Answers

1 This question requires candidates to explain the sources of Botswana law. Botswana law is derived from three main sources:

(a) Judicial Precedent

Under the doctrine of judicial precedent (*stare decisis*) earlier decisions of higher courts are binding on lower courts dealing with a similar matter at a later date. When a dispute arises between two parties, lawyers on both sides will usually argue the matter in court before a judge. At the end of the arguments, the judge makes a decision usually resolving the matter in favour of the successful party. Before reaching his decision, the judge usually reviews all existing relevant law and then formulates and applies a legal principle to the facts before him. The principle laid down in the case may form a binding or persuasive precedent to be followed by courts in later disputes involving similar issues. This is how common law is created. Common law is the law as laid down by the judges in deciding cases, though it is always said that judges do not make law – they merely interpret it.

The legal principle laid down in the case is known as the *ratio decidendi*. This is what binds later courts dealing with a similar matter. What the judge says in passing is known as *obiter dicta* and is strictly not binding.

The doctrine of judicial precedent is very much based on the hierarchy of the courts. Lower courts are bound by the decisions of higher courts. The highest court in Botswana is the Court of Appeal. This means that the High Court and the Magistrate's Courts are bound by the decisions of the Court of Appeal.

The doctrine of judicial precedent ensures growth, stability, and certainty in the law. The doctrine relies very much on law reporting. When the decisions of the earlier courts are reported, this makes it possible for lawyers and judges dealing with a similar matter later to consult them and apply them.

In Botswana, the common law is Roman-Dutch. This is a hybrid system combining the common law of Holland, which the Dutch settlers at the Cape brought with them, and English law. Where there is a Botswana precedent in existence on a particular matter the courts will follow it. Where there is no local precedent the courts are guided by decisions from South Africa, England or other Roman-Dutch common law jurisdictions such as Zimbabwe.

(b) Legislation

This is a very important source of law. Legislation (or statute law) refers to law passed by Parliament in the form of statutes or Acts of Parliament. The bulk of Botswana law is statutory. This includes the Constitution and the Citizenship Act. The Constitution is the most authoritative source of law in Botswana, and any statutory provision which conflicts with the Constitution is invalid. A lot of important business law is statutory although it is in some cases supplemented by important common law principles. Examples here include the Companies Act (Cap 42:01), the Income Tax Act (No. 12 of 1995), the Employment Act (47:01) and the Bills of Exchange Act (Cap 46:02).

Statutory law is important because Parliament is the sovereign body in the country. Parliament makes law in several ways:

(i) it can enact an entirely new law where there was none before to deal with a new problem or development or to fill an existing gap;

(ii) it can enact a new law by repealing an existing one that is outdated or unworkable;

(iii) it can enact a new law which codifies and clarifies existing common law;

(iv) it can enact a new law by consolidating law scattered in different statutes into one statute; and

(v) it can enact secondary or subsidiary legislation in the form of statutory instruments.

Where statute law and common law conflict, statute law prevails.

(c) Customary law

Botswana is inhabited mainly by various Tswana-speaking tribes. Each of these tribes has its own customs, traditions and political system. These customs and traditions form the customary law of these tribes. The Bechuanaland Protectorate was formally established in 1891 by the Bechuanaland Order in Council of 9 May 1891. This Order-in-Council established the office of the High Commissioner. He was enjoined to respect any native laws or customs by which the civil relations of Botswana were regulated except insofar as they were incompatible with the exercise of Her Majesty's power and jurisdiction. It can be seen that right from the early days of colonisation, the customary law of the Tswana people was left in place. This is the case up to the present day. Botswana has a dual legal system whereby the received Roman-Dutch law operates in conjunction with the customary law. Even the court system is dual: the main courts administer the general received law while the customary courts administer customary law. Customary law is very important in areas such as marriage, succession and land law.

2 This question requires the candidates to explain the rules relating to the implication of terms in a contract. Terms may be implied into a contract by law or on the facts. The expression 'implied term' denotes two distinct concepts. First, it denotes an unexpressed provision of the contract which the law *imports* therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. However it is important to note that it does not originate in the contractual consensus: it is imposed by law from without.

