Answers

1 (a) Interpretation of statutes is a process by which the courts determine the meaning of a statutory provision for the purpose of applying it to the situation before them. It is generally accepted that the object of statutory interpretation is to arrive at the intention of Parliament or the legislature. As noted by the court in *R* v *Takaendesa* (1972) 'the function of the court is to declare the law as given it by the legislature and not to make it.' To this end, the courts have developed rules namely the literal, golden and mischief rules in interpreting legislation in order to arrive at the intention of the law giver.

The literal rule, which has been described as the cardinal rule of interpretation is the fundamental rule of statutory interpretation, which states that the intention of the law giver should be arrived at from the language used in the enactment. The courts in trying to determine legislative intent try as much as possible to do restrictive interpretation by confining themselves to the language used by the Parliament provided that the language or words are clear, unambiguous and unequivocal. The task of interpretation using other rules than the literal rule can hardly be said to arise where the language is plain, clear and unambiguous and the courts normally resort to dictionaries to ascertain the ordinary meaning of a word as shown by *S* v *Nottingham Estates P/L* (1995). The court used the Black's Law Dictionary to define the word 'conduct', defined as 'to dominate, lead' and held that it was the hunters who had carried out hunting activities and not the local game park.

In *Kuvarega* v *The Registrar General of Elections* (1998) the court in trying to construe the intention of the legislature from the use of the literal rule, resorted to the shorter Oxford English Dictionary to find out the meaning of 'utter'. According to this dictionary the word means 'to give vent to joy etc in sound' and thus the donning of t-shirts by supporters of a political party emblazoned with slogans, their symbol and pictures of their candidate around or near the polling station were not covered and therefore held not prohibited by the Electoral Act [Chapter 2:13].

In construing statutes and legislative intent and written statement, the grammatical and ordinary sense of the words can be abandoned when following them would lead to some absurdity or some repugnancy or inconsistence with the rest of the instrument. Therefore, the courts normally modify the grammatical and ordinary sense of the words so as to avoid the absurdity and inconsistency. In modifying the obscure language of an act, thereby abandoning the literal rule for the golden rule, the courts will be trying to avoid absurd results never intended by the lawmaker.

Some legal commentators state that it is apparent therefore that the golden rule is a modification of the literal rule and only differs in one fundamental respect, that is, that the golden rule specifies one instance in which a departure from a plain meaning is justified, viz where adherence would result in absurdity. In *R* v *Takawira and Others* (1967), statute law made it an offence to possess 'subversive' material. If interpreted literally, the police officer who took possession of the subversive material, the public prosecutor who tendered it as evidence in court and the judicial officer who examined it at the trial would all be guilty of an offence. The literal rule was discarded and the phrase 'without lawful authority' was read into the statute. It would never be possible to secure a conviction under the statute at all and as a result, the intention of the legislature would be completely frustrated. It has been noted that a wider approach of the golden rule permits a departure from the clear, unambiguous language of an Act, if to do so otherwise would lead to absurdity so glaring that it could never have been contemplated by the lawmaker or where it could lead to a result contrary to the intention of the lawmaker as shown by the context or by such other considerations as the court is justified in taking into account.

The use of the golden rule in the construction of a statute is meant to give it more effect rather than to allow it to perish. An enactment should, if possible, be construed so as to render it effective, intelligible and valid, rather than in a manner that would defeat its object. It is trite that the courts should just glean the intention of the legislature and even if the intention leads to injustice, that is not the court's business to correct but the lawgivers. In *Hofrho PIL* v *UDC Ltd* (2001) McNally JA held that the Hire Purchase Act [Chapter 14:09] was 'in a deplorable state' and needed urgent clarification from the legislature. He argued that though the intention of the legislature was clear in that Act, s.29 was badly worded and there arose a need to depart from the literal to golden rule in order to achieve what the legislature intended.

In order to assist in deciding on the true intention of the legislature, the court may have regard to the mischief that the Act was designed to remedy. This rule was enunciated in the ancient English case of *Heydon* where the court considered the common law before the making of the act, the mischief for which that common law failed to provide, the remedy Parliament resolved to cure the mischief, and the true reason for the remedy. In *S* v *Harrington* (1988) the court departed from the literal rule to use the mischief rule. The appellant was convicted by the High Court for contravening s.3 Official Secrets Act [Chapter 97], in that she had acted as a spy for the government of South Africa and this would prejudice Zimbabwe's security. Dumbutshena CJ (as he then was) said, 'in interpreting 'enemy' in s.3 Official Secrets Act, the courts have to look at what the legislature desired to achieve and the mischief it sought to remedy.'

The mischief rule was also used in *S* v *Chitsa* (1966), where the accused approached the windows of the hostel in question and smashed some of the panes of glass by striking them with some unidentified object at a club. The court held that the use of ordinary words in a statute to interpret it had to be qualified with the particular context of the statute. It used the mischief rule to decide that s.46(2) then Law and Order (Maintenance) Act [Chapter 39], only covered the actual throwing or propelling of stones or other objects that fell into the section and not the wielding of clubs or similar objects. Hence it held that the mischief sought to be prevented by the lawgiver was the throwing of stones or other articles at vehicles, boats, aircraft, buildings or persons or similar action of propelling at them stones or other articles from catapults, slings, bows or similar instruments of propulsion.

From the above discussion, one can safely conclude that the courts use the literal, golden and mischief rules to interpret statutes and arrive at the intention of the legislature. However, it should always be borne in mind that they are not rules in the strict sense but they are of paramount importance as far as statutory interpretation is concerned. Some scholars even view the literal rule as the 'cardinal rule of construction'. At the end of the day, what is of critical importance in using or invoking the various cannons of construction of a statute is to determine the true intention of Parliament at the time the legislation in question was enacted.

(b) Presumptions

Presumptions may be described as assumptions that the court take into account in interpreting statutory provisions. In the absence of a clear indication of the contrary, a statutory provision is taken to have the meaning arrived at by employing the assumption. There are various presumptions: *inter alia* the presumption that the legislature does not intend that which is harsh, unjust or unreasonable, the presumption against retrospectivity, the presumption in favour of equality of treatment and the presumption of constitutionality.

