Answers

1 This question requires candidates to explain the structure and operation of the court system.

The structure of the courts in Botswana is hierarchical. The structure consists of the Court of Appeal, the High Court, the magistrates' courts and the customary courts. Botswana operates a dual legal system with the common law and statues operating alongside customary law. Each system of law has its own court. The Court of Appeal and High Court constitute superior courts and the magistrates' courts and customary courts constitute subordinate courts. Each of these courts will be considered separately. Botswana also has four courts of special jurisdiction, these are: the Industrial Court, Children's Courts, the Land Tribunal and Courts Martial whose jurisdiction is exclusive to labour matters, children in conflict with the law, tribal land issues and military offences respectively.

The Court of Appeal is governed by the Constitution and the Court of Appeal Act 2005. The Court is an appellate court receiving matters from lower courts, particularly the High Court and the Industrial Court. It may, in exceptional circumstances, exercise original jurisdiction on questions of law referred to it from the High Court in terms of s.15 Court of Appeal Act 2005. The Court of Appeal operates as a final court of appeal in all criminal and civil matters in Botswana. Appeals may be brought to the court as of right, for matters originating at the High Court or with leave to appeal from either the Court of Appeal itself or the High Court.

The operation of the High Court is governed by the Constitution and the High Court Act 2009. In terms of s.95 of the Constitution, the High Court has unlimited original jurisdiction to hear and determine any civil or criminal matter, even where a lower court has limited jurisdiction with respect to such a matter. For example, in *Mafokate* v *Mafokate* (1996) the High Court held that it had jurisdiction to hear a case concerning dissolution of marriage under customary law, even though the customary courts had jurisdiction to hear and determine the dispute. The High Court also has supervisory powers of over proceedings in lower courts, which essentially means it can review proceedings in such lower courts and make any orders it deems appropriate for the purpose of ensuring that justice is administered in the lower courts. Lastly, the High Court has appellate jurisdiction over decisions of magistrates' courts, customary courts, juvenile courts, courts martial, and the land tribunal.

Magistrates' courts are governed by the Magistrates' Court Act 2008. The courts deal with most criminal and civil matters although their jurisdiction is limited. In civil matters, the most notable exclusions from jurisdiction are civil claims exceeding P40,000, cases concerning dissolution of marriage, and cases concerning validity of wills which must be referred to the High Court. With respect to criminal matters, the offences of treason and murder which are capital offences may only be tried at the High Court at first instance.

Customary courts primarily apply customary law to resolve criminal and civil disputes within their jurisdiction. Notably however, customary courts may apply common law and statute in the determination of disputes before them in terms of s.15 Customary Courts Act 2006. The courts may try individuals for offences that exist in customary law, provided they also exist in the written law. Thus, in *Bimbo* v *The State* (1980) the High Court set aside a conviction against the accused for the offence of adultery because the offence, whilst known in customary law, was not recognised in written law. Further, the legislature has greatly limited the customary courts criminal jurisdiction by excluding offences like treason, murder, rape, robbery and others from the customary court's jurisdiction.

2 This question requires candidates to explain the remedies available for breach of contract.

The remedies available for breach of contract are specific performance, interdict, cancellation and damages. The first two can be regarded as means of enforcing a contract, the last two are means of seeking compensation for non-performance.

(a) In terms of the law, every party to a binding agreement who is ready to carry out his own obligation has a right to demand from the other party, as far as it is possible, a performance of his undertaking in terms of the contract – *Farmers' Co-op Society (Reg)* v *Berry* (1912). This is called specific performance. Specific performance will not be granted where it is impossible to comply with the order; where complying with the order will cause the defendant undue hardship; where the contract is one for personal services as there is a danger of further disputes arising between the parties; and where the obligations of the defendant in terms of the contract are vague and an order may result in disputes over whether specific performance has been effected or not.

