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# Answers

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- 1 (a) This question requires candidates to explain what is meant by case law.

Case law is classified as an independent source of law in Botswana. Case law refers to the decisions of the higher courts of Botswana, which are the High Court and the Court of Appeal. This body of law forms part of Botswana's common law. In receiving the common law in 1891, Botswana received the common law as it applied in the Cape Colony of Good Hope. This included English case law and Roman-Dutch law traditions that had developed in the Cape up to 1891. Case law is an important source of law in Botswana. This is because of its importance under the principle of judicial precedent but also because it is often used as a tool for the interpretation of statutory law. Case law is, in some instances, an antecedent to the enactment of statutory law rules. For example, the *Dow* case led to the amendment of the Citizenship Act allowing Botswana women to pass on citizenship to their children fathered by a non-citizen.

- (b) This question requires candidates to explain what is meant by the doctrine of judicial precedent.

The doctrine of judicial precedent requires courts to stand by its previous decisions. This doctrine has its origins in English Law. The doctrine was received into the law of Botswana in 1891. The doctrine of judicial precedent is founded on the traditional view that the function of a judge is not to make law but to declare and apply existing laws to the facts of particular cases. Judges therefore rely on earlier decisions of courts because they are bound to apply those decisions to similar facts. In doing this, they may sometimes widen and extend the rule of law in question or devise a rule by analogy to existing rules. Sometimes judges may create an entirely new principle. In declaring and applying the law in this way, judges develop the law. To this extent, case law forms an important source of law.

- 2 (a) This question requires candidates to define the various contractual terms.

The nature and extent of contractual obligations are usually discernible from the terms of the contract. Parties to the contract determine the terms of the contract. Terms of a contract are generally classified as express terms and tacit terms. The parties' terms explicitly agree express terms. On the other hand, the presence of tacit terms must be ascertained. This is because the parties to the contract do not express tacit terms in their agreement. Rather, tacit terms are those that may be reasonably inferred as falling within the scope of the parties' expressed intentions – *Stalwo (Pty) Limited v Wary Holdings (Pty) Limited* (2008).

The courts also recognise another set of contractual terms. These are terms implied into the contract by law. These terms form part of the contract as a matter of law without any need, on the part of the parties, to have deliberated and agreed upon them. Implied terms are sometimes referred to as residual terms. In principle, parties may amend or exclude terms implied by law by agreement in the contract except where such exclusion would be against public policy or against the requirement of legality.

- (b) This question requires candidates to explain the effect of exclusion clauses and discuss instances where exclusion clauses may be rendered unenforceable.

Exclusion clauses can also be referred to as exemption or limitation clauses. Exclusion clauses exclude or limit the liability of a party to a contract for a misrepresentation or for a breach of the contract – *Afrox Healthcare Bpk v Strydom* (2002). Exclusion clauses are valid and enforceable under the law of contract. For exclusion clauses to be enforceable, there must be agreement or consensus between the parties.

Exclusion clauses are also regarded as unenforceable when they exempt a party to the contract from liability for fraud and intentional breach of contract. An exclusion clause that results in an unacceptable degree of unfairness towards a party to the contract or one that transgresses relevant norms of society will be deemed to be against public interest and consequently, unenforceable.

- 3 (a) This question requires candidates to define the role of the agent and give examples of such relationships.

An agent is a person who, acting under the authority of another person who is referred to as the principal, concludes a juristic act the consequences of which bind the principal. The agent is not personally bound by the juristic act concluded. The act that the agent concludes for the principal may include entering into a contract, discharging certain obligations arising out of a contract or waiving certain rights. Agency often denotes contracts where the agent is authorised by agreement to act on behalf of a principal. Examples of such relationships include:

- (i) An employee may be an authorised agent of their employer where the employee has been authorised to act as such.
- (ii) The board of directors of a company acts as agents or representatives of the company – s.27 Companies Act, 2003.
- (iii) A member of a close company is by law its agent.
- (iv) Partners act as agents in relation to the partnership and have authority to enter into agreements binding other members of the partnership.

- (b) This question requires candidates to define the authority of the agent.

An agent may have direct authority to act on behalf of a principal. In such an instance, the principal, not the agent, is bound by obligations arising from the transaction and is equally entitled to the rights arising from the juristic act concluded by the agent. This occurs because the principal clothes the agent with authority to act on their behalf. In some instances, a person acts in such a way as to create the reasonable impression in the mind of a third party that a party acting on the person's behalf is authorised to do so. If indeed the third party acts on this belief to their detriment, the person holding out another as their authorised agent will incur liability. This kind of authority is called ostensible authority. The representation of authority must be of such a nature that it could reasonably be expected to mislead a third party into believing that a person has authority to act as they do on behalf of their principal.