The presumption against retrospectivity stipulates that unless the contrary intention is clear, a statute is not presumed to have an intentional retrospective operation. It has been said that it is wrong in principle to change the character of past actions and transactions which were validly carried out upon the basis of the then existing law. In *Mahomed No* v *Union Gvt* (1911), the court held that the principle that, in the absence of expressed provision to the contrary, no statute is presumed to operate retrospectively is one recognised by the common law. The lawgiver is presumed to legislate only for the future. However, if Parliament intends an enactment to have a retrospective effect, then that must be stated expressly and clearly in the enactment. Provisions which create offences can never be retrospective as this is prohibited by the constitution in s.18(5). With regard to subordinate legislation, only Parliament has the power to authorise retrospective legislation. Therefore subsidiary legislation should never contain certain provisions with retrospective effect unless specifically authorised to do so by an enabling Act. This was held in *Henks Construction (Pvt) Ltd* v *Zimbabwe Defence (Pvt) Ltd* (1998). However, it should be borne in mind that the presumption against retrospectivity was upheld as shown in *Bater* & *Another* v *Muchengeti* (1995), where the court expressly stated the presumption as follows, 'the correctness of that view of the matter is underscored when account is taken to the fundamental rule of construction in our law, dating probably from Order 1:147, that there is not to be given to an enactment so as to remove or in any way impair existing rights or obligations, unless such a construction appears clearly from the language used or arises by necessary implication. The supposition is that the lawmaker intends to deal only with future events and circumstances.'

The presumption in favour of equality of treatment provides that Parliament is presumed to intend to treat everyone affected by its law on the basis of equality. This presumption is enforced by s.23 of the Constitution, which prohibits discrimination on various grounds including gender, race, tribe, place of origin. This principle is further elaborated and expanded upon in the Constitution.

The presumption of constitutionality according to some legal commentators arises in almost every constitutional democracy where the Constitution is the supreme law of the land. In essence it operates this way, an Act of Parliament is presumed to be constitutional until the contrary is shown. If a provision is capable of more than one meaning, with one of the possible interpretations falling within the meaning of the Constitution while others do not, it will be presumed that the legislature intended to act constitutionally and that one possible meaning within the Constitution will be adopted. In *Zimbabwe Township Developers (Pvt) Ltd* v *Louis Shoes (Pvt) Ltd* (1983) from the court's remarks, two senses in which the presumption may be understood are: where a provision is capable of more than one meaning one of which is within the Constitution, it is presumed that the legislature intended that meaning which is within the Constitution and where it is sought to be established whether or not a provision is reasonably justifiable in a democratic society, it is presumed that the provision is reasonably justifiable and the onus lies on the challenger to prove the contrary.

The presumption against the alteration of common law more than is necessary is to the effect that, in the absence of clear language either by express words or necessary implication, the courts will not rule that the legislature intended a significant departure from the common law. It requires statutes to be construed as far as possible, in conformity with the common law rather than against it. The presumption requires clear and unambiguous language to alter the common law, therefore if the wording shows a clear intention to alter the common law, the full effect must be given to that intention. In *van Heerden & Others NO* v *Queens Hotel* (1973) the court stated, 'I cannot see how statutory rights can be regarded as more sancrosanct than a 'common law' right as the rights of man are founded on the 'common law' and as the 'common law' is less subject to change than statutory law, which may vary from year to year according to the whim of a particular legislature, common law rights must be more jealously guarded than statutory ones.'

In *Hama* v *National Railways of Zimbabwe* (1998) the Supreme Court was called upon to interpret Statutory Instrument 371/85 on the termination of employment. A previous decision by the court had held that where it was given that an employee was not guilty of the misconduct that formed the basis of his suspension from employment, the employer would be compelled to reinstate the employee. The employer had no option but to pay damages in lieu of reinstatement. The Supreme Court was reminded of the presumption against alteration of common law and asked to review its previous decision. The Supreme Court subsequently reversed its previous decision, holding the principle that an employer cannot be forced to keep an employee it no longer wants was deep-seated in the common law and the language of the statutory instrument was not sufficiently clear to oust this common law position.

2 An offer is a statement of the terms on which the offeror is willing to be bound. For a contract to exist, usually one party must have made an offer and the other must have accepted it. A person is said to make an offer when he puts forward a proposal with the intention that upon its mere acceptance, without more, a contract should be formed.

In addition, although an offer is usually addressed to a specific individual or to a group of individuals, there is no reason why it should not be addressed to an indeterminate group or even to the public at large. In other words a contract can equally be formed when an offer is made to the world at large and is accepted by someone who performs the conditions of the offer. In *Carlill* v *Carbolic Smoke Ball Co Ltd* (1893), the defendants were the manufacturers of medication known as a carbolic smoke ball, which was claimed to be capable of preventing influenza, as well as a variety of other ailments. By way of an advertising stunt the defendants offered to pay £100 to any person who used the smoke ball according to the instructions and nevertheless caught influenza. In order to 'show their sincerity', the defendants also stated that they had deposited £1,000 with their bankers to meet any possible claims. The plaintiff used one of the smoke balls according to the directions, but still caught influenza. She then claimed payment of the £100, which the company refused to pay. They argued that their advertisement could not give rise to a contract, since it was impossible to make a contract with the whole world. The court rejected the argument and held that the advertisement did constitute an offer to the world at large, which became a contract when it was accepted by Carlill using the smoke ball in the prescribed manner and getting influenza. She was therefore entitled to the £100.

Furthermore, an offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound provided that certain specified terms are accepted. The offeror must have completed his share in the formation of a contract by formally declaring his readiness to undertake an obligation upon certain conditions, leaving the offeree the option of acceptance or refusal. He must not merely have been feeling his way towards an agreement, not merely initiating negotiations from which an agreement might or might not in time result.

An invitation to treat is an indication that a person is willing to enter into negotiations, but not that he is yet willing to be bound by the terms mentioned. In *Gibson* v *Manchester City Council* (1979), Gibson, a council tenant, received a letter from the council saying that the council 'may be prepared to sell the house to you at the purchase price of ….£2,180'. Gibson formally applied to buy at this price, but meanwhile council policy was changed and it refused to sell. It was held that the council's letter was only an invitation to treat not an offer. Therefore there was no contract. In *Fisher* v *Bell* (1961) the Offensive Weapons Act 1959 prohibited 'offering for sale' various offensive weapons including flick knives. A shopkeeper displayed some on his window and was prosecuted unsuccessfully. The court held that this display of the weapon was not offering the prohibited weapon for sale but was a mere invitation to treat, an invitation to the customer to make an offer to buy.

The distinction between an offer and an invitation to treat is that the former may be accepted, turning it into a contract whilst an invitation to treat may not. Invitations to treat are merely steps in the negotiation of a contract. A common instance of agreement arrived at by offer and acceptance occurs where tenders are called for and one is accepted as in *National and Overseas Distributors P/L* v *Potato Board* (1958) at 479E, Schreiner J.A said, 'if the respondent had been a natural person who has accepted a tender according to its terms, there is no doubt that a contract would have been made when the acceptance was communicated to the tenderer, as by posting it.' In contrast, an invitation to treat may not result in a contract as shown in *Crawley* v *R* (1909) in which the court held that where a tradesman advertises goods at a certain price he does not make an offer which any member of the public is entitled to accept, he invites the public to do business with him and to make an offer which he can then accept or refuse.