Indeed, terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract. Examples include: the seller's implied guarantee or warranty against defects; the lessor's implied undertakings as to quiet enjoyment and absence of defects; and in the law of negotiable instruments the engagements by the drawer, acceptor and indorser as imposed by ss.53 and 54 of the Bills of Exchange Act (Cap 46:02). Such implied terms may derive from the common law, trade usage or custom, or from statute.

In the second place, 'implied term' is used to denote the unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express term of the contract and the surrounding circumstances. In supplying such terms the court declares the whole contract entered into by the parties. The court implies not only terms which the parties must have actually had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question or the situation requiring them had been drawn on their attention: see *Alfred McAlpine & Sons (Pty) Ltd* v *Transvaal Provincial Administration* (1974).

Rules as to implied terms

(a) The courts presume that the parties in entering into a contract have given expression to all the terms by which they intend to be bound. The courts therefore, are reluctant to find that an implied term affects the reciprocal obligation of the parties to the contract and will never do so if the effect of the implication would be to prejudice the rights of third parties: *Durmalingum* v *Bruce NO* (1964).

(b) It must be clear that the parties intended the term to be understood in the contract and that they would not have contracted otherwise than on the basis of that term: *Liquidator of Boysen's Race Club Ltd* v *Burton* (1910).

(c) The term must be necessary in the business sense to give efficacy to the contract: *Reigate* v *Union Manufacturing Co (Ramsbottom) Ltd* (1918); *Mullin (Pty) Ltd* v *Benade Ltd* (1952). However it is not necessary that the parties should have consciously envisaged the situation. It is sufficient that their common intention to such a possible situation would have evoked from them a prompt and unanimous assertion of the implied term: *Techni-Pak Sales (Pty) Ltd* v *Hall* (1968); *Van den Berg* v *Tenner* (1975).

(d) An implied term must be capable of clear and exact formulation: *Rapp & Meister* v *Avoronsky* (1943). It must be capable of being formulated substantially in only one way and once there is difficulty in formulating the term or doubt as to its ambit there can be no implication: *Rapp & Meister* v *Avoronsky* (1943).

(e) Whether or not a term is to be implied will depend upon the facts of each particular case: *Elite Electrical Contractors* v *The Covered Wagon Restaurant* (1973); *Barnabas Plein & Co* v *Joe Jacobson & Son* (1928).

3 This question requires candidates to discuss the remedies directed at fulfilment of a contract in the case of a possible breach of contract. The remedies directed at fulfilment of the contract are aimed at forcing the other party to the contract, by an order of court, to fulfil his or her contractual obligations. Although these remedies can be classified into a number of categories, only two of them need to be discussed, namely, the *interdict* and a claim for *specific performance*.

Where a party to a contract realises that the other party intends to perform an act which he agreed to refrain from doing, or which is in conflict with his contractual obligations, the appropriate remedy of the party, who stands to be injured by the impending breach of contract, is an interdict. An interdict is an order of court by which a party is restrained from performing the forbidden act, or by which he is ordered to undo what he has done in contravention of his contractual obligations.

The requirements which have to be met before a court will allow an interdict are that (a) a clear right must exist; (b) which is infringed upon or will be infringed upon; and (c) no other remedy must be available to the prejudiced party (*Setlogelo* v *Setlogelo* (1914)). Typical situations in which the interdict can be used, are where it becomes clear that a party intends to act contrary to an agreement in restraint of trade; where it appears that a lessee intends to sublet the property in contravention of his contract with the lessor; and where a seller, before delivery of the object of the sale to the purchaser, sells the same object to a second purchaser.

The aim of a claim for *specific performance* is to force the defaulting party, by an order of court, to make performance in the very terms agreed upon by the parties. In terms of such an order the party who commits breach of contract is, for example, forced to pay an amount of money (such as the purchase price or rent), to deliver or manufacture an object of a specific quality, to perform an act or complete certain work, and to pay damages as surrogate of performance. After the decision in *ISEP Structural Engineering and Planting (Pty) Ltd* v *Inland Exploration Co (Pty) Ltd* (1981) there is some uncertainty whether damages can be claimed as surrogate for performance as an alternative to a claim for specific performance.

