Answers

1 Tribunals in Zimbabwe deal with specific and special matters and their jurisdiction is governed by the statute which has created them. For one to institute proceedings to a specific tribunal, one has to exhaust all internal remedies first. In some cases they are a court of instance. The procedures in the tribunals are less complicated and are cheaper than in ordinary courts. Legal representation is not a necessity because of the informal nature of proceedings in the tribunals. However, lawyers are not proscribed from representing clients before a tribunal.

Three of the most common tribunals in the Zimbabwean legal system are the following:

(a) The Labour Court
(b) The Administrative Court
(c) Special Court for Income Tax Appeals

(a) The Labour Court

It is governed by the Labour Act (Chapter 28:01). Its jurisdiction is specified in s.89. In general it is an appeal court for a variety of labour disputes. In a few cases, it is a court of first instance (e.g. where a dispute may arise in relation to the description of an undertaking or industry represented by a trade union). It is also an appeal court in labour disputes which will have been referred to it after Conciliation and Arbitration. In such a case it is an appeal court on questions of law arising from the deliberations of the arbitrator.

The Labour Court has exclusive jurisdiction over matters specified in s.89 of the Act. An employee or employer, however, can appeal on any decision of the Labour Court to the Supreme Court but only on a question of law. The Supreme Court is the highest court in the land and final appeals arising from both the specialised tribunals and the formal courts go the Supreme Court.

The Labour Court consists of a senior President, several presidents of the court and assessors. The Labour Relations Tribunal which preceded it consisted of a Chairman and up to four members who were legal persons experienced in labour relations. A worker could also be represented by a member of the workers' committee or trade union to which they belonged.

(b) Administrative Court

It is founded by the Administrative Court Act (Chapter 7:01). It consists of the President of the Court and assessors. Its functions are found in various pieces of legislation, e.g. Land Acquisiton Act (Chapter 20:10), to confirm acquisition of land to which there has been an objection by the owner and the Regional Town and Country Planning Act – to resolve disputes between local planning authorities and any persons aggrieved by a landowner's proposed use of land or refusal to grant permit for development of land for certain purposes, ss.11, 38 and 41 of the Act.

Its main function is to act as the Water Court. Any person has a right to apply to the court to get a right to use public water where its authorisation is required, e.g. the right to use public water for agricultural, construction and electricity generation purposes.

An application for water rights can be lodged with the Registrar of the court at any time, who will thereafter place it before the Court. Before granting a right to public water the court is required by the Act to be satisfied that all persons who may be adversely affected by the grant have been given notice of the application, and if they wish have been allowed to make representations before the court. A person may be represented by a legal practitioner or any other knowledgeable person appointed in writing by the party who has a case before the court.

An appeal from the Administrative Court goes to the Supreme Court.

(c) Special Court for Income Tax Appeals

It is created by the Income Tax Act (Chapter 23:06). It is presided over by the President of the Court who has jurisdiction to hear all appeals by an aggrieved tax payer. The president sits with the assessors whose role is purely advisory, with the ultimate decision lying exclusively with the presiding President.

The most common grounds for appeals to this court by taxpayers are where the tax assessment is queried for being excessive or where the taxpayer argues that there is no liability for tax at all. The High Court has the same jurisdiction as the Special Court, but with the Special Court the taxpayer can be represented by a person who is not a legal practitioner, as long as the person appearing before it has been appointed in writing by a litigant.

An appeal to the Special Court by a taxpayer should be lodged by a notice of appeal in writing within 21 days of receiving a notice from the Commissioner confirming an assessment or decision as the case may be. The commissioner is required to respond within 60 days of receiving the taxpayer's grounds of appeal. There is a right of appeal to the Supreme Court from the decision of the Special Court on questions of law. Special leave is required if the appeal is based on facts or a mixture of law and facts.

In conclusion it can be said that experience has shown that specialised tribunals are faster, cheaper and less formal in resolving disputes than the conventional courts. In terms of ranking, presiding officers (Presidents of Tribunals) are pegged on a rank which is slightly lower than ordinary judges of the High Court. Often one is promoted to the High Court bench after serving some time as President of a specialised tribunal like the Administrative Court. Movement does not occur in the opposite direction.

2 For a valid contract to come into effect, the law of contract dictates that there be a valid offer and an equally firm and valid acceptance of that offer. The cases of *Crawley* v *Rex* (1909) and *Carlill* v *Carbolic Smokeball Co* (1982) are illustrative of this. The law of contract goes on to provide various ways by which a valid offer or acceptance can be made. It can be either oral or written or under the doctrine of quasi-mutual assent by conduct.

The doctrine of quasi-mutual assent dictates that if a party to a contract acts in such a manner as to lead the other party to reasonably believe that he was accepting the terms of the contract, that party shall be bound as if he had expressly assented thereto. In the leading case of *Smith* v *Hughes* (1871), it was held that if a party to a contract acts in such a manner as to lead the other party to believe that he was assenting to the terms proposed by the other party and that other party, relying upon that belief, enters into the contract with him, the party thus conducting himself would be equally bound as if he had intended to agree to the other party's terms. In that case the facts were as follows – A contract for the sale of oats was concluded between the plaintiff and the manager of the respondent. The respondent then sought to return the oats as he thought they were old, not new oats. The plaintiff refused and sought to enforce the contract and the court held that there was a valid contract.

In a situation such as the above, mere action and conduct is enough to conclude a valid contract as the law holds that it in itself signifies assent. The doctrine of quasi-mutual assent therefore dictates that a valid offer or acceptance can be made by conduct or action when a party to a contract acts as if he is assenting to it. Under the doctrine consequently, a valid contract can come into effect based on a party's conduct, even in the absence of express words to that effect. In *Pieters and Company* v *Salomon* (1911) the facts were as follows – The plaintiff promised to pay all Berger's debts including the one due to the defendant. The plaintiff did not communicate the list of creditors to the meeting. The plaintiff intended not to go further than their list of creditors. The court held that a contract was concluded and it is not subject to conditions which the promisor omitted to mention, whatever his real intention was. The other party was reasonably entitled to assume from this conduct that they were in true agreement. The court then ruled that:

'if one party so leads the other to reasonably understand that they were in agreement as to the terms, a valid contract would come into being based on that party's conduct and act.'

