Answers
1. This question requires candidates to discuss judicial precedent as a source of law in Botswana citing its advantages and disadvantages.

(a) Judicial precedent is a source of law in Botswana. Judicial precedent is also known as *stare decisis* in Latin, which literally means 'to stand by decided matters'. Botswana received this source of law as part of the general reception of Roman-Dutch law and English law from South Africa during the colonial period. This doctrine is founded on the traditional view that a judge does not make law but merely declares and applies the existing law to the facts of a particular case. Judges refer to precedent as a guide to decide similar cases. However, in the course of applying judicial precedent they may widen or extend a rule of law or devise a rule by analogy with existing rules or even create an entirely new principle. In applying the rule of precedent in this way, judges develop the law. Judicial precedent is therefore an important source of law in Botswana. In order for the rule of judicial precedent to operate properly there must be a hierarchy of courts. In Botswana, a lower court is bound by decisions of a higher court. A court would usually also be bound by decisions of a court of equal standing unless it can establish good reason to distinguish its decision.

(b) The system of binding precedent offers several advantages. These are:

(i) **Legal certainty:** Litigants have confidence in the future course that the court will take in resolving legal problems of a similar nature. This is because the judge is bound to adopt precedents in similar matters previously decided by a court of correct standing.

(ii) **Precision:** Case law contains a wealth of law which assists in the resolution of the innumerable legal problems arising in different branches of the law. Reliance on statute alone would be insufficient. Statute could never cater for the multiplicity of legal problems brought before the courts.

(iii) **Flexibility:** This is achieved by the possibility that unsound decisions can be overruled or distinguished by the courts. The doctrine of precedent also allows for the development of new principles by extension or analogy to meet new circumstances.

The doctrine of precedent presents several disadvantages. These are:

(i) **Rigidity:** There is inherent rigidity in the application of the doctrine which may sometimes cause hardship to litigants.

(ii) **Bulk and complexity:** The vast number of reported cases makes it difficult to learn and apply the law.

(iii) **Danger of illogical distinctions:** Overly subtle distinctions are sometimes drawn by judges in order to avoid applying an otherwise binding precedent or overruling it outright. This sometimes results in legal uncertainty.

(iv) **Absence of precedent:** This doctrine breaks down where there is no precedent. A judge faced with a legal problem for which there is a precedent must then make law usually by reference to analogous general principles of law.

2. This question requires candidates to define ‘terms’ and to explain and distinguish between the various classifications of contractual terms.

(a) Terms of the contract are promises agreed upon by the parties which together make up the contract. Not all statements made in the course of formation of a contract are necessarily terms of the contract. In *Petit v Abrahamson (II)* (1946), the court identified three types of statements that may be made by parties in negotiating an agreement. These are mere puffing or commendation, representations and lastly, undertakings – commonly referred to as warranties. Only the undertaking or warranty would give rise to a contractual obligation. In other words, terms of contract are promises made seriously and deliberately that are capable of enforcement.

(b) Terms of a contract can be classified into three types. These are *essentialia*, *naturalia* and *accidentalia*. *Essentialia* are described as things which are of the essence of a contract, those without which the contract cannot subsist and for want of which there would either be no contract or a contract of a different kind. Examples of *essentialia* of a contract are a thing to be sold and a price for which it is to be sold.

The second classification of terms of a contract is *naturalia*. These are terms implied by law into every contract of a particular type. Such terms are imposed by law and do not originate from the contractual agreement between the parties. The implied terms may derive from the common law, from trade usage or practice and lastly from statute. Terms falling into the class of *naturalia* are not essential to the contract and may be excluded by the parties by agreement. A classic example of a term of contract falling into this class is the implied warranty against latent defects which may be excluded by a sale voetstoots.

The third class of terms of contract is the *accidentalia*. These are terms that are only included by express agreement between the parties to the contract. Examples of such terms are an agreement to pay monies due in instalments, or an agreement to pay monies due on a contract after the passage of a specified amount of time.
This question requires candidates to discuss the appointment procedure relating to auditors, and explain the powers and duties of company auditors.