A claim for specific performance is the *natural remedy* in the event of breach of contract and the injured party is, in principle, always entitled to this remedy. In the past the courts in certain instances refused an order for specific performance. After the decision in *Benson* v *SA Life Assurance Society* (1986), the position seems to be that the courts will only use their discretion not to make such an order if the order would bring about an unjust or would be contrary to public or legal policy. Each individual case

must be adjudicated on its own merit and own set of circumstances. Where the obligation is to perform a relatively simple act, such as to sign a contract or power of attorney, or to transfer immovable property or to appoint a director of a company, the courts will readily grant an order for specific performance.

As a general rule, however, the courts will not grant such an order where it could work great hardship on the defaulting party or the public at large. A local authority who refuses to supply a farmer with more than a certain quantity of water during a severe drought will, for example, not be forced to deliver more water to this farmer when to do so would cause hardship to the townspeople (*Haynes* v *Kingwilliamstown Municipality* (1951)). An order for specific performance would also not be viable where performance has become or has been rendered impossible or where the debtor's estate has been sequestrated. A debtor may also in the case of a reciprocal contract resist the order for specific performance by raising the exceptio non adimpleti contractus. A reciprocal contract is one where both parties to the contract have to perform simultaneously. If one party to a contract claims specific performance such party should also be able to perform his or her side of the bargain.

4 This question requires the candidates to explain the difference between a contract of service and a contract for services. A person employed under a contract of service is an employee, while a person employed under a contract for service is an independent contractor.

A contract of service (*locatio conductio operarum*)

The employee puts his services at the disposal of the employer. He operates under the authority, control and supervision of the employer, who may prescribe what work is to be done; how, when and where it should be performed; and who may supervise the performance. The employer provides the employee with the goods required to perform his work. The employer is vicariously liable for the delicts committed by the employee against third parties in the course of employment.

A contract for service (*locatio conductio operis*)

The independent contractor undertakes to perform a certain job but does not operate under the control and supervision of the employer; he uses his own tools and discretion regarding the manner and time in which to complete the job. The means of achieving the task are left entirely up to the independent contractor. He does not operate under the employer's orders except in ensuring that the end product is acceptable to the employer. In this type of contract, the independent contractor is regarded as able to negotiate on an equal footing with the employer, and he therefore does not need the protection offered by employment law.

Tests for distinguishing the two types of contract

The parties are expected to reach an express understanding as to whether or not there is a contract of employment, but their express intentions do not necessarily prevail. There are also borderline cases where it is not entirely clear whether the contract is a contract of service or one for services. The courts have on several occasions been called upon to resolve this issue and various tests have been laid down in different cases from various jurisdictions. These tests are: the control test; the organisation test; and the multiple test. In *Power Nleya* v *Item Botswana (Pty) Ltd* (1996), the Botswana Industrial Court held that the supervision and control test is the most suitable in the context of s.2 of the Trade Disputes Act (Cap 48:02). According to this test, the employer must be able to control what work is done as well as where, when and how it is done.

The importance of the distinction

The distinction is of crucial significance because different legal consequences flow from the two types of contract. These consequences include the following:

(i) An employer must provide insurance for employees in terms of the Workmen's Compensation Act (Cap 47:01), but not for independent contractors.

(ii) An employee is protected by the Employment Act (Cap 47:01) as regards hours of work, number of leave days and maternity leave, but an independent contractor has no such protection.

(iii) An employer must deduct tax on a PAYE basis from an employee's salary, but not from payments to an independent contractor.

(iv) An employer is vicariously liable for acts of an employee, but not for acts of an independent contractor: *Lotter* v *Rhodes* (1902).

(v) A dispute between an employer and an employee may be decided by the Industrial Court, but the Industrial Court has not jurisdiction to hear disputes involving independent contractors (see *Power Nleya* v *Item Botswana (Pty) Ltd* (1996); *Financial Network and Auto Management Systems (Pty) Ltd* v *Derek Grace* (1996)).

5 This question requires candidates to distinguish between agency and contracts for the benefit of third parties.

In the case of agency, a person concludes a contract on behalf of another on the strength of authority given to him. For example P (the principal) authorises A (the agent), and A accepts it, to buy a motor vehicle from a third party (T). If A informs T that he contracts on behalf of P, the contract is concluded between P and T. No contract exists between T and A because it was not their intention to conclude a contract with one another. A is therefore not a party to the contract with T. Even if the agent does not disclose that he is acting on behalf of a principal (even though he had the authority to do so) the principal may step forward and claim from the third party. The third party may, likewise, once he becomes aware of the principal's existence, claim either from the

principal or from the agent. This is known as the doctrine of the undisclosed principal. It is also possible that the agent represents to the third party that he is acting on behalf of a principal whilst having no authority from the principal. The third party may then hold the agent personally liable for damages.

