Answers

1 (a) Customary law can be regarded as a set of norms and rules which the actors in a social situation derive from practice and which they invest with binding authority. Section 89 of Zimbabwe's Constitution sanctions the existence of a dual legal system, being comprised of general law, common law and statutes and African customary law.

Whether or not customary law applies in a particular case is governed by the provisions of legislation. Customary law applies under two circumstances: namely where the provisions of a relevant statute say so and, in the absence of a relevant statute, by applying the 'choice of law formula' (s.3) which includes considerations like the lifestyle of the parties.

Customary law applies in civil matters only. It does not apply in criminal matters. In *S* v *Matyenyika* & *Anor* (1996) the High Court dealt with a case involving the crime of incest. It set aside the conviction of the two cousins who, according to customary law, were prohibited from having sexual relations. There was no similar prohibition under the general law. The magistrates' court had convicted them on the basis of the prohibitions of customary law. The High Court set aside the conviction on the basis that customary law did not apply in criminal matters.

Customary law also applies where the parties agree that it should. The agreement must be genuine and must be either express or implied, that is, with regard to the nature of the case and the surrounding circumstances, it is reasonable to assume that the parties are in agreement. Where there is no agreement, the courts may impose the application of customary law, but only on the basis that it is 'just and proper'. In deciding this, the law requires the court to consider the 'surrounding circumstances'.

These include the mode of life of the parties, the subject matter of the case, the parties' knowledge of customary law and/or general law and the closeness of the case to general law or customary law. In *Lopez* v *Nxumalo* (1985) the court found it 'just and proper' to apply customary law. Here the appellant was a white Portuguese man and the respondent was a black Zimbabwean woman. The appellant had allegedly seduced the respondent's daughter and the respondent wished to sue him for seduction damages under customary law. The appellant contended that he knew no African customary law. He thus sought to have the matter dealt with under general law and not customary law, arguing that the community court had no jurisdiction to hear the matter. The community court rejected his arguments and held that customary law applied and therefore that it had jurisdiction. The appellant then unsuccessfully appealed to the Supreme Court. The Supreme Court noted that the fact that the appellant had no knowledge of African custom and customary law was merely one of the factors taken into account. That factor had been weighed against the fact that the respondent did not understand general law and that she and her daughter had lived a life guided by customary law.

The choice of law formula applies 'unless the justice of the case otherwise requires', meaning where the choice of law yields the application of customary law, but it has been established that the content of customary law would attain an unjust resolution of the matter, general law not customary law must be applied, as was stated in *Matibiri* v *Kumire* (2000). In *Chapeyama* v *Matende* & *Anor* (2000) the court in distributing matrimonial property in a divorce situation refused to apply customary law. Injustice would have been occasioned to the wife as under customary law she was entitled to a very limited share even if she had contributed to the acquisition of other property. The court then applied general law in order to do justice in distributing the property.

There has been a problematic interplay between customary law and general law in Zimbabwe. In *Katekwe* v *Muchabaiwa* (1984), the Supreme Court held that the father of an African female whose daughter had reached the age of 18 years no longer had a right to sue for seduction damages under customary law in respect of that daughter. On the basis that statute law had changed the status of women even under customary law, it was argued before, and accepted by, the court that the reason why women could not sue on their own under customary law was because they were regarded as perpetual minors. Since 1984 the statute law gave them majority status on reaching 18 years and therefore bestowed on them rights they could not enjoy under customary law.

In present day Zimbabwe, the first enactment to refer to the application of customary law was the Royal Charter of 1890 which was enacted at the time of the conquest. This enactment, after empowering the British South Africa Company to govern Southern Rhodesia, imposed on the company the duty of appointing judicial officers and establishing such courts as were necessary for the administration of justice.

Throughout Zimbabwe's 90 years of colonial history, customary law was largely applicable in civil cases involving Africans unless the justice of the case otherwise required. It was particularly applicable to any matter relating to seduction, adultery, lobola (bride price), custody of children and devolution otherwise than by will of movable property, rights in land not held under individual registered title and a marriage contracted under customary law. In all these cases, in order to be applicable customary law had to pass the test of not being repugnant to natural justice or morality or to the provisions of any statute law.

However, the court was not obliged to apply customary law if such application was contrary to the demands of the justice of the case. Colonial policy towards customary law clearly perceived this law as a secondary system of law for whose administration it was necessary to establish a separate system of courts: the chief courts and the district commissioner's courts. The general law on the other hand was administered by the magistrates' courts and the High Court. This dual system of courts was accompanied by a dual system norms and laws in civil matters, particularly in the field of family law.

Thus, in general terms, civil disputes between Africans were to be governed by customary law unless the justice of the case required otherwise or unless the applicable customary law was contrary to natural justice, good conscience or morality or unless an applicable statute was in existence. On the other hand, disputes between non-Africans were resolved by the application of Roman–Dutch common law and/or statute law.

The dual system of laws and norms prevailing in the country during the colonial period was preserved by Zimbabwe's Independence Constitution (s.89).

Under a system, the primary courts (village and community courts) have jurisdiction only to apply customary law.

Finally in our jurisdiction, the case of *Van Breda and Others* v *Jacobs and Others* (1921) lays down the requirements in order for custom to be recognised as a binding rule of law:

(1) The custom must be reasonable
(2) The custom must have existed for a long time
(3) The custom must be generally recognised and observed by the community
(4) The content of the customary rule must not contradict any existing statute law.

(b) Common law is that portion of the law which is not derived from legislation and emanates from a collection of principles made by judges in the course of resolving issues brought before the courts. Under Zimbabwean law, the common law is made up of two components of non-statutory law, namely, a collection of rules and principles made by judges in previous cases and rules and principles contained in that portion of the body of law called 'Roman–Dutch law' which is not reflected in any previous court decision.

Under English law, it is accurate to refer to the common law as 'judge-made law'. Under Zimbabwean law, only a portion of the common law is necessarily judge-made.

Zimbabwe is a former colony of England which 'exported' its legal system when it colonised this country in 1890. As a rule, the exported legal system required the colony to adopt some specified foreign laws as at the time of the reception. The common law of the colony was therefore made up of two components: the principles of law contained in the foreign law as at the time of imposition, and law derived from decided cases. Section 89 of the current Constitution of Zimbabwe provides that the law applicable in this country shall be the law in force at the Cape of Good Hope as at 10 June 1891 and this law shall co-exist with statute law enacted by Parliament of this country.

This law applicable at the Cape was Roman–Dutch law with substantial English law influence. This is why s.89 of the Constitution of Zimbabwe refers to 'the law in force in the colony of Cape of Good Hope' and not 'the Roman–Dutch law in force'. Nevertheless, it is accurate to say that the basis of our common law is Roman–Dutch law as long as it is borne in mind that some considerable aspects of our common law are derived from English law.

At the Cape of Good Hope on 10 June 1891, the common law applicable was derived from judicial decisions up to that date and the writings of the old Dutch jurists. It is this body of law we are required to to apply by s.89 of the Constitution. That body of law is binding on the courts as part of our common law.