(b) The second remedy is an interdict. This is an appropriate remedy to prevent breach or threatened breach of contract. Where an interdict is granted, the court orders the defendant to refrain from doing whatever is specified in the order. Where the defendant fails to comply with an interdict, he may be charged with contempt of court.

(c) The third remedy available for breach of contract is cancellation. Where one party repudiates the contract, the other may respond by cancelling the contract. This is also known as rescission of contract. Cancellation terminates the obligations of the contract at the time of cancellation. The injured party would still have a right to claim damages for breach of contract. Cancellation must be clear and unequivocal.

(d) The last remedy is damages. A party who has suffered damages as a result of breach of contract by the other party to the contract may sue for damages. The plaintiff must prove that he would not have suffered loss but for the defendant's breach. Damages for breach of contract are normally not intended to compensate the innocent party for his loss, unlike damages for delict but are meant to put him in the position he could have been in had the contract been properly performed – *Trotman* v *Edwick* (1951).The plaintiff must prove his damages and if he is unable to do so, no damages will be awarded – *Rhodesia Cold Storage* v *Liquidator, Beira Cold Storage* (1905). The plaintiff also has a duty to mitigate his damages – *Hazis* v *Transvaal and Delagoa Bay Investments Co Ltd* (1939).

3 This question requires candidates to explain how the authority of an agent is established.

An agent is a person who concludes a contract with another, the principal, in which they are authorised to contract or negotiate a contract on their principal's behalf with a third party. The agent cannot be described as an employee of the principal or an independent contractor working for the principal. The agent must have the authority of the principal in order to act on the principal's behalf.

The authority of the agent may be acquired expressly, impliedly by law, impliedly by conduct, and lastly through ratification of an unauthorised act.

Express authority given by the principal to the agent sets out the scope of the agent's authority, which is what the agent has to do, along with the remuneration that the agent is to be paid for their services. Where the remuneration is not specified, then it is a reasonable amount or an amount implied by trade usage. Generally, express authority will be given in a power of attorney, although a letter may effectively define the authority of an agent. A power of attorney is required by law in the following cases: where a conveyancer transfer lands or registers a bond, and where attorneys institute action for a client at the High Court.

An agent's authority may also be implied by law. For example, partners have implied authority to bind the partnership, the board of directors has implied authority to act on behalf of the company and members of a close corporation have implied authority to contract on behalf of a close corporation.

An agent's authority may also be implied by the facts. The authority of the agent may be inferred from the conduct of the principal. The conduct must be such that no interpretation can be made other than that the parties intended that the relationship of principal and agent exist between them. This situation may also arise with an authorised agent who may have implied authority to perform acts that go beyond the express authority given to them by the principal. It would be the duty of the third party dealing with the agent to investigate the limits of the agent's implied authority.

Lastly, the acts of a person acting as agent without authority may be adopted or ratified by the principal, either expressly or impliedly. The adoption or ratification will clothe the act with authority as if it had been originally authorised. The act of ratification must be express or implied and must be addressed to the agent or the third party with whom the agent dealt. Ratification will be implied where the principal behaves in such a way that a reasonable person would believe that the principal was ratifying the acts of the unauthorised agent. Ratification must occur within a reasonable time of the unauthorised act. The effect of the ratification is to authorise the agent's actions on behalf of the principal retrospectively.

4 **(a)** This question requires candidates to explain and distinguish between a sole trader, a partnership and a company.

A sole trader is a business run by a single individual. It is unincorporated and it requires no formalities in its establishment. The profits and losses of the sole trader are those of its owner. The sole trader has no perpetual succession. The partnership is an unincorporated business association. Unlike a sole trader, a partnership required 2 to 20 members for its formation. The members must contract with one another for the establishment of the partnership. In their contract, the members agree to contribute money, labour and skill to a common stock. They also agree to carry out the business with the object of making a profit for their joint benefit. The liability of partners is unlimited. The profits and losses of the partnership are shared between the members of the partnership in proportion to their respective interest in it. The partnership has no perpetual succession. The company is an incorporated business association. Its incorporation must follow the formalities set out in the Companies Act 2003. The liability of shareholders is limited to the amount of money unpaid on their shares. The company has corporate personality; this means that it has separate legal existence from its members. The company enjoys perpetual succession. It continues in existence even after the death of its shareholders. There are several types of companies in Botswana; these are private companies, public companies, close companies and companies limited by guarantee.