The contract for the benefit of a third party (*stipulatio alteri*) may be illustrated with the example where someone wants to enter into a contract on behalf of a company that has not yet been incorporated. With a contract for the benefit of a third party a contract is made by a person (A) as principal, i.e. in his own right, with a second person (B) for the benefit of a third (C), who is perhaps not even yet in existence or is only to be identified at some later date. Once the third party (in our case the company) comes into existence or is identified, it can accept the benefit of the contract. If the company adopts the contract or accepts the benefit, the contract comes into existence between the company and the other contracting party (B). Whether the contract will operate with retrospective effect depends upon its terms. Prior to the acceptance by the company of the offer, the promisor or *promittens* (B) and the promoter or *stipulans* (A) are the only persons bound by the contractual tie. At that stage it is to the promoter alone that the promisor is bound by his promise to make an offer to the company. Although the promoter is thus a party to the contract, he will incur thereunder only such obligations as he specifically undertakes. Until such time as the company comes into existence and accepts the offer, it acquires no rights in consequence of the agreement between the promoter (A) and the promisor (B).

The most important differences between agency and the contract for the benefit of a third person are:

(a) The promoter or *stipulans*, in contradistinction to the agent, has no authority from the principal.

(b) After conclusion of the agreement for the benefit of a third person, no immediate contract exists between the promisor and the third party, whereas in agency a contract immediately exists between the principal and the third party.

(c) It is a requirement of agency that the principal must have existed at the time of the agreement. After all, the principal must have given the agent the necessary authority. This is not a requirement in the case of a contract for the benefit of a third party.

(d) The promoter or *stipulans* does not conclude the agreement in the name of the third party, whereas the agent concludes it in the name of the principal. The promoter or *stipulans* acts in his own name but for the benefit of the third party.

6 In this question the candidates must discuss the duties of care and skill that directors owe to their companies.

A director must exercise his powers and carry out his office *bona fide* and for the benefit of the company. In so doing, he must exercise the required degree of care and skill. However, the standards according to which the degree of care and skill are measured are by no means clear. While it is to a certain extent possible to establish 'care' objectively, 'skill' varies from person to person.

Nevertheless it is required of directors that they apply such skill as they do possess to the advantage of the company. In *Fisheries Development Corporation of SA Ltd* v *Jorgensen* (1980) the court outlined the following guidelines in this regard:

(a) The extent of a director's duty of care and skill depends to a considerable degree on the nature of the company's business, and on any particular obligations assumed by, or assigned, to him. There is a difference between the full-time or executive director, who participates in the day-to-day management of the company's affairs and the non-executive director, who is not bound to give continuous attention to the affairs of the company. The non-executive director's duties are of an intermittent nature, to be performed at periodical board meetings and at any other meetings which may require his attention. He is not, however, bound to attend all such meetings, though he ought to whenever he is reasonably able to do so.

(b) A director is not required to have special business acumen or expertise, or singular ability or intelligence or even experience in the business of the company. He is, however, expected to exercise the care which can reasonably be expected of a person with his knowledge and experience. A director is not liable for mere errors of judgment.

(c) In respect of all duties that may be properly left to some other official, a director is, in the absence of specific grounds for suspicion, justified in trusting that official to perform such duties honestly. He is entitled to accept and rely on the judgment, information and advice of the management, unless there are some proper reasons for questioning such. Obviously, a director exercising reasonable care would not accept information and advice blindly. He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment accordingly. See also *Re City Equitable Fire Insurance Co* (1925).

7 This question requires the candidates to discuss the rule in *Turquand's* case. The rule in *Turquand's* case states that a person dealing with a company is entitled to assume, in the absence of facts putting him in inquiry, that there has been due compliance with all matters of internal management and procedure required by the articles: *Royal British Bank* v *Turquand* (1856).

The main reason for the rule is business efficacy. It would be expecting too much of the third party to have to go through all of the company's internal detail. Business would slow down. The rule therefore mitigates the harsh effects of the doctrine of constructive notice (on which see *Ernest* v *Nicholls* (1857)).