A display of goods in a shop, in a window or on shelves even with price tags attached is an invitation to treat and not an offer. The shopkeeper does not undertake to sell the goods. They are on display merely to invite customers to come in and offer to buy at the price shown. In *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists* (1953), Boots refurbished a shop into a self-service system which at the time was novel. By s.18 Pharmacy and Poisons Act 1933, the sale of certain drugs and poisons should not occur except 'under the supervision of a registered pharmacist'. The point at which the contract was formed was therefore critical, either when the customer removed goods from the shelves or when they were presented to the cash desk for payment. The court held that the contract was formed when goods were presented at the cash desk where a pharmacist was present, not when taken from the shelf. Mere display of goods on the shelf was an invitation to treat and Lord Parker agreed with this in *Fisher* (*supra*) when he stated, 'it is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale, the acceptance of which constitutes a contract.' In contrast with an offer, Bowen L.J in *Carlill* (*supra*) concluded, 'it is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate offers to receive, offers …'

Further, an offer differs from an invitation to treat in that the latter may come in the form of advertisements. Advertisements are usually considered invitations to treat on the grounds that they may lead to further bargaining, potential buyers might want to negotiate over the price. In *Grainger and Sons* v *Gough* (1896) the court held that the circulation of a price-list by a wine merchant was not an offer to buy at those prices but merely an invitation to treat. Lord Herschell noted, 'the transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in a number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited.'

An offer also differs from an invitation to treat in that the latter may come in the form of tenders. When a large organisation, such as a company, hospital or government ministry, needs to find a supplier of goods or services, it will often advertise for tenders. Organisations wishing to secure the business then reply to the advertisement, detailing the price at which they are willing to supply the goods or services and the advertiser chooses whichever is the most favourable quotation. The court in *Spencer* v *Harding* (1870) held that as a general rule, a request for tenders is regarded as an invitation to treat, so there is no obligation to accept any of the tenders put forward.

3 **(a)** Most actions in delict or tort are based on negligence (*culpa*). This is an allegation that a person acted carelessly, was thoughtless or imprudent because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him. The yardstick adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable person. The defendant is negligent if a reasonable person in his position would have acted differently and if the unlawful act of causing damage was reasonably foreseeable and preventable.

In *Kruger* v *Coetzee* (1966), the court formulated the test to be applied on negligence. It said liability on negligence arises if a reasonable person in the position of defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps to guard against such occurrence and that the defendant failed to take such steps.

The first stage in any case of alleged negligence is for the court to decide the facts. After the facts have been decided, the court has to determine how an ordinary, average, reasonably careful citizen would have behaved in the circumstances.

Negligence is thus the failure to display the same degree of care in avoiding the infliction of harm which the reasonable person would have displayed in the circumstances. In *Gordon* v *Da Mata* (1969), it was held that it was not reasonably foreseeable that, during the cutting of cabbage leaves, a small cabbage leaf would fly that distance and land under the plaintiff's foot causing her to slip and fall and be injured. The accident was so bizarre and freakish that a reasonable man would not have foreseen or taken steps to guard against it.

There are some situations where, despite the fact that harm was reasonably foreseeable, a reasonable person might not necessarily have taken any steps at all to prevent that particular harm or might only have taken certain limited precautions. Therefore, in addition to reasonable foreseeability, the question of what steps, if any, a reasonable person would have taken has to be investigated. The enquiry can be broken down as follows:

(i) would a reasonable person placed in the position of the defendant have foreseen the possibility that harm would result from the sort of conduct in which the defendant was engaged?
(ii) if he would have foreseen harm, would the reasonable person have taken steps to prevent that harm from occurring?
(iii) If he would have taken steps, what steps would he have taken?

If the answers to the above questions are in the negative, then no liability would attach to the defendant.

When deciding whether a reasonable person would have guarded against harm which was reasonably foreseeable the court will take into account the following:

(i) the degree of risk that the harm would occur (was it probable or unlikely that the harm would occur?)
(ii) the nature of the harm that would occur (if the harm occurred would it be serious harm or trivial harm?)
(iii) the nature of the precautions required to prevent the harm (were these elaborate and expensive or easy and inexpensive?)
(iv) The objective which the defendant was seeking to attain (was this legitimate or illegitimate?)

In *Lomagundi Sheetmetal* v *Basson* (1973) during welding operations on a roof, molten metal dropped on dry material alongside the building and a fire broke out resulting in damage to property. Although the risk of fire being caused in this way was not substantial, the precautions needed to prevent risk were easy, namely to move the dry material away. The defendant was therefore held liable to the plaintiff in negligence.

In this regard, the law recognises that there are some members of society who are rendered peculiarly weak by some particular ailments. It is thus considered to be still negligent to cause injury to such people as the law mandates everyone to take their victims as they find them, the so called 'thin skull' rule.

The reasonable foreseeability test is certainly not without its difficulties as the sole determinant of liability in these sort of cases which span a wide spectrum of differing situations. The present position is that liability in all cases is to be determined simply by applying the ordinary test for negligence, namely reasonable foreseeability of the average person. Ultimately each case will be determined on its own peculiar facts.

(b) *Volenti non fit injuria* means 'he who voluntarily exercises his will suffers no injury'. The concept embodies the principle that a defendant is not liable where the injured person has consented to injury or the risk thereof. Thus if a person, knowing the full nature and extent of the risks involved in an enterprise, voluntarily goes into the enterprise thereby assuming the risk of injury to himself, he should not be able to sue for injuries caused by that enterprise. *Volenti non fit injuria* thus constitutes a total defence in delict even in circumstances where the defendant was negligent.

The defence would thus cover injuries sustained by sportspersons engaged in sports that inevitably cause harm such as boxing, soccer and in some such other circumstances. Thus in *Lampert* v *Hefer NO* (1995), the defence was maintained under circumstances where a passenger was aware that the motorcyclist, with whom he was travelling, was under the influence of alcohol, which intoxication led him into an accident and resultant injuries to the plaintiff.

There are two approaches to the *volenti* defence which are: the narrow so-called bargain or bilateral agreement approach and the extensive voluntary assumption of risk approach. The basic difference between the two approaches is as follows: with the bargain approach, nothing less than an advance communication leading to an express or implied agreement between the parties is required, whereunder the plaintiff agreed to waive or give up his legal right to claim in respect of that type of harm, should it eventually occur. The approach thus postulates that there be a clear and unequivocal acceptance of a known risk in advance and a resultant waiver of the right to recover.

