Answers

1 This question requires candidates to explain the concept of human rights as expressed in the Constitution and any other legislation.

The Botswana Constitution contains a bill of rights which sets out a range of fundamental rights and freedoms for every person. All laws enacted in Botswana must conform to the Constitution and in particular to the Bill of Rights. The courts must also have regard to the Bill of Rights in their interpretation of existing laws.

Rights protected under the Botswana Constitution are the right to life, the right to personal liberty and security of the person, the right to privacy, protection from slavery and forced labour, protection from inhuman and degrading treatment, protection from deprivation of property, the right to a fair hearing, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement and freedom from discrimination. These rights are civil and political rights, otherwise known as first generation rights and freedoms. This bill of rights is also augmented by a bill of children's rights found in the Children's Act 2009. The bill of rights in the Children's Act, 2009, guarantees children the following protections: the right to life, the right to a name, the right to be known and cared for by their parents, the right to health and education, leisure, the right to be protected from exploitation.

The protection of human rights under Botswana's Constitution was tested in the landmark decision *Attorney General* v *Unity Dow* (1992). In this case, the Court of Appeal declared sections of the Citizenship Act unconstitutional on the grounds that they discriminated against women on the basis of their sex. The impugned provision of the Citizenship Act did not allow a woman to pass on citizenship to her children born with an alien male while the reverse was allowed.

Despite her aged constitution and the absence of second and third generation rights in Botswana's constitution, on balance, Botswana's human rights record has been good.

Tutorial note: *Candidates will receive credit for discussing any of the following cases:* Good *v* The Attorney General *(2) (2005),* Sesana and others *v* The Attorney General *(2006) or* Matsipane Mosetlhanyane and Others *v* The Attorney General *(2010) and* Edith Mmusi and others *v* Molefi S Ramantele and Others *(2013) all of which are leading cases in the protection of human rights in Botswana.*

2 **(a)** This question requires candidates to explain the meaning and effect of a breach of contract.

A breach of contract is a wrongful act of omission by contracting parties that result in a failure to attain the purpose for which a contract was concluded. Forms of breach of contract are delay, failure to perform, prevention of performance and repudiation of the contract.

A breach of contract does not automatically result in termination of the agreement. A party to the contract can always enforce the contract through specific performance. Cancellation of the agreement will be a result of the breach where the breach 'goes to the root of the contract' or is 'fundamental', or where the aggrieved party opts to cancel the contract in terms of a cancellation clause in the contract. Once the contract has been cancelled, the aggrieved party may sue for damages for breach of contract.

(b) This question requires candidates to discuss the remedies for breach of contract.

The remedies available for breach of contract are specific performance, interdict, cancellation and damages.

Specific performance is the right that every party to a binding agreement who is ready to carry out their own obligation has at law to demand from the other party, as far as it is possible, a performance of their undertaking in terms of the contract – *Farmers' Co-op Society* (Reg) v *Berry* (1912). Specific performance will not be granted where it is impossible to comply with the order; where complying with the order will cause the defendant undue hardship; where the contract is one for personal services as there is a danger of further disputes arising between the parties, and where the obligations of the defendant in terms of the contract are vague and an order may result in disputes over whether specific performance has been effected or not.

Interdict is an appropriate remedy to prevent breach or threatened breach of contract. Where an interdict is granted, the court orders the defendant to refrain from doing whatever is specified in the order. Where the defendant fails to comply with an interdict, they may be charged with contempt of court.

Where one party repudiates the contract, the other may respond by cancelling the contract. This is also known as rescission of contract. Cancellation terminates the obligations of the contract at the time of cancellation. The injured party would still have a right to claim damages for breach of contract. Cancellation must be clear and unequivocal.

A party who has suffered loss as a result of breach of contract by the other party to the contract may sue for damages. The plaintiff must prove that they would not have suffered loss but for the defendant's breach. Damages for breach of contract are normally not intended to compensate the innocent party for their loss, unlike damages for delict, but are meant to put them in the position they would have been in had the contract been properly performed *Trotman* v *Edwick* (1951). The plaintiff must prove their damages and if they are unable to do so, no damages will be awarded *Rhodesia Cold Storage* v *Liquidator, Beira Cold Storage* (1905). The plaintiff also has a duty to mitigate their losses *Hazis* v *Transvaal and Delagoa Bay Investments Co Ltd* (1939).