- 4 This question requires candidates to explain the way in which partnerships can be brought to an end.

Partnerships can be terminated in several ways.

- (a) Effluxion of time – Where partnerships are formed for a fixed period, the partnership will terminate by the effluxion of the agreed duration unless one of the partners has a just and lawful reason to terminate the partnership earlier or if the partners expressly or impliedly agree to continue in partnership.
- (b) By agreement – A partnership can be dissolved by agreement. The parties can agree expressly or impliedly to terminate the relationship.
- (c) Completion of business or undertaking – Where a partnership has been formed to carry out a certain business or specific undertaking, the partnership is dissolved upon the completion of the undertaking.
- (d) Notice of dissolution by one partner – In some instances, partnerships are formed for an indefinite period. These are called partnerships at will. The parties agree to act as partners until one of them no longer desires to do so. In such a case, any one of the partners can dissolve the partnership at their own discretion, even against the wishes of the other partners by giving notice that they no longer intend to continue in the partnership. The notice of dissolution must be given in good faith and not at an unreasonable or inconvenient time. The notice period must be in keeping with the terms of the partnership agreement.
- (e) Court order – A partner can unilaterally terminate a partnership agreement and obtain an order dissolving the partnership against the wishes of the other partners. In order to be granted such a court order, the partner must show just cause. What constitutes just cause will vary according to the facts of every case. Generally, any event or conduct, which irreparably destroys the mutual trust and confidence between the partners, which makes good cooperation between the partners impossible, may amount to just cause for dissolution of the partnership.
- (f) Sequestration – A partnership is dissolved automatically upon the sequestration of the estate and by the sequestration of the private estate of any of the partners.
- (g) Death of a partner – A partnership will end upon the death of one of the partners.
- (h) Illegality or impossibility – A partnership is dissolved if it becomes objectively impossible to achieve its business purpose due to the occurrence of an event beyond the control of the parties. A partnership is always dissolved by the occurrence of any event that makes it unlawful for the business of the partnership to continue.
- (i) Change of membership – Any change in membership destroys the identity of the partnership. If one partner dies or retires, a new partnership has to be created.

- 5 This question requires candidates to describe the difference between various classes of shares.

Section 46 Companies Act, 2003 provides that different classes of shares may be issued in a company. These include redeemable shares, shares that confer preferential or limited rights to the distribution of capital or income, shares that confer special, limited or conditional voting rights or shares that do not confer voting rights. Typically, there are four main types of shares.

- (a) Ordinary shares – These are issued by any company which has a share capital. Ordinary shares enable the shareholder to vote and enjoy a dividend. The dividend is paid after preference shareholders have been paid. These are the most common types of shares.
- (b) Preference shares – These are shares that confer preferential rights on their holders over and above the rights conferred on holders of ordinary shares. Preference shares usually carry a right of preference in the payment of annual dividends at a fixed rate if a dividend is declared. The preferential shareholder also enjoys the right of preference in the repayment of capital in a winding up.
- (c) Deferred shares – These shares are usually taken up by the founders of a company. They are called deferred because the shareholders' right to a dividend is deferred until a dividend at a specified rate has been paid out to other shareholders. These shares are also called founders or management shares. They are one way in which promoters are remunerated for their services in the formation of a company.
- (d) Employee shares – The constitution of some companies enable them to issue fully paid shares to *bona fide* employees. Such employee share participation schemes are meant to give employees ownership in the company, involve them in the business of the company and share profits through payment of dividends.

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

Section 161 Companies Act, 2003 provides that every company other than a close company shall have a company secretary. In order to be appointed a company secretary, one must have the qualifications set out in s.162 Companies Act, 2003. A body corporate may not be appointed company secretary unless one member of the firm accepts responsibility for the work of the firm as company secretary. Undischarged bankrupts are not qualified to be appointed as company secretary. The sole director of a company and an auditor of a company may also not be appointed as company secretary. Company secretaries must be qualified auditors, members of the Botswana Institute of Accountants, the South African Institute of Chartered Secretaries and Administrators or legal practitioners.

