
Answers

- 1 This question tests the candidates' knowledge of Botswana's court system. The candidates' answers will focus on the main courts while showing an appreciation of the existence of the customary courts.
- (a) The Court of Appeal: this is the highest court. It has criminal and civil jurisdiction. The jurisdiction is both original and appellate. Most of the matters handled by the court are on appeal. The Court of Appeal is staffed by the President of the Court of Appeal, the Chief Justice, Justices of Appeal and Judges of the High Court. The quorum is three and decisions are by majority. Most of the appeals come from the High Court (see Constitution of Botswana, s.99 and Court of Appeal Act, ss.7–13).
 - (b) The High Court: this is the second highest court in the hierarchy. It has original and appellate jurisdiction. It hears appeals from the Magistrate's Courts and the Customary Courts. It has original jurisdiction in several matters such as divorce and murder. The High Court is headed by the Chief Justice as the senior Judge assisted by a number of judges. The quorum is one (see Constitution of Botswana, s.95 and High Court Act, ss.3–13).
 - (c) The Industrial Court: the Industrial Court was established for the purpose of settling trade disputes and the furtherance, securing and maintenance of good industrial relations in Botswana (Trade Disputes Act, s.17). The Court is staffed by judges at the same level as the judges of the High Court (Trade Disputes Act, s.17 (3)) and it is headed by a President (Trade Disputes Act, s.17 (4)). The Court has jurisdiction, *inter alia*, to hear and determine any trade dispute (Trade Disputes Act, s.18 (1)) and to enjoin any employees' organisation from taking or continuing any industrial action (Trade Disputes Act, s.18 (1) (d)). The Court may order the payment to any person of any money it finds to be due to him under the Trade Disputes Act, s.25 (1)). Any decision of the court has the same force and effect as a judgment or order of the High Court and is enforceable in the same manner (Trade Disputes Act, s.25 (2)).
 - (d) Magistrates' Courts: there are five grades of magistrates. These courts are subordinate to the High Court. Botswana is divided into Magisterial Districts. This determines the geographical jurisdiction of the courts. The Magistrates' Courts Act delimits their pecuniary jurisdiction. The five grades of Magistrates are: Chief Magistrate, Principal Magistrate, Senior Magistrate, Magistrate Grade I and Magistrate Grade II.

Civil jurisdiction

The Chief Magistrate and the Principal and Senior Magistrates have jurisdiction in all civil claims where the total amount claimed or the value of the property does not exceed P5,000 (Magistrates' Courts Act, s.30 and ss.6 and 7 of the Magistrates' Courts (Amendment) Act 1992). Magistrates Grades I and II have civil jurisdiction in claims where the total amount claimed or the value of property claimed does not exceed P3,000-00 in the case of the former and P1,000-00 in the case of the latter (Magistrates' Courts Act, s.17 (2)).

Criminal jurisdiction

The Chief Magistrate and the Principal and Senior Magistrates have jurisdiction to try any offence except those punishable by death, or imprisonment in excess of 21 years. Magistrates Grades I and II have jurisdiction to try offences for which the maximum punishments do not exceed 10 years (see Magistrates' Courts Act, s.60 (2)).

- 2 It is a fundamental part of contract law that it is the acceptance of an offer by an offeree which gives rise to a binding contractual relationship. It is necessary, therefore, for there to be an offer, capable of acceptance, for there to be the possibility of a contract. The effect of the lack of an offer is clearly seen in situations where no offer has ever been made, such as cases involving an invitation to do business. However, it is possible for an offer to come to an end, and after such an event it would be equally impossible for anyone to purport to accept the former offer. It is, therefore, important to be aware of the various circumstances in which offers can come to an end. This question requires candidates to consider these various circumstances.

Rejection of offers

Express rejection of an offer has the effect of terminating the offer and the offeree cannot subsequently accept the original offer. Thus for example, if someone were offered a car for P70,000-00 and said he did not want to buy it at that price, then he cannot subsequently change his mind and try to accept the original offer and enforce a sale of the car at that price.

A counter-offer, where the offeree tries to change the terms of the offer, acts as an implied rejection of the original offer and has the same effect as an express rejection. It is important, however, not to confuse a counter-offer with a request for information. Such a request does not end the offer, which can still be accepted after the new information has been obtained.

Revocation of offer

The second way in which an offer can come to an end, is as a consequence of the offer being revoked. Revocation is merely the technical term for cancellation, and takes place when the offeror withdraws his offer. Once the offer is withdrawn it is no longer open to the offeree to accept it.

There are a number of points that have to be made with respect to the revocation of offers.

Firstly, an offer may be revoked at any time before acceptance (*Fern Gold Mining Company v Tobias* (1890)). The corollary of this point is, of course, that once the offer is accepted it cannot be withdrawn.