Common law develops through previous judicial decisions but it is not everything in a previous case which is binding on a future court. For a proposition to be binding, it should be a proposition of law and not a proposition of fact. The proposition must be part of the principle of law upon which the decision is based and there must be no material differences between the previous case and the case in question. In Zimbabwe, the Supreme Court is the highest court in the land and its precedents bind all the other courts. Since 1981, the Supreme Court is no longer bound by its own previous decisions and will depart from them when it appears right to do so. In *United Bottlers (Pvt) Ltd* v *Murwisi* (1995), the Supreme Court held that at law, an employer has two choices: either to dismiss an employee or to reinstate him. There was no option to pay damages in lieu of reinstatement. However, in *Hama* v *NRZ* (1996), the Supreme Court departed from its decision in *Murwisi* and held that there was an additional option to the employer to pay damages as an alternative to reinstatement. As a matter of practice, the Supreme Court will depart from its own decisions only in compelling circumstances.

2 **(a)** Where there is a material breach of contract, the injured party may claim from the defaulter such damages as they can prove that they have suffered as a result of the breach of the term(s). Damages are assessed as at the time of the breach. In *Victoria Falls and Transvaal Power Co Ltd* v *Consolidated Langlaagte Mines Ltd* (1915), it was held that the sufferer by such a breach is entitled to be put in the position they would have been in had the contract been properly performed, so far as that can be done by the payment of money and without undue hardship to the defaulting party.

In arriving at the appropriate sum of money as damages to the injured party, the court is guided by at least four considerations. The loss must be monetary. The loss for which the injured party is entitled to compensation is pecuniary loss. No damages are awarded in contract for sentimental loss or injured feelings. In *Jockie* v *Meyer* (1945), X, a Chinese and second officer on a British ship, reserved accommodation at Y's hotel. X was given a key to room 309 and took occupation. Y's agent a few minutes later sent for X, told X to return the key. X did so and was then told that the hotel was full and that there was no room for him. The real reason for the breach of contract was X's race. X sued for damages under three heads, the necessity in finding other accommodation, inconvenience caused by the breach and humiliation and loss of prestige. The court held that X was not entitled to damages in contract under the third head, although such a claim might lie in delict. The injured party is not automatically entitled to damages if breach can be proved. The plaintiff must also prove their loss.

The loss must result from the breach because compensation will be awarded only for loss suffered as a consequence of the breach. Whether the loss was actually caused by the breach is a question of fact to be decided on the evidence. In *Vision Projects (Pty) Ltd* v *Cooper Conroy Bell & Richards Inc* (1998), certain properties had been sold from A to T. Before transfer was taken of the properties, the trustee for the company to be formed entered into an agreement to purchase the business of T and its assets and liabilities. The company, the appellant, was subsequently formed. The appellant then insisted on transfer of the properties from A to itself. The respondent, an incorporated practice of attorneys, notaries and conveyancers who acted

for A, declined to transfer the properties directly to the appellant and one, C, who had purchased it from T. The properties were then transferred from A to T, but the transfer of the properties to the appellant was delayed and T was liquidated before it could occur. Although the appellant claimed transfer of the properties from the liquidator, he opposed the claim and it was referred for arbitration. The arbitrator dismissed the appellant's claim. It was held that it had not been shown that the breach on the part of the respondent had been a necessary link of the appellant's loss. The cause of the loss had been the arbitrator's incorrect decision, not the respondent's breach.

The loss must have arisen naturally or be within the contemplation of the parties. The loss for which damages are claimed must be sufficiently closely connected to the breach. There must be a nexus between the loss and the breach. The loss must not be too remote. The rule is that damages are awarded only for losses which arise naturally, in the ordinary course of things, from the breach and losses which may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract as a probable consequence of the breach (*Lavery & Co Ltd* v *Jungheinrich* (1931)).

The injured party cannot allow the damages to increase day by day and do nothing about it. They must do all that is reasonably necessary to minimise their loss. The extent of liability depends on the facts of each particular case, but the plaintiff is not required to take any steps which a reasonable and prudent person could not ordinarily take in the course of their business. See *British Westinghouse Electric & Manufacturing Co Ltd* v *Underground Electric Railways Co Of London Ltd* (1912). In *Bulmer* v *Woollens Ltd (in liquidation)* (1926), B contracted with W company to be its managing director for five years at a salary of £2 000 a year. When there was still more than two years to go, the company was placed into voluntary liquidation and B's employment was terminated. It was contended that B could easily have found employment as a builder's foreman and so have mitigated the loss that was suffered through the breach. The court held that the position of builder's foreman was of quite a different and subordinate character, and B was not bound to take such a position. So B was entitled to the full amount of his loss. In *Pilkington* v *Wood* (1953) it was said that the claimant is not bound to take extraordinary steps to mitigate the loss. The plaintiff does not have to plead and prove that they have done what is reasonable to mitigate their damages, because the onus is on the defendant to prove that this has not happened.

(b) Specific performance is a remedy aimed at the fulfilment of the contract because when it is claimed by the innocent party, they are trying to achieve the result envisaged at the conclusion of the contract by the parties. In general, the injured party has a right to claim specific performance (an order compelling a party to a contract who is in breach, to carry out their own obligation in the manner required by the terms of the contract) if ready to carry out their own obligations under it.

However, the courts will exercise a discretion in determining whether or not decrees of specific performance should be made. In *Farmers' Co-op Society* v *Berry* (1921), B, who was a member of F and as such obliged to send in his whole crop to F, notified it that he had a crop of 1 200 bags of mealies but later refused to deliver any to F; F then sued B asking for specific performance of a contract to deliver 1 200 bags and in the alternative, damages and addressing the question of specific performance the court ruled that:

'*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible a performance of his undertaking in terms of the contract. It is true that the courts will exercise a discretion in determining whether or not decrees of specific performance should be made.'

The discretion which the court enjoys in awarding (or declining to award) must be exercised judicially and is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own specific and peculiar circumstances. The injured party usually adds to their prayer for specific performance an alternative prayer for damages. As was noted by the court in *Woods* v *Walters* (1921):

'It is common practice to add to a prayer for specific performance an alternative prayer for damages ...'

As examples of the grounds on which the courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned:

(i) where damages would adequately compensate the injured party, for example, if the subject matter of the contract can easily be bought on the open market as is the case with items like cars, bicycles, shares, etc.

(ii) where it is impossible to effect the specific performance.

In *Shakinovsky* v *Lawson and Smulowitz* (1904), the plaintiff purchaser sued for specific performance of a contract of sale of a shop and business with no alternative claim for damages. L could not give specific performance as he had subsequently sold the same business to Smulowitz who had no notice of the previous sale. The court said that it was not practicable to award specific performance and the purchaser had to contend with damages.

'Now a plaintiff has always the right to claim specific performance of a contract which the defendant has refused to carry out but it is in the discretion of the court either to grant such an order or not. It will certainly not decree specific performance where the subject matter of a contract has been disposed of to a *bona fide* purchaser or where it is impossible for specific performance to be effected, in such cases it will allow an alternative of damages.'

(iii) where the subject matter of the contract involves the rendering of services of a personal nature.

Since it is undesirable, and indeed in most cases impossible, to compel an unwilling party to maintain continuous personal relations with another, it is well established that a contract for personal services is not specifically enforceable at the suit of either party.