Based on the above *dictum*, even the terms and conditions of a contract can be lawfully brought into effect based on a party's conduct. If one party so acts or conducts himself in a manner suggesting acceptance to the contract's terms, the law by virtue of the quasi-mutual assent doctrine shall hold him liable to perform according to those terms even if he did not expressly assent to them. In the absence of written or oral words to that effect, his conduct shall hold him liable by operation of the quasi-mutual assent doctrine as if he actually assented to them.

In the case of *Springvale* v *Edwards* (1969) a parent who received a prospectus containing the terms of a contract of enrolment at a private school was said to have accepted them when he did not raise any objection to them in due time and proceeded to act as if he was assenting to them. His act of receipt and failure to object to terms or attempt to vary or discharge them was held as valid acceptance of the terms contained in it.

In *George* v *Fairmead (Pvt) Ltd* (1958) where a party to a contract sought to repudiate it on grounds of error despite having signed it, was held liable to perform under it. It was held that a party who acts in such a manner as would lead the other party as a reasonable man to believe that he was assenting to the terms of the contract and was binding himself to it, is bound to perform his duty under it by virtue of his conduct. By appending his signature to the contract and accepting the keys to his hotel room, George had signified by conduct his acceptance of the terms contained in it. As such the doctrine of quasi-mutual assent provides that conduct by itself can be effective evidence to assent to a contract's terms and conditions.

As it is very difficult to ascertain the true terms of a contract in the absence of express words to that effect, the law of contract by the doctrine of quasi-mutual assent provides that the courts will look at the party's conduct and will arrive at a conclusion based on the party's conduct. See *Levy* v *Banket Holdings (Pvt) Ltd* (1956) and *SA Railways and Harbours* v *National Bank of SA Ltd* (1924).

The doctrine of quasi-mutual assent therefore provides that parties to a contract who conduct themselves or act in a manner suggesting that they are assenting to the terms of the contract shall be held to have assented and shall be bound to perform under that contract.

The courts have on a number of occasions directed their mind to the question of acceptance by conduct – when the offeree, instead of signifying acceptance of the offer by written or spoken words, does so by his conduct.

If a party to a contract conducts himself in a way that gives the other party the impression that he was accepting the other party's offer, he shall be held to have accepted it even in the absence of express words to that effect and a valid contract will ensue. In *Springvale* v *Edwards* (*supra*), the defendant's action and conduct was held to be valid acceptance of the plaintiff's offer even though he had not expressly stated so.

In the same manner, a party that so conducts himself to the other party and gives the impression that he is in agreement or *ad idem* with the other party's terms shall be so held and bound as if he expressly agreed thereto. If this conduct is in relation to an offer, he shall be held to have made an equally valid acceptance by virtue of his conduct.

The doctrine seeks to give relief and effect to the contracts of parties who have been led by the conduct of the other parties to reasonably believe that they were contracting. The court will look into their conduct and infer from it the conditions of the agreement.

In the absence of vitiating factors such as fraud, illegality, mistake, duress or undue influence, all things being constant a valid and legal contract shall be regarded as formed and shall be given effect to. Both parties to the contract shall be bound at law to perform their duties or side of the agreement in fulfillment of the terms of that contract. In *George* v *Fairmead* (*supra*) the plaintiff was ordered to perform as per the dictates of the contract as his actions had legally and validly signified his acceptance and assent to the terms of the contract.

The doctrine of quasi-mutual assent therefore provides that in the absence of express words, conduct or action can be sufficient to bring a valid contract into effect/being.

In summary, it can be said that although a party to a contract might not have really and truly assented to the terms proposed by the first party, their unexpressed reservations or conditions might be disregarded and they may be deemed to be contractually bound on the basis of quasi-mutual consent.

3 The concepts of causality and remoteness operate in the determination of liability in delict and also the extent of such liability to pay damages. There are checks and balances inherent in the law of delict which are contained in the public interest to protect defendants and promote the proper administration of justice.

The concept of causality states that the conduct of the defendant must be both the factual and legal cause of the harm to the plaintiff before liability can attach. The test of factual causality concentrates on whether harm would have occurred in the absence of the defendant's actions. It is a broad test which only seeks to establish the factual nexus or link between harm and conduct. The test for legal cause, which is narrower, concentrates on reasonable foreseeability. The question to be asked is 'was it within the range of ordinary human experience that harm would result from the defendant's conduct?'

In *Sadomba* v *Unity Insurance* (1978), a motor accident had been caused by the defendant's negligence. The plaintiff was dragged in an injured state and placed on the side of the road where he lay unconscious. His watch and shoes were stolen as he lay unconscious. The court held that he was entitled to claim for these losses as it was reasonably foreseeable that such losses could occur in the circumstances. Similarly in *Mbalawa* v *Mutandiro* (1989), the driver had been driving quite dangerously when a passenger seated in the front seat grabbed the steering wheel thinking that the driver had lost control. This led to an accident occurring and the court held that it was foreseeable that a passenger who felt he was in danger could act like that.

As it appears the test for legal causality can arise, the factual causality test must be determined first and the determination in the plaintiff's favour. Essentially, the common sense question to be asked is whether there was in any case, sufficient close connection between the defendant's conduct and harm caused to justify imposing delictual liability.

The test for legal cause contains a policy element and was conceived to limit the range of actionable harm. The test, it would also appear, is applied with hindsight knowledge, i.e. looking at the sequence of events, the courts then enquire as to whether that sequence was so exceptional as not to be reasonably foreseeable. This makes the distinction between the test and that for the fault required where negligence is alleged.

The chain of causation can be broken by the intervention of a third party whether such intervention is negligent or intentional. If, however, a reasonable person in the defendant's position would have foreseen the possibility of such intervention and guarded against it, the defendant is negligent if he fails to do likewise. He cannot rely on the intervention of an act breaking the causal link. Similarly, if the intervention was itself a negligent product of the defendant, then the chain of causation does not break.