Exceptions to the rule

(a) The rule does not apply where the third party has notice of the irregularity or has been put on inquiry: *Liggett (B) (Liverpool) Ltd* v *Barclays Bank Ltd* (1928).

(b) The rule does not apply where the defect would be apparent from an inspection of the company's registered documents: *Irvine* v *Union Bank of Australia* (1877).

(c) The rule cannot be relied on by 'insiders'. There are persons who by virtue of their position in the company are in a position to know whether or not the internal regulations have been observed. Directors are a very good example of insiders (see *Howard* v *Patent Ivory Manufacturing Co* (1888)).

(d) The rule does not apply where there has been a forgery: Ruben v *Great Fingall Consolidated* (1906).

8 This question invites candidates to examine the way in which contractual relations can come into existence. It requires a treatment of the rules relating to offer and acceptance and the possibility of revoking offers in relation to unilateral contracts. The answer will set out the general law applicable before applying it to the circumstances of the problem scenario.

Unilateral contract

A unilateral contract arises where one party promises something in return for some action on the part of another party. Reward cases are typical examples of such cases. There is no compulsion placed on the party undertaking the action but if they carry out the task requested they will receive the reward offered.

Offer

An offer is an undertaking, capable of acceptance to be bound on particular terms. The person who makes the offer is the offeror; the person who receives the offer is the offeree. An offer sets out the terms upon which the offeror is willing to enter into contractual relations with the offeree. An offer may, through acceptance by the offeree, result in a legally enforceable contract. It is important, therefore, to distinguish what the law will treat as an offer from other statements that will not form the basis of an enforceable contract. For example, the offer must be capable of acceptance. Thus it must not be too vague and the intended obligations must be stated unequivocally and unconditionally so that the rights and duties intended by the offer are determined or ascertainable. It is also essential to distinguish genuine offers from the following: a mere statement of intention; a mere supply of information or an invitation to do business (*Crawley* v *Rex* (1909)). An offer may be made to a particular person or to a particular group of persons, in which case it is only open for those persons to whom the offer has been made, to accept it. Alternatively, an offer may be made to the world at large, in which circumstances it can be accepted by anyone (*Bloom* v *The American Swiss Watch Company* (1915)). See also *Carlill* v *Carbolic Smoke Ball Co* (1893).

Acceptance of offers

Acceptance is necessary for the formation of a contract. Once the offeree has assented to the terms offered, a contract comes into effect. Both parties are bound: the offeror can no longer withdraw their offer, nor can the offeree withdraw their acceptance. Acceptance does not have to be in the form of express words, as it can be implied from conduct. Although a person cannot accept an offer they do not know about, their motive for accepting it is not important as long as they know about the offer. Generally acceptance must be communicated to the offeror. As a consequence of this rule, silence cannot amount to acceptance. However, acceptance need not be communicated, where the offeror waived the right to receive communication.

Revocation

An offer may be revoked at any time before acceptance and once revoked it is no longer open to the offeree to accept the original offer (*The Fern Gold Mining Company* v *Tobias* (1890)). In relation to unilateral contracts revocation is probably not possible once the offeree has started performing the task requested.

Intention to be contractually bound

The quintessence of reaching consensus is that every party to the contract must have the serious intention to be contractually bound. This means that each of the parties must have the serious intention to create particular rights and duties. It also means that each party must intend to be legally bound to perform his duties and to hold the other party legally liable for rendering performance as promised in the agreement.

If two friends make an arrangement to meet at a soccer match to enjoy the game in each other's company, there is normally no intention on their part to be legally bound to each other. The position is quite different if two persons agree that the one will give the other a sum of money to procure the ownership of the other's table. In this case the intention to create a legal obligation is indeed present.

Applying the foregoing to the facts of the scenario, it would appear that Kabelo made a unilateral offer to the world at large. Although Modisa was not with Kabelo's group, the offer was made to 'anyone' and therefore open to Modisa to accept it by performing the required act. He did not have to inform Kabelo that he was accepting the offer, he simply had to perform the act. Any doubt about Kabelo's intention to create legal relations may be rebutted by the fact that he placed the money on the table, thus indicating the seriousness of his offer. The fact that Modisa only swam across the river in order to rescue the child is immaterial. As for Kabelo's attempt to revoke his offer, it would be ineffective once Modisa had started to perform the required task. His attempt to revoke the offer would actually indicate the seriousness of the original offer. On the above analysis, it would appear that Modisa could claim the P2,000 from Kabelo.