'The courts', said Jessel, MR, 'have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relationship of master and servant, or whether they are

agreements for the purpose of pleasure or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy.' (*Rigby* v *Cannol* (1880))

(iv) where the order would cause great hardship on the defaulting party or the public at large.

If the effect of a decree of specific performance is to cause undue and great hardship to the defendant and members of the public alike, the courts are unlikely to award it. In *Haynes* v *Kingwilliamstown Municipality* (1951), the defendant contracted to supply the plaintiff with 250 000 gallons of water per day for a number of years. After some time, the defendant was unable to honour the agreement because of a crippling drought. An action for specific performance by the plaintiff was dismissed by the court because full compliance with the agreement would have resulted in a positive danger to the health of the Municipality's citizens. In breach of contract cases, it is quite clear that the courts award specific performance on a discretionary basis rather than a matter of course.

Ultimately each case in which specific performance is sought will be determined on its own facts and this is a typical remedy which is found in equity.

3 For a contract of employment to be valid, there must be consensus between the parties. They must agree, either expressly, tacitly or impliedly, on the contractual consequences which they wish to invoke, meaning that consensus should be established with regard to the services which the employee will render under the authority of the employer as well as the remuneration which the latter will pay as counter performance to the employee. In *Church of the Province of Southern Africa (Diocese of Cape Town)* v *CCMA* (2001), it was held that the relationship between a church and a priest was not one of employment because the one party had been contracting under the mistaken belief that it was governed by ecclesiastical law and not general law.

Both the employer and employee must have the capacity to enter into the contract of employment. Certain persons have restricted capacity. These include minors, foreigners, insolvents and specified persons.

The contract must not be in conflict with any provisions of the common law or any other law or rules of fairness. In *Mutandiro* v *PTC* (2001), an agreement to ignore the labour laws of the country was held invalid, as was an agreement tainted by corruption in *Babbage & Galloway* v *Electroreps* (1995).

The contract must also be capable of physical performance, that is the employee must be able to render the agreed services to the employer.

The terms of the contract must be clear and not uncertain or vague on the essential features of the contract of employment. In *Angath* v *Muckundalal's Estate* (1954), it was held that absence of an agreement on the remuneration rendered such contract invalid, unless this could be reasonably inferred.

After the conclusion of a contract of employment, the employer's most important duty is to treat the employee fairly and to compensate them for their services. If the employer does not perform these and various other duties towards their employees, they are guilty of a breach of contract and in certain circumstances of an unfair labour practice. The employer's duty to pay the prescribed remuneration and benefits is captured in s.6(1) Labour Act which provides that, 'No employer shall pay an employee a wage which is lower than that of fair labour standards specified for such employee by law or agreement.' In *Tel One* v *Nyambirai & Ors* (2004), failure to pay contract workers the minimum wages prescribed in the Collective Bargaining Agreement was held to be an unfair labour practice. In *S* v *Lyons Brooke Bond* (1981) an employer was convicted for failure to pay a statutory minimum wage.

Employers have a duty to ensure that they provide safe and healthy working conditions under the common law and statutes. Section 6(1)(d) Labour Act provides that an employer has a duty not to require any employee to work under any conditions or situations which are below those prescribed by law or by conventional practice of the occupation for the protection of such employee's health or safety. An employer has a duty to ensure reasonable care for the safety of workers, including the provision of safe premises, machinery and systems of work, taking into account the actual working conditions of the worker, including the dulling of his senses through exhaustion. In *Mushaya* v *Glens Corporation* (1992), the court rejected the dismissal of a long-distance driver for causing an accident, which he had been compelled to drive when he was exhausted.

Section 4 Labour Act provides that the employer shall have a duty to respect the worker's entitlement to membership of trade unions and workers' committees. The employers must respect the worker's right to join and participate in trade unions and workers' committees. In *POSB* v *Chimanikire & Ors* (2005), the court reiterated that an employer has no *locus standi* to interfere with a contract entered into between a trade union and the employees for the protection of the latter's rights enshrined in the current constitution.

An employer is under an obligation to grant sick leave, 'to an employee who is prevented from attending his duties because he is ill and injured or undergoes medical treatment which was not occasioned by his failure to take reasonable precautions.' In addition, s.18(1) Labour Act provides that an employer is required to grant maternity leave for a period of 90 days on full pay to a female employee who has served for at least one year.

An employer also has a duty to comply with prescribed conditions of employment. The Labour Act provides that an employer has a fundamental duty 'to provide such conditions of employment as are prescribed by law or as may be specified by agreement made under this Act.' They cannot unilaterally vary the terms of the contract. In *Muzondo* v *University of Zimbabwe* (1981), the employer was held liable to pay special damages including loss of income from potential published work to a lecturer whose contract had been terminated prematurely.

An employee is obliged to commence their duties on the day agreed upon by the parties. They must render their services as determined contractually and carry out the instructions of their employer faithfully and carefully. They must also make their services

personally available for the duration of the contract. In *Girjack Services (Pvt) Ltd* v *Mudzingwa* (1999), the court upheld the dismissal of an employee who had absented himself from work for more than five days as this was in conflict with the duty to render services to the employer. The law also stipulates that an employee may be dismissed where there is 'absence from work for a period of five or more working days without leave for no reasonable cause.' In *City of Harare* v *Zimucha* (1995) an employee had been absent from work due to sickness. He had not sought sick leave and the court held that he had been properly dismissed.

At common law, an employee has the duty to work and advance the interests of the employer and not against its interests. The employee is to refrain from misconduct or anything which makes the continuation of the employment relationship intolerable or unworkable or which undermines trust and confidence in employer and employee. In *ZESA* v *Dera* (1998), an employee was held to have been properly dismissed for theft as the conduct was inconsistent with the duty of good faith. In *Standard Chartered Bank* v *Mapuka* (2004), the court upheld the dismissal of a senior manager who altered a cheque from the employer to be paid to suppliers for building materials to instead be paid into his wife's account. In *Bonjesi* v *Ministry of Education and Culture* (2005), the court upheld the dismissal of a teacher who was dismissed for improper association with a student, whom he also had impregnated.

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 *Total Zimbabwe (Pvt) Ltd* v *Moyana* (2004), it was held that a worker is presumed to have given an implied warranty that he has the necessary qualifications or experience required in a job. 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 *Quest Motor Corporation (Pvt) Ltd* v *Nyamakura* (2000), the court stated that it is an implied term of a contract of employment that an employee will exercise skill and care in the performance of his duties. This must be combined with the employer's duty to provide all necessary assistance.

Arising from the fact that the employer is in a position of authority in relation to his employee comes the duty of subordination of the employee towards his employer. This duty means that the employee must show respect at all times and be civil and courteous towards his employer. If insubordination is sustained and deliberate and indicates an intention to defy or undermine the authority of the employer, the dismissal of the employee will be justified. In *Matereke* v *CT Bowring* & *Associates (Pvt) Ltd* (1987), it was held that disobedience means a deliberate refusal to obey an instruction or intentional defiance of an order given by the employer. In this case, the Chairman of a workers' committee felt the employer was refusing to promote him into a vacant post, previously occupied by another person, proceeded to occupy the office and refused to vacate despite instructions to do so. He was held properly dismissed for insubordination. In *Samkange* v *Wycombe Foundation* (2001), a suspended employee had been allowed into his old office to get some personal items but once in, refused to get out or hand over keys to the company car he was using, alleging his suspension to be unlawful. He was held properly dismissed for wilful disobedience.

