Answers

1 (a) The concept of human rights entails that citizens have rights which are justifiable or enforceable in a court of law in the event of a breach or where they are likely to be breached. Only those rights enshrined in the Declaration of Rights in the current Constitution of Zimbabwe are justifiable. They include the right to life, liberty, dignity, and property among others.

Section 12(1) of the Constitution provides for the right to life. It states that no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. In *S* v *Makwanyane* & *Anor* (1995), it was held that the death sentence goes against human dignity and amounts to inhuman and degrading punishment. The Constitutional Court of South Africa held the death sentence to be unconstitutional. In Zimbabwe the right to life is not absolute because the death penalty is still retained for serious crimes such as treason and murder.

Section 13(1) of the Constitution provides that no person shall be deprived of his or her personal liberty and freedom arbitrarily. In *Muzonda* v *Minister of Home Affairs* & *Anor* (1993), the court held that the deprivation of liberty has been regarded as an odious interference and the court will award damages for unlawful imprisonment. In addition, in *Allan* v *Minister of Home Affairs* (1985), the court said, 'since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society … the protection of this right is enshrined in the Constitution of Zimbabwe and the courts will certainly play their part in preserving this right against all infringements and all attempts to erode or violate the principle involved.'

In terms of s.15(1) of the Constitution, no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment. This is the right to dignity and in *Catholic Commission for Justice and Peace in Zimbabwe* v *Attorney-General* & *Ors* (1993), the court said that this right 'stands as a sentinel over human misery, degradation and oppression. Its voice is that of justice and fairness.' In that case, the court held that delays in carrying out the sentence of death on four condemned prisoners by the state amounted to a violation of their right to dignity. It went on to set aside the death sentences and commuted the sentences to life imprisonment. In *Furman* v *Georgia* (1972), the court held that capital punishment is *per se* unconstitutional, and the fact that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of the sentence and the actual action of death. However, the legislature passed a Constitutional Amendment Number 13 of 1993 to the effect that delays in carrying out executions on condemned prisoners shall not be held to be amounting to a violation of the right to dignity. Hence in *Nkomo* & *Anor* v *Attorney-General* (1993), the court held that the amendment extinguished the pre-existing rights of the applicants to argue that s.15(1), which provides for the right to dignity, had been contravened.

The right to property or to protection of property is a human right enshrined in s.16 of the Constitution. In *Nyambirai* v *NSSA* & *Anor* (1995), the applicant objected to being forced to contribute to the NSSA scheme for pension and other benefits, arguing that his property or rights were being compulsorily acquired contrary to s.16 of the Constitution. The court held, among other things, that s.16 allows the acquisition in satisfaction of any tax, except if that tax is not reasonably justifiable in a democratic society. In terms of ss.16A and B of the Constitution, the state can acquire land compulsorily for the purposes of resettlement and if it is in the public interests to do so. Hence in *Commercial Farmers Union* v *Minister of Lands* & *Ors* (2000), the court held that the government, by acquiring land, was acting in accordance with these provisions.

Section 22(1) of the Constitution provides that no person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Zimbabwe, the right to reside in any part of Zimbabwe, the right to enter and to leave Zimbabwe. In *Rattigan* & *Ors* v *Chief Immigration Officer* & *Ors* (1995), the issue before the Supreme Court was whether a female citizen of Zimbabwe married to a man who is an alien, being a citizen of a foreign country, is entitled to the right to reside permanently with her husband in Zimbabwe. Three Zimbabwean female citizens had applied for residence permits for their foreign husbands. The immigration department turned down the applications. The Supreme Court held that the rights of the applicant wives under s.22 of the Constitution had been breached as they had a right to have their husbands reside with them in Zimbabwe. However, the Government amended the Constitution by Amendment Number 14 to provide that only foreign female spouses shall have the right to reside in Zimbabwe.

Section 23(1) of the Constitution provides that no law shall make provision which is discriminatory either of itself or in its effect and no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. In *Mandizvidza* v *Chaduka* & *Ors* (1999), a tertiary institution had a policy of expelling female students who fell pregnant while studying for teacher training. The applicant who had been married and fell pregnant faced expulsion. She applied to the Supreme Court on the grounds that the policy was discriminatory against female students and be declared unconstitutional. The court held that the policy was discriminatory and unconstitutional as it did not punish male students who would have authored the pregnancies.

From the foregoing discussion, it is quite clear that the Declaration of Rights (Part 3 of the Constitution) gives a comprehensive outline of major fundamental rights and freedoms.

(b) The Zimbabwe Human Rights Commission was set up by s.242 of the current Constitution [Lancaster House] as read with s.3(1) Zimbabwe Human Rights Commission Act [Chapter10:30] and is tasked with safeguarding and promoting human rights in Zimbabwe and this has to be done in a number of ways such as investigating cases of human rights abuse in any institution ranging from prisons to refugee camps.