9 This question requires candidates to explain and apply the law relating to redundancy and unfair dismissal and the appropriate remedies.

(a) The law relating to unfair dismissal and redundancy

Both the right to claim compensation in the event of redundancy and compensation for unfair dismissal are important statutory employment rights contained in the Employment Act (Cap 47:01). Although the two rights are conceptually different, there is considerable overlap between them and it is convenient to deal first with those matters which are common to both. As indicated above, both rights are based in statute and both are enforced by claims to the Industrial Court. In order to claim compensation for either redundancy or unfair dismissal, an employee is required, as a precondition of a successful claim, to show that he or she has been dismissed. The same definition of dismissal applies to both rights.

The situation in which Refilwe finds herself is governed by the provisions of various pieces of employment legislation.

The grounds on which dismissal is capable of being fair are as follows:

(i) Lack of capability or qualifications

Capability may be defined in terms of the employee's skill, aptitude, health or any other physical or mental quality, and qualifications include any degree, diploma, or other academic, technical or professional qualification relevant to the position which the employee held. However, even in this situation, the employer must show that not only was the employee incompetent but that it was reasonable to dismiss him.

(ii) Misconduct

To warrant instant dismissal the employee's conduct must not be merely trivial but must be of sufficient seriousness to merit the description 'serious misconduct'. Examples of such conduct might involve assault, drunkenness, dishonesty or a failure to follow instructions, or safety procedures, or persistent lateness.

(iii) Redundancy

This is, *prima facie*, a fair reason for dismissal as long as the employer has acted out of a genuine commercial motive.

(iv) In situations where continued employment would constitute a breach of a statutory provision

If the continued employment of the person dismissed would be a breach of some statutory provision then the dismissal of the employee is again, *prima facie*, fair. For example, if a person is employed as a driver and is banned from driving then they may be fairly dismissed.

(v) Some other substantial reason (operational reasons)

The above particular situations are not conclusive and this general provision allows the employer to dismiss the employee for 'some other operational reason'. As a consequence, it is not possible to provide an exhaustive list of all grounds for 'fair dismissal'. Examples that have been held to be substantial reasons have included: conflicts of personalities, failure to disclose material facts, refusal to accept necessary changes in terms of employment, and legitimate commercial reasons.

It has to be emphasised that the above reasons are not sufficient in themselves to justify dismissal and under all instances the employer must act as would be expected of a 'reasonable employer'. In determining whether the employer has acted reasonably, the Industrial Court will consider whether, in the circumstances including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating the reason given as sufficient reason for dismissing the employee. In this case the burden of proof is neutral.

Reasonable employers should follow best practice on disciplinary practice and procedures in employment in relation to the way they discipline and dismiss their employees. Thus it would usually be inappropriate to dismiss someone for lack of capability without providing them with the opportunity to improve their skills. Nor would redundancy, *per se*, provide a justification for fair dismissal, unless the employer had introduced and operated a fair redundancy scheme, which included preferably objective criteria for deciding who should be made redundant, and provided for the consideration of redeployment rather than redundancy.

In terms of s.23 of the Employment Act (Cap. 47:01), it is unlawful for the employer to dismiss the employee on any of four specified grounds. A dismissal for these reasons will therefore be regarded by the courts as automatically unfair.

(i) Dismissal for trade union reasons

The employee's membership of a registered union or involvement in any activities of a registered trade union outside working hours (or within working hours by consent of the employer).

Dismissal of individuals involved in a strike, lock out, or other industrial action is not unfair as long as all of those engaged in the action are dismissed. What is unfair is for the employer to select which individuals to dismiss from the general body of strikers.

(ii) Dismissal for acting as a representative

Dismissal is automatically unlawful where the employee is dismissed because he has acted as a representative for other employees.

(iii) Dismissal for making a complaint

A dismissal is unlawful where the employee is punished for making, in good faith, a complaint or participating in proceeding against the employer involving the alleged violation of any law.