In summary, it can be observed that a contract of employment spans an extensive web of duties and rights enjoyed by either party (employer and employee), both in terms of the common law and the Labour Act.

4 **(a)** Each partner becomes the agent of each of the others and of the partnership for the purposes of carrying on the partnership business in the usual way. In *re Paarl Bank (in liquidation)* (1891), it was held that each partner has authority to do all acts incidental to the proper conduct of the business and such acts bind his partners and the firm.

The partners have implied authority and, consequently, a contract made by a partner is binding on the firm if they purport to act for the firm, that is when they make it in the name of the firm, and if the subject-matter of the contract falls within the scope and purpose of the business dealt in by the partnership. In *Julaka* v *Duguza Abantu Butchery* (1933), a lease described the lessee as A & B trading as DA Butchery and was signed by A in the name of the DA Butchery. It was held that the lessee was the partnership. The authority of a partner to make contracts of this description is said to be implied. In *Braker* & *Co* v *Deiner* (1934), it was held that a partner has implied authority to consent even to judgement being granted against the firm.

The implied power of a partner to make contracts or to perform other acts binding on the firm may be limited by express agreement among the partners, for example, it may be agreed that the management be divided among the partners, one of them to supervise the buying only of merchandise, the other selling only of it. In *Goodrickes* v *Hall and Anor* (1978), the court said, 'the implied power of a partner to make contracts or to perform other acts binding on the firm may be limited by express agreement among the partners … if a partner whose power is thus limited, exceeds his express authority, and makes a contract with a third person who is not aware of limitations, but the partner acted within his implied or ostensible authority, the firm cannot shelter itself behind these secret or private instructions but is bound by the contract.'

A partnership is not bound by the act of a partner which is beyond the powers or scope of the partnership. In *Stein* v *Garlick* & *Holdcroft* (1910) where a partner in a general dealer's business gave a guarantee in regard to the financial stability of a customer, a matter beyond the scope of his firm, it was held that the guarantee was not binding on the latter.

If a partner has exceeded their authority, the other partners may adopt or ratify the transaction, in which case they become bound by it, and the same result follows if they waive their rights by raising no objection after they have had notice of the transaction. In *Whiteside* & *Fianagan* v *Shakinowsky* & *Kaplan* (1924) where one of two partners signed a cheque in the name of the firm, without having authority to do so, and the other on being informed thereof failed to notify the payee of his partner's want of authority, he was held to have acquiesced in the transaction, and the partnership was held liable on the cheque.

In order to bind a firm, contracts made by one of the partners must, as already stated, be made in the name of the firm. Hence if third parties dealing with a partner with full knowledge that the partner is acting for the partnership give credit to that partner exclusively, they will not be entitled afterwards to hold the firm liable. In *Lamb Bros* v *Brenner* & *Co* (1886), X

and Y speculated on joint account in mohair. The mohair was shipped to England by X through T, who made advances thereon, being partly induced to do so by his knowledge that Y was interested. Y participated in these advances. Y was held liable to T. Whatever the authority of the partner who has contracted an obligation, it is necessary to render his co-partner or the partnership liable, that the obligation should have been contracted in the name or on behalf of the partnership.

In summary, this discussion represents an outline of the authority partners have over partnership activities.

(b) One of the implied consequences of partnerships is that the losses are borne or shared by all the partners; for it is essential in partnership that profits are to be shared and since profits are composed of returns less losses, it follows that losses must be taken into account. In *Muller & Anor* v *Pienaar* (1970), it was said that it is not necessary for an agreement to constitute a partnership that the parties to it should agree that losses must be shared. The parties may, however, expressly agree to share losses, and such a provision greatly strengthens the inference that a partnership is intended.

A partner is obliged to exercise due diligence in the conduct of their duties. The degree required is the ordinary standard observed by a prudent man of business and consequently a partner is responsible for gross and ordinary negligence only and not for slight negligence. If they hold themselves out as being skilled, they will be liable for loss caused by any want of such skill. An action for an account lies for breach of this duty of care. It is no defence that the defendant has ordinarily been diligent, and they will be liable not only for actual damages to partnership property, but also for loss of business or profits. See *Olifants Tin 'B' Syndicate* v *De Jager* (1912).

A partner is a debtor to the partnership for what they have agreed to contribute, and may be sued for this contribution if they fail to deliver it and since this would normally be a breach of a material term of the contract, an order dissolving the partnership could be claimed (See *Oosthuizen* v *Oosthuizen* (1956)). In the case of a monetary contribution, a partner who fails to contribute is liable for interest from the date when the money was payable, or where no date has been fixed, from the date of demand.

One of the most important of the implied powers of a partner is that of borrowing money on the credit of the firm. The fluid nature of modern commerce renders it absolutely necessary that such power should exist in the members of a trading partnership. One partner can bind the firm by a bill of exchange or promissory note upon which money may be obtained. At the same time, the implied power of borrowing money, like every other implied power of a partner, only exists where the business is of such a kind that it cannot be carried on in the usual way without such a power. In *Montaignac* v *Shitta* (1890), it was decided that if the general agent of a firm has an implied power to borrow money for the purpose of the firm, he has power to borrow money on unusual terms, if money is necessary and he cannot borrow it otherwise.

The firm is liable although the goods may have been supplied to only one of the partners, and no other person may have been known to the supplier as belonging to the firm, if the partner who ordered the goods acted on behalf of the firm. This was reiterated in *Ruppell* v *Roberts* (1834) and is in accordance with the principle that he who acts through another acts himself. One partner can bind the firm by assenting to a transfer of a debt due to it, as for example, to a transfer of the firm's account from their banker to his successor in business. In *Lacy* v *McNeile* (1824), the court held that where a creditor of the firm assigns the debt due to him, and one of the partners recognises the transfer and promises to pay the transferee, the firm is bound by this promise.

Every member of an ordinary trading partnership has implied power to bind the firm by drawing, accepting, or endorsing bills of exchange or by making and endorsing promissory notes in its name and for the purposes of the firm in the ordinary course of business, but not otherwise. In *Davison* v *Robertson* (1815), the court held that if two partners, unknown to each other, give two bills in the name of the firm in payment of the same demand, the firm will be liable on both bills, if held by *bona fide* holders for value without notice of the mistake.

5 (a) (i) A rights issue occurs where the company offers a new issue of shares to its existing shareholders in proportion to their current shareholding. Such issues are usually offered at a discount to the market price.

(ii) An issue of shares at a premium is an issue of shares at more than the par value. For example, a $1·00 share may subsequently be issued for $2·00. Section 74 Companies Act [Chapter 24:03] requires that when 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 has to be transferred to an account called the share premium account, which can only be resorted to for limited purposes.

(b) Companies are formed specifically to make a profit. It is for this reason that companies from time to time declare a profit and then go on to declare a dividend to the shareholders. The amount of money that the shareholder gets depends on the amount of shares the shareholder has. It should be noted that a dividend is declared under special circumstances.