Secondly, revocation is not effective until it is actually received by the offeree. This means that the offeror must make sure that the offeree is made aware of the withdrawal of the offer, otherwise it might still be open to the offeree to accept the offer. This applies equally when the offeror uses the post to withdraw the offer as there is some indication that the postal rule does not apply in relation to the withdrawal of offers.

Even where the offeror promises to keep an offer open for a certain time, he may still withdraw the offer before that period is up. Such a promise is only binding if it is in the form of an option contract in which instance the offeror cannot withdraw his offer unilaterally.

The situation with regard to withdrawal of offers is somewhat different in relation to unilateral contracts, which are contracts in which one party promises something in return for some action on the other party, e.g., reward cases. Although the offeree is not obliged to undertake the action requested by the offeror, it would be unfair if the promisor were entitled to revoke his offer just before the offeree was about to complete his part of the contract.

Lapsing of offers

Offers will lapse, i.e., come to an end automatically, and no longer be capable of acceptance in a number of instances.

Firstly, both the parties may agree, or the offeror may set a time limit within which acceptance has to take place. In such situations, if the offeree has not accepted the offer within the stated period, then the offer lapses and can no longer be accepted.

Secondly, where the parties have not set an express time limit on accepting the offer, it will, nonetheless, lapse after the passage of a reasonable time. What amounts to a reasonable time depends on the circumstances of each particular case.

In conclusion, the death of the offeree brings the offer to a close, and the death of the offeror normally has the same effect.

- 3 This question requires 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 the following ways:

- (a) Performance: this is the commonest way of discharging the contract. The parties perform their reciprocal obligations under the contract and it comes to an end. Performance must be completed and unconditional. Performance of a contractual obligation often takes the form of payment of the sum of money. The general rule is that payment must be made in cash: *Schneider & London v Chapman* (1917).
- (b) Breach: a contract is discharged where one of the parties fails to observe one or more terms of the contract. Anticipatory breach occurs where one of the parties unlawfully repudiates the contract before the agreed time of performance: *Novick v Benjamin* (1972).

Where there is breach of a material term, the injured party may treat the contract as cancelled and sue for damages, or he may abide by the contract, sue for specific performance and claim such damages as he has suffered. Where there is a breach of a non-material term, the injured party is not entitled to treat the contract as cancelled, but he may claim such damages as he has suffered as a direct result of the breach of the term.

- (c) Prescription: a debtor is not legally bound to perform in terms of an obligation which has been prescribed. The Prescription Act (Cap 13:01) renders certain rights unenforceable after the lapse of a certain period of time. The periods of prescription are as follows:
 - (i) Three years in respect of (*inter alia*) any oral contract; any remuneration whatever or disbursement due to any person for or in connection with services rendered or work done by him; the price of movables sold and delivered, materials provided or board or lodging supplied; rent due upon any contract; interest due upon any contract including a mortgage bond (Prescription Act, s.4 (2) (b)).
 - (ii) Six years in respect of written contracts including bills of exchange and other liquid documents but excluding mortgage bonds unless a shorter period is applicable under s.4 (2) (b) (Prescription Act, s.4 (2) (c)).
 - (iii) Thirty years in respect of mortgage bonds, judgment debts, or for any other action for which a period is not provided by the Prescription Act (Prescription Act, s.4 (2) (d)).

The beginning, interruption and suspension of prescription is governed by ss.6, 7 and 8 respectively.

- (d) Set-off: where two persons are in debt to each other and the debts are due and liquidated both debts are automatically extinguished if they are both the same amount (*SA Metropolitan Life Assurance Co (Pty) Ltd v Ferreira* (1962)). If one is larger than the other, the smaller is extinguished and the larger automatically reduced by the amount of the smaller debt. A liquid obligation is an obligation sounding in money, the amount of which is ascertained and does not require extrinsic evidence to prove: *Union Share Agency & Investments Ltd v Spain* (1928).
- (e) Merger: merger is the occurrence of the debtor and creditor in the same person and in respect of the same obligation. A very good example is the use of a bill of exchange. Where the acceptor of a bill is or becomes the holder of it at or after its maturity in his own right, the bill is discharged (Bills of Exchange Act (Cap 46:02) s.60).

- (f) **Agreement:** the parties may by express or implied agreement put an end to contractual obligations by waiver or novation. Waiver is the abandonment of rights by one or both parties to a contract. It is itself a contract which requires offer and acceptance in the ordinary way: *St Patrick's Mansions (Pty) Ltd v Grange Restaurant (Pty) Ltd* (1950). Novation occurs where the parties agree on a new contract which replaces the old one completely. The original contract is therefore terminated and a new contract comes into being. Whether or not a novation has taken place is a question of fact.
- (g) **Insolvency:** insolvency is generally a form of compulsory novation. The insolvent is not generally excused from performing the contract but the rights and duties of an insolvent are affected in various ways by the sequestration of his estate. The insolvent's trustee has an election whether to abide by the contract or terminate it. Where he adopts the former course, the trustee steps into the shoes of the insolvent and must render full performance of the obligations due by the insolvent in terms of the contract.