On the other hand, the voluntary assumption of risk approach does not require that the plaintiff must have agreed in advance of the enterprise to surrender his right to sue in the event of being injured. All that is required is that the plaintiff, having full knowledge and appreciation of the nature and extent of risk involved in an enterprise, nonetheless voluntarily goes into it, thereby assuming the risk of injury. Though these approaches differ, the idea of voluntariliness cuts across both of them.

Our courts are yet to rule authoritatively on the approach to be adopted and followed by them. The one case that has dealt with the defence, *Mutandiro* v *Mbulawa*, seems to cast doubt on the approach to be adopted. In that case the plaintiff who was a passenger in a vehicle which was being driven by the defendant had been seriously injured when the vehicle had overturned, apparently caused by the defendant's drunken state. The court held that the defence could not apply because there was no express advance agreement between the parties. This holding was in line with the narrow approach. It, however, went on to add that the defence could still not apply as the plaintiff had no full knowledge of the nature and extent of the risk involved – which seems to remind one of the extensive approach. The above notwithstanding, the defence still forms part of our law and a case could be made for the application of the extensive approach as it is in line with the South African position enunciated in *Santam Insurance* v *Vorster* (1973).

The defence is however difficult to raise and sustain because of its requirements. Whichever approach one looks at, it seems clear that there is a requirement that there be at least an appreciation of the nature and extent of the risk involved and this leads to an inquiry of subjective foresight. By way of illustration, in the *Santam* case (*supra*) a race between two cars on an ordinary road resulted in one of the cars overturning and leading to the plaintiff sustaining very serious injuries. The court noted that if the plaintiff had subjectively foreseen the risk of injury to himself that would ordinarily suffice as consent debarring him from recovering damages. It, however, went on to refer to the practical difficulties of establishing subjective foresight.

In order to overcome this difficulty a two stage approach is utilised. The first stage involves the court asking itself what objectively were the inherent risks of the activity in question. Having determined that, it then applies the subjective test and the court makes a factual finding as to whether the plaintiff must have foreseen the risk and whether he will be held to have consented to it despite his protestations to the contrary.

There are, however, limitations to the idea of voluntariness. There are two situations where the plaintiff will be acting under an obligation or constraint such that his conduct may not be termed voluntary with the result that the defence cannot be raised against him. Thus, in rescue situations and in situations where an employee has to undergo a danger negligently caused by his employer, the defence will not be raised to evade harm caused under such circumstances.

The *volenti* defence is justified on the grounds of public policy. The purpose of the law of delict being to protect people from harm negligently caused, it then makes no sense to extend the protection to those who actually go out to seek the harm. In the circumstances, the voluntary undertaking of risk thus constitutes a good defence and a total one too.

4 There are three broad ways through which a partnership agreement terminates or comes to an end and these may be described as dissolution by agreement, by operation of law and by renunciation.

A partnership is dissolved by operation of law where a partner by reason of the outbreak of war becomes an alien enemy. A partnership existing between persons domiciled in different countries is dissolved by a declaration of war and perhaps also a *de facto* state of war between those countries. In *R* v *Knupfer* (1915), the court was able to say, 'The declaration of war had the effect of dissolving the partnership by operation of law.' This in other words entails the termination of the partnership agreement due to *vis major* or superior force, legislation, an act of God, etc. Furthermore, in *Enseleit* v *Enseleit* (1952) the court held that where a partner who has been detained in an internment camp is repatriated to his country of origin, a state with which the union is at war, the partnership is terminated forthwith and an order of court is not necessary declaring such termination. In *re Liebermann, Bellstedt and Co*, the court stated that the fact that some members of a partnership are alien enemies is sufficient to dissolve the partnership. In that case some of the partners in the partnership firm, whose head office was in South Africa, were alien enemies, the court upon application by two of the other partners, made an order for the dissolution of the partnership and appointed receivers to liquidate the partnership business.

In addition, under termination by operation of law, there is the factor of frustration which stipulates that a partnership is dissolved if its business purpose can no longer be achieved, if 'the substratum of the partnership is gone' as stated in *Curtis and Curtis* v *Beart* (1909). In that case the parties had agreed on a partnership for a certain period. The mine which the partnership was formed to work proved valueless and there was no reasonable likelihood of profit for the rest of the unexpired period. The court ordered dissolution of the partnership.

A partnership agreement can be terminated by the death of one partner. The death of any partner dissolves the whole firm unless there is agreement to the contrary. In *Craven* v *Craven* (1908), a partner's will left his share to his wife for life, with remainder to his partner. The court held that the partnership had still dissolved at his death and if it had not, it was still a partnership at will dissoluble by either the partner or the widow. In other words, the surviving parties to the partnership agreement do not continue as partners and have the right to wind up the partnership.

However, it may be highly inconvenient, according to some legal commentators, for a large modern partnership to subject itself to the whole dissolution process every time one partner dies or becomes insolvent. In either case, it will be much easier to value the relevant partner's share and provide some method of sorting things out whilst preserving the partnership business. This was aptly stated in the case of *Ex Parte Whaley N.O.* (1962), where the testator and his son, the applicant, had conducted farming operations in partnership. In terms of his will, he bequeathed to the applicant two thirds in the farm and partnership, subject to the applicant accepting liability for all debts of the partnership at the date of his death, to his paying to each of the testator's other sons £5,000 and to his continuing with his administration of the partnership. This shows that the death of one partner does not automatically warrant a dissolution of the partnership where it would cause inconvenience and hardship and it should not be viewed as a rigid rule.

Under termination by operation of law, there is another factor in which one partner may apply to the court for a dissolution order in the case of mental incapacity. The incapacity may either be permanent or temporary. In *Bagshaw* v *Parker* (1847) the partnership agreement provided for dissolution as regards to the defendant partner in the event of such severe illness as should oblige him to quit India for more than one year. He returned to India, but became an incurable lunatic on the way. The court held, on the construction of the agreement, that the partnership dissolved in accordance with the deed.

Renunciation is another way through which the partnership agreement comes to an end. Any one partner may at any time effectively renounce and so dissolve the partnership, but will render himself liable in damages unless he renounces, in certain cases, by due notice of dissolution. This entails that where a partnership is for an indefinite period, it may be dissolved at will by a partner. In *Wenger* v *Surgeson* (1910) the court remarked, 'the partnership lasts so long as the consent of the partners is there. A partnership at will is exactly what the name implies – an agreement to act as partners until one of them no longer desires to do so.'