It is also recognised that it is reasonably foreseeable that some people in society suffer from ailments and other physical conditions, which make them more susceptible to injury or more serious injury than the person who is free from such conditions. This is the so called thin skull rule. The rule lays down that defendants should take their plaintiffs as they find them. A defendant could thus be liable under such circumstances, the peculiarity of the plaintiff's condition notwithstanding.

In *Santam Insurance Co (Ltd)* v *Paget* (1981) an accident aggravated a pre-existing back complaint and the court applied the rule and as a result the defendant was found liable. Similarly in *Smith* v *Leech, Brain and Co* (1961) a flake of molten metal splashed on a workman's lip. The burn turned cancerous and the workman died. The defendant was held liable under the circumstances as such harm was within the range of human experience and expectation.

The concept of remoteness, on the other hand, operates when liability has been determined and is meant to limit delictual damages payable. It has a public policy bias and is meant to protect defendants. Damages are therefore awarded only when there is a sufficient nexus and remote damages will not be awarded. The idea is to limit infinite liability for damages in an infinite amount.

In the interests of fairness to the defendant, a line must be drawn between damages caused by his negligence for which he is liable, and damages which, although in the broad sense, are caused by his negligence are so remote from it that he ought not be liable for them. Thus, damages which are too remote to have been within the contemplation of the parties cannot be recovered.

This stage is highlighted in *Holmdene Brickworks (Pty) Ltd* v *Roberts Construction Co Ltd* (1977) where the court stated that 'to ensure that undue hardship is not imposed on the defendant, the defendant's liability is limited in terms of broad principles of causation and remoteness to (a) those damages that flow naturally and generally from the kind of action in question and which the law presumes the parties contemplated as a probable result of their actions and (b) those damages caused by the defendant's actions and are ordinarily regarded by law as being too remote to be recoverable …'

The rationale for this position comes from the idea that the law of delict being based on negligence seeks to encourage diligent and conscientious behaviour. A person should thus be made to pay damages only for loss that was within his contemplation and which he could have averted had he acted with reasonable caution and circumspection.

It clearly appears that both the concepts of causality and remoteness are meant to cushion the defendant from extravagant claims. The starting point for the concepts however is to recognise that the defendant ordinarily should make good the loss that he causes.

In summation it can be said that for delictual liability to attach, the courts employ the standard of the ordinary reasonable man, use the so-called diligent paterfamilias. If a person acts below a reasonable man's level, the epitome of reasonable prudence, he is deemed in law to have been negligent and thus delictually liable. However, there has to be a causal nexus between the harm suffered by the plaintiff, on the one hand and the defendant's wrongful behaviour which emanated in the causation of the harm that is the subject matter of the complaint. Ultimately the public policy issue at stake is to effect simple justice between citizens.

4 There are various methods of termination of the employment relationship. The main methods of termination recognised are:

(a) by notice
(b) cancellation for breach or repudiation
(c) by mutual agreement
(d) by expiry of time or conclusion of specified time
(e) by supervening impossibility

(a) **Termination by Notice**

A permanent contract of employment may be terminated by either party on giving due notice. The party terminating does not have to give reasons or to conduct any hearing before terminating.

The principles governing fixed-term contracts are different. Such contracts cannot be terminated on notice unless it is expressly provided for in the contract itself. In *Lever Brothers (Pvt) Ltd* v *Marafuzah* & *Ors* (1997), the court upheld the dismissal on notice of employees on a short-term contract because the terms of the contract expressly provided that it may be so terminable. The giving of notice is a unilateral act which does not require acceptance or concurrence by the other party. The notice must be unequivocal and clear and may not be unilaterally withdrawn. Notice may be given at any time or day and it is standard procedure for the notice to be in writing.

(b) **Termination for Breach/Repudiation**

The right to terminate the contract is available to either the employer or the employee where the other party is in material breach.

If an employee breaches a contract of employment by conduct which amounts to fundamental breach, the employer is entitled to terminate the contract summarily and possibly to sue the employee for losses occasioned by the breach. In the case of *Muchakata* v *Netherburn Mine* (1996) the appellant was employed as a security sergeant at the mine by the respondent. Under him were a number of security guards. On a number of occasions, there were breaches of company rules by various employees. Following these incidents, the assistant personnel manager instructed the appellant to take disciplinary action against the employees concerned but he refused. It was held that what the appellant was being required to do was not within the parameters of his contract of employment. The appellant's wilful disobedience to an unlawful order gave the respondent no right to dismiss him.

(c) **Termination by Mutual Agreement**

Despite the actual provisions of the contract on termination, the parties may mutually agree to terminate their contract. Agreement may be in writing or made orally. It should not be unilateral. In the case of *Mushonga* v *NRZ* (1986), it was held that when an employee renounces his obligations by tendering his resignation, an assertion that the contract was wrongfully terminated cannot be sound in law. Parties to a contract may, at any time during the currency of the contract, mutually agree to terminate the contract. Such an agreement can override formal and substantive restrictions placed on the termination of the contract by the original contract itself.

(d) **Termination by Expiry of Time or Performance of Task**

If a contract of employment is for a specified period of time or for a specific task, then such contract expires automatically at the end of the period or completion of the task. No notice or reason is required. In *Chikinye* & *Others* v *Peterhouse School* (1999), the appellants were employed by the respondent school as teachers. Their task for which they had been employed ceased. They claimed to have been unfairly dismissed but the court could not agree with them because their contracts had terminated through operation of law.

(e) **Termination because of Supervening Impossibility**

If either party to a contract becomes permanently unable to perform his obligations due to an exceptional and unforeseen happening (*vis major*), the other party is entitled to terminate the contract of non-performance. In *Baretta* v *Rhodesia Railways Ltd* (1947), the contract was held to have been properly terminated by action of the state as a result of the Second World War, when an Italian employee was designated an enemy 'alien' and unable to lawfully work in the then British colony of Rhodesia, now known as Zimbabwe.

In *City of Harare* v *Zimucha* (1995), the respondent worked for the City of Harare as a fitter and turner from January 1984 until 4 May 1988. From that date he was absent as he was sick. The council knew he was sick and kept sending him medical forms to complete which he never did. He was summarily dismissed. The council claimed the return of the salary paid from 4 May 1988 on the grounds that it was not due and payable, as the respondent had been absent without authority because he did not apply for sick leave. It was held on appeal that the respondent did not have a 'valid reason' for his absence. If he was sick and wanted to go on being paid, he had to apply for sick leave. Without sick leave he was absent without leave.