Certain contracts do terminate on sequestration. A contract of employment automatically terminates on sequestration of the employer's estate.

4 This question requires the candidates to discuss the common law duties of an employee in a contract of employment. Although the employee has freedom to contract, the provisions of the common law play a significant role in setting out his duties. These duties are as follows:

- (a) **Duty to enter into the service of employer.** The primary duty of an employee is to place their labour potential at the disposal of the employer. In terms of the 'no work, no pay' rule, if the employee does not work, there is generally no entitlement to remuneration. The Basic Conditions of Employment Act of 1997 has qualified this position by providing for specific periods of paid leave.
- (b) **Duty to work completely and without negligence.** The employee implicitly guarantees that the employee is capable of doing the work for which he contracted. There is a further duty to exercise due care and diligence. A failure to perform the work completely and without negligence will result in a breach of contract and a possible termination of the employment relationship.
- (c) **Duty to obey all reasonable and lawful commands.** The employee is under the control and authority of the employer. The employee has an implied duty to obey all reasonable and lawful commands of the employer. Serious insubordination may amount to a breach of contract. The interpretation of 'reasonable command' will depend on the circumstances of each individual case.
- (d) **Duty to act in good faith.** The common law duty to act in good faith is implied in every contract of employment, even if it is not an express term of the contract. This duty entails:
 - *Confidential information:* The unauthorised use, or divulging of, confidential information amounts to a breach of good faith if it occurs during or even after the period of employment has terminated. An employee is entitled to use general knowledge acquired during employment, but not knowledge which is confidential in nature.
 - *Promote business of employer:* The employee must devote his hours of work to furthering the employer's business. The employee may not work for another employer if such work would conflict with the interests of the original employer.
 - *Employee may not compete:* An employee may not compete with the business of the employer and an employee who does compete will be in breach of contract.
 - *Employee must act honestly:* Any dishonest behaviour on the part of the employee, such as theft, fraud or the procurement of secret commissions will be a breach of good faith. If the breach is serious, the employer may dismiss the employee summarily.

5 This question requires candidates to set out the various grounds for the dissolution of a partnership. These grounds are set out below:

- 1 **Mutual agreement.** In general, any agreement may be terminated by a subsequent termination agreement between the parties. The partnership agreement can therefore be terminated by agreement between all the partners. When the agreement is terminated in this manner, the partnership dissolves.
- 2 **Effluxion of term.** A partnership may be established for a specific term, for instance 12 months. When the term expires, the partnership dissolves automatically. During the existence of the partnership the partners are entitled to extend, shorten or waive the initial term by agreement. In the latter case the partnership will be continued without any limitation in term and the partners will still retain the same rights and obligations, unless the partners conclude an agreement to the contrary.
- 3 **Completion of partnership business.** A partnership can be established in respect of a specific project, for example the construction of an office building. When the project is completed and final distribution of profit or loss has taken place, the partnership dissolves automatically.
- 4 **Change of membership.** A partnership is an association of specific persons who established their partnership relationship by mutual agreement. Each partner enters into the partnership on the condition and assurance that each of the other parties to the agreement will be a partner and that, collectively, they will be the only partners in that partnership. Each of the partners stands in an individual contractual relationship to each of the other partners. A change in membership can occur because of the death or retirement of a partner or the admission of a new partner.

The partnership dissolves immediately upon the death of a partner. The partnership relationship between the surviving members is also terminated and there is no duty on them to continue a partnership. The partners are, however, entitled to agree, in their partnership agreement, that the surviving partners will continue a partnership should one of the partners die. As the old partnership is irrevocably dissolved upon the death of the partner, such a partnership will constitute a new partnership.

In the absence of an agreement between the partners that the partnership will only exist for a specific period, it will continue until one of the partners indicates that he wishes to retire. Normally any one of the partners in such a partnership is entitled to retire by giving unilateral notice. This right of a partner can, however, be restricted in the partnership agreement.

The admittance of a new partner constitutes a change in membership of the partnership and automatically dissolves the old partnership.

- 5 **Order of court.** A partner may apply to the court for an order that dissolves the partnership. A court will grant such an order if there are sufficient grounds to make dissolution just and equitable. The court will exercise its discretion in the light of the interests of all the partners. If the fiduciary relationship between the partners is irreparably destroyed and further co-operation between the partners is impossible, it will be just and equitable to grant a dissolution order.
- 6 **War.** When war is declared and one of the partners is an alien subject domiciled or resident in enemy territory, the partnership dissolves automatically. If he is not domiciled or resident in the enemy territory, the other partners may apply to the court for a dissolution order.
- 7 **Sequestration.** The partnership dissolves when the partnership estate or the estate of any of the partners is sequestered or, should the partner be a company or close corporation, when its estate is liquidated. The sequestration of the partnership estate leads to the sequestration of the personal estates of each of the partners, with the exclusion of the estates of extraordinary partners.