Furthermore, whether or not there is a definite period fixed for the duration of the partnership, and in the former case even if the partnership agreement expressly provides that there shall be no renunciation before the period has elapsed, a partner may renounce the partnership on the ground that there was a breach of an essential term of the agreement. Here, a partner is entitled to terminate the partnership on breach by a co-partner. In *Schur* v *Davidoff* (1916), on entering into a partnership with Y, X stated that his business debts amounted to R164; in fact, he owed a further R80. Y was held entitled to dissolve the partnership on the ground of X's breach of faith. Additionally, persistent breach of the agreement also leads to the termination of the partnership. Where the offending partner wilfully or persistently commits a breach of the partnership, that will warrant a dissolution of the partnership by the court. In *Cheeseman* v *Price* (1865) the offending partner had failed to enter small sums of money received from customers into the accounts as he was required to do under the agreement. This had happened 17 times, and that was sufficient to tip the scales in favour of the dissolution. In *Strachan* v *Prinsloo* (1925), X agreed to manage the farm of his co-partner, Y, so as to relieve Y of all duties of supervision. X persistently failed, despite warnings, to attend to these duties. It was held, applying the test whether Y would have contracted in the absence of the term imposing the duty of management on X, that this was an essential term, that X was in breach thereof, and Y was consequently entitled to renounce partnership.

A partner may renounce the partnership on the basis of fulfilment of a condition, allowing him to give notice of dissolution. The agreement may allow a partner to dissolve the partnership in certain circumstances. In *Holshausen* v *Cumming* (1909), the agreement provided that if either partner became addicted to drink the other could dissolve the partnership on notice.

In some partnership agreements, there are many examples of express dissolution clauses which expand the available grounds for dissolution. These are particularly important for professional partnerships where reputation and professional integrity are paramount. In *Clifford* v *Timms* (1908), one dentist in a firm was held to be entitled to a dissolution under a clause in the deed allowing him to do so if his partner was 'guilty of professional misconduct', where the other partner became involved in a company which produced scurrilous pamphlets, etc as to the activities, both dental and private, of other dentists. Lord Loreburn LC held, 'for my part, if this be not disgraceful conduct, if it be not professional misconduct, I know not what the terms mean.'

Conduct, as a factor that induces termination of the partnership agreement, entails that a partner is entitled to renounce on the ground of circumstances, arising otherwise than through his own fault, which cause him to lose confidence in his co-partner. In *Armstrong* v *Wallwork* (1913), 'it is not necessary that a case of gross misconduct, should be made out on the part of the respondent, but if the court is satisfied that, owing to quarrellings, bickerings and loss of confidence the partners can no longer carry on business, and if this is not largely due to the applicant, the court can interfere.' In *Re Yenidge Tobacco Co Ltd* (1916), the following were suggested as examples of such circumstances: refusal to meet on matters of business, continued quarrelling and a state of animosity that precludes all reasonable hope of a reconciliation and friendly co-operation.

In addition, a partner may abandon his interest in the firm and a whole partnership may similarly be abandoned by total inactivity over a long period of time. In addition, if one partner leaves the business and goes into hiding the partnership can be treated as ended.

A partnership may also be terminated by agreement, whether express or implied. There will be dissolution on the fulfilment of a condition, expressly or impliedly agreed upon by all the partners, at the time of the formation of the partnership or subsequently, as dissolving the partnership for example, the completion of the partnership business.

In conclusion, the various ways discussed above will result in the inevitable termination of the partnership as the court will take other factors such as prejudice, inconvenience and hardship into account in reaching the inescapable decision that more harm than good would be done if the court insists that the partnership be continued. Hence the court will be obliged to pay heed and due regard to the wishes of the agreement. It would be a futile attempt by the court to try to uphold a contract which faces collapse and would inevitably fail.

5 Under a contract of employment, an employee has various duties which he is obliged to perform, thereby honouring his part of the contract, and these duties include the duty to provide service, the duty to serve diligently and competently and the duty of subordination among others.

At common law, the worker has the duty to make his services available to the employer from the agreed time and in terms of the contract, including duties reasonably ancillary thereto. He must commence working on an appointed day and render his services consistently at the times agreed upon. In addition, he must obey all lawful instructions loyally and accurately. Zimbabwean law stipulates that an employee may be dismissed where there is 'absence from work for a period of five or more working days without leave or a reasonable excuse'. An employee is supposed to report for work as provided by his contract. In *Girjac Services (Pvt) Ltd* v *Mudzingwa* (1999) an employee was arrested on charges of theft at the instance of his employer. He was released on bail but did not come back to work. After some days, he asked to be allowed to resume work but the employer refused the request. Some months later the employee was acquitted, although the circumstances of his acquittal did not establish his innocence. The employee sought to resume work and payment of wages from the date of arrest until the date of resumption of duty was also demanded. The employer said that the contract had been repudiated by the employee's absence. After fruitless negotiations the employee brought an action in the High Court seeking reinstatement. The court held that the employee was not entitled to absent himself from work because he had been arrested. He was not incapacitated from working and should have tendered his service. He could not blame his absence on his employer for having wrongfully caused his arrest, there having been a reasonable suspicion that he had committed an offence. This shows that an employee risks dismissal from employment if he is absent from work without reason or consent as he commits a breach of contract. However, there are circumstances when an employee is justified in refusing to render services, that is where the employer fails to pay for services rendered or there is unlawful deduction on remuneration. In *Mukandi and Others* v *Hwedza Rural District Council* (2004), the court reversed the dismissal of employees who had gone on strike in protest against the non-payment of their backpay which the employer had diverted to other uses.

There is another duty which the employee is expected to pay due regard to and this is a duty of competence and efficiency. This entails that the worker has a duty to be reasonably efficient and competent at the commencement of the contract and throughout its duration, in other words not to be negligent. In *Zimbabwe Mining and Smelting Co Ltd* v *Mafuku* (1992), the court upheld the dismissal of a human resources manager who was unable to perform the basic duties of personnel management despite being given a number of chances. In *Gemsbock Construction Ltd* v *Prowse* (1950) it was held that the worker is bound by any representations made concerning her competency including information in testimonials and references. However in *Rhodes* v *SA Bias Binding Manufacturers* (1985), the Industrial Court stated that the employee may not, however, be summarily dismissed. He must first be granted the opportunity to improve his performance and the employer must give him proper orders, and possibly also training. At the end of the day, the employee is expected to be efficient and competent for the job he was appointed to do. Once on the job, the employee should exercise reasonable skills, diligence and perform his duties competently. *Quest Motor Corporation (Pvt) Ltd* v *Nyamakura* (2000).