The duties of a company secretary are listed in s.163 Companies Act, 2003. These are: preparation of all returns to be filed with the Registrar of Companies, issuing all notices of meetings, attending meetings of directors and general meetings of shareholders and keeping minutes of such meetings. The company secretary is also responsible for maintaining the register of shareholders, debenture holders, directors, secretaries and charges. The company secretary must also ensure with the directors that proper accounts are kept and that financial statements are prepared and presented at the annual meeting. Lastly, the company secretary is responsible to the board for maintaining an adequate system of record keeping in relation to the correspondence, affairs and activities of the company.

- 7** This question requires candidates to explain insider trading and how the law seeks to control it.

Insider dealing (also known as insider trading) occurs where a person buys or sells securities whilst in possession of confidential price sensitive information to which the other party to the transaction is not privy. The price sensitive information will generally be in their possession because of some connection that they have with the company whose securities they are trading in. Directors, employees and professional advisors of a company are usually good examples of such insiders. Common law rules for the control of insider dealing are generally considered weak. In this regard, the Companies Act, 2003 enacted new rules under s.324 to control insider trading.

According to s.324 Companies Act, 2003, it is an offence to directly or indirectly deal in a security based on price sensitive information. This is the case where the information in question was obtained by virtue of a relationship of trust or any other contractual relationship or through espionage, theft, bribery, fraud, misrepresentation or any other wrongful method irrespective of the nature thereof. Where a person gains some advantage from the use of such price sensitive information, they shall be liable in civil law to any person who suffered losses because of the transaction. They may also be liable to the company which issued the securities for any profit accrued or loss avoided by them in the transaction. A person engaging in insider trading may also expect a fine not exceeding the consideration for the securities in question.

- 8 (a)** This question requires candidates to explain the basis for a compulsory liquidation.

An application for the compulsory winding up of a company may be made in court if a company is unable to pay its debts – s.369(b) Companies Act, 2003. Section 368(c) Companies Act provides that a company shall be deemed unable to pay its debts if it is proved, to the satisfaction of the court, that the company is unable to pay its debts. In determining whether the company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company. In *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* (1962), it was held that a company will be wound up if it is commercially insolvent and that a company would be regarded as commercially insolvent if it is unable to pay its debts, that is unable to meet the constant demands upon its business and its day-to-day liabilities in the ordinary course of the business.

The creditors are advised that Wiseacre is a suitable company for compulsory liquidation. Wiseacre is unable to pay its debts. It has several creditors all of whom it is unable to pay. It owes P50,000 to Tirong Labour Brokers, P3 million to Betabuild and it has difficulty paying its loan to Housing Finance Bank. Wiseacre cannot meet the constant demands upon its business and its day-to-day liabilities in the ordinary course of business.

- (b)** This question requires candidates to explain some elements of the procedure involved in compulsory liquidation.

Once the winding up process has commenced, all actions or proceedings against the company are stayed and cannot be commenced except by leave of the court – s.376(i) Companies Act, 2003. In view of this section, the liquidator is advised that the actions brought by Betabuild and Housing Finance Bank against Wiseacre are unsustainable.

Once the winding up has commenced, any attachment or execution put in force against the assets of the company after the commencement of proceedings is void – s.376(ii) Companies Act, 2003. Therefore, the liquidator is advised that the attachment of Wiseacre properties by Tirong Brokers is void.

Once the liquidation has commenced, every disposition of the company's property and every transfer of shares or alteration in the status of its members is void unless the court orders otherwise – s.376(iii) Companies Act. Therefore, the liquidator is advised that the sale of shares by Wiseacre shareholders is void unless the court orders otherwise.

**9** This question requires candidates to discuss constructive dismissal.

Nikiwe can sue her employer Workspace for constructive dismissal. A constructive dismissal takes place when an employee terminates an employment agreement, or agrees to a termination that is prompted or caused by the conduct of the employer. The onus is on the employee to prove that there was a constructive dismissal and not a resignation. The conduct of the employer must render the situation intolerable for the employee to continue in employment. The courts have recognised an offer of inferior employment coupled with a threat of dismissal if the employee does not accept the offer as amounting to constructive dismissal – *Groenewald v Cradock Municipality* (1980). An offer of an alternative position coupled with a reduction in salary has also been deemed to amount to constructive dismissal – *Mhlambi v Commission for Conciliation, Mediation & Arbitration & others* (2006).

Nikiwe has been offered an inferior position at a reduced salary. Nikiwe has also been threatened with dismissal should she decline the job. The conduct of Workspace amounts to constructive dismissal. Nikiwe is advised to bring action against Workspace for constructive dismissal. The remedies available to Nikiwe are compensation made up as follows: payment for notice period, payment for loss of earnings and payment for loss of benefits.