(a) In terms of s.196 Companies Act, 2003, the directors of a company may appoint the company’s first auditor. The first auditor shall hold office until the conclusion of the first annual meeting. If an auditor is not appointed before the first annual meeting, the company must appoint an auditor at the meeting. The auditor shall hold office from the conclusion of the meeting in which he is appointed until the conclusion of the next annual meeting. Only auditors resident in Botswana qualify for appointment under the Companies Act, 2003.

(b) The powers of auditors are as provided for under s.201 Companies Act, 2003. These include the right of access to the company’s accounting records and other documents of the company. The auditor is also entitled to require from the company’s officers or employees such information and explanations as he deems necessary for the performance of his duties as an auditor. In terms of s.202 Companies Act, 2003, the auditor also has a right to attend general meetings of the company and a right to be heard on any part of the business of the meeting which concerns him as an auditor.

The duties of the auditor are two-fold. Firstly, s.204 Companies Act, 2003 requires that upon becoming aware of an irregularity affecting the affairs of the company, the auditor must send a report in writing regarding the irregularity to the board of the company within seven days. The board is required to remedy or report back on the matter within 30 days. Should the board fail to meet this obligation, the auditor is then authorised by law to file a report to the Registrar of Companies or to the Stock Exchange with respect to listed companies. The company auditor is also under a duty to avoid any conflict of interest that may impair his judgement by reason of any relationship or interest he may have in the company he audits or in its subsidiaries.

This question requires candidates to distinguish between administration of companies and winding up of companies.

Administration of companies is also known as judicial management. Judicial management is a process whereby the court places the management of the company’s affairs into the hands of a manager. The person appointed as a manager will then control the affairs of the company under the supervision of the Master of the High Court.

On the other hand, winding up or dissolution of a company is a process by which a company ceases to exist as a legal entity. Dissolution can be compulsory, that is by way of court order, or voluntary, that is by special resolution by the company board of directors. Voluntary dissolution may also occur by effluxion or passing of time where a company was incorporated to exist for a limited time.

The purpose of judicial management is to enable companies suffering a temporary setback due to mismanagement or other special circumstances the opportunity to be successful businesses. This it achieves by placing the company in the care of a judicial manager.

The purpose of a winding up order is to dissolve the company in a structured manner giving persons with claims against the company the opportunity to lodge their claims and receive payment.

Companies may be placed under judicial management when they are unable to pay their debts. Another reason for judicial management is that by reason of mismanagement or some other cause, it is just and equitable that the company should be wound up by the court. Lastly, the court may on consideration of the facts take the view that there is a reasonable probability that if the company is placed under judicial management it will be able to meet its obligations and avoid liquidation. A company may also be placed under judicial management at the request of any member of the company or its creditor if it appears to the court that by reason of mismanagement or any other cause it is desirable that the company be placed under judicial management.

In contrast, a company will be dissolved where by special resolution, it resolved that it should be wound down, where it is unable to pay its debts, where the company had persistently or seriously failed to comply with provisions of the Companies Act, where as an external company it is dissolved in its country of registration and where it is just and equitable to wind up the company. A company may also be voluntarily wound up of its constitution provided that it should exist for only a fixed period of time.

In this question, candidates are required to illustrate the effect of incorporation.

There are two effects of incorporation. These are separate legal personality and limited liability. Once a company is incorporated, it becomes an artificial entity under the law with a separate legal personality from its owners. In Salomon v Salomon & Co Ltd (1897), the House of Lords held that a company is a separate legal entity from its owner. A similar finding was made in the South African case of Dadoo Ltd v Krugersdorp Municipal Council (1920) with the court citing the decision in Salomon with approval. In Botswana the doctrine of separate legal personality was recognised as constituting part of our law in T.L. Investments v Molefe (1985).

The effects of separate legal personality are manifold. Firstly, by virtue of separate legal personality, a company can acquire and dispose of property in its own name. In Macaura v Northern Assurance Co Ltd (1925), the court upheld this principle, ruling that the majority shareholder in a company who had insured the company’s property in his own name could not claim against such a policy when the property that was destroyed by the fire was the property of the company and not his property. The court held that by virtue of the fact that the property belonged to the company and not its owner, he had no insurable interest in the property of the company.
The second effect of separate legal personality is that the company acquires the capacity to enter into contracts in its own name with anyone including its own shareholders. This principle is illustrated in Lee v Lee's Air Farming (1961) where the court held that the majority shareholder in the company could enter into a valid contract of employment with the company. The company was liable to pay workmen's compensation in respect of that employee when he was killed in a flying accident at work.