Generally, unless the articles of association provide for the declaration of a dividend, the company is under no obligation to declare a dividend. In other words, it need not distribute all or available profits to the shareholders. However, most if not all articles of association have distinct provisions on the payment of a dividend. So, in effect, a dividend will be declared and issued out as per the articles of association.

It should be noted that a dividend will only be paid if the company has made a profit. If the company has not made any money, then no dividend is payable. Profit is therefore a condition precedent to a dividend. It is illegal for the company to pay out a dividend from its capital reserve because that will be a violation of the law relating to maintenance of share capital.

As has already been noted, a dividend is a share in the profits of a company. The manner in which profits are to be divided is determined by the articles of the company. The articles may provide for the declaration of dividends by the company in a general meeting with the right of directors to pay such interim dividends as are justified by the profits of the company, or they may authorise the directors to declare dividends without reference to a general meeting.

Usually the articles prescribe that no dividend may be paid otherwise than out of profits. It is now a settled proposition both in terms of the common law and statutory law that dividends may not be paid out of capital, even if the memorandum or articles purport to authorise payment because such payment would constitute an illegal or unauthorised reduction of capital. Article 116 of Table A of the Companies Act [Chapter 24:03] says:

'no dividend shall be paid otherwise than out of profits.'

Whilst the company in general meeting may declare dividends, no dividend shall exceed the amount recommended by the directors (Article 114, Table A). Thus, while the shareholders can vote to reduce the amount of the dividend, they cannot vote to increase it.

The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied and pending such application may, at their discretion, either be employed in the business of the company or be invested in such investments, other than shares of the company, as the directors may from time to time think fit.

In the case of *Buenos Aires Railway Company Ltd* v *Preston* (1947), after incurring heavy losses on its trading account for several years, a company made profits in one year sufficient to pay the full dividends on preference shares. The directors, however, considered that it would be unwise to pay such dividends and decided to transfer the profits to reserve. The court held that they had power to do so and that the preference shareholders were not entitled to claim dividends.

Whilst it is true that dividends are declared at the sole discretion of the directors and that shareholders cannot insist on the company declaring a dividend, once a dividend is declared, a company becomes indebted to its shareholders to the amounts of their dividends. However, such dividends are debts which bear no interest against the company. This is as a result of Article 122 of Table A, which states that no dividend shall bear interest against the company. Whilst the legal position is that dividends may only be paid out of profits, it is also clear that if the directors have, without negligence, formed the *bona fide* belief that the company has earned sufficient profits to pay a dividend when in fact it has not, no liability will attach to them. On the other hand, if they were negligent in declaring a dividend, they can be held liable.

As has already been noted, it is the duty of the company in general meeting to declare a dividend upon a recommendation of the directors. Article 114 reads:

'The company in general meeting may declare dividends but no dividend shall exceed the amount recommended by the directors.'

Finally directors may deduct from any dividend payable to any member all sums of money, if any, presently payable by him to the company on account of calls or otherwise in relation to the shares of the company (Article 119, Table A).

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 objects clause.

Basically, the purpose of the *ultra vires* doctrine is as follows:

(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 ensuring 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* (1975).

The memorandum gave the company 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 [Chapter 24:03], 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 altogether been discarded by s.10 since it permits the following exceptions, namely:

(i) 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;

(ii) 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* (1885).

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 to 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. However, s.91 Companies Act [Chapter 24:03] requires 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 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 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 aggregate not less than one-fourth of the total votes of the company are present in person or by proxy.

7 Directors have been described as constituting the mind and soul of the company and what they do as representatives of the corporation, the corporation itself must be deemed to do.

Common law duties of directors are fiduciary in nature. A director has a duty to prevent a conflict of interest. They should not obtain any advantage from their authority than that to which they are entitled by way of director's remuneration. In *Robinson* v *Randfontein Estates Gold Mining Co Ltd* (1921), the court held that the director who used his office to his advantage to purchase an alluvial farm which he subsequently sold to the company was not justified in making a profit from his office due to his personal interest conflicting with the duties arising out of his fiduciary position. They can be held liable for breach of a fiduciary duty by their company on the basis that they have committed a breach of trust if they act for their own benefit and to the prejudice of the company. The courts will apply a reasonable man test to determine if a reasonable man would have acted in the same way in the interests of the company given the same circumstances.

The day-to-day control of the company rests with the board of directors, which in theory must act as a collegiate body. A director has to perform the duties of honesty and fair dealing. In *Re City Equitable Fire Insurance Co Ltd* (1925), Romer J pointed out that a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.

A director is obliged to serve the interests of the company to the exclusion of the interests of third parties. The ability to act in the best interests of the company should not be fettered and courts are hesitant to interfere with their discretion and compelling them to do what they honestly believe would be detrimental to the interests of the shareholders as enunciated in *Coronation Syndicate Ltd* v *Lilienfield* & *New Fortune Co Ltd* (1903).

Directors stand in a fiduciary relationship to their companies and one of the implications of this relationship is that directors' powers must be exercised to achieve the purposes for which they are conferred in the interests of the company as a whole. Most companies' articles of association confer upon the board of directors full authority to manage and control the affairs of the company, subject to certain matters, which in law require the approval of a resolution of the company in general meetings. In *Tika Tore Press Ltd* v *Ajibade Abria* & *Ors* (1973) the court pointed out that, 'it is true that directors are the only competent persons to allot shares, such a power, like any other powers of the directors, is a fiduciary power and must be exercised in good faith to the advantage of the company.'

Directors must use their power for their true purpose, that is, furthering the interests of the company. They should not frustrate the interests of the majority, hence they are not allowed to use their powers to allot shares in the company with the object of defeating the pre-existing majority as stated by the court in *Howard Smith Ltd* v *Ampol Petroleum* (1974).

A director must exercise their powers and carry out their duties *bona fide* and for the benefit of the company with the required degree of care and skill. A standard to which the degree of care and skill is to be measured is by no means clear, though care can be established objectively. In *Fisheries Pvt Corp of SA Ltd* v *Jorgensen* (1980), it was said that the type of care and skill largely depends with the nature of the company's business and on any particular obligations assumed by or assigned to the director.

Section 172 (1) Companies Act imposes a duty upon every director who is by the articles of the company required to hold a specified share qualification and who is not already qualified to obtain their qualification within two months after their appointment or such shorter time as may be fixed by the articles.

Section 124 Companies Act stipulates that in the case of a public company every company shall within a period of not less than one month nor more than three months from the date at which it is entitled to commence business hold a general meeting of its members which shall be called a statutory meeting. The directors therefore shall have a duty to forward a statutory report to every member of the company 14 days before the meeting.

Section 186 provides that it shall be a duty of a director of a company who is in any way whether directly or indirectly interested in a contract or proposed contract with the company to declare the nature and full extent of their interest at a meeting of directors of the company. This section gives practical statutory effect to the directors' common law fiduciary obligations. A director may give a general notice that they are interested in any contract with a particular company or firm but such notice must be given at a meeting of directors or they must take care to see that it is brought up or read at the next meeting of directors after it is given: *Milne and Erleigh* v *Rex* (1951).