(b) This question requires candidates to explain the meaning and effect of limited liability.

When a company is incorporated, it acquires corporate personality separate from its members. The members of the company acquire limited liability. This means that their liability is limited to the amount of money unpaid on their shares. Section 91 Companies Act 2003 codifies the common law position that the liability of shareholders is limited. This principle was laid down in *Salomon* v *Salomon* (1897), where the House of Lords held that the company formed by Salomon to take over his business was a separate legal entity and that Salomon was not liable for its debts. The point was reiterated in the Botswana case *Silverstone (Pty) Ltd* v *Lobatse Clay Works (Pty) Ltd* (1996).The effect of the doctrine is to shield the shareholder from the debts of the company. Should the company go into liquidation, the shareholder will only be liable to the extent of the amount that remains unpaid on the shares that he subscribed to and no more. The company stands responsible for its own debts as it is a person separate and distinct from its members at law.

5 **(a)** This question requires candidates to define companies' borrowing powers.

Every company has an implied power to borrow money – *General Auction Estate Co* v *Smith* (1891). This power is exercised by directors. Directors must exercise the power to borrow within the limits set by the company. Where a company has a constitution, borrowing will be invalid where the directors have borrowed the money for an *ultra vires* purpose – *Rolled Steel Products* v *BSC* (1985) or where the directors have borrowed in excess of their limit as set out in the constitution. The power to borrow has the attendant power to create charges over company assets in order to secure the loan.

(b) This question requires candidates to explain the meaning of debentures.

A debenture is any document which creates or acknowledges a debt arising out of a loan taken by a company. A debenture usually creates a charge over company assets as security for the loan. Debentures can, however, be unsecured. In terms of the Companies Act, 2003 a debenture is defined as a written acknowledgment of indebtedness issued by a company in respect of a loan made or to be made to it or to any other person whether constituting a charge on any of the assets of the company or not.

(c) This question requires candidates to explain the differences between shares and debentures.

Shares and debentures are similar in as far as they are both transferable securities. Further, they are both long-term investments in the company. Shares and debentures differ in the following manner. First, the holder of a debenture is a creditor of the company whilst the holder of shares is a member of the company. Second, debentures may be issued at a discount whereas shares, in general, may not be issued at a discount. The prohibition against issuing shares at a discount is to safeguard against reduction of capital to the prejudice of creditors. Third, a company may purchase its own debentures. In contrast, as a general rule, a company may not purchase its own shares, subject to specific exceptions. Fourth, interest on debentures may be paid out of capital; however, dividends on shares may not be paid out of capital but out of profits. Last, upon liquidation of a company, debentures must be paid out in full like all other company debts before any distribution is made to shareholders.

6 This question requires candidates to discuss the appointment procedure relating to, and the duties and powers of, a company secretary.

In terms of s.161 (1) Companies Act 2003, every company shall have a company secretary who must be a natural person, who has reached the age of majority and who is ordinarily resident in Botswana. A firm or corporation may also be appointed as company secretary, provided one qualified member of the firm or director of the corporation takes full responsibility for the work. The appointment of the company secretary is effected by the board. A person shall be appointed company secretary where they have consented to the appointment in the prescribed form and where they possess the requisite qualifications. The person appointed should have requisite knowledge and experience to discharge the functions of secretary of the company. The secretary of a public company shall be an auditor, a member of the South African Institute of Chartered Secretaries and Administrators or a legal practitioner or a member of a professional association of company secretaries approved by the minister.

Section 162 Companies Act 2003 provides that the following persons are excluded from taking office as a company secretary: a body corporate except as provided for in s.161, an undischarged bankrupt, and a person who is the sole director or auditor of the company.