3 This question requires candidates to explain the nature of the contract of employment.

The contract of employment may be defined as an agreement between two legal persons in terms of which the employee undertakes to place their personal services at the disposal of the employer for an indefinite or determined period in return for a fixed or ascertainable wage, and which agreement entitles the employer to define the employee's duties and usually to control the manner in which the employee discharges them. The essentials of the contract of employment are derived from this definition. They are:

(i) A voluntary agreement
(ii) Between two legal persons
(iii) The employee agrees to perform certain specified and/or implied duties for the employer
(iv) The contract is for an indefinite or specified period
(v) The employer agrees to pay a fixed or ascertainable wage to the employee
(vi) The employer gains qualified right to command the employee in the manner in which they carry out their duties.

In order to conclude a binding contract, the employer and employee are bound by general principles of contract law which provide that there must be consensus between the parties each having the intention to be bound and create mutual rights and duties, each party must have capacity to conclude a contract; the rights and duties created by the contract must be lawful and capable of performance and any formalities prescribed for the contract must be observed.

4 This question requires candidates to illustrate the effect of separate personality.

Once a company is incorporated, it acquires separate legal personality. The doctrine of corporate personality was discussed in the famous case *Salomon* v *Salomon* (1897). Salomon was in the boot making business as a sole trader. He sold his business to a company he incorporated. He, his wife and five children made up the membership numbers.

The company bought the business for about £39,000. The company could not pay Salomon the full purchase price so it issued him with debentures valued at £10 000. As security for the debt, the company offered him a floating charge over the company assets. A floating charge is similar to a mortgage. As holder of a floating charge, Salomon was entitled, on the liquidation of the company, to have the assets of the company sold and the money raised from the sale used to pay the £10 000 that the company owed him. If Salomon had enforced the charge, other creditors of the company would get nothing. The company went into liquidation. Salomon tried to enforce the charge. The liquidator took Salomon to court to prevent him from selling the assets of the company, which he held as security for the money owed to him. Instead, the liquidator suggested that Salomon instead should be made responsible for the debts of the company just as he would have been if he had continued to trade as a sole trader. The liquidator wanted to ignore the company's separate legal personality and Salomon's limited liability. The court disagreed with the liquidator and held:

'The company is at law a different person all together from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profit, the company is not in law an agent for the subscribers or a trustee for them. Nor are the subscribers as members liable except to the extent and in the manner provided by the act.'

The company does not have a relationship of principle and agent with its shareholders. The liability of shareholders in a company is limited to the amount still unpaid on shares allotted to them. The doctrine of separate legal personality is recognised in s.24, Companies Act, 2003. This principle has been incorporated into Botswana Law in the *Silverstone* v *Lobatse Clay Works* (1996) decision as follows:

'The general rule is that a corporate entity should be recognised and upheld except in the most unusual circumstances. That has been frequently emphasised by the South African courts… That it is a salutary principle that the courts should not lightly disregard a company's separate personality but should strive to give effect to it and that a court has no general discretion to disregard a company's separate legal personality wherever it considers it just to do so, has been stressed once more in the recent case before the *South African Appellate Division of Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd and Others* (1995) (4) S.A. 790 (A) at 802F-804D.'

5 This question requires candidates to explain the role and duties of company promoters.

In *Twycross* v *Grant* (1877) a promoter is defined as a person who undertakes to form a company with reference to a given project, and to set it going, takes the necessary steps to accomplish that purpose. In short any individual or group of individuals coming together with the goal of forming a company can be termed as a promoter(s).

As creators of the company, the promoters determine what form it shall take. Whether limited by shares or by guarantee, whether public or private or closed. They also determine the business that the company may engage in and in so doing are free to restrict its objects in terms of s.26 Companies Act, 2003. The promoters also decide whether the company should have a constitution. In terms of s.37 Companies Act, 2003, a company need not have one. The promoters will nominate the first directors and other officials of the company, for example the company secretary. The promoters will be responsible for raising capital for the company. Promoters also negotiate for the acquisition of any business or property that the company will be using upon registration.

A promoter stands in a fiduciary position towards the company they are forming. This means they owe the company a duty to exercise utmost good faith in their dealings with the company. The promoter may not make a secret profit. Any profit they make from the promotion of the company must be declared to the other promoters and to the board. The board will then decide whether they may keep the profit or not.

Disclosure must be frank and clear in the prospectus so that all present and future members are aware of the promoter's dealings with the company. Partial disclosure is insufficient. In *Gluckstein* v *Barnes* (1900) a company called the Olympia was in liquidation. A group of investors banded together to purchase the company for £140,000. They sold it on to another company they created for £180,000. They declared a profit of £40,000. They failed to disclose that they had bought Olympia debentures very cheaply from debenture holders. They then required the company they created to pay for the debentures at face value making a secret profit of £20,000. They had disclosed the secret profit in the prospectus as 'interim investments'. The new company went into liquidation. The liquidator sued Gluckstein to recover his share of the secret profit from him. The court held that Gluckstein was liable, finding that the partial disclosure was insufficient and deceptive and holding that he had made a secret profit.