The Companies Act [Chapter 24:03] lists numerous obligations and duties which directors must carry out and they may be liable to penalties if they fail to perform them. Among them would be the following:

(1) To see to it that proper accounts are kept
(2) Keep a register of members
(3) Call an annual general meeting every year within the proper time frames
(4) Send in a proper report before the statutory meeting
(5) Send to the Registrar copies of special resolutions
(6) Keep a register of directors
(7) Take care not to allot shares until minimum subscription has been achieved
(8) Have certificates ready for delivery
(9) Keep register of mortgages.

Apart from the duties which have already been highlighted, directors owe their principal (the company) a whole host of other obligations and duties. At common law a director is subject to certain fiduciary duties which require them to exercise their powers *bona fide* and for the benefit of the company. The fiduciary doctrine originates from the principles of agency and trust. It is a well established rule that a director owes a fiduciary duty to their company and not necessarily to individual shareholders.
(*Percival* v *Wright* (1902))

Other notable duties which may already have been alluded to include but are not restricted to:

(i) the duty to exercise powers *bona fide* in the company's interest.
Lenvin v *Tweeds Ltd* (1961)
(ii) the duty to disclose. There are many statutory references to this duty (s.163)
(iii) the duty of care and skill
(iv) the duty to act *intra vires* the Companies Act [Chapter 24:03], memorandum and articles of association
(v) the duty to exercise an independent discretion
S v *Shaban* (1965).

The list is obviously not exhaustive and both the common law and the Companies Act [Chapter 24:03] impose on directors a host of obligations and responsibilities which in the event of non-observance would result in certain penalties and sanctions being imposed on an errant and wayward director.

Finally it cannot be overemphasised that directors occupy a very important and central role in a company. They play a pivotal and indispensable part in the operation and survival of the company. Directors run the company on behalf of the shareholders and they constantly interact with the general public. It is because of this role that it is of paramount importance that the office of director be held by competent persons of integrity and who are honest. The provisions of the Companies Act [Chapter 24:03] prohibit certain classes of persons from becoming company directors in an effort to protect not only the shareholders but the public and the business community which will have to deal with these company directors.

According to s.173 (1)(d) Companies Act, persons who have been convicted of theft, fraud, forgery and perjury are disqualified from becoming company directors. As pointed out in the case of *Tengende* v *Registrar of Companies* (1988), the main rationale behind this provision is that the management of companies should not be in the hands of unscrupulous or disreputable men. Previous criminal convictions are an indication that an individual has a tendency to be dishonest or sometimes disregards the law. Directors by nature should be honest individuals and if a person has been convicted of a crime which involves some sort of dishonesty, then there is a likelihood that that person might use the company as a vehicle for future dishonest activities. Allowing such a person to become a company director would place the public and business community in danger. However, the provision does recognise that in certain circumstances some people can prove that although having a criminal record they have reformed. These people are allowed to become company directors but only with the leave of the court.

8 **(a)** The problem involving Joe and his wife Ketty falls under the law of obligations, more to the point, the law of contract. The facts relate to issues the courts must consider in determining the existence of a contract. One would have to enquire as to whether there is a firm offer from either party, which if accepted would result in a contract. Alternatively, the reservation of a table for two on Valentine's Day might in fact merely amount to an invitation to treat. A firm offer would then involve not merely sitting at a 'reserved' table but ordering food and acceptance of that offer would involve the hotel preparing the ordered food and serving it to Joe and Ketty. Issues like making the reservations and a firm booking being made by the hotel and communicated to Joe and Ketty are all preliminaries, which ultimately would culminate in a firm offer being made.

A discussion which highlights the critical distinction(s) between an invitation to treat and a firm offer now follows.

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 they put forward a proposal with the intention that upon its mere acceptance, without more, a contract should be formed.

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 their share in the formation of a contract by formally declaring their readiness to undertake an obligation upon certain conditions, leaving the offeree the option of acceptance or refusal. They must not merely have been feeling their 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 that they are not yet willing to be bound by the terms mentioned. In *Fisher* v *Bell* (1961) the Offensive Weapons Act 1959 prohibited 'offering for sale' various offensive weapons including knives. A shopkeeper displayed some in his window and was prosecuted unsuccessfully. The court held that the 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. In the present case, Joe and Ketty's actions amounted to an invitation to treat. It would have involved the formation and breach of contract if they had gone to take up the two places at the table and then left when the other party had performed its part by delivering food to Joe and Ketty at the table.

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. In the present case, it was an invitation to treat. The only misdeed which Joe and Ketty did was neglecting to inform the other party that they were no longer interested in taking up the places at the table and ordering a meal. Invitations to treat are merely steps in the negotiation of a contract. A common instance of an agreement arrived at by offer and acceptance occurs where tenders are called for and one is accepted as in *National and Overseas Distributors (Pvt) Ltd* v *Potato Board* (1958) where the court 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 happened in *Crawley* v *Rex* (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 *Fisher* above the court said, '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.'

Therefore, Joe and Ketty are not liable to pay the Five Seasons Hotel because there was no contract but an invitation to treat. It would have amounted to breach of contract had Joe and Ketty gone to the hotel, taken up the table and left after ordering a meal without having eaten or paid for it. In *Glass Service Co* v *State Farm Mutual Auto Ins Co Ltd* (1995) the court held that appointments made by customers with an auto glass repair company did not constitute contracts. The court said, 'we do not believe people intend to be legally bound when they make reservations at a restaurant, or schedule appointments to have their car repaired, their hair cut, or their teeth checked. Nor is it likely that the providers of such services perceive the customers to be bound or intend to be legally bound themselves by scheduling appointments.'

Therefore Joe and Ketty are not liable to pay anything to the Five Seasons Hotel as there was no concluded contract between them and the hotel.

(b) The facts of the case relate to the law of delict (tort) and what must be proved to establish negligence in cases involving breach of a duty of care owed by one individual or entity to another.

The law of delict is a branch of civil law which falls under the law of obligations. A delict has been variously defined as:

(a) a civil wrong to an individual for which damages can be claimed for compensation and for which redress is not usually dependent on a prior contractual undertaking to refrain from causing harm.
(b) an unlawful, blameworthy act or omission which causes another person damage to person or property or injury to personality and for which a civil remedy for recovery of damages is available.
(c) a breach of a general duty imposed by law giving rise to a civil action at the suit of the injured person.

Most actions in delict or tort are based on negligence. This is an allegation that a person acted carelessly, thoughtlessly or imprudently because by giving insufficient attention to their actions they failed to adhere to the standard of care legally required of them. The criterion 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 their position would have acted differently where the unlawful causing of damage was reasonably foreseeable and preventable.

In *Kruger* v *Coetzee* (1966) Holmes JA formulated the test to be applied on negligence. He said liability on negligence arises if a reasonable person (*diligens parter familias*) 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.

In *Jones* v *Santam Bpk* (1965) it was stated that:

'A person is guilty of *culpa* (negligence) if his conduct falls short of the standard of a *diligens pater familias* – a standard that is always objective and which varies only in regard to the exigencies arising in any particular circumstances. It is a standard which is one and the same for everybody under the same circumstances.'

Negligence is thus the failure to display the same degree of care in avoiding the infliction of harm which a 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, injured. The accident was so bizarre and freakish that a reasonable man would not have foreseen nor 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.

