a company and their qualifications.

Appointment

All companies must have an auditor. The first auditor, who must be a member of a recognised accountancy body, are appointed by the directors within 30 days of the issue of the certificate of incorporation. They may also make an appointment to fill a casual vacancy. In each case the auditor so appointed holds office until the conclusion of the first annual general meeting [s.122 CA, 1967].

Thereafter auditors are appointed annually by the annual general meeting until the conclusion of the next general meeting. A retiring auditor can be reappointed. If the general meeting fails to appoint an auditor, the Minister may appoint one. [s.122(3) CA, 1967]. The expression Minister refers to the 'Minister responsible for company affairs.'

Qualifications

In order to be an auditor a person, (i) must be a member of a recognised accountancy body of any country recognised by the Minister for the purpose of qualifications, or (ii) should have recognised alternative qualifications, or (iii) be one with adequate knowledge and experience he acquired during the course of his employment.

The Companies Act, 1967, disqualifies the following from being an auditor of any company:

(a) an officer or servant of the company,
(b) a partner or employer or employee of an officer or servant of the company. This does not prevent a person employed by the auditor from being an officer or servant of the company,
(c) a body corporate,
(d) an officer or servant of a body corporate which is an officer of the company; and
(e) a person who personally, or whose partner or employee, regularly performs the duties of a secretary or book-keeper of the company.

A disqualified person acting as an auditor commits a crime and is liable for criminal prosecution.

6 This question asks candidates to explain the doctrine of *ultra vires* as it applies in Lesotho.

One of the consequences of a company as a legal person is that it can pursue only those objects which are set out in its memorandum of association and possess only those powers which are expressly or impliedly conferred on it. In other words, unlike an individual or a partnership, a limited liability company has a limited capacity and any transaction beyond its capacity is ineffective even if agreed to by all of its members. This is the *ultra vires* doctrine as applied to companies.

The doctrine protects the investors, who can be sure that their money would not be invested in unauthorised activities. It also protects the creditors by ensuring that the funds of the company to which alone they can look for repayment would not be dissipated in unauthorised activities.

In a leading British case, *Ashbury Carriage Co* v *Riche* (1875), the court observed that the memorandum of association provides affirmatively what can be done and negatively what cannot be done. 'The memorandum of association is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations as they think fit. … … The question is not as to the legality of the contract; the question is about the competence and power of the company to make the contract.' Since constructing the railway line was beyond the objects of the memorandum and beyond the powers of the company, it was void from the very beginning and could not be ratified. 'If every shareholder of the company had been in the room, and every shareholder had said: 'That is a contract we desire to make, which we authorise our directors to make,' the result would not have been any different.'

The *ultra vires* rule has been interpreted by the courts rather liberally. Anything that is reasonably incidental to the objects specified in the memorandum is regarded as *intra vires*. As from 1 March 1985, the memorandum of a company must divide the objects 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. A system of trading licence operates in Lesotho and the main objects, in practice, are usually limited to those for which trading licences are available.

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, will have the capacity to carry out such businesses as fall within the scope of the main objects or ancillary to the main objects. The main objects under the Act are deemed to be the 'original purpose' for which a company has been formed. They may not be 'departed from' which probably means that the objects clause will have to be altered in accordance with the Act should the company choose to embark on other activities which are not covered by its main objects. It is the courts which would interpret what is meant by the 'original purpose'. Does it mean the immediate business a company embarks upon? And suppose the memorandum states at the end that 'each and every object stated above shall be deemed to be main objects and the original purpose for which the company has been formed'. Would it have legal effect? Only time would provide answers to these questions.

The Act does not provide that the amendment will apply retrospectively. It will, therefore, cover those companies that are formed after 1 March 1985. If a company was formed before that date, it is not required to conform to the main objects requirements.

7 This question seeks to test the candidate's understanding regarding the compulsory winding up of a company.

Winding up of a company has been described as the process whereby its life is ended and its property administered for the benefit of its creditors and members.

When winding up of a company is on the orders of a court, it is known as the compulsory winding up.

In a compulsory winding up, the company, or any creditor or any member may petition the court to wind up the company on any of the following grounds:

(a) The company has by special resolution resolved that it be wound up by the court;

(b) The company has made a default in holding the statutory meeting or in lodging the statutory report. Only a member can petition the court on this ground and the court has a discretion to order that the statutory meeting be held or the statutory report lodged within a specified period;

(c) The company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;

(d) The number of members have been reduced in the case of a private company to below two, or in the case of a public company to below seven;

(e) 75% of the paid-up share capital of the company has been lost, or has become useless for the business of the company;

(f) The company is unable to pay its debts. If the company is indebted to a creditor in a sum exceeding R100 and the company has neglected to pay the sum three weeks after a demand has been made on it, it may be deemed unable to pay its debts. The courts, however, do take into account the contingent and prospective liabilities of the company before holding that it should be wound up on this ground;

(g) If the court is of the opinion that it is just and equitable that the company should be wound up.