In *Erlanger* v *New Sombrero Phosphate Company* (1878) the promoters formed a syndicate to purchase a lease for Sombrero Island. They bought it for £55,000. They then formed a company and sold the island to it for double the price they obtained it at, being £110,000. They then declared the profit they made on the sale to the board. When the company (the shareholders) discovered the transaction, they removed the board and appointed a new board. The new board sued the promoters to rescind (cancel) the contract. The court ruled that the contract could be cancelled. The reason being that disclosure was made to a board that was not independent. It consisted of two directors who never attended meetings, one who was an agent of the promoters and another who did the promoter's bidding. The court noted that an independent board should comprise of persons who are competent, impartial and capable of forming intelligent judgements about whether the promoters own the property they are trying to sell to the company and whether the price is reasonable or not.

6 This question requires candidates to explain and distinguish between loan capital and share capital.

Corporate finance is the manner in which companies raise finance, capital or money for their business. Capital is raised in order to create, develop, grow or acquire businesses. Companies raise finance to run its business by way of issuing shares and making calls on issued shares. Finance raised in this manner is known as share capital. A company may also raise capital by borrowing money from third parties through instruments called debentures. This type of capital is known as loan capital.

Individuals who purchase shares in a company agree to contribute capital to the business of that company in return for shares. Shareholders will contract with the company regarding how much capital they wish to contribute. The contributed capital is engaged in the business of the company, ideally to make a profit. The profit is then shared proportionally amongst the members of the company depending on their level of contribution or investment. The assignment of shares thus helps the company to gauge or measure the shareholders interest in the company. The shareholders interest in the company translates into their share of the profits.

Sometimes businesses are wound up or closed down whilst solvent. In such cases, the shareholders then get their capital contribution back. The method for determining who gets what is by way of shareholding. If the company is wound up because of insolvency, then the contributed capital is used to pay the company's debt. In such instances, the shareholders get no capital contribution back.

Members of a company also participate in its running by appointing a board to manage the company's affairs. Those who contribute more capital want a greater share in the distribution of profits or contributed capital and more influence in decision making through votes. Shares also facilitate the transfer of a member's interest or part thereof to another member. It is a convenient way to measure that interest. Transfer is usually by gift, sale or inheritance.

Companies also raise finance or capital to create, develop, grow or acquire a business by borrowing money from third parties. Third parties, usually private individuals, lend money to companies in return for interest. They are investors in the company who assist it to raise finance by way of loans. These loans are called debentures after the documents issued by the company acknowledging indebtedness to the investors.

A debenture is defined in s.2 Companies Act 2003 as a written acknowledgment of indebtedness issued by a company in respect of a loan made or to be made to it whether secured or unsecured. The holder of a debenture is therefore a creditor of the company. In liquidation, debenture holders must be paid out before the members of the company receive and distribution of assets of the company. Where a debenture is secured, the debenture holder has a right to attach and sell the property of the company should they not get their interest and capital back in terms of the loan. The company property secures the loan.

The Companies Act 2003 recognises different types of debentures. These are debenture stock, convertible debentures, bonds or obligations, loan stock, unsecured notes, a debenture trust deed.

7 **(a)** This question requires candidates to explain the idea of corporate governance.

Corporate governance can be defined as the processes, customs, policies, law and institutions that affect the manner in which a corporation is directed, administered or controlled. Corporate governance involves several stakeholders like government as the legal regulator, the stock exchange, the board of directors, senior executives, employees, creditors and debtors of the company.

Corporate governance is achieved through mandatory and voluntary rules as well as policies and customs affecting a company. Legal rules concerning governance that would be binding on a company are found in the Companies Act, 2003 and in the Constitution adopted by the company. Voluntary governance codes have also become increasingly important as a measure of ethical corporate behaviour. In Botswana, the King Code has been voluntarily applied by some businesses as a governance standard.

(b) This question requires candidates to describe extra-legal codes of corporate governance.

In Botswana, the King Code is the most notable extra-legal code of corporate governance. The King Code was first developed in 1994 by the King Committee led by Mervyn King. The Report contained a code on corporate practices and conduct on good governance. The code was revised in 2002 and dubbed King II. The current code, referred to as King III, was issued 2009 and is the latest revision of the code. King III takes into account the new companies act in South Africa and changes in international trends. Compliance with the King Code is a listing requirement on the Johannesburg Stock Exchange.