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 which the harm would occur (if the harm occurred, would it be serious harm or any trivial harm?)
(ii) the nature of the harm which would occur (if the harm occurred, would it be serious harm or any trivial harm?)
(iii) the nature of the precautions required to prevent the harm (were those elaborate and expensive or easy and inexpensive?).

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.

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 positon is that liability in all cases is to be determined simply by applying the ordinary test for negligence, namely reasonable foreseability.

In conclusion it can be said that when applying the test on negligence and duty of care as pronounced in the well known English case of *Donoghue* v *Stevenson* (1932), it is quite clear that the City Council as the local authority in charge of road maintenance and street lighting owed Gamu and other citizens a duty of care.

In *Mills* v *Farmery* (1989) the court said that in considering the degree of foreseeability required the court must consider:

(i) how real the risk is of the harm eventuating;
(ii) if the harm eventuates, the likely extent of the damage; and
(iii) the cost or difficulty of guarding against the risk.

In *Norman* v *Highway Construction* (1975) gravel dumps were left on the road. A motorist hit one of these. The company was held liable as it had taken totally inadequate steps to warn motorists of the hazard and in *Cape Town Municipality* v *Paine* (1922) the Municipality had leased a sport ground. In terms of the lease, the Municipality retained the duty to repair grandstands. A spectator was injured when a plank on a grandstand broke. The Municipality was held liable.

In light of the decisions in the above mentioned cases, it is quite clear that the City Council of St Thomasburg is liable to Gamu for damages occasioned to her car as a result of the City Council's negligence in failing to maintain roads falling under their jurisdiction. Gamu is likely to be awarded by the courts $1,000 being the cost of repairs to her car.

9 The fortunes of companies are not always positive. Sometimes companies face difficulties which result in them being unprofitable. It is for this reason that the Companies Act [Chapter 23:04] provides for the placement of certain companies under judicial management. There are basically two types of judicial management orders. There are provisional management orders and final judicial management orders. Judicial management is the substitution by the court of a new management of a company in place of its original directors. The main purpose of judicial management is to save the company from dissolution. In other words, the primary aim of judicial management is to avoid the drastic remedy of winding up when a company is in financial difficulties due to mismanagement or some other cause. There must be, however, reasonable probability that under more carefully controlled management it will surmount its difficulties. The issue of 'reasonable probability' therefore demands that the court must assume an active role when weighing facts of a particular matter. This entails making a proper sound decision accompanied by a proper exercise of discretion in a simultaneous manner.

Sections 299 and 300 Companies Act clearly spell out the circumstances where a provisional judicial management order may be granted. Basically, s.300(a)(i) says that a provisional judicial management order may be given if it is proved that the company will be unable to pay its debts and other financial obligations. Inability to pay its debts does not necessarily mean the company is broke. There should be a distinction between bankruptcy and commercial insolvency, where that company is not able to pay its creditors

upon demand. In this situation, the court may grant a provisional judicial management order. See the case of *Roseenback and Co* v *Signhis Bazaar Ltd* (1962).

Another possibility where the court may grant a provisional judicial management order is when there is evidence that the company is otherwise a viable commercial concern but is being mismanaged. It should, however, be noted that the courts are not always keen to grant a provisional judicial management order on the basis of mismanagement. The attitude is that a company should be free to manage its own affairs. The court will, however, interfere where it is proved that there has been some sort of illegality, oppressive or fraudulent activities in the management of the company. For the application to succeed, the mismanagement complained of must be such as to justify the granting of a winding up order on the ground that it is 'just and equitable' to do so.

The other basis upon which the court may grant a provisional judicial management order is when the company is being deliberately prevented from being viable. Companies are generally formed to be profitable. When someone deliberately hampers with the ability of a company to operate as a viable enterprise, that then defeats the whole purpose why companies are formed. It is for this reason that the courts will not hesitate to grant a provisional judicial management order so that the company is not hindered from survival. This basically is a tool to protect shareholders, who usually have a lot to lose should the company fold.

The last most notable ground upon which one can apply for a provisional judicial management order is when it is just and equitable to do so. This is covered under s.300(a)(ii). In this case, the court looks at the interests of the shareholders and creditors. This type of application is usually done where shareholders or creditors have a genuine lack of confidence in the conduct of company affairs. This ground is deliberately ambiguous to allow for the provision of the Companies Act [Chapter 24:03] to cover the many different scenarios which might arise in the operation of companies. Mere disagreement on the domestic policy of the company is not necessarily sufficient grounds to get a provisional judicial management order on this ground. As earlier observed, this provision is incapable of a precise definition. It calls for a consideration of various relevant factors to a case in a holistic approach. This entails a very wide discretion which must, however, be exercised in a reasonable manner and within the parameters of the Act. The discretion enjoyed by the courts in matters relating to judicial management has been shown and reaffirmed in a long line of cases in Zimbabwe. The cases of *Ex parte National Overseas and Grindlays Bank Ltd* (1958), *Ex parte Mayhew* (1959), *Tobacco Auctions Ltd* v *Hamilton (Pvt) Ltd* (1966) and *Argee and Sons (Pvt) Lt*d v *Lever Brothers Ltd* (1981) bear testimony to the wider discretion enjoyed by the courts in matters relating to judicial management in Zimbabwe. In summary, the situations under which a provisional judicial management order in Zimbabwe will be granted are as follows:

(a) where the company is unable to pay its debts;
(b) where there is mismanagement of the company;
(c) where the company is probably unable to meet its obligations;
(d) where the company is prevented from becoming a successful concern;
(e) where it is just and equitable;
(f) if the company is placed under judicial management, the grounds for its winding up may be removed and it will become a successful concern.

It should be emphasised that a provisional judicial management order is instituted primarily to protect the company. Anyone applying for such an order must generally prove that it is necessary and that the company is better off under judicial management than not. In the exercise of its discretion in terms of s.300 Companies Act, the court is empowered to look into several factors without restrictions provided this is done for the good of the company and all interested parties. In *Tobacco Auctions Ltd* v *A.W. Hilton (supra)*, the court considered the extent and scope of the business activities of the company, its assets and liabilities and the nature of its difficulties as relevant factors in deciding whether judicial management proceedings apply to very small companies.

Ultimately, it can be noted that 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 provisional 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 resources, it may be able to surmount its difficulties and carry on.

In *Lief NO* v *Western Credit* (1966), the court noted that 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 debts in the hope that it will lead ultimately to the payment of creditors and the resumption by it of normal trading.

The facts of the case clearly show that there has been gross mismanagement of the company, poor corporate governance systems and an extravagant use of the company's resources. The company's trading prospects are not hopeless and if surrendered into the hands of capable managers, there is a probability that Machiro Investments (Pvt) Ltd can be nursed back to vitality and profitability.

On the facts of the case, it would appear that the prospects of success in having the company placed under provisional judicial management are very good.

10 The facts of this case relate to a very important area which straddles across a number of disciplines such as law, public administration and business ethics.