5 (a) Shares are basically divided into different classes, namely ordinary shares, preference shares and deferred shares. Ordinary shares, as the name implies, constitute the residual class in which everything is vested after the special rights of other classes, if any, have been satisfied.

They confer a right to the equity of the company. As a form of company security, ordinary shares are the riskiest and it is for this reason that they are referred to as 'equities' or 'risk capital'. Ordinary shareholders bear the risk that payment is postponed until a dividend is declared and after the payment of preference shareholders. This remains the same even when regarding the repayment of capital upon the winding up of the company.

(i) Ordinary Shares

Ordinary shares are not fixed and where the company is doing well they may be paid the residual distributable profit, divided proportionally by ordinary shareholders' dividend percentage. This is the same with the repayment of capital or where the company is distributing the remaining capital or assets.

However, this is only possible where preference shareholders do not have a right to participate in the surplus assets.

Ordinary shareholders normally comprise the bulk of the company's shares. In most cases, they are the majority and participate in most of the decision-making within the company and are better placed in exercising their right to vote. They have overall control over the running of the company.

It is usually spelt out in the company's articles of association that whenever a fresh issue of shares is made, these should be offered to ordinary shareholders, usually at a lower price than outsiders.

(ii) Preference Shares

These confer on holders, preference over other classes of shareholder in respect of their dividends, repayment of capital or both. Preference shares include a right to receive dividends of a specified, or of a fixed rate of dividend. An example would be 10% of their nominal value of profits each year before any dividend may be paid out to holders of ordinary shares.

Preference shares are cumulative unless the articles or terms of issue state otherwise. This means that if the company cannot pay a dividend in one year the arrears must be carried forward to future years. If preference shares are non-cumulative and the company cannot pay the dividend, the arrears are not carried forward and so the preference shareholders will not receive a dividend for that year.

Preference shareholders have a right to sue for payment of dividends from the available profits where the articles of association specifically confer this right and this would be contractually binding. Unless the articles provide to the contrary, preference shares carry the same voting rights as other shares. However, preference shareholders' voting rights are usually restricted to specified circumstances which directly affect them, for example when the rights of preference shareholders are being varied.

In liquidation, preference shareholders do not automatically have a right to prior return of their capital. If the articles are silent, preference shareholders and ordinary shareholders rank equally. The usual preferences given are:

(1) payment of dividend and,
(2) return or capital on winding up of the company.

The shares may also be subject to restrictions on voting rights.

In *Webb* v *Earle* (1875) the directors, in accordance with the articles and with the consent of a general meeting, issued 10% preference shares. It was, however, held that if the profits of one year could not meet the dividend in full, the deficiency could be paid out of subsequent profits. In *Will* v *United Lankat Plantations Company Ltd* (1912), a claim by holders of 10% preference shares that they were entitled to dividends equally with ordinary shareholders after provision for a 10% cumulative dividend on the preference shares was rejected by the Court of appeal and the House of Lords.

(iii) Redeemable Preference Shares

Section 76(1) Companies Act (Chapter 24:03) gives the company power to issue redeemable shares of any class provided that the articles so allow and so provide that the shares are fully paid for.

Redemption of shares must be effected out of the profits of the company which would otherwise be available for dividend, or out of proceeds of the fresh issue of shares for the purposes of redemption.

In most cases, the terms of redemption of redeemable shares must be prescribed by the articles or to be determined as provided in those articles, i.e how the company would buy back its own shares.

Where a company is being wound up, the redemption or purchase may be enforced against the company unless the redemption or purchase was for a date later than that of commencement of winding up or the company could not, before the winding up is completed, have lawfully paid a dividend to shareholder of an amount equal to that of the costs of the redemption or purchase.

In a case where the company is being wound up, all other creditors must be paid first and then shareholders who hold preferential shares before payment of amounts which are liable to be paid out of a redemption purchase of shares: per s.110 Insolvency Act (Chapter 6:04).

(iv) **Deferred Shares/Founders Shares**

These are shares which the holder's rights are deferred until the claims of other classes of shares are satisfied. Sometimes this class of shares is accepted by the sellers or vendors of a business as part consideration for the sale.

- Deferred/founders shares have the same relationship with ordinary shares that ordinary shares have with preference shares.
- A significant amount of risk is attached to these shares given that they rank lower than ordinary shares.
- However, this risky investment is often rewarded by a large share of surplus profits after the ordinary shareholders have been paid their minimum dividend or repaid their capital on a winding-up or a reduction of share capital.
- Such shareholders often enjoy disproportionately large voting rights as compared to ordinary shareholders.

It should be noted however, that the rights, which may be enjoyed by these shareholders, is a matter to be determined from the document under which the shares are issued. Ultimately, the articles of association would make provision for the different classes of shares, the rights attaching thereto and the manner in which variation of class rights can be effected.

(b) Shares are usually divided into different classes with their own class rights. However, it is also possible that, depending on what the articles of association have prescribed, the shares in a company may be exactly alike, i.e. they may carry the same rights to attend and vote at company meetings and to dividends. If the company has different types with varying rights as is often the case, the company is said to have different classes of shares and the rights attached to the different classes are called class rights.

Class rights refer to those rights which relate to voting, dividends and the return of capital particularly when the company is in liquidation. For class rights to be in existence the share capital must be divided into separate classes.

If the shares are exactly alike then the usual practice is that the rights attached to those shares are specified in the articles. This means that they can be altered in the same way as any other clause in the articles that is by special resolution. Section 20 Companies Act, Chapter 24:03 says that:

'subject to the conditions contained in its memorandum a company may by special resolution alter or add to its articles and any alteration or addition so made in the articles shall be as valid as if originally contained therein and subject in like manner to alteration by special resolution.'

