Answers

1 This question requires candidates to define law and explain and distinguish between common law and statutory law and customary law.

There is no universally accepted definition of law. A general definition of law therefore helps to provide a good starting point for understanding the nature and scope of law and its manner of operation in any legal system. Law is defined as a body of rules, whether formally enacted or customary, which a state or a community recognises as governing the actions of its subjects or members and which such a state or community may enforce by imposing penalties.

In Botswana, the phrase common law is used to refer to the English common law and Roman-Dutch law received through a Proclamation in 1891, which extended to the Bechuanaland Protectorate the law in force in the Cape Colony of Good Hope. By this proclamation, the colonial power endowed Botswana with a complete system of law that continues in force to date and is subject to continued development by Botswana's courts of law.

Statutory law is also known as legislation. It refers to all laws enacted by parliament as well as subsidiary legislation made under the authority of parliament. Statutory laws are enforced by Botswana's courts of law. Whilst the courts may declare laws unconstitutional and strike them down as such, only parliament can make or amend statutory law. Good examples of statutory law are the Botswana Constitution, the Penal Code and the Companies Act, 2003.

Customary law is another type of law in Botswana. It is derived from the customs and conventions of tribal communities observed over a period of time which such tribes regard as binding as law. Customary law in Botswana is not codified or written down. The ascertainment of the content of customary law is therefore a matter of fact to be proved in court by calling expert evidence from persons who are regarded as custodians of customary law such as chiefs and headmen. Customary law is largely applied by the customary courts. The High Court and Court of Appeal also have the power to determine disputes between individuals that are governed by customary law.

2 This question requires candidates to explain the duties of the employee.

(a) The employee has a duty to make their personal services available to the employer in accordance with the requirements of the contract of employment. The employer cannot force the employee to perform work other than that agreed upon without subsequent agreement.

(b) The employee has a duty to perform the work faithfully, diligently and competently, and to subordinate himself or herself to the employer. By accepting the job, the employee warrants that they are competent to perform the work required. Serious incompetence or negligence are grounds for terminating the contract. Lack of subordination through showing the employer contempt or offensive conduct by the employee can amount to breach of the contract of employment.

(c) The employee has a duty to obey reasonable orders given in the course of employment. Refusal without good reason to carry out the employer's lawful and reasonable instructions constitutes a breach of contract.

(d) The employee has a duty to act in good faith. They must protect the employer's interests. They may not do harm to the business interests of the employer by divulging confidential information to any competitor or by competing with the employer. The employee must therefore be honest, not make use of the employer's property for themselves and use their working hours to further the interests of the employer and not conduct unauthorised business.

(e) The employee must conduct themselves properly. Gross misconduct may lead to summary dismissal. The employee may not make use of confidential information belonging to the employer for their own enterprise or use their position to make a secret profit.

3 **(a)** This question requires candidates to explain the contents and effect of the company constitution.

Section 38 Companies Act, 2003 provides that the effect of having a company constitution is that the constitution sets out the rights, powers, duties and obligations of the company, its directors and shareholders. The constitution regulates the allocation of shares, the holding of shareholders' meetings, the appointment and remuneration of directors, proceedings of directors' meetings, the paying out of dividends and distribution of surplus assets of the company upon winding up. In terms of s.42(2) Companies Act, 2003, the company constitution is a contract binding upon the company and each shareholder and between the shareholders in accordance with its terms.

(b) This question requires candidates to explain how the company constitution can be amended.

In terms of s.43(2) Companies Act, 2003, the company may alter its constitution by passing a special resolution. There are limitations on a company's power to amend its constitution. In terms of s.43(2) Companies Act, 2003, the alterations must be in keeping with the Act. In terms of s.43(3), any existing company which has as its constitution a memorandum and articles of association may not alter these documents unless it replaces them with a single consolidated document, which is its constitution. The courts held in *Allen* v *Gold Reefs of West Africa* (1900) that the alteration of a company's constitution must be *bona fide* and for the benefit of the company as a whole. Where any alteration of the company's constitution results in a breach of a separate contract, the courts have held that the company may be held liable for such breach. Thus in *Southern Foundries* v *Shirlaw* (1940), the company appointed the plaintiff as managing director for ten years. The company then altered its articles of association to remove the managing director after only four years. The managing director successfully sued the company for damages for breach of an independent contract.