The topic of bribery is increasingly coming to the fore, not only in domestic business transactions but also in international trade. On the African continent the scourge of bribery and corruption has been so deep rooted that the majority of African countries have seen it fit to put in place anti-bribery legislation. Anti-bribery and anti-corruption legislation on the African continent is often accompanied by the establishment of an anti-corruption commission, a vehicle which is meant to fight corruption, both in the

private and public sectors of the economy. Bribery is like a cancer which corrodes the moral fabric of society. It is very devastating in financial terms particularly in the context of developing economies such as Zimbabwe. Citizens are 'short-changed' and they do not get value for money.

In the instant case it is quite clear that the benefits which Ripai got (an all expenses paid holiday for two people) were meant to be a 'kickback' for facilitating the award of a tender to construct the largest shopping mall in Harare to Blue Tooth Investments (Pvt) Ltd. What follows is a legal narration of the law on bribery in Zimbabwe.

The crime of bribery is the practice of tendering and accepting a private advantage as a reward for the performance of a duty. Section 170(1) Criminal Law (Codification and Reform) Act [Chapter 9:23] criminalises bribery. It provides that:

'Any agent or person who obtains or agrees to obtain or solicits or agrees to accept for himself or any other person any gift or consideration as an inducement or reward,

(i) for doing or omitting to do or having done or omitted to do, any act in relation to his or her principal's affairs or business or
(ii) for showing or not showing, or having shown or not shown, any favour or disfavour to any person or thing in relation to his or her principal's affairs or business … shall be guilty of bribery.'

The crime is committed both by the person who corrupts another by giving the bribe and by the person who corruptly receives it. The briber commits this crime when they unlawfully and intentionally offer to or agree with another person to give any consideration in return for action or inaction by them in an official capacity.

The person bribed on the other hand commits the offence by unlawfully and intentionally agreeing to take any consideration in return for action or inaction by them in an official capacity. Both the person giving the bribe and the person taking the bribe are criminally liable. In *S* v *Mpofu* (1976) there was bribery of a prosecutor by a father to have a case against his son stopped. In *S* v *Ngara* (1987) the court stated that a person who gives a bribe in contravention of the Prevention of Corruption Act [Chapter 9:16] is an accomplice to the person who accepts it.

Bribery in relation to officials is punished because it is subversive of democratic principles of good public administration and destroys public trust and confidence in the public administration. Public officials should exercise power and discretion to benefit the public. They should, therefore, consider only the public interest. When they accept a bribe, they allow the private interest of the giver to influence the decision. Section 4(a) Zimbabwean Prevention of Corruption Act [Chapter 9:16] provides, 'if a public officer, in the course of his employment as such

(a) Does anything that is contrary to or inconsistent with his duty as a public officer; or

(b) For the purpose of showing favour or disfavour for any person, he shall be guilty of an offence …'

This provision was used to charge former High Court of Zimbabwe Judge Mr Justice Paradza in *S* v *Paradza* (2006). In *S* v *W* (1991) a traffic officer was convicted of corruption where he solicited sexual favours from a female accused in return for his official inaction.

A consideration usually will be money but it can be, for example, property or services. The consideration must have been offered by the briber in return for an official opportunity from the official. As regards the briber, the crime is completed when the briber offers the bribe and it is not necessary that the official accepts the bribe or that the bribe actually be handed over. If the person bribed accepts the bribe, they are guilty of bribery provided that they accepted the consideration in return for providing official opportunity.

Official opportunity includes such things as making sure that the briber's tender is accepted even though competitors' bids may be lower or arranging that the criminal charges be withdrawn against the person giving the bribe. There is a lot of case law involving bribery. For example, in *S* v *Makandigona* (1981) a vehicle inspector was convicted for issuing corruptly a driver's licence to a woman who had not undergone a test.

The briber must intend to offer the consideration in return for some official opportunity. The person bribed must intend to accept the consideration in return for providing an official opportunity and they must know that the briber gave the consideration for this purpose. In *S* v *Deal Enterprises (Pty) Ltd* & *Ors* (1978) a corrupt intent was inferred given the peculiar circumstances of the case.

If it is proved in any prosecution for bribery that

(a) an agent has obtained or agreed to obtain or solicited any benefit or advantage whether for himself or herself or for another person or;

(b) any person who has given, agreed to give or offered any benefit or advantage:

    (i) to an agent, whether for himself or herself or for another person or
    (ii) to any other person after agreeing with an agent to do so

it shall be presumed that the law against the giving of bribes has been broken.

The legislature takes such a dim view of the crime of bribery such that s.170(1) provides for imprisonment of up to 20 years.

Bribery corrodes the moral fibre of society and undermines good public administration, investment opportunities and sound business practices and ethics.

Clearly the actions of Ripai are in contravention of both the Prevention of Corruption Act [Chapter 9:16] and the Criminal Law (Codification and Reform) Act [Chapter 9:23] Chapter IX (Bribery and Corruption). Both James and Ripai are liable for bribery and corruption and stern sanctions of up to 20 years imprisonment might be visited upon them.

1 **(a)** 4–6 marks A good answer which defines and explains the nature of customary law as a source of law in this jurisdiction.

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

1 mark A deficient answer in all respects.

(b) 3–4 marks A good answer which reflects accurately what the common law entails.

1–2 marks An average answer with gaps here and there.

2 **(a)** 3–5 marks A good answer which adequately covers issues relating to the principles which regulate the award of damages.

1–2 marks An average answer.

(b) 3–5 marks A good answer which adequately addresses the various principles upon which the equitable remedy of specific performance is granted.

1–2 marks An uninspiring answer.

3 7–10 marks Answers in this bracket would give a detailed explanation of the duties on the parties of an employment contract. It is absolutely important to discuss fully the main duties which are placed on the parties by the law.

4–6 marks An answer which leaves out some of the critical issues.

1–3 marks An incomplete answer.

4 **(a)** 3–5 marks An answer which discusses fully the authority of partners over partnership activities.

1–2 marks An inadequate answer.

(b) 3–5 marks The answer would adequately explain the liability of the various partners for partnership debts.

1–2 marks A deficient answer.

5 **(a)** **(i)** 2 marks An accurate answer.

1 mark An average answer.

(ii) 2 marks An accurate answer.

1 mark An average answer.

(b) 4–6 marks A good answer which explains fully the rules and regulations which pertain to the distribution of dividends.

1–3 marks An average answer.

6 **(a)** 3–4 marks A good answer which explains the objects clause.

1–2 marks An average answer.

(b) 4–6 marks An impressive answer which explains how articles of association can be changed.

2–3 marks An average answer.

1 mark A poor answer.

7 7–10 marks A comprehensive answer with a list which fully discusses the duties of directors. Citation of relevant case law would be useful.

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

1–3 marks Answers in this mark bracket display a lack of appreciation of the information which is required.

8 **(a)** 3–5 marks A good answer which adequately and clearly gives a distinction between a firm offer and an invitation to treat.

1–2 marks An average answer.

(b) 3–5 marks A good answer which comprehensively discusses delictual issues based on negligence.

1–2 marks An average answer.

9 7–10 marks A comprehensive answer which fully explains the concept of provisional judicial management in the context of the facts.

3–6 marks An average answer with omissions here and there.

1–2 marks An inadequate answer.

10 7–10 marks A very good answer which makes specific references to the law on bribery.

4–6 marks An average answer with some omissions.

1–3 marks A below average, if not poor, answer.