The third consequence of incorporation is that the company acquires the capacity to sue or be sued in its own name. In the Botswana case Ghanzi Hotel v the Attorney General (1985), the court held that a legal or artificial person, just like a natural person, was capable of being defamed stating that trading corporations should have the same rights to protect their names trading and reputations as those afforded to natural persons.

Lastly, the members of an incorporated entity acquire limited liability. This means that their liability is limited to the amount of money unpaid on their shares. Where a member has fully paid for his shares, his personal property may not be attached to pay the company's debts.

6 In this question, candidates are required to define a share and discuss the meaning of share capital.

(a) The meaning of a share at common law can be found in Borland's Trustee v Steel Bros (1901) where the court held that 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 ... . A share is not a sum of money ... but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.'

In terms of s.48 Companies Act, 2003 a share is defined as movable and transferable property, which confers on the holder the right to one vote in a poll at a meeting of the company on any resolution, the right to an equal share in dividend authorised by the board and the right to an equal share in the distribution of the company’s surplus assets.

(b) In company law, the word capital refers to share capital and loan capital. Share capital is the money that the company raises through the issue of shares. There are several types of share capital which are: issued or allotted capital, paid-up capital, uncalled capital and stated capital.

(i) Issued or allotted capital refers to a company's nominal capital which has been issued or allotted to shareholders. A shareholder's evidence that shares have been allotted and issued to him by a company is his share certificate.

(ii) Paid-up capital is the part of issued capital which has been paid up by shareholders.

(iii) Uncalled capital is the remainder of issued capital that remains unpaid or that is outstanding on issued shares. Uncalled capital can be called up at any time by the company in terms of the Companies Act and the company’s constitution.

(iv) Stated capital is the total of all amounts received by the company or due and payable to the company in respect of shares issued and in respect of calls on shares. Stated capital is therefore a combination of paid-up and uncalled capital or in other words, the issued capital.

7 This question requires candidates to explain the meaning of delict distinguishing a delict from a breach of contract and a crime.

A delict is a civil wrong. This definition is not precise because it also describes a breach of contract. A more precise definition is that a delict is unlawful, blameworthy (that is intentional or negligent) conduct, which causes another person damage to person or property or injury to personality and for which a civil remedy for recovery of damages is available. Examples of delictual acts include trespass, nuisance, defamation and negligence.

A delict must be distinguished from a breach of contract which also qualifies as a civil wrong. The major distinction between the two is that a delict is a breach of a duty imposed by law independently of the party bound by that duty. On the other hand, a breach of contract is a breach of a duty voluntarily assumed by the individual in breach. The same wrongful act may give rise to actions both in contract and in delict. For example, where a medical doctor injures a patient through his negligent conduct, the patient may sue the negligent doctor for delict or for breach of contract.

A delict can also be distinguished from a criminal act, which is also a wrong or unlawful conduct. A crime is a wrong viewed from the perspective of the state. The state prosecutes the criminal conduct, which infringes upon the interests of the state and of the individual. The convicted individual is liable to punishment. A delict on the other hand is a wrong looked at from an individual's point of view. The law of delict regulates relationships between individuals. In a delictual claim the plaintiff will usually seek damages as compensation from the defendant. There can also be an overlap between criminal conduct and delictual conduct. For example, a person assaulted by another may seek redress against his assailant through the criminal courts but may also seek compensation from his assailant for injuries sustained as a result of the assault. The object of proceedings in a crime is to punish the offender rather than to compensate the victim.
Candidates are required to explain the concept of ostensible authority of a director acting as agent for his principal, the company. The company is an artificial entity and can only act through human agents, which are its officers. The most important of the company's officers are its directors. The company acts through its directors and they in turn derive their authority from the company's constitution and the Companies Act, 2003. There are two types of authority: actual authority and ostensible authority. Actual authority occurs where the agent is authorised to bind the company through a provision of the constitution of the company or a resolution. There are two types of ostensible authority: (a) that authority which a person in the position and that type of business can reasonably be assured to have (see Panorama Developments (Guildford) v Fidelis Furnishing Fabrics (1971)); and (b) that authority which the particular agent has been held out by his principal as possessing. In that case the principal is estopped from denying that the agent did have authority. Midlands Auctioneers (Pvt) Ltd v Bowie (1975).