Section 20 has to be read in tandem with s.16 which reads as follows:

(1) a company may by special resolution

(a) **'… alter any condition in its memorandum which could lawfully have been contained in articles of association provided that this paragraph shall not apply where the memorandum itself provides for or prohibits the alteration of all or any of the said conditions and shall not authorise any variation or abrogation of the special rights or any class of members …'**

Whilst as a general rule a special resolution is required to change a provision specified in the articles (including variation of class rights). Sections 16 and 20 will not apply if the memorandum itself stipulates a different method of alteration or variation and this would mean that the method so stipulated must be followed. It is also interesting to note that article 4 of Table A states that class rights can be altered with the written consent of the holders of three-quarters of the issued shares of the class or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of the class.

Guidance in the passing of a special resolution is provided for under s.133 Companies Act, Chapter 24:03.

6 As the company is an artificial person with no physical existence, it needs the services of human beings to act on its behalf. *Salomon* v *Salomon and Co* (1987).

The powers concerning the company's control and management may, for purposes of convenience, be divided among three authorities, that is:

(a) the managing director (if there is one)
(b) the directors (collectively) and
(c) the members themselves.

Members are often scattered all over the country and it is difficult for them to be involved in the daily management of the company business. Collective decisions, however, have to be made at some point. This can be done by calling a general meeting of the members.

The general meeting is the ultimate organ of corporate control.

There are three kinds of meetings namely:

1. Statutory meetings of a public company.
2. The annual general meeting which has to be called in each year.
3. The extraordinary meeting which may be convened at any time during the year.

There may be a fourth meeting if a company has more than one class of shares; a class meeting. Every member of that class may attend to speak and vote. The resolutions there bind only members of the class concerned. Class meetings also consider alterations in the rights of the class under provisions to that effect in the memorandum or articles of association and comprises of arrangements affecting the class. In the absence of express provision, such meetings are governed by the provisions of the Companies Act concerning general meetings.

(a) Statutory meetings – s.124

The object of the statutory meeting, which is usually the first general meeting in the case of a new company, is to afford members of a new company an opportunity of discussing its affairs as soon as possible. The business of the meeting is to discuss any matter relating to the company's formation or arising out of the 'Statutory Report'. This report is forwarded to every member by the Director at least 14 clear days before the meeting, s.124(2). This report must be certified by at least two directors and by the auditors, if any, of the company, s.124(4). A copy of this report is also filed with the Registrar of Companies, s.124(5).

The report must give the details required or specified in s.124(3)(a–e). At the meeting, the directors must produce a list showing the names, descriptions and addresses of the members of the company and the number of shares held by them respectively. This must be kept open for any members during the continuance of the meeting, s.124(6).

Members are free to discuss any matters relating to the formation of the company or arising out of the Statutory Report, s.124(7).

Only business left unfinished at one meeting can be dealt with at an adjourned meeting, but in terms of s.124(8) the members can introduce new business at the adjourned meeting.

Failure to hold the statutory meeting or file the statutory reports are grounds for winding up of the company by the Court, s.206(6).

Instead of making a winding up order, the court may direct that the report shall be delivered or the meeting held and order the costs to be paid by any persons who, in the opinion of the court, were responsible for the default – s.210(3)(a).

(b) Annual general meeting (AGM) s.102/Table A, Article 47

The AGM shall be held at such time and place as the directors decide. Section 125 requires every company to hold an AGM within 18 months of incorporation except in the year of its incorporation. The businesses which may be transacted at the AGM may be 'ordinary' or 'special'. In terms of s.132(6) there is no requirement or limitation placed on the type of business which may be conducted at an AGM. Section 175(7) stipulates the penalties imposed on a company for failure to hold an AGM. Business that is transacted at the AGM includes the appointment of directors, appointment of auditors, declaration of dividends, remuneration of directors and auditors and consideration of the company's accounts.

(c) Extraordinary general meeting (EGM)

These are general meetings of a company which are not AGMs – Article 48 Table A. The purpose of these meetings is to provide members or directors an opportunity to deal with urgent matters which must be attended to in between AGMs – Article 49. Some of the more urgent issues that may be discussed at an EGM might very well include such matters as changes to the memorandum and articles of association, removal of errant and non-performing directors before the expiry of their contracts, results of merger and de-merger talks, etc.

7 In many jurisdictions, including Zimbabwe, corporate governance has in recent years firmly entrenched itself to the modern business agenda. Though appearing in somewhat different contexts and in different forms, it has successfully retained similar core issues – viz the need to achieve and maintain institutional progress and stability together with its attendant results.

Corporate governance refers to the processes and structures by which a business and affairs of an entity are directed and managed in order to enhance shareholder value through enhancing performance and accountability whilst taking into account the interests of other stakeholders. Good corporate governance accordingly embodies transparency, performance, ethics and accountability.

The idea, in part, stems from the principle of separate personality – *Salomon* v *Salomon* (1897). It is recognised that a corporation is an abstraction, has no mind of its own and is directed by someone, who assumes the status of an alter ego of its personality. It is when one considers the role of these human agents that the concept becomes critical in the proper administration and management of business entities and institutions.

Corporate governance encompasses a set of relations between a company's management, its board, shareholders and other stakeholders. Corporate governance provides structures through which objectives are set and accomplished. It incentives and monitors how a corporation uses resources effectively. Corporate governance is all about best practices in the running and management of organisations. It is recognised that business evolves faster than legislation hence the need for corporate governance.

Corporate governance is prominent the world over and arose from titanic corporate failures that have affected many businesses. The Treadway and COSO reports seem to have given rise to the Cadbury Code, the leading light. More recently there has been the King 2 Reports in addition to other reports. Corporate governance has thus evolved as a global phenomenon, a reaction to misfortune coupled with the proactive spirit of preventing more massive business failures.

As alluded to above, corporate governance was conceived to stop or at least minimise corporate failures. Indiscipline in Zimbabwe's financial sector led to people suffering unimaginable financial losses as a result of corporate indiscipline since 2000. On the global level, the case of the Enron Corporation, 2001 makes sad reading. Due to corporate indiscipline, when the corporation filed for bankruptcy its stock closed at 72 cents, down from more than $75 less than a year earlier, causing unprecedented losses to the unsuspecting investing public. Equally devastating is the case involving Donald Black, the publishing mogul with interests in Canada, the USA, the UK and Australia.