- 6 (a) Corporate governance refers to the way in which companies are run and operated. According to the Organisation for Economic Cooperation and Development (OECD), corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance.

Although these interrelated issues have always been of concern in the way companies function, it cannot but be recognised that the increase in the attention placed on matters of corporate governance has been a result of the perceived weakness in company regulation which has been apparent in some of the recent scandals involving such large companies as Enron and Worldcom in America and Marconi and Parmalat in Europe.

In order to ensure an effective corporate governance framework it has been deemed necessary to set out defined rules and regulations, including voluntary codes. In the United Kingdom one such code is the Combined Code On Corporate Governance, which is the result of the review of the role and effectiveness of non-executive directors conducted by Derek Higgs and a review of audit committees conducted by Sir Robert Smith. This new combined code has applied to listed companies since November 2003. Companies have either to confirm that they comply with the Code's provisions or, where they do not, to provide an explanation of their non-compliance. Whilst listed companies are expected to comply with the Code's provisions most of the time, it is recognised that departure from its provisions may be justified in particular circumstances. Every company must review each provision carefully and give a considered explanation if it departs from the Code's provisions. In South Africa, the governing Code is the *King Report on Corporate Governance (King II)* (2002). Although it is mainly concerned with companies listed on the JSE Securities Exchange, *King II* has influenced the development of Corporate Governance Principles in Southern Africa and beyond.

- (b) As regards the structure of the board of directors the UK Combined Code requires that the board should include a balance of executive and non-executive directors (and in particular independent non-executive directors) such that no individual or small group of individuals can dominate the board's decision taking.

Executive directors usually work on a full-time basis for the company and may be employees of the company with specific contracts of employment. Section 318 Companies Act 1985 UK requires that the terms of any such contract must be made available for inspection by the members. Section 319 of the same Act renders void any such contract, which purports to be effective for a period of more than five years, unless it has been approved by a resolution of the company in a general meeting. In fact the Combined Code on Corporate Governance recommends that the maximum period for directors' employment contracts should be one year.

Non-executive directors do not usually have a full-time relationship with the company, they are not employees and only receive directors' fees. The role of the non-executive directors, at least in theory, is to bring outside experience and expertise to the board of directors. They are also expected to exert a measure of control over the executive directors to ensure that the latter do not run the company in their, rather than the company's, best interests. As the Combined Code puts it:

'As part of their role as members of a unitary board, non-executive directors should constructively challenge and help develop proposals on strategy. Non-executive directors should scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance. They should satisfy themselves on the integrity

of financial information and that financial controls and systems of risk management are robust and defensible. They are responsible for determining appropriate levels of remuneration of executive directors and have a prime role in appointing, and where necessary removing, executive directors, and in succession planning'.

It is important to note that there is no distinction in law between executive and non-executive directors and the latter are subject to the same controls and potential liabilities as are the former.

According to *King II*, an executive director is a director who is involved in the day to day management of the company and/or is in full-time salaried employment of the company or of its subsidiaries.

A non-executive director is an individual not involved in the day-to-day management and not a full-time salaried employee of the company or of its subsidiaries. The Code goes on to state that 'an individual in the full-time employment of the holding company or its subsidiaries, other than the company concerned, would also be considered to be a non-executive director unless such individual by his or her conduct or executive authority could be construed to be directing the day-to-day management of the company and its subsidiaries' (see para 2.4.3 of the Code).

It is also important for a company, more especially one listed on the stock exchange, to have an independent director. An independent director is defined as a non-executive director who:

- (i) is not a representative of a shareholder who has ability to control or significantly influence management;
- (ii) has not been employed by the company or the group of which it currently forms part, in any executive capacity for the preceding three financial years;
- (iii) is not a member of the immediate family of an individual who is, or has been in any of the past three financial years, employed by the company or the group in an executive capacity;
- (iv) is not a professional advisor to the company or the group, other than in a directional capacity;
- (v) is not a significant supplier to or customer of the company or group;
- (vi) has no significant contractual relationship with the company or group; and
- (vii) is free from any business or other relationship which could be seen to materially interfere with the individual's capacity to act in an independent manner (see para 2.4.3 of the Code).

This is to ensure that executive directors are accordingly, monitored and supervised in their execution of their corporate decision-making role. Without independent directors, boards may be constituted by directors' cliques. This is undesirable, more especially in a listed company where there is separation of ownership and control.

Another individual who needs to be seriously considered in a corporate governance context is the shadow director. A 'shadow director' is considered to be a person in accordance with whose directions or instructions (whether they extend over the whole or part of the activities of the company), the directors of the company are accustomed to act. Such a person is not formally appointed by the company as a director but formally appointed directors will usually act in accordance with his or her instructions. There is therefore a need to consider the consequences of the shadow director's decisions and actions. This individual will usually be regarded as a formally appointed director for the purposes of liability.