Mmusi has no actual authority to bind the company. He has not been appointed managing director by the board. Further, there was no clause in the company's constitution appointing Mmusi as managing director. In a similar case, Freeman and Lockyer v Buckhurst Park Properties (1964), the company sought to avoid a contract concluded with an architectural and surveys firm by one of its directors on the basis that the director had contracted with the firm without the necessary authority. The court held that the company was bound by contracts concluded by the director because it had held out the director as its managing director. The company was held to be aware that the director was acting as managing director. The act of engaging architects and surveyors was held to be one within the ordinary ambit of a managing director. The court held that by virtue of the rule in Turquand's case, (Royal British Bank v Turquand (1856)), the firm did not have to enquire whether the director was properly appointed as managing director. The firm was entitled to rely on the director's ostensible authority. Similarly, Horizon Architects is likely to succeed in its claim against TM Developments. TM Developments held out Mmusi as managing director. He has ostensible authority to act as agent for TM Developments. According to the rule in Turquand's case, Horizon Architects is not under common law duty to enquire whether Mmusi had actual authority. Horizon Architects is entitled to rely on Mmusi's ostensible authority to bind TM Developments. In terms of s.27 (1) c Companies Act, 2003, TM Developments is precluded from claiming that a person held out by the company as director has not been duly appointed or that he does not have authority to bind the company. Further in terms of s.28 Companies Act, 2003, Horizon Architects is under no obligation to enquire into whether Mmusi has actual authority by inspecting TM Developments' registered company documents. It is sufficient that TM Developments held out Mmusi as managing director to create liability on the contract.

In this question, candidates are required to discuss the employee's duty to further the employer's business.

From the facts, it is evident that Tiro has divided loyalties. He devotes some of his time, energy and skill furthering his employer's business interests in the bakery. However, some part of his normal working hours is being dedicated to a rival bakery business owned and managed by his wife. He has also managed to divert business away from his employer by supplying bread to his employer's main customer.

It is the duty of the employee to further his employer's business interest. This means that he must devote all his normal working hours to the employer's business and he may not without the employer's permission take up work for another employer during the hours in which he is contracted to work. Therefore, in this respect Tiro is in breach of his duty as an employee.

The common law also provides that an employee is in a fiduciary position towards his employer. The employee may not place himself in a position where his own interests conflict with that of the employer. The employee may not work for another whose business interests conflict with that of the principal employer (Ketteringham v Cape Town City Council (1933); Harrismith Building Society v Taylor (1938)). An employee would be obliged to disclose such arrangements to their employer before accepting employment (Jeffery v Persetel (Pty) Ltd (1996)). An employee who secretly competes with their employer's business is in breach of their fiduciary duty. In this respect as well, Tiro is in breach of his duty to further his employer's business. Modisakgotla will be able to successfully defend the lawfulness of the dismissal. Any serious misconduct that renders the continuation of the employment relationship unworkable or that undermines trust and confidence between the employer and employee is regarded as sufficient to justify dismissal.

In this question candidates are required to explain the nature and legal control over insider dealing in Botswana.

Maria's conduct concerning the purchase of Kopano's shares in MainTel amounts to insider dealing. Insider dealing is defined as the purchase or sale of securities whilst in the possession of unpublished price-sensitive information, which is unknown to the other party to the transaction. The price-sensitive information would generally be in the possession of the individual dealing in the securities by virtue of his connection with the company as director, employee or professional advisor. Maria was in possession of information relating to the impending takeover that would result in the increase of MainTel's share price, which information was not generally available and was unknown to Kopano.