The duties of a company secretary are set out in s.163 Companies Act 2003 as follows: preparation of all returns required to be filed with the Registrar of Companies; responsibility to the board for issuing all notices of meetings and responding to all enquiries in relation to notices of meetings; attending all meetings of directors and general meetings of shareholders and keeping minutes of those meetings; maintaining the register of shareholders, debenture holders, directors and secretaries, substantial shareholders and charges; ensuring that the company keeps accounting records; being responsible to the board for maintaining an adequate system of record keeping in relation to the correspondence and affairs and activities of the company. The Companies Act 2003 also provides that should the company secretary be removed from office, the secretary has the power to require the company to include in its annual financial statements a statement of reasonable length setting out the secretary's version of the circumstances resulting in the secretary's removal.

7 This question requires candidates to explain the meaning of and procedure involved in voluntary liquidation.

Voluntary liquidation is the dissolution or winding up of a company where the company has resolved by special resolution that it should be wound up in terms of s.405 (b) Companies Act 2003. Voluntary liquidation may also occur where the constitution provides that the company is to exist for a fixed period or until the occurrence of a particular event. When that period expires or the anticipated event occurs, the company may then pass a resolution in a general meeting requiring that the company be wound up voluntarily. There are two types of voluntary winding up. These are a members' winding up and a creditors' winding up.

Within 14 days of passing a resolution for winding up, the company must give notice of the resolution to wind up by advertisement in the Government gazette. The company must also give the same notice to the Registrar and Master of the High Court. If the company holds any immovable property or mineral interests, notice must also be given to the Registrar of Deeds. Failure to comply with this requirement is an offence – s.406.

Section 408 Companies Act 2003 provides that the company must, once it passes the resolution for voluntary winding up, cease to carry on its business except as may be required for the benefit of the winding up.

In a members' voluntary winding up, the directors may wish to furnish security to the Master of the High Court in an amount satisfactory to the Master for the payment of company debts. The directors may recover from the company any costs incurred for the furnishing of this security. This security may be dispensed with by the Master if the majority of directors provide him with a sworn statement supported by certificate from the company auditors attesting to the fact that the company has no liabilities – s.409 (1) & (2) Companies Act 2003.

The company in a general meeting then appoints a liquidator to wind up its affairs and distribute the assets of the company. The company can in a general meeting fix the liquidator's remuneration. At this point, the powers of the directors cease unless the company in a general meeting, or the liquidator, sanctions their continuance. The liquidator may, without a court order, exercise all the powers of the liquidator under the Act – s.411 Companies Act 2003.

Where security for debts has not been provided by the directors and where the Master has not dispensed with the requirement for security, then the winding up is a creditors' winding up – s.409(3) Companies Act 2003. The general meeting will still meet to appoint an auditor. In addition, in a creditors' voluntary winding up, the company must call a meeting of creditors on notice. The purpose of the meeting shall be to nominate an auditor to wind up the company voluntarily. Where the persons nominated for the office of liquidator in the company meeting and the creditors' meeting differ, then the liquidator nominated by the creditors shall prevail. Following his appointment, the liquidator shall inform the Master of his appointment to conduct a voluntary winding up in the prescribed form – s.421 Companies Act 2003. The liquidator shall then receive claims against the company which must be proved by affidavit. The liquidator has the power to accept or reject claims. A person aggrieved by the liquidator's decision may apply to court by notice of motion to have the decision set aside – s.421 Companies Act 2003. The liquidator shall then prepare a final account which shall be delivered to the Registrar and registered. After three months from the registration of the final account, the company shall be deemed to have been dissolved – s.427 Companies Act 2003.

8 This question requires candidates to discuss whether Sechaba Breweries is liable to Helen for damages.

In order to succeed against Sechaba Breweries, Helen must prove that the conduct of the brewery was wrongful and negligent, that there exists a causal link and that she suffered damages.

