Examiners' report

F4 Corporate and Business Law (BWA)
December 2008

General Comments

The examination consisted of ten questions of ten marks each. There were seven knowledge-based questions and three problem based questions. The performance of the candidates was lacklusture. It was noticeable that all the candidates are struggling to answer questions set on the new areas in the syllabus (such as corporate governance). Since all questions are compulsory, failure to answer such questions or answering them incorrectly proved fatal in the majority of cases.

Specific Comments

Question One
The question tested the candidates' knowledge of the Botswana court system. The candidates were expected to focus on the main courts while showing an appreciation of the existence of the customary courts. The candidates' answers showed familiarity with the Court of Appeal, the High Court and the Magistrates' courts but the majority of candidates seemed unaware of the existence of the Industrial Court, which is at the same level as the High Court in the courts hierarchy. Furthermore, many candidates were unable to articulate the jurisdiction of the various courts. The worst answers discussed the Botswana ***legal*** system instead of the Botswana ***court*** structure.

Question Two
The question invited the candidates to explain the various ways in which a contractual offer can come to an end. These are: rejection; revocation; and lapse of time. Many answers were incomplete. A large number of candidates did not realise that counter-offer is part of rejection. They therefore treated it is a separate way of terminating offers. Many candidates confused termination of offers with discharge of contracts. The majority of the incomplete answers were due to a failure to mention or discuss lapse of time as a way of terminating an offer.

Question Three
This question required the candidates to discuss the various ways in which a ***valid*** contract may be ***discharged*** under Roman-Dutch law of contract. There is an overlap between 'termination' and discharge of contract. Termination is a narrower term and refers to those instances where the contract comes to an end without defect or default. Discharge is a wider term and includes breach as a means of ending the contract. A contract can be discharged in seven ways: performance; breach; prescription; set-off; merger; agreement; and insolvency. The majority of the candidates' answers indicated that they were aware of performance and breach as ways of discharging a contract. Not a single candidate mentioned or discussed prescription, set-off or merger as ways of discharging a contract. A few mentioned agreement and insolvency but they were unable to articulate the governing principles.

Question Four
This question invited the candidates to discuss the ***common law*** duties of an ***employee*** in a contract of employment. There are duties laid down by the judges in decided cases as opposed to statute. These duties are: the duty to enter into the service of employer; the duty to work completely and without negligence; the duty to obey ***all reasonable*** and ***lawful*** commands; and the duty to act in good faith. The latter has four components: confidential information; promoting the employer's business; competition with the employer; and honesty. The question was on the whole satisfactorily answered.

Question Five
The question invited the candidates to set out the grounds for the dissolution of a partnership. There are mutual agreement; effluxion of term; completion of partnership business; change of membership; order of court; war; and sequestration. The question was on the whole well answered.

Question Six
This was the worst answered question in the entire paper – especially part (a). This part required the candidates to explain the principles of corporate governance. Not a single candidate was able to define corporate governance and to explain the related principles. It was clear from the answers presented that the candidates had no knowledge at all of corporate governance. They were totally unaware of the relevant Reports and Voluntary Codes such as *Cadbury* and *King II.*

Part (b) required the candidates to examine, within the context of corporate governance, the role of, and relationship between executive directors and non-executive directors. The candidates performed better here and the answers indicated that the candidates were vaguely aware of the ***distinction*** between executive and non-executive directors.

The candidates were totally unprepared for this question. It is clear the students were never instructed on corporate governance and they consequently never did any reading or preparation relating to this topic. As I stated at the beginning of my Report, since all ten questions are compulsory, a total or partial failure to answer one or two questions could be fatal. Accordingly, both students and their instructors must pay attention to all segments of the new syllabus especially the new topics such as corporate governance.

Question Seven
This question was inadequately answered by all candidates who attempted it. The question focused on the important role played by the company secretary. Although presented in one sentence, the question is divided into three distinct sections each of which had to be addressed: *qualifications*; *powers;* and *duties.*

(a) The qualifications of the company secretary are now clearly laid down in the Companies Act 2003. Section 162 of the Companies Act 2003 indicates the persons who are disqualified from being appointed or acting as a company secretary: a body corporate; an undischarged bankrupt; a person who is the sole director of the company; and the auditor of the company (s.162(1)). Furthermore, the Act provides that the secretary of a ***public company*** and a ***non-exempt*** private company must be a **QUALIFIED** person as laid down in S.162(3) and (4) of the Act.

All candidates were unable to articulate these qualifications.

(b) *Panorama Developments Ltd v Fidelis Furnishing Fabrics* Ltd (1971) established that a company secretary has ostensible authority to bind the company where the transaction involved relates to the administrative affairs of the company. Several candidates did fairly well on this segment of the question.

(c) Duties

Before the Companies Act 2003, the duties of a company secretary were based on best practice, custom or usage. The law is now codified in s.163 of the Act which lays down ***six*** specific duties which includes: the preparation of returns; issuing all notices of meetings; and keeping minutes of those meetings. The candidates' answers indicated that they were not aware of s.163 and its contents.

Question Eight
This question required the candidates to examine the rules that govern offer and acceptance in the formation of a contract with particular reference to the rules relating to communication or acceptance. The question was on the whole well answered. By applying the postal rule, most candidates correctly concluded that there was no contract between Luzibo and Mowana Ltd because by the time Mowana posted her letter of acceptance at **10:00 am** on 6 June 2007, Luzibo had already revoked her offer by phone at **9:00 am** the day. It followed therefore that if Mowana had posted the letter of acceptance at **8:00 am** on 6 June 2007, there would have been a binding contract between the parties. Similarly, if Luzibo had requested the company to enter her name in the

register and sign it on her behalf, there would have been a binding contract between the parties because by so doing she would have dispensed with the need to communicate acceptance *(Mackenzie v Farmers'Co-operative Meat Industries Ltd* (1992); *R v Nel* (1921).

Question Nine

The question required candidates to discuss directors' fiduciary duties with particular emphasis on the duty to avoid conflict of interest. A director must not be interested in a contract or proposed contract with the company unless the articles permit or the company in a general meeting approves the contract. Thus at ***common law***, a director is under a duty to disclose his interest to the general meeting through the board of directors. In addition to the ***common law*** duty, a director is under a further ***statutory*** duty to disclose his interest to the board of directors under s.130 (1) of the Companies Act 2003. The disclosure must be in accordance with ss134 and 135 of the Companies Act 2003.

In the instant scenario, Tiroyakgosi did not disclose both under common law and statute. Accordingly the contract was voidable at the option of the company (Companies Act 2003, s.136; *Aberdeen Rly Co v Blaikie Bros* (1854). However, since *restitutio in integrum* is no longer possible, Tiroyakgosi was liable to account to the company whatever profit he made from the transaction. He is also guilty of an offence and liable to a fine not exceeding P20, 000.00: Companies Act 2003, s.135 (5) read with s.492 (2).

The majority of the candidates' answers exhibited a lack of knowledge of the relevant common law and statutory principles.

Question Ten

This question tested the candidates' knowledge on various aspects of health and safety at work and rules relating to dismissal in employment law. The question was not satisfactorily answered. The candidates' answers contained many general and inaccurate statements with little or no reference to the relevant common law and statutory principles. The conclusions, if any, were weak, inaccurate and unsupportable.