



Examiners' report

F4 Corporate and Business Law (BWA)

June 2008

General Comments

This was the second session of Corporate and Business Law under the new syllabus. The performance of the candidates was on the whole influenced by three factors:

- (i) **Preparation for the examination:** there were several candidates who did not appear prepared for the examination. The candidates must be properly instructed at whatever centre they are getting their tuition and they must revise and adequately prepare for the examination. They must be provided with all relevant teaching manuals, materials and texts.
- (ii) **Communication skills:** most of the candidates suffer from poor communication skills. They seem to have adequate knowledge of the law but they cannot apply that knowledge to answer the questions because their communication skills are limited.
- (iii) **Answering problem questions:** the candidates must be adequately trained to answer problem questions. This involves identifying the legal issues and resolving those issues by applying the relevant case law and statutory law and arriving at some cogent and supportable the conclusions.

Specific Comments

Question One

This question required the candidates to consider the ways in which judges interpret legislation and required some consideration of the three rules of interpretation together with some knowledge of the presumptions that normally will be applied in such procedure. The candidates were able to state the rules and presumptions but the majority were unable to refer and apply to the relevant case law.

Question Two

This question required the candidates to distinguish between an offer and an invitation to treat in contract law and to explain why the distinction is important. This required defining and illustrating both an offer and an invitation to treat and to discuss the four most important situations that distinguish an offer from an invitation to treat: the display of goods in a shop window; the display of goods on the shelf of a supermarket; a public advertisement and a share prospectus. The question was on the whole satisfactorily answered.

Question Three

The question asked the candidates to detail the ways in which the courts distinguish between contracts of service and contracts for services and to explain why the distinction is important. The majority of the candidates were able to explain and illustrate the distinction and to discuss the main reasons why the distinction is important in employment law.

Question Four

The question required the candidates to discuss the main duties of an agent towards his principal. Agency is a contract whereby one person (the agent) is authorised and required by another (the principal) to contract or to negotiate on the latter's behalf with a third person. The duties of an agent are (a) to perform his mandate (b) honestly and (c) carefully, (d) in accordance with his principal's instructions and (e) to account to his principal. The candidates were expected to analyse each of these ingredients in detail and support their analysis by referring to the relevant case law. The candidates appeared prepared for this question and it was answered satisfactorily.

Question Five

This question tested the candidates' appreciation of the legal characteristics of a limited company thereby appreciating the advantages and disadvantages of the limited company vis-à-vis the other forms of business association in Botswana. The candidates were expected to identify and define the various forms of business association in Botswana and then focus on the sole proprietorship, the partnership and the company in their analysis of the characteristics. Many candidates made a modest attempt to explain the distinction but were unable to refer to the relevant case law and statutory provisions.

Question Six

The first part of this question required the candidates to discuss the meaning of promoter in company law. The second part of the question involved a discussion of the law that governs pre-incorporation contracts. Regarding the latter, the candidates were expected to show an appreciation that in Botswana the principles and rules that govern pre-incorporation contracts are at three levels: the common law; Roman-Dutch common law (the *stipulation alteri*); and the Companies Act. The question was not satisfactorily answered.

Question Seven

The question required the candidates to describe the characteristics of preference shares. The essential characteristic of any preference share is that it carries a prior right to receive an annual dividend of fixed amount. There are no other implied differences between preference and ordinary shares though there are often expressed differences between them. Many candidates were unable to articulate the characteristics of preference shares especially in relation to the priority dividend entitlement. Many answers were tentative and incomplete.

Question Eight

This was a problem-based question that dealt with issues of breach of contract and the remedies available for such breach. There was no doubt that Jabulani was in breach of contract. The only question therefore related to the remedies that were available, and likely to be awarded to Dudu. Candidates were expected to discuss two main remedies: specific performance and damages. Regarding specific performance, the candidates were expected to point out that as a general rule the courts are reluctant to grant an order which could cause hardship on the defaulting party or the public at large, and that they are reluctant to grant a decree which they cannot enforce. It would thus seem very unlikely that the court would grant an order for specific performance in the circumstances of the question. Regarding the claim for damages, the candidates were expected to discuss the rules and principle which the courts employ to decide what damages are to be paid for breach of contract. This would involve a discussion of remoteness of damage and the measure of damages. In the given scenario, Dudu would be entitled to receive the difference between the value of the tower provided and the value of the tower she had contracted for, i.e. P2,000.00. The candidate's answers to the question were on the whole not satisfactory.

Question Nine

The question sought to test the candidates' understanding of directors' fiduciary duties, and in particular, the duty not to make a profit at the expense of the company. The general principle of law is that where one person stands to another in a position of confidence involving a duty of trust, they are not allowed to place themselves in a position where their interests conflict with their duty. Accordingly, a director may not, for personal gain, make use of information that he has acquired in his capacity as a director. One of the central issues in this area is whether a director could still be in breach of his fiduciary duty owed by him to his company even after he has resigned.

The crucial case here is *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* (1988). It was held in this case that a director should be disqualified from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is pursuing. He should also be precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company or where it was

his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired. In the present case therefore, Molapo Ltd would be entitled to claim from Boitumelo the benefits that accrued to her under her contract with Savuti (Pty) Ltd.

The majority of the candidates' answers were disappointing and inadequate. The candidates were on the whole unable to identify the relevant legal issues in the scenario and consequently they were unable to resolve those issues by applying the relevant case law.

Question Ten

The question tested the candidates' understanding of the rules that govern the auditor's liability towards the company, shareholders, and especially third parties. The candidates were expected to identify and resolve all the issues but paying particular attention to liability of the auditor towards third parties in delict in the light of *Caparo Industries plc v Dickinson* (1990) and *James McNaughton Paper Group Ltd v Hicks Anderson & Co.* (1990). On the basis of *Caparo*, Ayanda, a *shareholder* and Whizz Ltd a *potential investor* could not succeed against Tiro, the company's auditor.

Very few candidates were able to answer the question satisfactorily.