**10** This question requires candidates to discuss the duty of care of auditors.

Auditors have a common law duty to exercise reasonable care and skill in the execution of their duties. The auditor must certify to shareholders only what he believes to be true. In *Re London & General Bank (No. 2)* (1895), an auditor reflected loans as assets of the company knowing that the loans were not realisable. In his report to shareholders, he certified the financial statements as showing a true and fair view. Relying on the financial statements, shareholders declared a dividend. In reality, the dividend was paid out of capital. The liquidator sued the auditor to reimburse the company. It was held that an auditor has a duty to be honest and that he must only certify that which he believes to be true. Further, it was held that the auditor must exercise reasonable care and skill before he believes what he then certifies to be true. The court held that the auditor's first duty is to examine the books to ascertain what they show but also to ensure that they show the true financial position of the company. The court also held that what is reasonable care would depend on the circumstances of each case.

The auditor is also under a duty to make an exhaustive investigation where he has been put on enquiry – *Re Thomas Gerrard & Son* (1968). Failure to conduct an exhaustive investigation where auditors have been put on notice of irregularities was held to be negligent.

Katlego Associates & Co are aware of irregularities in HighWater's financial statements. The auditors have been put on notice that there are issues that require further investigation. The auditor has not conducted an exhaustive investigation. The auditor has certified the financial statements, which they know may not reflect the true financial position of the company. The auditor can be held liable for a breach of their duty of care and skill and be required by the liquidator to reimburse HighWater the amounts wrongfully paid in dividends.

- 1 (a)** This question requires candidates to explain what is meant by case law.
- 3–5 A concise answer showing understanding of case law.  
0–2 A partial answer showing little understanding of the material.
- (b)** This question requires candidates to explain what is meant by the doctrine of judicial precedent.
- 3–5 A clear answer showing understanding of the doctrine.  
0–2 An incomplete answer showing poor understanding of the concept.
- 2 (a)** This question requires candidates to define the various contractual terms.
- 3–5 A complete answer containing discussion of all contractual terms.  
0–2 An incomplete response with only some terms identified and discussed.
- (b)** This question requires candidates to explain the effect of exclusion clauses and the circumstances which render them unenforceable.
- 3–5 A detailed answer showing understanding of exclusion clauses.  
0–2 A partial answer showing poor grasp of the material.
- 3 (a)** This question requires candidates to define the role of the agent and give examples of such relationships.
- 3–5 A crisp definition of an agent and their role and a reasonable list of examples.  
0–2 An incomplete answer lacking in examples.
- (b)** This question required candidates to define the authority of the agent.
- 3–5 A clear answer with a concise discussion of an agent's authority.  
0–2 An incomplete answer showing weak grasp of the material.
- 4** This question requires candidates to explain the way in which partnerships can be brought to an end.
- 6–10 A thorough answer citing most to all modes of ending partnerships.  
0–5 A poor to average answer citing few or no modes of ending partnerships.
- 5** This question requires candidates to describe the difference between various classes of shares.
- 6–10 A complete answer illustrating the difference between classes of shares.  
0–5 An incomplete answer inadequately comparing the various classes of shares.
- 6** This question requires candidates to discuss the appointment procedure relating to, and the duties and powers of, a company secretary.
- 6–10 A full answer covering all facets of the question.  
0–5 A partial answer not adequately covering all facets of the question.
- 7** This question requires candidates to explain insider trading and how the law seeks to control it.
- 6–10 A complete answer showing grasp of relevant legal rules.  
0–5 An incomplete answer with poor grasp of relevant legal rules.

- 8 (a)** This question requires candidates to explain the basis for a compulsory liquidation.
- 3–5 A full answer explaining the relevant legal test.
  - 0–2 An incomplete answer without discussion of the test.
- (b)** This question requires candidates to explain some elements of the procedure involved in compulsory liquidation.
- 3–5 A full exposition of relevant statutory rules.
  - 0–2 A partial answer with poor grasp of relevant rules.
- 9** This question requires candidates to discuss constructive dismissal.
- 6–10 A complete answer showing grasp of relevant legal rules.
  - 0–5 An incomplete answer with poor grasp of relevant legal rules.
- 10** This question requires candidates to discuss the duty of care of auditors.
- 6–10 A thorough answer detailing the duty of care of auditors.
  - 0–5 An incomplete answer lacking in relevant detail.