As the employer is in a position of authority, the employee is obliged to be subordinate to the employer and to show him due respect. He commits a breach if he does not display the required respect. Rather, he must obey the lawful order given by the employer and he must also be respectful to the employer and their business associates and customers. In *Miles* v *Jagger and Company* (1904) the use of rude language to a superior by an employee was cited as an example of insubordination that warrants dismissal. In *Matereke* v *CT Bowring and Associates* (1987), it was held that for wilful disobedience of a lawful order given by the employer to justify summary dismissal of an employee in terms of the Act, it must be such as to be likely to undermine the relationship between the employer and employee, going to the root of the contract of service.

The duty of good faith or of maintaining *bona fides* means that while an employee is in service, he obtains certain information regarding his employer's business. He is obliged to act in good faith and not to do anything which may harm the relationship of trust. He has a duty to work in and advance the interests of the employer and not against their interests. Furthermore, the employee must at all times act in accordance with acceptable practice and the policy of his employer and therefore must not commit any misconduct, for example, assault, incompetence, drunkenness, etc. In *May* v *Raw and Co* (1881) the court held that the giving of trade secrets of his employer by the employee to anyone in competition with the employer is viewed in a serious light and justifies summary dismissal.

The employee has another duty to exercise reasonable care when using the property of the employer. Negligent behaviour by the employee causing damage to the property of the employer constitutes breach.

On the whole, it is important to always bear in mind that once a contract of employment comes into existence, either party to the contract has his obligations to perform and uphold. The employer has his own, and the employee also has his own, obligations to take care of. Failure by the employee to uphold any of the vital duties he shoulders in the contract usually leads to the termination of the contract through dismissal by an aggrieved employer. The sanctity of contract (of employment) is upheld if parties diligently and efficiently perform and take care of their responsibilities under the contract.

6 **(a)** The objects clause is one of the most important organs of the memorandum of association. It defines the parameters within which the company may engage in business and anyone dealing with the company can verify and ascertain the legality or otherwise of a particular contract by looking at the company's object clause. Prior to 1993 the *ultra vires* doctrine in relation to the contents of the memorandum of association was strictly applied by our courts. A contract that was outside the scope of the memorandum of association was regarded as null and void and therefore unenforceable. Suppliers to such a contract could breach the contract with impunity, in as much as the company itself could refuse to perform a contractual obligation that was in violation of its objects clause.

Basically the purpose of the *ultra vires* doctrine was two fold, namely:

(1) to protect investors so that they might know the objects for which their money was to be employed;

(2) to protect creditors of the company by insuring that its funds to which alone they could look for payment in the case of a limited liability company would not be dissipated in unauthorised ventures. *Ashbury Railway Carriage and Iron Company* v *Riche* (1875).

The memorandum gave the company the power to make and sell railway carriages. The directors entered into a contract to purchase a concession for constructing a railway line in Belgium. The question was whether this contract was valid or not, whether it could be ratified by the shareholders. The court emphatically ruled that the new activity was *ultra vires* the objects clause and therefore the contract was illegal.

Presently s.10 Companies Act, which was introduced as an amendment in 1993, introduces a number of far reaching and fundamental changes. The major change is to severely restrict the operation and effect of the *ultra vires* doctrine. A contract cannot be invalidated or avoidable on the basis that it exceeds the objects of the company. The company and the other party cannot rely on the *ultra vires* doctrine in order to escape liability for contracts earnestly entered into. However, the *ultra vires* doctrine has not been discarded by s.10 since it permits the following exceptions, namely:

(a) any member or debenture holder may, prior to the event, apply to court for and may obtain an interdict restraining the company from making or entering into any transaction which exceeds its objects;

(b) in the event that a specific transaction exceeds the objects clause and the company suffers losses as a result of that transaction, any member or debenture holder may claim, on behalf of the company, compensation for such loss from any officer of the company who took part in the transaction concerned.

The net effect of these two exceptions is that the *ultra vires* doctrine, in relation to the objects clause, has not been completely abolished. It is still applicable in a watered down form and through the 'back door'.

(b) In terms of s.20 Companies Act (Chapter 24:03), a company may, by special resolution, alter its articles and any alteration or addition so made in the articles shall be as valid as if originally contained therein and be subject in like manner to alteration by special resolution.

The articles of association of a company can be altered in a variety of ways:

(i) by deleting an article
(ii) by deleting and replacing an article
(iii) by inserting a new article.

It should be noted that the alterations to be effected must be consistent with the company's memorandum. If there is a conflict between any part of the altered articles and a provision in the memorandum, the articles are to that extent void. See *Ashbury* v *Watson* (1985).

It was once believed that articles could be altered only if they relate to the company's management and that fundamental provisions, which formed part of the company's constitution, such as the right of its shareholders, were unalterable. See *Atutton* v *Scarborough Cliff Hotel Co B* (1865). The division of articles into fundamental and alterable has long been held to be baseless. See *Andrews* v *Gas Meter Co* (1887). In terms of the Companies Act there is no such distinction. As a result, companies have been held entitled to alter their articles to facilitate the issue of preference shares having priority for both dividend and repayment of capital in a winding up over existing shares, to impose a lien or equitable charge in favour of the company on its existing partly-paid shares for debts owed to it by its shareholders.

A company can alter its articles in a way as to alter the voting and other rights given by the articles to a particular class of shareholders. This is subject to the provision of s.91 Companies Act, requiring the consent of the shareholders concerned.

In the case of *Allen* v *Gold Leaf of West Africa Ltd* (1900), Lindley MR said that the statutory power given to shareholders to amend their company's articles must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole. In the case of *Shattleworth* v *Cox Bros Ltd* (1927), a company altered its articles to provide that any director ceases to hold office if requested to resign by all other directors. The original articles did not enable a director to be dismissed for misconduct and the admitted purpose of the alteration was to facilitate the dismissal of the plaintiff, who was suspected of misconduct by his fellow directors. The court upheld the alteration of the articles of association. The alteration of a company's articles of association can only be effected once a special resolution to that effect has been passed. The special resolution passed for this purpose must be lodged with the Registrar of Companies within one month after being passed. The requirement for a special resolution is meant to ensure a high threshold of consensus within the company over the proposed amendments. Section 133 Companies Act (Chapter 24:03) defines a special resolution as one which has been passed by a majority of not less than three quarters of such members entitled to vote as are present in person or by proxy at a general meeting of which not less than 21 days' notice has been given. The notice must specify the intention to propose the resolution as a special resolution and the terms of the resolution at which members holding in the aggregate not less than one fourth of the total votes of the company are present in person or by proxy.