8 When a debtor tenders his creditor a sum less than that which is due under the contract and accompanies this by a statement that it is made 'in full settlement,' the creditor is not bound to accept the lessor sum and may refuse to accept it. A question, however, arises as to the legal significance of his act if he decides to accept it. Can he later sue the debtor for the balance?

It was laid down in *Harris* v *Pieters* (1920) that when a debtor pays money 'in full settlement' it may mean either part-payment or a conditional offer. In the latter case, if the creditor accepts the offer of lesser payment, the balance is not recoverable. The words 'in full settlement' are used as a mere assertion of a debtor's contention and the creditor is not bound to accept that. To be able to make a conditional offer, the debtor should deny all liability, offer to pay a certain amount and deny the rest (conditional offer).

The facts of the problem are very similar to *Harris* v *Pieters*. Suzy cannot force Evergreen Supermarket to accept a lesser payment. Evergreen Supermarket have sent her an invoice for R800. Suzy has paid by a cheque an amount of R770 and has claimed that such payment is 'in full settlement' of Evergreen Supermarket's invoice. 'In full settlement of my debt' is more indicative of part-payment; 'in full settlement of your claim' is more indicative of a compromise or conditional offer. Suzy's payment, it would appear, is indicative of a compromise or conditional offer as she has offered to pay a lesser sum 'in full settlement of their invoice.' By banking Suzy's cheque, Evergreen Supermarket can be said to have accepted Suzy's conditional offer or the offer of a compromise and cannot claim the balance of R30.

It would have been better if Suzy had written to Evergreen Supermarket that if her offer was not acceptable, Evergreen Supermarket should return her cheque. In that case, if the Evergreen Supermarket banked her cheque, it would have been clear beyond a shadow of doubt that Suzy's was a conditional offer or an offer of compromise and by banking her cheque, Evergreen Supermarket lost their right to claim the balance.

9 This question requires the candidates to answer if the control over the management of the company includes control over the corporate litigation.

Molefi has undoubtedly been in breach of his fiduciary duty by putting himself in a position where his personal interest conflicted with his loyalty to his company. This is not in issue. What is in issue is whether shareholders in a general meeting can direct the directors not to take legal action against Molefi for breach of his fiduciary duty? This requires us to analyse Table A Art.79 and some relevant cases.

Table A Art. 79 states: The business of the company shall be managed by the directors who may exercise all such powers of the company as are required to be exercised by the company in a general meeting. The exercise of these powers is subject to (a) the provisions of the Companies Act and (b) the memorandum and articles of the company. This language is identical to what was in the English Companies Act, 1948.

Under Art. 79, the directors have the power of management of the company and this may include the power to decide whether to take legal action against Molefi. It is open to shareholders to replace their directors by using s.146 Companies Act, 1967, or by altering the articles. In the problem, the shareholders have not chosen any of these alternatives.

Instead, they have chosen to pass an ordinary resolution which directs the board of directors not to take legal action against Molefi. The shareholders can justify it on the ground that the power to commence or discontinue litigation is not part of the management of the 'business' of the company; therefore, shareholders can validly direct the board not to take any legal action against Molefi. In *Estmaco (Kilner House) Ltd* v *Greater London Council* (1982), the shareholders told the directors not to commence legal action and the court observed: 'Where the majority shareholders genuinely believe that it is in the best interests of the company as a whole that an action by the company should not be brought, that is decisive, unless no reasonable shareholder in their position could hold this belief ... Even if the minority is profoundly convinced that a decision not to sue is wrong, the minority is a minority and not the majority...' The shareholders can contend that it was their genuine decision.

On the other hand, the board can argue that articles constitute a contract by which shareholders have agreed that directors alone shall manage their company. Control of corporate litigation is a management function and that since management functions have been delegated to them by the shareholders under Art. 79, shareholders cannot interfere with the exercise of such power in the circumstances mentioned in the question.

However, the directors should be reminded that the general meeting does have power to remove them, if they decide to ignore the wishes of the majority and replace them with ones who would enjoy their confidence. Articles can be altered but the altered articles cannot operate retrospectively.

10 A partnership is a contract *uberrimae fidei*. It means that the relationship between partners is the same as between brothers, namely one of mutual trust and confidence. No partner may acquire and retain for himself any benefit which was within the scope of the partnership business and which he acquired through the use of partnership assets.

The important question is thus to determine the scope of the partnership business in the given problem. The business of the partnership was to purchase well-bred horses but not every well-bred horse – only those that have been specifically agreed upon. Sim and Sam agreed to purchase Beauty and not Champion. Sam had no right to risk more money of the partnership and buy Champion as well. Had he done so and a loss occurred, he surely would have been liable to Sim in respect of the additional investment made.