It is submitted that Sechaba Breweries' conduct was wrongful. Wrongfulness is established by proving that the claimant had a right that was breached by the wrongdoer or that the wrongdoer owed the claimant a legal duty. In this specific instance, Sechaba Breweries, which manufactures the ginger ale, has a legal duty to ensure that defective products do not reach the market infringing the interest of consumers – *Ciba-Geigy (Pty) Limited* v *Lushof Farms (Pty) Ltd* (2002).

Once wrongfulness has been established, negligence on the part of the manufacturer must be proved. The conduct of the manufacturer must be tested against the care that a reasonable man could have exercised in similar circumstances. The cut caused by the rusty piece of metal to Helen's tongue was because of the manufacturer's negligence. The manufacturer did not take reasonable care to ensure that the product was safe for consumption. The manufacturer could reasonably have foreseen such an injury and ensuing illness from the defective product.

In this question, causation is not in issue. There is a direct nexus between the conduct of the manufacturer and the damage caused to Helen. The manufacturer bottled a defective drink, which caused Helen a cut on her tongue and several days' illness. It is submitted that Helen will be able to prove Sechaba Breweries' liability to her in delict.

9 This question requires candidates to distinguish between a contract of service and a contract for services.

Statutory definitions of what amounts to a contract for service or contract for services are not always able to assist in determining the nature of the contract between parties – s.2 Employment Act, 2010. The courts therefore look beyond the Employment Act to determine the classes of contract. There are three tests that the court can use to determine if an employer and employee relationship exists. The first is the control test. This test developed from the English Law and was adopted by Roman-Dutch law. The control test examines whether there exists the right of the master to instruct and supervise his servant in the discharge of his duties. The greater the degree of control exercised by the employee, the more likely that the contract is one of service – *Tucker* v *SA Broadcasting Services Corporation* (1985).

The second test is the organisation test. This test enquires into whether employees form members of the organisation and where they are integral to its day to day running – *R* v *AMCA Services* (1959). Where the workers are members of the organisation and are integral to its workings, they are employees. This test has been criticised for creating more questions than it answers.

The final test applied by the courts in deciding if a contract is one of service or for services is the dominant impression test. This test weighs the many factors in an employment relationship which tend to signal a contract as one of service or one for services. There is no single determinant factor. The court will rule on the dominant impression it gets of the particular relationship after examining all factors. In *Michael Jordaan* v *Tamlac (Pty) Limited* (2004), De Villiers, J held that courts have discretion to apply any test they wish depending on the particular circumstances of each case.

In the case at hand the dominant impression test can be applied to arrive at a conclusion whether Dipeo is an employee or an independent contractor. By considering all the factors together, one can arrive at a determination that the contract tends towards a contract of service.

Dipeo is restricted from taking on other work whilst in the employ of the employer. In a contract for services, an independent contractor can take on other work. Dipeo is subject to a probation period. An independent contractor is not subject to a probation period. Dipeo is obliged to work fixed hours. An independent contractor determines what hours he works, provided he completes the task in an agreed period. Dipeo has been asked to resign, yet an independent contractor's contract can only be ended by termination of his contract. An independent contractor cannot be asked to resign. One can reasonably conclude that Dipeo is engaged as an employee by SureBuild and is entitled to sue for wrongful dismissal in terms of the Employment Act 2010.

10 This requires candidates to discuss directors' fiduciary duties with particular reference to conflict of duty and interest.

In terms of the common law, a director has a fiduciary duty of loyalty and good faith towards the company. This duty precludes the director from placing himself in a position where there is a conflict between his duty and his personal interests. The common law provides that a director must not be interested in a contract or proposed contract with the company unless the constitution permits or the company in general meeting approves the contract – *Aberdeen Railway Company* v *Blaikie Brothers* (1854). Where a director fails to disclose his interest in a transaction, the contract will be voidable at the instance of the company. If the general meeting approves the transaction, the contract is valid – *Northwest West Transportation* v *Beatty* (1887). However, if the general meeting denies approval, then the company is at liberty to cancel the contract. If the contract has been executed and cancellation is no longer possible, the director will be required to account for secret profits made.