(iv) Unlawful discrimination

A dismissal is unlawful where the employee is dismissed on account of his race, tribe, place of origin, nationality, social origin, marital status, political opinion, sex, colour or creed.

Redundancy in the employment law sense occurs when the employer terminates the employee's contract of employment in order to reduce his work force. Sometimes this situation is forced upon him by changed economic conditions in times of recession. Sometimes redundancy occurs because the employer has introduced new technology which is not labour intensive, thereby necessitating the reduction of the labour force. S.25 of the Employment Act (Cap 47:01) regulates redundancy. An employer carrying out a redundancy exercise must do so in respect of each category of employee, wherever reasonably practicable, in accordance with the principle of 'first in, last out'. He must take into account the need for the efficient operation of the undertaking in question and the ability, expertise, skill and occupational qualifications of each employee concerned (Employment Act, s.25 (1)). Where an employer decides to undertake a redundancy exercise, he has a duty to immediately give written notice to the Commissioner of Labour and to every employee to be, or likely to be, directly affected by the exercise (Employment Act, s.25 (2)).

(b) Refilwe's position

As indicated above, employees have a right not to be unfairly dismissed and it would appear that Refilwe would have an action for unfair dismissal if Mowana (Pty) Ltd were to dismiss her as a result of their disagreement.

All that the employee has to show is that he was dismissed and then the onus is placed on the employer to show that they acted reasonably in dismissing him for a potentially fair reason.

Once the Industrial Court has found in Refilwe's favour, it could award any one of a number of remedies from the following: reinstatement, re-engagement or compensation. The calculation of a basic award of compensation is based on factors such as the age of the employee and the length of continuous service.

In the present scenario, it is at least certain that Refilwe is entitled to redundancy payments. However even in the case of redundancy the company must have acted reasonably and if it has not done so then Refilwe may have a claim for unfair dismissal and access to potentially higher compensation. For instance the question could be asked as to whether the company could have retained Refilwe rather than simply dismiss her.

10 The central issue in this problem revolves around Sethunya's authority to bind the partnership in contract and her possible breach of her fiduciary duties.

A close mutual or reciprocal fiduciary relationship between the partners arises from the formation of the partnership agreement. This special fiduciary relationship between the partners has been described as a relationship of the utmost good faith and can be compared to the relationship between brothers (*Purdon* v *Muller* (1961)).

A partner must promote the interest of the partnership unselfishly. In general a partner must therefore avoid a conflict between his personal interests and the interests of the partnership and, in cases where a conflict arises, subordinate his own interests to the interests of the partnership. This duty comprises, *inter alia*, the following:

(a) Business opportunities which fall within the scope of the partnership business and which a partner is obliged to secure for the partnership must be acquired for the partnership and may not be exploited by a partner in his personal capacity. If a partner breaches this duty and exploits such an opportunity, he is obliged to disclose the benefits to the partnership and to share it with the partnership. This duty was expressed as follows by Innes CJ in *De Jager* v *Olifants Tin 'B' Syndicate* (1912):

> 'No partner may acquire and retain for himself any benefit or advantage which was within the scope of the partnership business, and which it was his duty to acquire for the partnership. All such benefits must be shared with an accounted for to his fellow members'.

(b) A partner may not, without permission, carry on a business in competition with his partnership. He may not coax away partnership clients or use partnership information for his own account or compete in any other way with his partnership.

Sethunya may thus well be in breach of her fiduciary duties with regard to her intention to sell stationery in competition with the partnership.

The next issue is Sethunya's authority to bind the partnership in contract. According to the general rules of agency, a partnership will be liable in terms of a contract that a person concludes on behalf of the partnership if that person had the necessary authority to conclude that agreement on behalf of the partnership. Authority is essentially the power to perform binding legal acts on behalf of another. In terms of the principle of mutual mandate each partner has the power to bind the partnership in transactions that fall within the scope of the partnership business. If a third party wishes to hold the partnership liable in terms of a contract concluded by a partner, it is sufficient for him to prove that the contract fell within the scope of the partnership business. This power of partners to represent each other in partnership business is one of the *naturalia* of the partnership.