Implementation of the King Code is voluntary and non-legislated. Its purpose is to achieve the four cornerstones of corporate governance in every enterprise. These principles are fairness, accountability, responsibility and transparency. The King Code, where adopted by companies is implemented on an 'apply or explain' basis as opposed to a 'comply or explain' basis. 'Apply or explain' means that a board of directors could conclude that to follow a particular recommendation in the Code would not be in the company's best interests. The board could then decide to apply the recommendation differently or adopt an entirely different practice and still achieve the overarching principles of corporate governance, explaining how these principles are applied and the reasons for their non-application would result in compliance. The 'comply or explain' model has been criticised for being too legalistic and forcing boards to focus on compliance at the expense of growth and enterprise.

The King Code has been voluntarily applied by some boards of directors in Botswana on a completely voluntary basis. The King Code, in particular King II, has been adopted as a guide to the drafting of the Botswana Stock Exchange (BSE) Code of Best Practice on Corporate Governance.

On 1 March 2011, the Botswana Institute of Directors issued a Draft Code of Corporate Governance. This code of principles governs the conduct of a board of directors. It is divided into nine chapters each with a set of principles and a commentary. The first chapter dealing generally with boards and directors contains 35 principles on the make-up of the board and its primary responsibilities. The following chapters deal with audit, the governance of risk, information technology, stakeholder relationships, corporate reporting and board appraisal.

The Botswana Institute of Directors Draft Code of Corporate Governance is not legally binding. The director's institute has made efforts to secure adherence to it by proposing that all entities in Botswana in particular listed companies, corporate members of the Institute of Directors, private and state owned enterprises abide by the principles. They have also proposed it as a listing requirement for the BSE. Once a company adopts the code it would be bound to abide by its provisions on an 'apply or explain' basis. This means that a company wishing to adopt the code should adopt the principles and practices found therein. However, should it find that it wishes to apply different principles or practices; it may freely do so provided that it explains its departure from the principles recommended in the code. This approach moving away from legalism to voluntary adoption of good corporate governance practice it is expected will be less punitive and more sustainable in the long run. Genuine good governance means that companies should apply the principles because they want to and not because they have to.

8 This question requires candidates to discuss the procedure for conducting company meetings.

In terms of s.109 Companies Act 2003 proceedings of the general meeting shall be governed by the second schedule of the Companies Act subject to the provisions of the constitution.

The second schedule provides that the meeting shall be chaired by the chairperson of the board of directors failing which those present at the meeting shall elect a chairperson from amongst themselves. The company meeting called by Katlego was not chaired by the chairperson of the board. Further, Katlego appointed herself as chairperson without giving others the opportunity to agree by way of a vote.

In terms of the second schedule, written notice of the shareholders meeting must be forwarded to every shareholder, director, auditor and company secretary at least 10 days before the meeting. It must contain the date, time, venue and business to be discussed at the meeting. Irregularities to the notice of meeting may be waived if all shareholders attend and no one protests about the irregularity or if they all agree to the waiver. Despite Ame's protests of irregularity, there was no agreement to waive these requirements.

Katlego's meeting is irregular because the notice for the meeting was short and no agenda was circulated.

Some decisions reserved to shareholders can only be passed by way of special resolution. A special resolution requires 75% of the votes in a quorate meeting.

Decisions requiring special resolutions are listed in s.96 Companies Act 2003 as follows:

(i) Adoption, alteration or revocation of the company's constitution,
(ii) Approval of a major transaction in terms of s.128 Companies Act
(iii) Approval of amalgamation of the company in terms of s.224 Companies Act and
(iv) Winding up of the company.

The decision adopted by the company meeting purported to amend the constitution to increase the number of directors from five to seven. In terms of the Companies Act, such a decision may only be taken by way of special resolution. Since the purported amendment of the constitution was by way of an ordinary resolution, the decision is irregular.

Given that the company meeting held by Katlego and the other shareholders did not comply with the requirements of schedule 2 Companies Act. The resolution adopted at that meeting can be challenged for legality.

9 This question requires candidates to explain the doctrine of capital maintenance and the prohibition against the reduction of capital.