Section 4 Act provides for the functions of the Commission while s.243 of the Constitution also provides for some of these functions. Section 100R(95)(a) of the Constitution provides that the Commission has a duty to promote awareness of and respect for human rights and freedoms at all levels of society. This entails educating people about their rights as human beings and ensuring that they know how to seek redress in cases of abuse of their rights. The Commission, therefore, has to elaborate to the people on the various human rights which the citizens have and their justiciability and these rights include the right to life enshrined in s.12 of the Constitution, the right to personal liberty in s.13, the right to dignity enshrined in s.15 and the right to the protection of the law in s.18 of the current Constitution.

The Constitution provides that the Commission has a function of conducting investigations on the conduct of any authority or person where it is alleged that any of the rights in the Declaration of Rights has been violated by that authority or person. This duty entails that the Commission will have to probe into complaints which it would have received and find out if any of the justiciable rights of the complainants has been violated.

It is the duty of the Commission to ensure and provide appropriate redress for violations of human rights and for injustice. This means that whatever relief it accords to an aggrieved citizen, it has to enforce it and make sure that the relief or redress is effective. On the other hand, s.100R(5)(d) of the Constitution, the Commission shall recommend to Parliament effective measures to promote human rights and freedoms. Since it is the body which deals with human rights issues on the ground, the Commission is in a better position to know areas which need to be improved and this can be done by ratifying and adopting certain international treaties such as the United Nations Convention against Torture in order to eradicate the use of torture as it violates the human right to dignity. The Commission can also recommend the promulgation of laws addressing and promoting human rights by the Parliament of Zimbabwe, for example, criminal laws which ensure that those who use torture are brought to book and dealt with according to law.

In addition, the Commission has a duty to visit and inspect prisons, places of detention, refugee camps and related facilities. The rationale behind this is to ascertain the conditions under which inmates are kept and to make recommendations regarding those conditions to the Minister of Justice and Legal Affairs. On numerous occasions, the Deputy Minister of Justice and Legal Affairs has lamented the state of affairs which bedevil various prisons in the country where there are food shortages for inmates and also a shortage of prison garb, blankets and other basic commodities. It is the duty of the Commission to ensure that it reports these matters to the Minister and make recommendations for the improvement of these conditions. The Commission may recommend to the Minister the need to seek assistance from non-governmental organisations such as the Red Cross if the government is unable on its own to improve prison conditions. The Commission shall do the same on institutions where mentally disordered citizens are kept so that the facilities are improved by the Government with the assistance of non-governmental organisations, if necessary.

Furthermore, the Commission shall monitor and assess the observance of human rights in the country and ensure that Zimbabwe complies with the international human rights treaties to which she is a member. The international conventions include the African Charter on Peoples and Human Rights, the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW) and others. The Commission shall also report on cases where Zimbabwe has failed to comply with these treaties and encourage compliance therewith.

The Commission, since it will be investigating complaints against human rights abuses by any authority or person in Zimbabwe, is expected to be independent and impartial in the discharge of its functions. However, it should be noted that in terms of s.160R(1)(a) of the Constitution, the Chairman of the Commission is appointed by the President after consultation with the Judicial Service Commission and that may imply that his or her independence and impartiality will be compromised. However, they cannot be expected to appoint themselves and the fact that the commissioners are presidential appointees is not a bar in their carrying out of their duties impartially and independently.

The law requires the Commissioners or a member of staff of the Commission to serve impartially and without fear or favour in the performance of his or her duties. This entails that when they are carrying out their investigations about human rights abuses, they should do so without bias and instead should be independent and impartial. They should probe any body or person alleged to have violated the rights of others in the Declaration of Rights and afford relief to the aggrieved individual.

The law provides that neither the state nor any person, body or organ belonging to or employed by the state shall interfere with, hinder or obstruct the Commission or any member of its staff in the exercise or performance of its, his or her functions. The Commission, therefore, should be afforded all the latitude which it needs to do its work without any hindrance. Instead, the Commission, in terms of s.7(3) shall be afforded such assistance as may be reasonably required for the protection of the independence and impartiality by the state or any person, organ or body belonging to or employed by the state. These provisions have to be adhered to if the Commission is to achieve its objectives in the promotion and development of human rights in Zimbabwe.

The Commission may, on its own initiative, investigate any case of human rights abuses alleged to have been committed by any authority or person. This means that the Commission's jurisdiction is over all bodies belonging to or employed by the state and over all persons within Zimbabwe. This therefore means that the Commission cannot do this task successfully if it is not independent. Hence its independence and jurisdiction go hand in hand in trying to ensure that those citizens whose rights have been abused are afforded effective redress. Furthermore, this will ensure an improvement in the human rights situation in Zimbabwe.

However, in terms of the law, the Commission shall not have the jurisdiction to investigate any complaints which occurred earlier than February 2009. This therefore means that in spite of the seriousness of human rights abuse complained of, the Commission shall not have the jurisdiction or power to investigate it and afford appropriate relief if it happened before February 2009. Hence the aggrieved person in such a case would not be entitled to any relief and the matter shall be treated as a non-issue.

Furthermore, the Commission shall not have the power to investigate any complaint which relates to the exercise of the prerogative of mercy by the President. This means that if the alleged abuser of the human rights in issue is pardoned by the President, the complainant shall not be entitled to relief because the Commission shall not have the power to investigate the complaint in terms of s.9(4)(c) Act.