Therefore, additional investment made by Sam was on his own account and not on partnership account. Nor was it within the scope of partnership business.

But it is also a rule of law that a partner cannot retain any profits made through the use of partnership assets. It can be argued that Sam made the profits through the use of partnership assets.

However, it was held in *Mattson* v *Yiannakis* (1976) that in order that a gain may become a partnership asset, the profit-making transaction must be within the scope of partnership business. If a partner in a firm of stockbrokers uses the firm's typewriter for the purpose of typing a prize-winning novel, the prize does not become the property of partnership merely because an asset of the partnership, namely the typewriter, has been used to write that novel. It does not mean that the partnership has no remedy for unauthorised use of its assets but that remedy does not include taking away the prize.

It is also a rule of law that a partner is not allowed to run a business in competition with his partnership. He must not put himself in a position where his duty of loyalty to partnership conflicts with his personal interest.

That situation does not exist here. Sam is not running a competing business. Betting on *each and every* well-bred horse was not the partnership business. The partnership business was to purchase only *those* well-bred horses that had been *mutually* agreed to. When Sam bought Champion, he did it on his own account. He was not competing with the partnership at all. Nor was he in any way in conflict with his duty of loyalty to the partnership.

Therefore, in the given problem half of Sam's profits do not belong to Sim. They do not belong to the partnership either.

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 a discussion of the meaning of the phrase 'common law in Lesotho' and its place in corporate and business law matters.

6–10 Thorough explanation of the meaning of the phrase generally and correct identification of the sources of corporate and business law. Lower band answers will show an understanding of the phrase but will lack the detailed knowledge of the answers in the higher band. Alternately, they may be unbalanced in structure, or missing out important issues.

0–5 Answers will show some knowledge but with little detail or analysis. Lower band answers would be poor and would show either no or very little knowledge of the area.

2 This question examines the candidate's knowledge and understanding of the law regarding an advertisement.

6–10 Thorough explanation of the terms offer and invitation to treat. Lower band answers will show an understanding of the terms but will lack the detailed knowledge of the answers in the higher band. Alternately, they may be unbalanced in structure, or missing out important issues.

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

3 This question tests the understanding of the candidates regarding the concept of contributory fault.

6–10 Thorough discussion of the concept of 'contributory fault' including relevant examples to explain its working.

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

4 This question invites the candidates to discuss rights of an employee and the obligations of an employer, who is closing down his business.

6–10 Thorough explanation of the meaning of the term, 'operational requirements' in the context of retrenchment and 'procedural fairness'.

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

5 This question asks the candidates to explain the process of appointment of auditors in a company and their qualifications for the appointment.

6–10 Thorough explanation of the process of appointment of auditors and the qualifications for their appointment.

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

6 This question asks candidates to explain the doctrine of *ultra vires* as it applies in Lesotho.

6–10 A comprehensive explanation of the doctrine of *ultra vires* as it operates in Lesotho, together with a thorough discussion of the March 1985 amendment of the Companies Act, 1967, in this regard.

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

7 This question seeks to test the candidate's understanding regarding the compulsory winding up of a company.

6–10 Excellent understanding of the grounds on which compulsory winding up can be ordered by the court.

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

8 This question requires candidates to advise Suzy regarding the claim of Evergreen Supermarket.

- 8–10 A thorough analysis of the scenario focusing on the appropriate rules of law and applying them accurately.
- 5–7 A fairly accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation.
- 2–4 An ability to recognise some, although not all, of the key issues and suggest appropriate legal responses to them. Or, a recognition of the area of 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 requires the candidates to answer if the control over the management of the company includes control over the corporate litigation.

- 8–10 Accurate analysis of the issues involved in the problem scenario and a clear and accurate attempt to deal with the particular problems involved with reference to suitable cases.
- 5–7 Correct identification of the issues involved in the problem and a fairly accurate attempt to deal with them.
- 2–4 Identification of at least some of the central issues in the problem and an attempt to apply correct legal rules to those issues. Towards the bottom of this range of marks, there will be major shortcomings in analysis or application of legal rules.
- 0–1 Very weak answers, which might recognise the central issues what the problem is about but show no ability to analyse or answer the problem as set out.

10 This question requires candidates to advise Sim if he or their partnership had any claim on the prize money.

- 8–10 A thorough analysis of the scenario focusing on the appropriate rules of law and applying them accurately.
- 5–7 A fairly accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation.
- 2–4 An ability to recognise some, although not all, of the key issues and suggest appropriate legal responses to them. Or, a recognition of the area of law but no attempt to apply that law.
- 0–1 Very weak answer showing no, or very little, understanding of the question.