7 (a) Shares and debentures differ from one another in the following respects:

(i) shareholders are members of the company while debenture holders are creditors;
(ii) the return to shareholders consists of dividends payable out of profits (only if there are any profits), the return to a debenture holder is interest which is payable whether or not profits are made;
(iii) dividends, where these are declared, are debited to the appropriation account while debenture interest is debited to the profit and loss account and is an allowable deduction for taxation purposes;
(iv) except in very limited circumstances, share capital may not be repaid; debentures, however, usually provide for their repayments on a fixed date or over a specified period of time;
(v) although shares and stock must always be fully paid, debentures and debenture stock may, and frequently are, issued as partly paid, the balance being due at certain stated intervals;
(vi) while no trustee is appointed on behalf of shareholders, since directors fulfil this function, it is the usual practice for one or more trustees for debenture holders to be appointed for purposes of looking after their specific interests.

Debentures may be secured by a mortgage over property of the company, in which case they may be called 'mortgage or secured' debentures, on the other hand there may be no charge over the company's assets, in which case they are described as 'naked' or 'unsecured' debentures.

(b) The issue of shares at a premium is governed by s.74 Companies Act (Chapter 24:03).

It reads as follows:

(1) If a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account called the 'share premium account', and provisions of this Act relating to the reduction of a company's share capital shall apply as if the share premium account were part of its paid up share capital.

It is quite clear from the above that a company may sell its shares at a premium either for cash or otherwise. For example, a company may purchase a piece of immovable property which is worth $250,000 and in return the company then issues shares worth $200,000 to the seller of the immovable property as consideration for the property. In that event, the company effectively would have sold shares at 'a profit' and a sum in the amount of $50,000 would have to be appropriated to the share premium account.

The company is not at liberty to use the share premium account anyhow. It (the company) may apply its share premium account:

(a) in paying up unissued shares to be allotted to its members, directors or employees or to trustees for such persons as fully paid bonus shares or

(b) in writing off

  (i) the company's preliminary expenses
  (ii) ……..

(c) in providing for the premium payable, if any, on redemption of any redeemable preference shares or of any debentures of the company.

From the foregoing it is quite clear that the use of the share premium account can only be done in terms of what s.74 prescribes.

8 Agency involves a contract whereby one person (the agent) is authorised and usually required by another (the principal) to contract or to negotiate a contract on the latter's behalf with a third person.

The essential characteristics inherent to the contract of agency are the following:

(i) one person acts on behalf of another
(ii) this act on behalf of the other is a juristic act
(iii) the act is authorised
(iv) the action results in a legal tie between the two parties, one of which was not involved in the original action.

The major duties of an agent are to:

(i) perform his mandate according to the instructions of the principal
(ii) act honestly and in good faith
(iii) display care, skills and diligence and
(iv) account to his principal.

Agency being a form of service, it is clear that agents are bound to do what they have been instructed to do, as one of the primary obligations of an agent is to act in terms of the mandate given by the principal. An agent who does not do what he has undertaken to do is not entitled to claim remuneration.
National Screenprint (Pvt) Ltd v *Campbell* (1979) and *Esse Financial Services* v *Cramer* (1973).

In a well-known Zimbabwean case, *Umtali Farmers' Co-op* v *Sunnyside Coffee Estates* (1971), the court reiterated the point that when performing the principal's mandate, the agent is enjoined to act within the scope of the instructions. The principal has the right to sue the agent for breach of contract if the agent fails to perform his mandate.

When performing his mandate an agent must exercise care and diligence. As a result of the nature of representation, it is quite clear that it is an agent's duty to perform his mandate fully. Should he fail to do so he forfeits his commission and becomes liable in delict, *Le Clus (Pvt) Ltd* v *Kearney* (1946).

Thus in the case of *S* v *Heller* (1971), the court made the interesting observation that 'the principal bargains … for the exercise of disinterested skill, diligence and zeal of the agent …'

Concerning the standard of care required, the basic rule is stated by Milne J in *Blooms Woollens (Pvt) Ltd* v *Taylor* (1961).

In the course of time, the law has implied into every contract of agency an undertaking by the agent that he will act with the care and diligence of the ordinary prudent man when he engages upon his principal's business.

In conclusion it is clear that Kudzi lacks the ordinary care, skill and diligence expected of an agent. He has also failed to operate strictly within the parameters of the principal's (Ngoni) mandate. Not only has he exceeded the maximum amount of $50,000 which Ngoni was prepared to pay, by paying $60,000 he has disregarded the principal's instructions, by purchasing the stand in Marlborough instead of the more prestigious area of Borrowdale Brooke.

Ngoni can repudiate the agreement of sale, refuse to pay the agent's commission and also sue Kudzi for damages arising out of his acts of malfeasance.

9 The situation involving the three small scale farmers pertains to a fundamental issue in our law, namely the various types of business associations an aspiring businessman can adopt. The farmers would like to convert their present partnership status to an incorporated legal body, which they can use as a vehicle to carry out professionally the growing and marketing of horticultural produce. The alternative available to the three farmers can be narrowed down to three options and these are:

(i) a co-operative society
(ii) a Private Business Corporation
(iii) a Private Limited Liability Company.

The minimum number of members who can register a co-operative society in terms of the law is ten persons and since the farmers are only three this option is unavailable to them.
(Section 13 Co-operative Societies Act, Chapter 24:05)

Another possibility would be for the farmers to register a Private Business Corporation (PBC), in terms of the Private Business Corporation Act (1993). This is a corporation for businesses enterprises which can be formed by one or more persons so long as the membership does not exceed 20 persons. Some of the salient features which the three farmers should know are the following:

1. A PBC is not allowed to issue shares and instead each member is to hold an interest in the corporation which will be recorded as a percentage in the incorporation statement. In the event of the winding up of the corporation a member will be entitled to a share in the assets of the corporation in proportion to his percentage.
2. There is no need to appoint directors or even to hold formal meetings except for certain purposes, for example, winding up of the corporation.
3. Each member is an agent of the corporation.
4. In limited cases there may be personal liability of the members, for example, where there has been a reckless dealing or disposal of assets to members when the corporation is unable to meet its debts, the court will declare any member who knowingly took part in such activity to be personally liable for the debts.

It is interesting to note that with a PBC (unlike a Private Limited Liability Company) membership is not open to certain categories of people in terms of s.23(3) of the Act. These restrictions might act as a disincentive to some people to join a PBC.

A Private Limited Liability company is arguably the most suitable business association which best meets their needs. The major advantages of forming an incorporated body compared to a partnership are as follows:

1. **Legal Personality**

   Once a company has been registered it acquires legal separate personality which is different from the members of the company.
   Salomon v *Salomon and Co* (1987)
   Dadoo Ltd v *Krugersdorp Municipal Council* (1920)

   Section 9 Companies Act (Chapter 24:03) reads as follows:

   'A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers'

   On the other hand, a partnership is not a distinct 'persona'. It is made up of the several persons who comprise it.
   Shingadia Brothers v *Shingadia* (1926).