7 This question focuses 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 should be addressed as follows:

(a) Qualifications

The following persons are not qualified to be appointed and cannot act as secretary of a company:

- (i) a body corporate, except in accordance with s.161 (6) of the Companies Act 2003;
- (ii) an undischarged bankrupt;
- (iii) a person who is the sole director of the company; or
- (iv) an auditor of the company (See Companies Act 2003, s.162 (1)).

It is the duty of the directors of the company to take all reasonable steps to ensure that the secretary of the company is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company and such qualifications, if any, as may be prescribed under the Act and by Regulations made under the Act (See Companies Act 2003, s.162 (2)).

The secretary of a **public company** and **non-exempt private company** must be:

- (i) either a qualified auditor, a member of the Botswana Institute of Accountants, a member of the Southern African Institute of Chartered Secretaries and Administrators, or a legal practitioner; or
- (ii) a member of a professional association of company secretaries approved by the Minister of Trade and Industry (See Companies Act 2003, s.162 (3) and (4)).

A private company qualifies as an exempt private company if:

- (i) its total assets are less than P2,000,000 in the preceding financial year; and

- (ii) its annual turnover is less than P5,000,000 in the preceding financial year (see Companies Regulations 2007, Reg.2). Such companies need not have a qualified secretary.

(b) **Powers**

Although old authorities, such as *Houghton & Co v Northard Lowe & Wills* (1928), suggest that company secretaries have extremely limited authority to bind their companies, later cases have recognised the reality of the contemporary situation and have extended to company secretaries potentially extensive powers to bind their companies. The leading case here is *Panorama Developments Ltd v Fidelis Furnishing Fabrics Ltd* (1971). In this case, the Court of Appeal held that a company secretary was entitled 'to sign contracts connected with the administrative side of a company's affairs, such as employing staff and ordering cars and so forth. All such matters now come within the ostensible authority of a company secretary'. There is little doubt that the Botswana courts would follow *Panorama*.

(c) **Duties**

The duties of a company secretary are:

- (i) to be responsible to the board of the company for the preparation of all returns required to be filed with the Registrar of Companies including those under:
 - (1) s.34 for the change of name,
 - (2) ss.43(4) and 175 for the alteration of the constitution,
 - (3) s.50 for the issue of shares,
 - (4) s.125 for registration of particulars of charges,
 - (5) s.53 (2) for the certificate regarding shares issued for consideration other than cash,
 - (6) s.55 for the notice of call and of increase in stated capital,
 - (7) s.155 for the notice of change of directors and secretary,
 - (8) s.184 (2) for the notice of change of registered office,
 - (9) s.209 for the registration of financial statement, and
 - (10) s.217 for the annual return;
- (ii) to be responsible to the board of the company for issuing all notices of meeting and responding to all enquiries in relation to notices of meetings;
- (iii) attending meetings of directors and general meetings of shareholders and keeping minutes of those meetings and together with the chairman of directors, signing the minutes as a true and correct record;
- (iv) to be responsible to the board of directors for maintaining the register of shareholders, debenture holders, directors and secretaries, substantial shareholders and charges;
- (v) ensuring, together with the directors, that the company keeps accounting records pursuant to ss.205 to 208 of the Companies Act 2003 and that annual financial statements are prepared and presented at the annual meeting; and
- (vi) to be responsible to the board of directors for maintaining an adequate system of record keeping in relation to the correspondence, affairs and activities of the company (See Companies Act 2003, s.163).

- 8 (a)** This question requires 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 of acceptance. Luzibo made an offer to buy 7,000 shares in Mowana Ltd. On 5 June 2007 Mowana Ltd's directors met and allotted 7,000 shares to Luzibo. This means that Mowana Ltd accepted Luzibo's offer. The acceptance of an offer is the act which completes the contract. Until acceptance there is nothing but a revocable offer which binds nobody. After acceptance there is a completed contract which binds both parties. The acceptance must be absolute and unconditional and must indicate a willingness to contract on the exact terms put by the offeror. As a general rule, the acceptance must be communicated to the offeror and until it is so communicated and actually received by the offeror, the contract is incomplete: *R v Dembovsky* (1918). In the instant case Luzibo phoned Mowana Ltd at 9.00 am on 6 June 2007 and informed them that she was no longer interested in buying the shares. However on the same day at 10.00 am, Mowana Ltd posted the letter of acceptance which Luzibo received on 9 June 2007. The issue is whether there was a contract between Luzibo and Mowana Ltd.