The proposed transaction is prohibited at law. Section 76(1) Companies Act, 2003 prohibits the giving, whether directly or indirectly, and whether by means of a loan, guarantee, provision of security or otherwise, of any financial assistance for the purchase of any shares in a company. The rationale for this rule is when a company makes a loan to a third party for the purpose of buying shares in the same company, the shareholders and the creditors of the company will suffer if the loan proves to be unserviceable. The rule exists to prevent persons taking control of the company using the company's own resources to finance the purchase of their shares. In terms of s.76(2) Companies Act, 2003, a company may lend assistance in the purchase of its own shares where the board has resolved that giving assistance is in the interests of the company, the terms and conditions of the loan must be fair and reasonable to the company and to shareholders of the company and the company must satisfy the solvency test immediately after giving the loan. In the absence of a board resolution in terms of s.76(2) and the certainty that Lesedi (Pty) Limited can pass a solvency test, immediately after giving the loan, the transaction must fail. Lesedi (Pty) Limited is advised that the proposed transaction is illegal.

The rules governing the payment of dividends are essential to the maintenance of capital. This is because dividends should be paid out of profit not out of capital.

Before dividends a dividend is paid, s.58(1) Companies Act, 2003 provides that the dividend must be authorised by the board and approved by the shareholders in general meeting. Section 58(2) and 58(3) Companies Act, 2003 provide that in authorising a dividend, the board must be certain that the company will immediately after the payment of the dividend satisfy the solvency test and sign a certificate to that effect.

These rules are meant to ensure that dividends are not paid out of capital, as this would be detrimental to the company's creditors.

10 This question requires the candidates to explain the duty of care and its breach.

In order to recover his loss, Dube may choose to bring an action against Simon for negligence. In order for Dube to succeed, he must prove wrongfulness of Simon's act or omission, negligence, causation and loss.

Simon acted wrongfully towards Dube. In order to succeed in proving this requirement, Dube must prove that Simon was under a legal duty to prevent danger arising where, by his own conduct, he created a potentially dangerous situation. Simon lit a fire. He ought to have watched the fire in order to ensure that it did not burn out of control and cause damage to other people's property. This omission was a failure in his duty to act to prevent danger to Dube.

Dube must also establish that Simon acted negligently by leaving the fire unattended. Simon's failure to supervise the fire was in fact negligent. Simon had a duty of care to ensure that any dangerous force he was in charge of did not cause problems for his neighbours.

The next requirement is proof of factual and legal causation. Factual causation requires reference to the 'but for' test or the *conditio sine qua non*. Dube must establish that he would not have suffered loss 'but for' the negligent omission of Simon. It is submitted that a factual causal link exists between the negligent abandonment of the fire and the damage.

Legal causation must also be established. This requires that the link between the wrongdoer and the damage be close enough so that the loss caused can be imputed to the wrongdoer. The link in Dube's case is sufficiently established because he suffered damage to his veranda directly as a result of Simon's conduct. Simon should be held liable in delict for negligence and be required to pay damages to Dube.

1 This question requires candidates to explain the concept of human rights as expressed in the constitution and any other legislation.

6–10 A concise answer showing thorough understanding of the material.

0–5 An insufficient answer showing unsatisfactory grasp of the material.

2 **(a)** This question requires candidates to explain the meaning and effect of a breach of contract.

2–3 A complete answer with adequate explanation of concept.

0–1 An incomplete answer with inadequate explanation.

(b) This question requires candidates to discuss remedies for breach of contract.

4–7 A detailed answer discussing all remedies.

0–3 A partial answer discussing only some remedies.

3 This question requires candidates to explain the nature of the contract of employment.

6–10 A full answer showing understanding of the content.

0–5 A partial answer showing poor grasp of the content.

4 This question requires candidates to discuss the doctrine of separate legal personality and illustrate the effects of the doctrine on shareholders' liability.

6–10 A detailed answer discussing separate legal personality.

0–5 An incomplete response showing lack of understanding of the doctrine and its effects.

5 This question requires candidates to explain the role and duties of company promoters.

6–10 A detailed answer showing grasp of the material.

0–5 A partial to fair answer with unsatisfactory grasp of the material.

6 This question requires candidates to explain and distinguish between loan capital and share capital.

6–10 A thorough answer stating and discussing the differences.

0–5 An incomplete answer lacking in relevant detail.

7 **(a)** This question requires candidates to explain the idea of corporate governance.

2–3 A concise response explaining corporate governance.

0–1 An incomplete response.

(b) This question requires candidates to discuss extra-legal codes of corporate governance.

4–7 A detailed answer discussing more than one extra-legal code.

0–3 A partial answer showing unfamiliarity with extra-legal codes.

8 This question requires candidates to describe the procedure for conducting company meetings.

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

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

9 This question requires candidates to explain the doctrine of capital maintenance and the prohibition against the reduction of capital.

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

0–5 An incomplete answer showing insufficient grasp of the material.

10 This question requires the candidates to explain the duty of care and its breach.

6–10 A thorough discussion of the duty of care and its breach.

0–5 An incomplete discussion of the duty of care and its breach.