A third party who wishes to hold the partnership liable for a contract which was concluded by a partner does not need to prove that the partner had the necessary power to conclude the agreement on behalf of the partnership. The third party must simply

prove that the specific contract fell within the usual scope of the partnership business. The partnership will be liable in terms of the contract provided the contract fell within the scope of the partnership business. Such a contract will be binding on the partnership, irrespective of whether the partner in fact had the necessary authority or not. A third party who wants to rely on this principle must be *bona fide*, that is to say he must not have been aware that the partner was acting without the necessary power of representation. Furthermore, if a partner whose power or authority is limited exceeds his express or implied authority and makes a contract with a third person who is not aware of the limitation, the partnership cannot shelter itself behind these secret or private instructions and will be bound by the contract.

It would thus appear that the partnership would indeed be bound by the contract irrespective of the fact that Sethunya did not have the authority to buy more than P10,000 worth of goods on credit.

1 6–10 Full and accurate account of the sources of law in Botswana. Accurate definition of important terms. Some use of examples, cases and specific places of legislation to illustrate the answer.

0–5 Incomplete and inaccurate, perhaps with major errors or omissions. A possible mix up of judicial precedent and common law as different sources of law.

2 6–10 Full and accurate explanation of the rules that govern the implication of terms in contracts. Accurate reference to relevant authorities.

0–5 Weaker answers may show little understanding of the rules. Alternatively they may be unbalanced with several omissions.

3 6–10 Good account of the main remedies that are available that are directed at the fulfilment of the contract in the event of an impending breach or breach of the contract. Excellent answers will demonstrate a sound understanding of the principles involved and will also refer to relevant case law or examples.

0–5 Poor understanding of the main remedies. Perhaps unbalanced treatment. Little or no use of cases.

4 6–10 Good understanding of the difference between a contract of service and a contract for services and a good account of the importance of this distinction.

0–5 Incomplete or inaccurate. Possible major errors or omissions.

5 This question requires candidates to discuss the differences between agency and the contract for the benefit of a third party.

6–10 Clear understanding of the differences between agency and contracts for the benefit of third persons and an understanding of the significance and importance of the distinction. Good answers will use examples to illustrate the principles.

0–5 Limited understanding of the nature of the question and/or unbalanced treatment of the topic.

6 6–10 Thorough explanation of the concept of care and skill. Answers to the top end of the scale will also deal extensively with decided cases.

0–5 Weaker answers may show little understanding of the concept of care and skill. Accordingly they may be unbalanced or deal with only one aspect of the question.

7 6–10 Answers in this band will effectively define the rule in *Turquand's* case, state the rationale and discuss the exceptions. Satisfactory use of relevant case law.

0–5 Inaccurate attempt to define the *Turquand* rule. Inadequate discussion of the exceptions with little knowledge.

8 This requires candidates to examine the way in which contractual relations can be brought into existence. It requires a treatment of the rules relating to offer and acceptance and the possibility of revoking offers in relation to unilateral contracts.

8–10 A complete answer, highlighting and dealing with all of the issues presented in the scenario. It is most likely that cases will be referred to, and they will be credited.

5–7 An accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation.

2–4 An ability to recognise some, although not all, of the key issues and suggest appropriate legal response to them. A recognition of the area of law but no attempt to apply that law.

0–1 Very weak answer showing no, or very little, understanding of the question.

9 This question requires candidates to explain and apply the law relating to redundancy and unfair dismissal and the appropriate remedies.

8–10 Accurate knowledge of the legal principles involved linked to a sound application of those principles. It is highly unlikely that marks at this level could be achieved without reference to the cases, although it is possible nonetheless.

5–7 Sound knowledge of the law but perhaps lacking in application or alternatively not showing a sufficiently clear understanding of the legal principles involved.

2–4 Weak or unbalanced answer. Perhaps aware of the nature of the problem but lacking in clear knowledge of the law or deficient in relation to how those principles should be applied.

0–1 Very weak answer. Perhaps mentioning some of the issues involved in the question but failing to consider them in any detail.

10 This question refers to key issues relating to the fiduciary duty, authority and liability of partners.

8–10 Candidates exhibit a thorough knowledge of partnership law together with the liability to analyse the problems contained in the question.

5–7 Candidates will exhibit sound knowledge of partnership law together with the ability to recognise issues contained in the question. Knowledge may be less detailed or analysis less focused.

2–4 Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be a major shortcomings in analysis or application of law.

0–1 Very weak answers which might recognise what the question is about but show no ability to analyse or answer the problem as set out.