An offeror may expressly or impliedly prescribe the method of acceptance. If he sends the offer by post there is an implied indication that acceptance should also be by post *R v Dembovsky* (1918). Where in the ordinary course, the Post Office is used as a channel of communication and a written offer is made, the contract is concluded at the time when, and the place where the letter of acceptance is posted: *Cape Explosives v SA Oil & Fat Industries* (1912). However in the instant case Mowana Ltd posted their letter of acceptance after Luzibo had phoned them revoking her offer. In *Fern Gold Mining Co v Tobias* (1890), the defendant on 6 February posted a letter containing his offer to buy shares in the plaintiff company. On 18 February the company's directors accepted his offer. The letter of acceptance was posted on 19 February late in the morning. However earlier that same morning on 19 February he informed the plaintiff company that he was revoking his offer. The letter of acceptance reached him on 22 February. The issue was whether there was a contract between the parties. The court held that since the defendant repudiated his offer before receipt of the acceptance and even before it was posted, there was no contract.

On the basis of *Fern Gold Mining*, it would appear that there was no contract between Luzibo and Mowana Ltd. By the time Mowana Ltd posted the acceptance, Luzibo had already revoked her offer. Therefore the postal rule does not apply in this case and it would appear that Mowana Ltd's case action for breach of contract will not succeed.

- (b) (i) The advice would be different if Mowana Ltd had posted their letter to Luzibo at 8.00 am on 6 June. An offeror is entitled to revoke his offer any time before acceptance even where he has promised to keep it open. However the revocation must be communicated to the offeree before acceptance. By virtue of the postal rule, if Mowana Ltd had posted the letter at 8.00 am, the contract would have come into existence at that time. Accordingly, the communication of revocation at 9.00 am by Luzibo would be too late and she would be liable for breach of contract.
- (ii) The advice would be different if Luzibo had requested the company to enter her name in the register and sign it on her behalf because by so doing she would have dispensed with the need to communicate acceptance: *Mackenzie v Farmers' Co-operative Meat Industries Ltd* (1922); *R v Nel* (1921).

9 This question requires candidates to discuss directors' fiduciary duties with particular emphasis on the duty to avoid a conflict of interest. Directors are fiduciaries. This means that they must display utmost good faith towards the company in their dealings with it or on its behalf. Directors must not, without the consent of the company, place themselves in a position in which there is a conflict between their duties and their personal interests. 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. If this rule is broken the contract is voidable at the option of the company. In *Aberdeen Rly Co v Blaikie Bros* (1854), the appellant company entered into a contract with the respondents whereby it was agreed that the respondents sued to enforce the contract. The appellants pleaded that they were not bound by the contract because at the time when it was made, the chairman of its board of directors was a managing partner of the respondents. It was held that the company could avoid 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. If the general meeting approves the transaction, it will be valid. If he fails to disclose, the contract is voidable at the option of the company. If this contract is still executory, the company will rescind it. If it is executed and *restitutio in integrum* is no longer possible, the director will disgorge the secret profit he has made.

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) (i) of the Companies Act 2003. The disclosure must be in accordance with ss.134 and 135 of the Companies Act 2003.

In the instant case Plush Ltd ordered a quantity of material from a firm in which Tiroyakgosi, a director of Plush Ltd, was a partner. Tiroyakgosi was under a duty to disclose his interest both at common law and under ss.130–136 of the Companies Act 2003 before the contract was entered into or soon thereafter. Since he did not do so, the contract was voidable at the option of the company (Companies Act 2003, s.136). The company could rescind the contract. However, since the material was delivered and used up, this means that the contract was executed and *restitutio in integrum* is no longer possible. It is therefore too late to rescind the contract. Accordingly, Tiroyakgosi is 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).

10 This question tests the candidates on various aspects of health and safety at work and rules relating to dismissal.

- (a) When an employee is dismissed with a shorter period of notice than the employer is obliged to give either under the employment contract or by statute and wishes to claim against his former employer, there are two courses of action open. He may claim for damages at common law for wrongful dismissal. Unfair dismissal is a concept created by the Industrial Court, and is also a possible route where proper notice has been given. An action for wrongful dismissal would be heard in the Magistrates' Courts or the High Court, while an action for unfair dismissal would be heard by the Industrial Court.

If sufficient notice is given by the employer, he will be open only to a claim for unfair dismissal and not to a claim for wrongful dismissal. If insufficient notice is given by the employer, he may be open to a claim for unfair dismissal or wrongful dismissal, if the employer did not have a good reason for the dismissal.

Company policy

Looking at the facts of the case, Tswelelo's behaviour is in contravention of the 'no smoking' policy in the factory section, while Khumo's behaviour appears to be permitted by the employer.

Wrongful dismissal

To prevent the risk of an action for wrongful dismissal, an employer should give the appropriate period of notice to an employee. Alternatively, the employer must show one of the following:

- (i) *Wilful disobedience* of a lawful order suffices if it amounts to wilful and serious defiance of authority, serious enough to show that the employee is repudiating the essential basis of the employment agreement: *Pepper v Webb* (1969).
- (ii) *Misconduct* in connection with the business or outside if it is sufficiently grave. For example, acceptance of a secret commission, disclosure of confidential information, assault on a fellow employee or even financial embarrassment of an employee in a position of trust: *Pearce v Foster* (1886).
- (iii) *Dishonesty* where the employee is in a position of particular trust: *Sinclair v Neighbour* (1967).