2. **Limited Liability**

   The advantage of limited liability is the greatest benefit of incorporation. It means that the liability of the members is limited to the unpaid balance due on their shares. It is a time-honoured principle that a company is a separate legal entity from its members, the debts and obligations incurred in the course of the company's business are those of the company.

   With a partnership, the liability of each partner for the debts of the partnership is unlimited with the partners being jointly and severally liable for the partnership's debts.

3. **Transferability of Interest**

   Shares are freely transferable unless the articles of association make special provision to the contrary (this is invariably the case with private companies). With a partnership, one partner cannot transfer his share without the consent of the others.

4. **Assets**

   One of the most important advantages of corporate personality is that it enables the company to own, hold or occupy, acquire or dispose of property in one right and name. The company's property is separate from that of its members. However, with a partnership the property is jointly owned by the members of the partnership and in the event of bankruptcy the claims of the creditors will be made against the members themselves.

5. **Perpetual Succession**

   A registered company enjoys perpetual succession, whereas a partnership does not. The death or insolvency of a partner automatically dissolves the partnership, although the remaining partners may be at liberty to reconstitute themselves into a new partnership.

6. **Borrowing**

   Financial institutions find it much easier to lend money to an incorporated association (by creating a floating charge) compared to lending money to a group of individuals.

The major disadvantages associated with incorporation is that of publicity and scrutiny. The Companies Act (Chapter 24:03) imposes a number of obligations (for the benefit of shareholders) which require disclosure (e.g. accounts annual returns etc).

All things considered, the balance of convenience lies with the three small-scale farmers incorporating a Private Limited Liability Company in favour of other forms of business association that have already been canvassed.

10 In terms or corporate governance and ethical issues, the three directors have committed a serious offence, which is called insider dealing. Simply defined, insider dealing is the misuse or abuse of sensitive, confidential corporate or business information for personal gain by someone who by virtue of his close association or relationship to the company has access to critical information, which is not yet in the public domain. Due to its juristic personality, a company necessarily operates through agents like directors and company employees (*Salomon* v *Salomon and Company* (1897)).

Where an agent of a company has privileged access to information which they illicitly use for personal gain, insider trading occurs. Such information is primarily used for market manipulation. The use by the three directors of confidential information which ultimately had a bearing on the value of the company's shares is a classic case of misfeasance and insider dealing.

In terms of the common law, directors owe a number of duties including honesty, utmost good faith, skill, care and uprightness in dealing with matters relating to the company.

Some of the more familiar cases involving insider dealing in Zimbabwe in the recent past include the *Cottco* and *Southampton Life Assurance* cases. In the latter case a fund manager was charged with having abused confidential company information to influence and manipulate the stock market to the detriment of the company and its shareholders. In *Industrial Development Consultants Ltd* v *Cooley* (1971) the defendant, who was a managing director for the plaintiff company, attempted to withhold and use information he had gathered before his resignation from the board of directors for personal gain. The court held that he was under a fiduciary duty to pass on that information to the company and that he could not use it for his personal gain as it rightfully belonged to the company and not anyone else.

The Zimbabwe Stock Exchange Act (Chapter 24:18) has a number of provisions, which attempt to curb the incidence of insider dealing. Section 73(d) specifically provides that no person shall directly or indirectly use or take part in any manipulation or deceptive method of dealing in listed securities. In terms of both common law and statute law there is a wide range of laws that are meant to combat the spectre of insider dealing. The activities of the three directors are a blatant transgression of the law and are tantamount to fraudulent and unethical behaviour in business.

By buying an additional one million shares before it became public knowledge that the company's prospecting teams and geologists had discovered large deposits of diamond ore in Marange communal lands, the directors are illicitly and unethically using their strategic and privileged position to enrich themselves. In terms of s.318 Companies Act (Chapter 24:03), the directors of Hombarume Mines Ltd are guilty of misfeasance and may be liable to both criminal and civil action. In terms of the common law, the directors owe the company a duty to observe utmost good faith and they must refrain from illegally enriching themselves. That being the case, they would be liable to surrender the huge profits that they acquired through the abuse of their positions as company directors. In conclusion, it can be said that this is a typical case of insider dealing and fraudulent behaviour, which attracts both statutory and common law penalties, be it civil or criminal law.

1 **(a)** 3–5 marks A good answer that clearly spells out the various rules of interpretation of a statute.
1–2 marks A lukewarm answer.

(b) 3–5 marks A good answer that clearly spells out the various presumptions that apply to statutory interpretation.
1–2 marks A lukewarm answer.

2 7–10 marks Top range marks will be given to candidates whose answers are comprehensive. Citation of relevant case law would be helpful.
4–6 marks An average answer.
1–3 marks A poor answer which clearly shows lack of knowledge of the subject.

3 **(a)** 3–5 marks Answers in this bracket would show a good grasp of the concept of negligence in delict.
1–2 marks An average answer.

(b) 3–5 marks Marks in this bracket show a good understanding of the concept of *volenti non fit injuria*.
1–2 marks A poor answer.

4 7–10 marks A good answer exhibiting thorough knowledge of the subject.
4–6 marks An average answer with deficiencies here and there.
1–3 marks A rather uninspiring answer.

5 7–10 marks A comprehensive survey of the law relative to the duties of the employee under an employment contract.
4–6 marks An average answer.
1–3 marks A poor answer with a lot of inadequacies.

6 **(a)** 3–5 marks A good answer which adequately explains the concept of *ultra vires* in relation to the objects clause.
1–2 marks A light answer.

(b) 3–5 marks A good answer which adequately explains how articles of association can be altered.
1–2 marks An inadequate answer.

7 **(a)** 3–5 marks A good answer that gives an adequate coverage of the distinction between shares and debentures.
1–2 marks A rather thin answer.

(b) 3–5 marks A good answer which comprehensively deals with the issue pertaining to the issuing of shares at a premium.
1–2 marks A poor answer.

8 7–10 marks A good answer which adequately explains the principles of agency that are at stake. Citation of relevant case law would be helpful.
4–6 marks An average answer with a number of omissions.
1–3 marks An inadequate answer.

9 7–10 marks A comprehensive answer in which the various types of business associations are discussed.
4–6 marks An average answer.
1–3 marks An inadequate answer.

10	7–10 marks	A good answer which clearly identifies the issue of insider dealing and the legal issues around that particular theme.
	4–6 marks	An average answer with inaccuracies here and there.
	1–3 marks	A rather poor answer.