Maria's conduct is wrongful at common law under the Companies Act, 2003. At common law, a director has a duty not to use corporate information to their advantage without the consent of the company. Maria's conduct is wrongful in terms of the common law as well. In Regal (Hastings) v Gulliver (1967) the court held that directors were bound to account to the company for a secret profit made on the basis of knowledge and opportunity they gained as directors. It should be noted, however, that the director's liability under common law would be to the company only. If such a claim were successful at common law, Kopano would have no share in damages awarded although the secret profit was made at his expense. Thus whilst MainTel could pursue Maria for the secret profit made, Kopano, as a shareholder, would have no personal claim against Maria.
Given this weakness of the common law, the Companies Act, 2003 has introduced a specific clause prohibiting insider trading. In terms of s.324, where a person knowingly deals with securities on the basis of unpublished price-sensitive information in respect of that security, which information was obtained by virtue of a relationship of trust or contract with the company, or by virtue of fraud or any other wrongful means, such person commits an offence and is liable to a fine of up to P100,000 and to imprisonment for a maximum of two years. Where an advantage is gained from dealing in such securities, the person who gained such an advantage will be liable to any other person for any losses incurred. Kopano can therefore report Maria for criminal conduct under the Companies Act. Kopano also has the option to recover personal losses suffered as a consequence of Maria’s insider dealing by instituting a suit for damages against Maria.
1 (a) This question requires candidates to discuss judicial precedent as a source of law.

3–4 A good to excellent discussion of judicial precedent.
0–2 A poor grasp of judicial precedent.

(b) This question requires candidates to explain the advantages and disadvantages of judicial precedent.

4–6 A good to excellent statement of advantages and disadvantages of judicial precedent.
0–3 A poor to fair enumeration of advantages and disadvantages of judicial precedent.

2 (a) This question requires candidates to define ‘terms’.

2–3 An accurate definition of the phrase.
0–1 A poor definition of the phrase.

(b) This question requires candidates to explain and distinguish between the various classifications of contractual terms.

4–7 A good to excellent discussion of the various types of contractual terms.
0–3 A poor to average discussion of the various types of contractual terms.

3 (a) This question requires candidates to explain the procedure for the appointment of auditors.

3–4 A succinct discussion of the procedure for the appointment of auditors.
0–2 A weak discussion showing little grasp of rules regarding the appointment of auditors.

(b) This question requires candidates to explain the powers and duties of company auditors.

4–6 A thorough discussion of the powers and duties of company auditors.
0–3 A shallow understanding of powers and duties of company auditors.

4 This question requires candidates to compare and contrast the judicial management and winding up of companies.

6–10 A sound and thorough understanding of the difference between the judicial management and winding up.
0–5 A shallow understanding of the difference between the two remedies.

5 This question requires candidates to illustrate the effects of incorporation.

6–10 A complete answer citing relevant legislation and case law.
0–5 A shallow answer unsupported by any authorities.

6 (a) This question requires candidates to define a share.

3–4 A clear and unambiguous definition of a share citing relevant case law.
0–2 An inaccurate definition unsupported by authorities.

(b) This question requires candidates to discuss the meaning of share capital.

4–6 A thorough answer showing understanding of the content of the question.
0–3 A shallow and incomplete discussion.
This question requires candidates to explain the meaning of delict, distinguishing the delict from a breach of contract and a crime.

6–10 A complete answer with clear definition of delict and a clear distinction between a delict, a crime and a breach of contract.

0–5 A shallow discussion of the meaning of delict and poor discussion of the distinction between a delict, a breach of contract and a crime.

This question requires candidates to discuss the concept of ostensible authority.

6–10 A clear understanding of ostensible authority and the manner in which it is established.

0–5 A shallow answer showing poor grasp of the concept of ostensible authority.

This question requires candidates to discuss the duty of the employee towards the employer.

6–10 Good to thorough discussion of duties of the employee.

0–5 Poor understanding of the duties of the employee.

This question requires candidates to discuss the nature and legal oversight of insider dealing in Botswana.

6–10 A succinct discussion of common law and statutory rules governing insider dealing.

0–5 A shallow understanding of insider dealing and relevant rules of common law and statutory provisions.