- (iv) *Incompetence or neglect* in so far as the employee lacks or fails to use skill which he professes to have: *Taylor v Alidair Ltd* (1978).
- (v) *Immorality* only if it is likely to affect performance of duties or the reputation of the business.
- (vi) *Drunkenness* only if repeated or if it occurs in aggravated circumstances such as when driving a vehicle or a train.

Unfair dismissal

Even if notice is given, an employer may be open to a claim for unfair dismissal. Dismissal may be justified in the following circumstances.

He must first show that he has acted reasonably, by applying the correct procedures, taking all circumstances into consideration and doing what any reasonable employer would have done.

- (i) The capability or qualifications of the employee for performing work of the kind which he was employed to do.
- (ii) The conduct of the employee.
- (iii) Redundancy.
- (iv) Legal prohibition or restriction by which the employee could not lawfully continue to work in the position which he held (e.g., if a doctor or a solicitor employed as such is struck off the relevant professional register).
- (v) Some other substantial reason which justifies dismissal.

Conclusion

It is unlikely that Tswelelo's behaviour is enough to warrant summary dismissal (dismissal without notice). Even though it could be classified as misconduct, it is unlikely that it is serious enough to fall into the category described above. It may be that Dijo Ltd could show justifiable dismissal (with notice), as there is clearly a hygiene issue involving work with food. This misconduct, if proven, would probably justify dismissal. Dijo Ltd would, of course, also have to show that it had acted reasonably in all the circumstances.

As regards Khumo, it is extremely unlikely that Dijo Ltd could show a justifiable reason for dismissal, and Khumo could probably win an unfair dismissal claim.

- (b) If an employer dismisses an employee, he may defeat a claim for unfair dismissal by showing that the contract of employment has in fact been frustrated.

Ill health

If the employer relies on ill health as the ground of incapability there must be proper medical evidence. The employer may make enquiries of the employee's doctor and also obtain an opinion from the company's medical adviser. In the event of long-term sickness, the employer can only be expected to act within sensible limits. He should consider the employee's situation, but is also entitled to consider his own business needs. In the event of a number of periods of short-term sickness, the employer should again act with sympathy, understanding and compassion. This involve cautions, confrontation with records and the granting of a period for improvement.

In *International Sports Ltd v Thompson* (1980), the employee had been away from work for around 25% of the time, suffering from a number of complaints, including dizzy spells, anxiety, bronchitis, viral infections, dyspepsia and flatulence, all of which were certified by medical certificates. She received a number of warnings. Following a final warning and prior to dismissal the company consulted their medical adviser. As the illnesses were unrelated and unverifiable, he did not consider an examination worthwhile. She was dismissed. It was held that the dismissal was fair.

Frustration

This is most likely to occur in two particular situations. If there is a long-term absence of the employee through accident or illness, this may frustrate the contract: *Not cuff v Universal Equipment Co (London) Ltd* (1986). If the employee is imprisoned, this is also frustration, even though it may appear that the imprisonment is effectively self-induced: *FC Shepherd & Co Ltd v Jerrom* (1986). Such cases will be judged according to a number of factors, including the length of absence, the necessity for the employer to obtain a replacement, length of service and position of the employee.

Conclusion

Again, Dijo Ltd should give notice to avoid a claim for wrongful dismissal. The company might be subject to a claim for unfair dismissal. As noted in (a), a claim for unfair dismissal might be defeated if the employee is not capable of performing work of the kind which he or she was employed to do. Dijo Ltd should, of course, act reasonably in all the circumstances.

- (c) The effect of a ban would be different in each part of the business.

Factory

The 'no smoking' policy is described as something which Dijo Ltd has always operated. To this extent, it could be described as an implied term of the contract of employment. A spreading of the ban throughout the premises would effectively make this into an express term of the contract.

Office

There is currently no 'no smoking' policy. Therefore, the implementation of such a policy would constitute a change in contract terms.

Change in contract terms

At common law, because a change in the contract amounts to a unilateral changing of contract terms, employees who disagree with it may have an action for breach of contract. They should register their disapproval by protesting or ignoring the ban; if they impliedly accept the ban by working according to it, they will lose this right.

The Industrial Court has ruled that an employer may unilaterally amend the contract of employment if there is good reason for so doing, and a fair procedure to do so is followed. This requires that the employer must consult with the employee concerned until deadlock is reached, following which the employer may vary a contract unilaterally.

The employer should, as above, act reasonably. This will include the provision to the employees of notice of the ban. An employee may still claim unfair dismissal, but this is unlikely to succeed.

In *Dryden v Greater Glasgow Health Board* (1992), Dryden, a heavy smoker, was accustomed to smoking cigarettes in areas of the hospital where she worked set aside for this purpose. Her employer decided to ban smoking throughout the hospital and, after extensive consultations, imposed a smoking ban. She decided that she could not continue to work without smoking, and resigned, claiming constructive dismissal. It was held that 'the right to smoke' was not an implied term of contract.