Section 130(1) Companies Act 2003 provides that if a director is interested in a transaction to which the company is a party, he should disclose such interest. Section 134 defines the scope of the term 'interested' as including deriving a material benefit from a transaction. In terms of s.135, a director who has an interest in a transaction should disclose such an interest to the board which shall note in its minutes the monetary value of the director's interest and cause it to be entered in the interests register. Amending the common law position, s.135 (4) provides that failure to declare an interest does not affect the validity of the transaction concluded with the company. In terms of s.135(5) the director does, however, face criminal liability for failure to disclose an interest in a transaction. Lastly, a transaction concluded with the company in which a director is interested may be voided by the company within six months of disclosure of the transaction to shareholders, provided the company did not receive fair value under the contract – s.136 Companies Act 2003.

The board of Golden Arrow (Pty) Limited is advised that it may have Lorato charged with a criminal offence for failure to disclose her interest in the contract. Second, if the board believes that it did not receive fair value on the contract, it may, within six months of disclosure of Lorato's interest, opt to avoid the contract on grounds of the director's interest in terms of s.136, Companies Act 2003. The company may also sue Lorato to account for secret profits.

1 This question requires candidates explain the structure and operation of the court system.

6–10 A good to full and balanced answer showing thorough grasp of the material.

0–5 An unbalanced or incomplete answer showing little understanding of the structure and operation of courts.

2 This question requires candidates to explain the remedies available for breach of contract.

6–10 A detailed discussion of each remedy to breach of contract.

0–5 A partial answer showing inadequate grasp of the material.

3 This question requires candidates to explain how the authority of an agent is established.

6–10 A complete answer showing clear understanding of the various methods of establishing authority.

0–5 An incomplete answer dealing with only some of the methods with unsatisfactory explanation of each.

4 **(a)** This question requires candidates to explain and distinguish between a sole trader, a partnership and a company.

3–6 Fair to excellent grasp of the difference between these business associations.

0–2 Absent to inadequate differentiation.

(b) This question requires candidates to explain the meaning and effect of limited liability.

3–4 Good to excellent understanding of the doctrine.

0–2 Absent to inadequate understanding the doctrine.

5 **(a)** This question requires candidates to define companies' borrowing powers.

1–2 A complete statement of the meaning of borrowing powers.

0 An incomplete answer with inadequate understanding of borrowing powers.

(b) This question requires candidates to explain the meaning of debentures.

1–2 A complete statement of the meaning of debentures.

0 An incomplete definition.

(c) This question requires candidates to explain the differences between shares and debentures.

4–6 A complete answer clearly distinguishing the two securities.

0–3 An incomplete answer showing little understanding of the subject.

6 This question requires candidates to discuss the appointment procedure relating to, and the duties and powers of, a company secretary.

6–10 A succinct and detailed discussion of material.

0–5 A shallow discussion with inaccuracies and clear absence of knowledge of the area.

7 This question requires candidates to explain the meaning and procedure involved in voluntary liquidation.

6–10 A succinct detailed discussion of voluntary liquidation

0–5 A shallow discussion with inaccuracies.

8 This question requires candidates to discuss liability in delict arising out of negligence.

6–10 A detailed answer clearly stating relevant principles.

0–5 An inadequate answer with failure to identify relevant principles.

9 This question requires candidates to distinguish between a contract of service and a contract for services.

6–10 An ability to distinguish between the two types of contracts and methods of determining their existence.

0–5 A shallow discussion showing inadequate understanding of the material.

10 This question requires candidates to discuss whether directors may be interested in a transaction to which the company is party, and remedies available at law for breach of this rule.

6–10 An identification and discussion of relevant statutory provisions and case law.

0–5 A shallow discussion with failure to identify relevant authorities.