The aims of corporate governance can be summarised as follows: increased benefit to stakeholders, sustainability and enhanced competitiveness of enterprises, increased capacity of corporation to attract investment, enhanced legitimacy, responsibility and responsiveness of the corporation and transparency, accountability and probity and rectitude in running businesses. The aims are naturally linked with the core pillars and the two inevitably compliment each other. Thus the core pillars of good corporate governance are identified as fairness, accountability, responsibility, transparency, independence, social responsibility, discipline and uprightness. These values represent best practices in the running of corporations and business entities.

Guidelines on corporate governance underscore the principle that there should be a balance of power in boards. A board of directors should be well chosen and should have competent directors who are creative and innovative being appointed. No one should have unfettered power and the activities of directors should be examined regularly. The board should also ensure that there is communication and that all communications to shareholders, employees and other stakeholders are made with accuracy and timeously. A look at these guidelines shows that a board which follows them will achieve the aims of corporate governance and address its core pillars. One cannot over-emphasise the desirability and absolute need for checks and balances amongst corporate organisations.

The Higgs report (UK) basically focuses on the role and effectiveness of non-executive directors. It advocates a two-tier board system with the majority of the board being independent and non-executive. Non-executive board members also ought to have the relevant expertise. Clearly in such a situation accountability is ensured, decentralisation achieved and results brought to the corporation's doorstep.

The SA King II Report is primarily concerned with risk management. Responsibility is placed on the board to identify key risk areas of the business and it is required to constantly monitor its key performance indicators. It is also obliged to disclose details of risk management strategies and ultimately the idea is to enhance shareholder value.

The Australian Bosch Report also carries a lot of useful insights. The report says that the company has to be properly managed to protect and enhance shareholder value and to meet obligations to stakeholders, the industry and the law. Non-executive members are obliged to provide independent advice to executive members. It advocates the separation of the roles of Chief Executive Officer and Chairperson of the Board so as to avoid concentration of power in one person and thereby ensure greater output.

One cannot over-emphasise the centrality of the board of directors in matters pertaining to corporate governance. It is expected that directors be independent, trained, be competent and elected transparently. Various duties and obligations are cast upon directors from statute, common law and contract. The overriding theme in all these obligations and duties is that they should ultimately achieve the aims of corporate governance and give effect to its principles. In practice these values and best practices have been embraced wholesale in Zimbabwe.

The Company Secretary plays a pivotal role in the corporate governance structures of a company. He provides guidance on ethics, good governance, responsibility and statutory duties, obligations and meetings. His office effectively monitors the whole establishment in order to ensure that the spirit of corporate governance is attained and consolidated. His office is the heartbeat and nerve-centre of the company's activities.

The directors are responsible for internal control in the spirit of the Turnball framework. They should maintain a sound system of internal control whose effectiveness is regularly monitored and reviewed.

To this end, the role of auditors and accountants is important. This is a watchdog mechanism which ensures transparency, accountability and responsibility, in the achievement of corporate governance. Section 150 Companies Act, Chapter 24:03 makes provision for the appointment of auditors. Their duties and functions are not only specified statutorily, but also in terms of the common law.

Finally, the directors, in line with their traditional roles, will have to both report and disclose. This duty is also cast upon auditors and accountants. This enables the board to review its strategies, appraise them and also advance justifications on unclear issues. Disclosure will in particular minimise either the risk of fraud and other corrupt practices or the appearance thereof.

In terms of our law, statute in the form of inter alia, the Companies Act, Chapter 24:03, Insolvency Act and to some extent the Central Bank's guidelines contain various provisions (some penal) for the enforcement of corporate governance. In this respect criminal liability attaches to directors in respect of breaches of the provisions of the Companies Act, Chapter 24:03, which espouse corporate governance principles.

Section 318 Companies Act, Chapter 24:03 is very instructive in this regard. It says that:

(1) If at any time it appears that any business of a company was being carried on

(a) recklessly or
(b) with gross negligence or
(c) with intent to defraud any person or for any fraudulent purpose;

the court may, on the application of the Master or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible *without limitation of liability* for all or any of the debts or other liabilities of the company as the court may direct.

This particular section amply demonstrates the fact that Zimbabwean law takes a dim view of transgressions against sound and good corporate governance practices.

In terms of the common law, liability might arise under the law of agency, since directors are basically agents of a company. Behaviour which constitutes a repudiation or breach of the mandate necessarily attracts sanctions.

In the same vein delictual damages are available for negligent performance of duty by the directors. With this in mind, directors become diligent and in the process uphold corporate governance.

All in all, Zimbabwe has tried to adopt best practices on the theory and practice of corporate governance from other jurisdictions, particularly the developed economies of the western world. Various stakeholders in the country like academia, the business community, government and non-governmental organisations appreciate the fact that corporate governance promotes sound business practices by placing a high premium on ethics, integrity, transparency and accountability. The essence of corporate governance in relation to the business environment in Zimbabwe is to do with the curbing and prevention of business malpractices such as mismanagement, bad company practices, corruption, nepotism, abuse of company property, insider dealing and other forms of corporate transgressions and perfidy.

Several examples, particularly in the last 10 years or so in which several corporate entities especially in the banking sector experienced difficulties and stress due to glaring corporate governance deficits, have heightened the average person's consciousness of the need for exemplary corporate behaviour on matters of governance.

8 **(a)** The question raises a number of issues pertaining to the formation of contracts. The first question to ask is whether or not Rover's advertisement in the Daily Echo constitutes a mere invitation to treat or a firm offer. An offer is a declaration by the offeror of his intention to conclude a contract while all the terms on which he is prepared to contract are set out in this declaration.

The offer must be made with the intention that it shall serve as an offer so that it may be accepted and result in a contract coming into existence – *Efroiken* v *Simon* (1921).

On the other hand, an invitation to treat (or solicitation for offers) does not result in a contract – *Crowley* v *Rex* (1908). Whilst it is true that, generally speaking, advertisements constitute an invitation to treat rather than a firm offer, a lot will depend on the intentions of the parties, particularly the offeror. In this case it is quite clear that Rover as the offeror intended to conclude a contract for the sale of the rare painting to the first person to validly accept his offer.