4 **(a)** This question requires candidates to discuss the ways in which directors can be appointed.

A person may be named as a director in an application for the registration of a company. In terms of s.148(1) Companies Act, 2003, such a person will be regarded as a first director of the company and shall hold office from the date of registration until he ceases to hold office in accordance with the Companies Act, 2003. Subsequent directors of a company must be appointed by ordinary resolution in a general meeting. In terms of s.150 Companies Act, 2003, the appointment of directors in a general meeting must be by individual vote unless there is agreement amongst the shareholders that directors may be voted in as a block. In terms of s.147 Companies Act, 2003, a person shall not be appointed as a director of a company unless he has consented in writing to be a director of the company and has certified that he is not disqualified from being appointed or holding office as a director of a company.

(b) This question requires candidates to discuss the circumstances in which directors can be disqualified from office.

Persons may be disqualified from holding the office of director if they fall foul of the requirements of s.146 Companies Act, 2003. In terms of this section, a body corporate may not be appointed as a director of a company. Persons under the age of 18 years are also prohibited from being appointed as directors. Unrehabilitated insolvents, persons convicted of offences involving dishonesty and who have been sentenced to a term of imprisonment without the option of a fine or been fined any amount exceeding P5,000, along with persons removed by a competent court from an office of trust on account of misconduct may not be appointed as directors without leave of the court. In relation to a particular company, persons who do not comply with qualifications for directorship as set out in the constitution of such company do not qualify for the office. Any person prohibited from being a director by order of the court in terms of ss.500 and 501 Companies Act is also disqualified from holding the office of director. Lastly, persons of unsound mind may not be appointed as directors.

5 This question requires candidates to define the various contractual terms.

The terms of a contract contain the specific obligations to which the parties to a contract agree. Terms of a contract can generally be classified according to their nature and effect. There are three classifications. These are *essentialia*, *naturalia* and *incidentalia*.

Essentialia are terms which are essential to a contract of a particular class or type or a specific contract. There are several types of specific contract, for example, contracts of sale or lease or donation. Such contracts have essential clauses that must be present in order for them to be classified as such. Thus, a contract of sale would have as its *essentialia* a clause wherein the seller binds himself to deliver the object of the sale to the buyer. The buyer will in turn bind himself to pay a sum of money in exchange for the item purchased. If one of these two clauses is not present, for instance, if the buyer does not pay with a sum of money but offers some other object in exchange, then the nature of the contract changes to one of exchange and not one of sale. *Essentialia* are therefore useful as they serve to identify the class to which the particular contract belongs. Once the class of the contract is known, it is then easy to identify the *naturalia*, or terms implied by law, which apply to such a contract.

The second classification is *naturalia*. *Naturalia* are terms that are attached by the law to every contract of a particular class. They are commonly referred to as terms implied by law. *Naturalia* help to determine the rights and duties of the contracting parties, and the effects and consequences of their contracts. *Naturalia* incorporate into contracts a number of relatively simple, normal or usual terms, which the parties to the contract do not have to negotiate themselves. *Naturalia* are usually based on what is generally accepted as economically viable, fair and reasonable. For example, in a lease agreement, some terms implied by law are that the lessor will maintain the property in good condition and that the lessee will rent the entire house. Parties may vary these implied terms if they choose to do so. For example, the parties may agree that the lessor may leave some of his property in one room of the house which will remain locked. The agreed term will then override the term implied by law.

The last classification is *incidentalia* or *accidentalia*. These are terms agreed by the parties in order to capture their intentions in contracting. These terms would not be *essentialia* or *naturalia* of the particular class of contract. They are terms which meet the particular needs of the contracting parties. For example, a term in a lease agreement that one room of the house will be reserved for the use of the lessor would be an incidental term. It does not fall into *essentialia* or *naturalia* but meets the specific needs of the parties to the contract.