Marks

- 1** This question requires candidates to explain the structure of the Botswana court system.
- 6–10 Full and accurate description of the main courts. Candidates will show awareness of the presence of the customary courts but will not describe them in detail.
- 0–5 Incomplete and inaccurate discussion of the hierarchy and jurisdiction of the courts. Inadequate or inaccurate definition of terms.
- 2** This question is relatively straightforward and candidates would be expected to demonstrate a thorough knowledge of each of the three main ways in which offers can come to an end, although not all the points made above need to be mentioned. Credit will be given for the correct use of cases or examples.
- 8–10 Thorough treatment of the three main ways in which offers come to an end, although a particularly good treatment of rejection and revocation may gain as many as 8 marks.
- 5–7 Reasonable treatment of two of the ways or a less complete treatment of the three.
- 0–4 Very unbalanced answer, focusing on only one aspect of the question and ignoring the others, or one which shows little understanding of the subject matter of the question.
- 3** This question requires candidates to explain the different ways of discharging a contract.
- 6–10 Full and accurate discussion of the different ways of discharging the contract with appropriate references to the relevant authorities.
- 0–5 Incomplete and inaccurate account. Discussion of some of the ways of discharging the contract. Weak and tentative statement of principles. No satisfactory reference to relevant authorities.
- 4** This question requires the candidates to discuss the common law duties of an employee in a contract of employment.
- 6–10 Thorough, to complete, answers will demonstrate a clear and detailed understanding of the duties of employees in an employment contract.
- 0–5 Weaker answers will show little or no understanding of the area.
- 5** This question requires candidates to state the grounds for the dissolution of a partnership.
- 6–10 A thorough, to complete answer, dealing with all the grounds for the dissolution of a partnership.
- 0–5 A less complete answer, lacking in detail or unbalanced in that it does not deal with some of the aspects of the question.
- 6** This question requires candidates to explain the principles of corporate governance and the relationship between executive and non-executive directors.
- 8–10 A good explanation of the meaning of corporate governance generally and the roles of the two types of directors in particular. Reference might well be made to the Organisation for Economic Co-operation and Development (OECD), the Combined Code, and *King II*.
- 5–7 A sound understanding of the area, although perhaps lacking in detail.
- 2–4 Some understanding of the area, but lacking in detail, perhaps failing to deal with the relationship of the two groups of directors.
- 0–1 Little or no knowledge of the area.

Marks

- 7** As stated in the introduction, this question is divided into three parts, and each part will be allocated three marks, with one mark floating in order to allow markers to reward the best performance in any one particular part.
- 8–10 Thorough treatment of all three aspects of the question.
- 5–7 Thorough treatment of two of the aspects or a reasonable treatment of all three.
- 0–4 Unbalanced answer, merely dealing with one element of the question, or demonstrating no real understanding of the nature of the question.
- 8** 8–10 Sound knowledge of the principles which govern offer and acceptance in the formation of a contract. Full and accurate identification of the issues. Excellent application of the legal principles to resolve the issues. Accurate application of relevant case law. Cogent conclusions.
- 5–7 Identification of the major issues in the problem and a good attempt to apply relevant legal principles of those issues. Some use of the relevant case law to support the answer. Accurate conclusions.
- 2–4 Identification of some of the issues in the problem and an attempt to apply legal principles to their issues. Failure to put premium on the major issues. Inadequate or inaccurate use of the case law. Tentative conclusions.
- 0–1 Very weak answer with little understanding of the issues and the legal principles involved. No reference to case law.
- 9** 8–10 Sound knowledge of the legal principles that govern directors' fiduciary duties. Accurate identification of the principle applicable in the problem. Accurate identification of the issues and statement of the applicable legal principles. Full and accurate resolution of the issues with reference to relevant statutory provisions and case law.
- 5–7 Correct identification of the major issues in the problem and a sound attempt to apply legal issues to those issues. Some candidates in this band will not adequately explain the rules relating to statutory disclosure under ss.130–136 of the Companies Act 2003.
- 2–4 Identification of some of the issues in the problem. Incomplete statement of the legal principles. Inadequate or inaccurate application of the case law. Weak conclusions. No reference to statutory disclosure.
- 0–1 Very weak, incomplete, inaccurate and unbalanced. Little understanding of the issues. Little or no use of relevant case law and statutory provisions.
- 10** The three parts of the question are worth 5, 3 and 2 marks respectively. Answers at the top of the band will correctly identify the issues, state the governing legal principle, apply those principles to the facts in each part and arrive at accurate conclusions. There will be good use of the relevant case law.
- Weak answers will be incomplete, inaccurate or unbalanced and will demonstrate little understanding of the issues. Little or no use will be made of the relevant case law.