In order to be valid, the acceptance must comply with the following requirements. The acceptance must

(i) be clear and unambiguous
(ii) be unconditional
(iii) take place within the time stipulated
(iv) be communicated by the offeree to the offeror in the prescribed manner. If for instance the offeror has prescribed or suggested that acceptance be in writing, any other method of acceptance, even if technically more efficient or convenient than the one suggested by the offeror, would be invalid and inadmissible.

In *Laws* v *Rutherford* (1949) the defendant offered the plaintiff a contract to cut timber on her estate. Acceptance had to be effected by registered mail and by 27 July of a given year. In the event, the plaintiff just moved onto the estate on 28 July and started cutting down timber and the court said that there was no valid contract because the prescribed manner and time of acceptance had not been observed by the offeree.

Therefore, Piper's purported acceptance by email and not the telephone did not constitute valid acceptance whose effect would be to result in a contract.

Secondly, and even assuming that (which assumption would patently be wrong) Piper could validly accept through sending an email message, by offering to pay $45,000·00 and not the required $50,000·00, this amounts to a counter-offer. If the offeree were to 'accept' the offer subject to a condition or qualification, this does not constitute a valid acceptance but a conditional acceptance which is actually a counter-offer.

The effect of a counter-offer is to negate, or supersede the original offer. In *Hyde* v *Wrench* (1840) W offered to sell H a farm for £1,000·00. H made a counter-offer by offering £950·00. W rejected this. Later H came back and said that he now accepted the original offer of £1,000·00. W rejected it. The court held that H could not accept the original offer since it had been nullified by the counter offer and was no longer capable of acceptance.

As far as the second offer to purchase the painting for $50,000·00 is concerned it would appear that Piper is now the offeror and Rover is the offeree. Since the painting has already been sold to Chancer, the new offer to pay $50,000·00 is a non-event because the subject matter of the sale is not available any more. That being the case, there cannot be any valid acceptance of that offer.

(b) If Piper were to approach the High Court for an interdict to stop the proposed sale of the painting by Rover to Chancer, in all likelihood the action would fail. Since there is no valid contract between Rover and Piper, there is no cause of action on which litigation can be based. Therefore any attempt to institute litigation would be ill-conceived and liable to fail.

9 (a) Generally speaking, a partner is in the fullest sense of the term an agent of his co-partners and to be rendered liable for a partnership obligation, a person must have been a member of the partnership at the time the obligation was contracted.

The onus lies upon the third party to show that the contracting party had authority to bind the partnership, and this authority may arise in a number of ways.

First, it may arise by express provision in the partnership agreement. Second, it may be implied from the partnership agreement or from the customary dealing of the partnership since

'each partner has authority to do all acts incidental to the proper conduct of the business'.

Braker and Company v *Deiner* (1934).

Third, partners may be bound by their having held out, one of their number as having authority.

Fourth, there may be ratification, express or implied, of an authorised act.

Whatever the authority of the partner who has contracted an obligation, it is necessary to render his co-partners or the partnership liable, that the obligation should have been contracted in the name or on behalf of the partnership. *Lamb Brothers* v *Brenner and Co* (1986).

In buying two tonnes of assorted rock from Germinston Quarries, Robert was ostensibly acting for and on behalf of Shingai Sculptors, the partnership, at a time when he was the Chairman of the partnership.

Finally, for the partnership to be able to rescind the contract on the basis that the rock delivered by Germinstone Quarries was only suitable for general sculpture work and not for the particular style of sculpture carried out at Shingai Sculptors they would have to prove that Robert had given Germinston Quarries exact specifications on the type of product the partnership required. Such knowledge on the part of the supplier will not be presumed. In the circumstances of the case the partnership faces formidable legal obstacles in its attempts to avoid the 'rock' contract with Germinston Quarries.

(b) A partnership is a legal relationship between two or more persons (up to a maximum of 20) who carry on a lawful business or undertaking to which each contributes something with the object of making a profit and of sharing it between them.

A partnership is essentially a contract founded on the agreement of the parties. The agreement comprises the following essentials:

(1) that each partner is to contribute something whether capital (such as money, property, materials or goodwill) or labour (such as work, industry or skill).

(2) to a lawful business.

(3) which is carried on for their joint benefit.

(4) with the object of making a profit and sharing the same.

The sharing of profit is so essential a feature of a partnership that an agreement that one of the partners is to have no share in the profit is void. *Bester* v *Van Nierkerk* (1960).

One of the fundamental obligations of a partner is that partners stand in a fiduciary relation to one another and are obliged to observe *uberrima fides*, the highest degree of good faith. A partner must not allow himself to be placed in a situation where his personal interests and the interests of the partnership conflict or may possibly conflict.

Partners are accountable to the partnership for any profits, benefits or advantages that they obtain in the performance of their duties and may not appropriate for themselves assets, advantages and opportunities which belong to the partnership.

This duty embraces any act prejudicial to the partnership or potentially so – for example the opening of a competitive business.

In the famous case of *Robinson* v *Randfontein Estates* (1921) the court made the following observation,

'where one man stands to another in a position of confidence, involving a duty to protect the interests of that other he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty …'

Also in the case of *Olifants Tin 'B' Syndicate* v *De Jagel* (1912) the court said,

'It is a general principle of our law that the contract of partnership is based on the utmost good faith, all the decided cases flow from the one great principle …'

In the light of the above authorities, it is quite clear that Robert has violated the principle of utmost good faith in relation to the 'Barnes contract'.

The partnership has a legitimate claim to the proceeds of the contract between Robert and Digger Barnes for the supply of 1,000 assorted stone sculptures for sale in a Dallas gift shop. Apart from the question of damages for breach of contract, a breach of the duty of good faith will normally entitle a co-partner to claim a dissolution of the partnership.

10 (a) Flame Lily Industries have launched a creditor's winding up petition that is based on Buildarama's alleged inability to pay debts. Section 206 lists seven specific circumstances (a to g) under which a company may be wound up by the court (compulsory winding up). Section 206(f) reads as follows:

A company may be wound up by the court – 'if the company is unable to pay its debts'.
The preceding section, s.205 defines the concepts of inability to pay debts.