6 This question requires candidates to describe the procedure for calling and conducting an annual general meeting.

The manner of calling and conducting a shareholders' meeting is set out in the second schedule to the Companies Act, 2003. In order to call a meeting of shareholders, notice of the meeting must be sent to every shareholder, director and secretary as well as an auditor of the company not less than ten working days before the meeting. The notice of the meeting must contain the nature of the business to be discussed and the text of any special resolution to be submitted to the meeting. The chairman of the board if they are present at the meeting shall chair the meeting. In their absence, the directors may select one of their number to chair the meeting. If no director is willing to act as chairman or no director is present, the shareholders present shall choose one of their number to chair the meeting. The quorum for a general meeting shall be a simple majority of those present along with those who have sent proxies or who have cast postal votes. No business may be transacted if the meeting is not quorate. The meeting may be held by the number of shareholders who constitute a quorum being assembled together at one time or by means of audio or audio visual communication by which all shareholders present can simultaneously hear each other during the meeting. Unless a poll is demanded, voting shall be by voice or by show of hands. A declaration by the chairman that the resolution is carried by the majority shall be conclusive proof unless a poll is demanded. The chairman at a shareholders' meeting is not entitled to a casting vote. Shareholders may exercise their right to vote by being present or by proxy. The shareholder using the requisite form shall appoint a proxy. The proxy form must be produced before the commencement of the meeting for a proxy vote to be valid. A shareholder may also vote by casting a postal vote. The notice of the meeting at which shareholders may cast a postal vote must contain the name of the person authorised by the board to receive and count postal votes. Where no such person is appointed, every director shall be deemed to have such authorisation. It shall be the duty of the person authorised to receive and count postal votes to collect all postal votes, to certify the result of the counts and present the certificate to the chairperson of the meeting. The certificate of the postal votes must be annexed to the minutes of the meeting. The board shall ensure that the minutes are kept of the proceedings of the shareholders' meetings. An instance where a shareholder will not be allowed to vote is where he has failed to pay any amount due to company in respect of his shares after a call has been made on such shares.

7 This question requires candidates to explain judicial management as an alternative to winding up.

Administration of companies, or judicial management, is a process where the court places the management of company affairs in the hands of a judicial manager who runs the company under the supervision of the High Court. The purpose of judicial management is to enable companies suffering temporary financial difficulties to become successful businesses. The judicial manager strives to ensure that the company becomes successful again. Judicial management can be ordered as an alternative to winding up.

In terms of s.471(1) Companies Act, 2003, where an application is made to the court for the liquidation of the company on the grounds that the company is unable to pay its debts or by reason of mismanagement or because it is just and equitable that the company should be wound up, the court may order judicial management as an alternative. This occurs where the court is of the opinion that there is a reasonable probability that if the company is placed under judicial management, it will be enabled to meet its financial obligations. The court will then postpone the granting of a liquidation order and instead grant a judicial management order. The test under s.471(1) is one of reasonable probability. The company will be placed under judicial management where there is a reasonable probability that the company will recover financially. In *BP Distributors (Pty) Limited* v *Gladden Supplies (Pty) Limited* (1968–1970), the court declined to order judicial management because the petitioner failed to establish the reasonable probability that the companies concerned would recover if placed under judicial management. A similar decision was reached in *Builders Merchant Botswana* v *Botoka Construction (Pty) Ltd* (1979–1980). The burden of proving a reasonable probability of recovery is a heavy one. The court in *BP Distributors* explained why courts were reluctant to grant the order. Dendy Young CJ stated that judicial management was a drastic remedy to apply to a company, especially where coupled with an order that all litigation pending against the company be stayed for the period of administration. Where the petitioner is able to discharge the burden and prove reasonable probability that the company will recover if placed in administration, the court will place the company under judicial management for a definite period of time or for an indefinite period. The court will also appoint a judicial manager to conduct the affairs of the company during the period when the company is placed under judicial management.

8 This question requires candidates to distinguish between an offer and an invitation to treat.

A firm offer must be distinguished from a mere invitation to do business. A valid offer must be made seriously with the intention to create legal obligations between the parties. Advertisements of goods for sale in shop windows, newspapers and catalogues and certain prices are not generally regarded as firm offers. They are mere invitations to do business or invitations to treat. In *Crawley* v *Rex* (1909), a customer saw an advertisement for tobacco at a reduced price. He successfully purchased the tobacco at the reduced price once. He returned later to purchase tobacco and offered the shopkeeper the reduced amount, which the shopkeeper declined to accept. In court, Crawley argued that he had accepted the tobacco at the reduced price as advertised by the shopkeeper and that he was entitled to take delivery. The court held that the notice amounted to a mere invitation to do business and not an offer to sell and that there was nothing requiring the shopkeeper to sell the goods to him at the advertised price.

In a self-service shop, the offer takes place when the customer tenders the purchase price to the cashier who may then accept the offer. The fact that the goods are on the shelves does not constitute an offer and there is no acceptance when the item is taken from the shelf. Similarly, the half price sale sign that Dimpho saw outside Elegance Boutique was an advertisement amounting to an invitation to do business. It was not a firm offer to sell items in the store at half price. The cashier had the option to accept or decline, at the till, Dimpho's offer to purchase the goods at half price. The cashier was not bound by law to sell the goods to Dimpho at the advertised price. The advertisement was a mere invitation to treat and not a firm offer to sell. Dimpho will be required to pay P100 for each item as the cashier did not accept the half price offer.

9 This question requires candidates to discuss the circumstances in which the court may lift the veil and ignore the separate legal personality of the company.

The main consequences flowing from the incorporation of a company are corporate personality and limited liability. Once the company is incorporated, it acquires separate legal personality and becomes an artificial entity under the law, s.24 Companies Act, 2003. In *Salomon* v *Salomon* (1897), the court held that the company was a separate legal entity and not Salomon's agent or trustee. Salomon was therefore held not to be liable for the company's debts. This position was also upheld in the South African case *Dadoo* v *Krugersdorp Municipal Council* (1920). In some instances, however, the law will ignore the separate legal personality of a company and lift the veil of incorporation. This may be done by Parliament or by the courts. When lifting of the corporate veil is done by the parliament or legislature, it is called statutory lifting of the corporate veil. Where it is done by the courts, it is called judicial lifting of the corporate veil. Sometimes, the veil of incorporation is used to perpetuate fraud or improper conduct. In such instances, the courts will lift the corporate veil. In *Silverstone (Pty) Limited & Another* v *Lobatse Clay Works (Pty) Limited* (1996), the court stated that the purpose of lifting the veil was to fix liability elsewhere for what were ostensibly the acts of the company. The court noted that, generally, elements of fraud, dishonesty or improper conduct would have to be present in the establishment or use of the company or the conduct of its affairs. In the instant case, Aone has set up his company for a fraudulent or improper purpose. His intentions are to avoid, through the veil of incorporation, the restraint of trade agreement that he entered into with The Wood Doctor. In the words of *Jones* v *Lipman* (1962), the company is a sham, a mere mask formed by Aone to avoid his contractual obligations. The Wood Doctor is advised to bring an application against both The Wood Workshop (Pty) Limited and Aone seeking an interdict to prevent them trading as a carpentry enterprise in Maun for the duration of the restraint of trade against Aone. For the court to make such an order, The Wood Doctor will have to urge it to lift the veil of incorporation of The Wood Workshop (Pty) Limited on the grounds of fraud and improper conduct.

10 This question requires candidates to discuss capital maintenance and, in particular, the power of a company to purchase its own shares and the power of a company to give financial assistance for the purchase of its own shares.

As a general rule of capital maintenance, a company may not purchase its own shares. It is also generally unlawful for a company to give any kind of financial assistance for the acquisition of its own shares by any person.

The rule that a company may not purchase its own shares was laid down in *Trevor* v *Whitworth* (1887), where the House of Lords held that a company has no power to purchase its own shares. The rationale for the rule in *Trevor* v *Whitworth* is to avoid the reduction in share capital to the prejudice of the creditors and to stop companies trafficking in their own shares.