A company shall be deemed to be unable to pay its debts:

(a) if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) if the execution or other process issued, on a judgement, a decree or order of any competent court in favour of a creditor, against the company is returned by the Sheriff or messenger with the endorsement that no assets could be found to satisfy the debt or that the assets found were insufficient to do so; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

Zimbabwean jurisprudence is replete with case law that makes it clear that in winding up proceedings based on the debtor's inability to pay debts, the debt in question should be clear, irrefutable and uncontestable. In the case of *Delta Beverages Limited* v *Nickstate Investments (Pvt) Limited* (2009), the High Court sitting at Harare made the observation that 'winding up of a company is a drastic action which should only be taken when there is real evidence of failure to pay debts'.

In another Zimbabwean case *Stambolie and Another* v *Nyamutamba (Pvt) Ltd* (1985), the court dismissed an application for the provisional winding-up of a company because the debt in question was disputed by the respondent on bona fide, reasonable and substantial grounds. Whether the petitioners succeed or not depends entirely upon whether the debt in question is disputed by the respondent on bona fide and reasonable grounds. This approach is deeply entrenched in Zimbabwean law. In *Apotex Incorporation* v *Surgimed (Pvt) Ltd* (2000) Mr Justice Smith had this to say:

'In my approach to this matter, I must bear the following in mind. An application for the liquidation of a company should not be resorted to to enforce the payment of a debt which is bona fide disputed by the company …'

The facts of the case make it clear that not only is the amount of the debt ($200 000·00) disputed by the respondent company, Buildarama (Pvt) Ltd but they believe that they have an unspecified counterclaim for breach of contract against Flame Lily Industries. In our law it is well recognised that a winding up order will not be made where there is a *bona fide* dispute as to an existence of a debt. Where there is a bona fide dispute the court may order an applicant to prove his debt first before applying for a winding up order, but the dispute must be a bona fide one.

In light of the above discussion, Flame Lily Industries' prospects of success based on Buildarama's alleged inability to pay debts look rather slender and minimal.

(b) For the court to appoint a provisional judicial manager the requirements that must be met are clearly spelt out in s.300(a) Companies Act, Chapter 24:03.

Basically the court is enjoined to grant such an order if it appears to the court:

(i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and

(ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and

(iii) that it would be just and equitable to do so.

When a company is in difficulties and it appears likely that these difficulties might be overcome, the court has power to make an order which is known as judicial management, placing the control of the company under the management of a judicial manager who is appointed by the court when the order is made. Before the court can grant an order for judicial management it must be shown that there has been mismanagement or some other cause conducive to the failure of the company and that there is a strong probability that if time is given to the company, by proper management or by proper conservation of its resources, it may be able to surmount its difficulties and carry on.

In *Lief No* v *Western Credit* (1966) a winding-up order, in its nature, is intended to bring about the dissolution of the company, whereas the purpose of a judicial management order is to save the company from dissolution. A judicial management order, on the other hand, usually provides for a moratorium in respect of the company's debt in the hope that it will lead ultimately to the payment of all creditors and the resumption by it of normal trading.

1 7–10 marks Answers in this bracket would define adequately the current position of tribunals in Zimbabwe's legal system.

Citation of relevant authorities is helpful.

4–6 marks An average answer with a few omissions here and there.

0–3 marks An answer which is totally inadequate.

2 7–10 marks Answers in this bracket would clearly spell out the meaning of quasi-mutual assent and its implications. Candidates are able to score full marks without knowledge of cases.

The general approach of the courts in such cases should be explained and citation of relevant case law is helpful.

4–6 marks An average answer with shortfalls here and there.

0–3 marks A deficient answer in all respects.

3 7–10 marks A good answer supported by relevant case law should define the delictual concepts of causation and remoteness of damages.

4–6 marks A below average to average answer with glaring misses here and there.

0–3 marks A below average answer.

4 7–10 marks Answers in this bracket would give a full breakdown of at least five ways in which a contract of employment terminates.

4–6 marks An average answer with shortfalls here and there.

0–3 marks An inadequate answer.

5 **(a)** 4–6 marks Answers in this bracket would give a comprehensive inventory of the various classes of shares including the major features of each class.

2–3 marks An average answer with deficiencies here and there.

0–1 mark A poor answer.

(b) 3–4 marks A good answer which explains the concept and methods of variation of class rights.

1–2 marks An answer with shortcomings here and there.

6 **(a)** 3–4 marks A good answer which covers nearly everything.

0–2 marks An average answer.

(b) 2–3 marks An accurate answer.

0–1 mark A poor answer.

(c) 2–3 marks An accurate answer.

0–1 mark A poor answer.

7 7–10 marks Answers in this bracket define in a comprehensive way the concept of corporate governance and how it has been applied in Zimbabwe.

4–6 marks An average answer with important points missing.

0–3 marks A below average answer.

8	**(a)**	5–8 marks	A comprehensive answer that discusses the topic of offer and acceptance and what constitutes a valid acceptance. The effect of a counter-offer has to be discussed as well and on the facts, the conclusion that there is no valid contract between Rover and Piper is inescapable. Citation of relevant case law is helpful.
		3–4 marks	An average answer with a number of gaps.
		0–2 marks	A poor answer.
	(b)	2 marks	A good answer which spells out the fact that Piper's proposed action would be ill-conceived.
		0–1 mark	A poor answer.
9	**(a)**	3–5 marks	A good answer which gives a comprehensive treatment of the law relating to partnerships in the specific context of the facts. Citation of case law would be very helpful.
		0–2 marks	A weak answer.
	(b)	3–5 marks	A good answer supported by relevant examples.
		0–2 marks	A poor answer.
10	**(a)**	5–7 marks	A good answer which is able to define the concept of inability to pay debts as defined under ss.205 and 206 Companies Act, Chapter 24:03.
		3–4 marks	An average answer with gaps here and there.
		0–2 marks	A rather poor answer.
	(b)	2–3 marks	A good answer that lays down the requirements of s.300 for the appointment of a provisional judicial manager.
		0–1 mark	An indifferent answer.