Share buyback is regulated by s.66 Companies Act, 2003. Section 66 requires that the proposed purchase of its own shares be approved by the board of directors and by an ordinary resolution of the shareholders, provided that the shares are fully paid up. The board is also required in terms of s.66(4) to pass a resolution that it is not aware of any information which has not been disclosed to shareholders which is material to the assessment of the value of the shares or which may result in the terms of the sale or the consideration to be paid being unfair to the shareholders selling their shares to the company. In terms of s.65(5), share buybacks are subject to a solvency test. The solvency test is a safeguard to ensure that the company will be able to pay its debts as they become due in the normal course of business. Where the company purchases its own shares without satisfying the solvency test, s.67(1) Companies Act, 2003 provides that the company directors may be held jointly and severally liable to restore to the company any amounts paid and not recovered by the company.

Whilst it is legal for the company to proceed to purchase Anthony's shares, the requirements of s.66 must be met by the board and the shareholders in a general meeting. Should the board of the general meeting withhold approval of the transaction, then the buyback would be illegal. The fact that Anthony has not fully paid for his shares would make the buyback impossible. Crucially, however, if the company cannot pass a solvency test as prescribed by s.65(5), then the buyback would be ill advised. The company directors may find themselves having to restore to the company any amounts paid to Anthony for his shares. Kilimanjaro (Pty) limited is advised not to proceed with the transaction.

1 This question requires candidates to define law and explain and distinguish between common law, statutory law and customary law.

6–10 A concise answer showing understanding of the meaning of law and the distinction between the three types of law.

0–5 A partial answer showing little understanding of the material.

2 This question requires candidates to explain the duties of the employee.

6–10 A detailed answer encapsulating all the duties of an employee.

0–5 An incomplete response with only some duties identified and discussed.

3 **(a)** This question requires candidates to explain the contents and effect of the company constitution.

3–4 A complete answer showing understanding of the contents and the effects of the constitution.

0–2 A partial answer showing little grasp of the concepts.

(b) This question requires candidates to explain how the constitution of a company can be amended.

4–6 A thorough answer stating the process and limitations to it.

0–3 An incomplete answer lacking in relevant detail.

4 **(a)** This question requires candidates to discuss the ways in which directors can be appointed.

3–5 A concise answer showing understanding of the material.

0–2 An incomplete response showing lack of understanding of the material.

(b) This question requires candidates to discuss the circumstances in which directors can be disqualified from office.

3–5 A complete answer displaying a grasp of the requirements of the Companies Act, 2003.

0–2 A partial answer showing unfamiliarity with the requirements of the Companies Act, 2003.

5 This question requires candidates to define the various contractual terms.

6–10 A succinct description of all three terms with a clear understanding of the differences.

0–5 A imprecise answer with poor differentiation between the terms.

6 This question requires candidates to describe the procedure for calling and conducting an annual general meeting.

6–10 A concise discussion of schedule 2 of the Companies Act, 2003

0–5 An answer showing unfamiliarity with the relevant schedule.

7 This question requires candidates to explain judicial management as an alternative to winding up.

6–10 A detailed discussion of judicial management as an alternative to winding up.

0–5 A partial answer showing lack of understanding of the process of judicial management and its relationship with winding up.

8 This question requires candidates to distinguish between an offer and an invitation to treat.

6–10 A complete answer showing understanding of the concept.

0–5 An incomplete answer with a lack of understanding of invitations to treat.

9 This question requires candidates to discuss the circumstances in which the court may lift the veil and ignore the separate legal personality of the company.

6–10 A detailed answer discussing separate legal personality and lifting of the veil in instances of fraud and improper conduct.

0–5 An incomplete response showing lack of understanding of the concepts.

10 This question requires candidates to discuss the legal requirements for share buyback in the maintenance of share capital.

6–10 A thorough discussion showing understanding of the rules regarding a company purchasing its own shares.

0–5 A partial discussion with an unsatisfactory grasp of the material.