Section 9(4)(b) provides that the Commission shall not have the power to investigate a complaint where the action complained of is the subject matter of civil proceedings before any court of competent jurisdiction. This means that if the matter complained of is also before a court of law, the jurisdiction of the Commission shall be ousted regardless of the decision made or to be made by that court.

2 **(a)** Parties will often make statements in the course of their negotiations without intending that the statements be part of any final agreement which may be reached. Such a statement may be made with the intention of influencing the other party to enter into the contract. A statement of that kind is called a 'mere representation' or simply a 'representation' to distinguish it from a statement which is analysed to have become a 'term of the contract' or 'contractual term'. Not all statements made in the course of the formation of a contract are necessarily terms. In *Petit* v *Abramson* (1946), the court referred to '... an age-old problem which has given rise to a little controversy. It is notorious that statements made by parties when negotiating a contract may conceivably take the status either (1) of mere puffing or commendation, or (2) of representations or (3) of undertakings, commonly referred to as warranties. An undertaking or warranty in this relation denotes a promise which gives rise to a contractual obligation.'

There are some statements made in the course of negotiations which are not even dignified with the name 'representations', but are described as 'advertising puff' or 'promotional puff'. Superlatives such as 'the world's best', 'the finest that money can buy', 'you could not wish for a better...' come to mind. Advertising extravagances will be ignored by the court as reasonable people understand that such 'puffing' is not to be taken seriously. In *Hopkins* v *Tanqueray* (1854), T, the owner of a horse, on a day before the horse was to be sold by auction, walked into a stable where H was examining the animal and said to the purchaser 'you have nothing to look for, I assure you it is perfectly sound in every respect.' H replied 'if you say so I am perfectly satisfied.' Relying on T's assurance, H did not complete their examination of the animal and successfully bid for it the next day. The horse was not sound and H sued T for breach of contract based on the warranty alleged to have been given in the statement referred to. The court held that the defendant's statement was not intended to become a part of any subsequent contract which might be made between the parties. It was simply a pre-contract representation.

In each case of this nature, the court is attempting to ascertain the intentions of the parties from the particular facts before it. Therefore it is not possible to extract one general rule from the many reported decisions. However, the case establishes that the following matters are taken into account when the courts consider this issue:

– The importance attached to the statement by the parties. The more important it is, the more likely it is to be treated as a term of the contract. In *Small* v *Smith* (1954), it was ruled that a statement made seriously and deliberately during the negotiation of a verbal contract becomes a term of the contract, if the parties by mutual intention either expressly or impliedly intended it to be a term of the contract.

– The time which elapsed between the making of the statement and the conclusion of the making of the contract. The longer the lapse of time, the less likely it is that the statement will be regarded as part of the contract.

– Whether a written contract was executed after the making of an oral statement. This will increase the likelihood of that statement being treated as a term (although it should be noted that it is possible for a contract to be partly oral and partly written).

– The precision of the statement. The less precise a statement, the less likely it is to be treated as a term. In *Nemeth* v *Bayswater Road (Pvt) Ltd* (1988), a lessor had referred to the possible hourly use of the plane, the subject of the lease, by saying that it 'might even be able to do 50 hours or maybe even more'. This was found to be nothing more than an unenforceable expression of opinion.

– Whether the statement was made by a person with special knowledge or skill or relates to some matter of which the other party was necessarily ignorant. The court will then be more inclined to treat the statement as a term rather than as a representation.

An innocent misrepresentation – an untrue representation made without knowledge that it is untrue and without any intention to deceive – does not give the innocent party the right to sue for damages for breach of contract as the representation, by definition, is not part of the contract. The result used to be that the remedies available for innocent misrepresentation were very limited.

The importance of distinguishing between a term of the contract and a mere puff is obvious. The former is enforceable in the sense that if the promise contained therein is broken, the aggrieved party has their remedy or remedies for breach of contract, but a mere puff has no legal significance. The difference between a term of the contract and a representation is equally important because the remedies for breach of contract do not apply to a misrepresentation which, at most, will entitle the aggrieved party to rescission of the contract and to damages if fraudulent and negligent as in *Voges* v *Wilkins* (1992).

(b) An express term is one which the parties specifically agree upon and express. It is to be contrasted with an implied term, which does not satisfy that description and which is read into the contract. A party may argue that an express agreement, either written or oral, does not constitute the whole of a contract because some additional unstated terms should be taken to be part of the contract. The argument is that an implied term should be added to the express terms of the agreement.

Courts recognise that parties often do not specify every term which they intend to form part of their contract. If the facts establish the appropriate intention of the parties, a court will read, or imply, into a contract a term or terms which have not been expressly stated. These are sometimes called 'terms implied in fact'. Again, courts and legislatures sometimes require that the terms be implied into contracts generally or into contracts of a particular kind or class, such as those involving consumers. These are sometimes called 'terms implied in law'. What the parties are taken to have intended is an irrelevancy to the question whether a term is implied in law.

Terms implied by law

In *Alfred McAlpine and Son (Pty) Ltd* v *Tvl Provincial Administration* (1974), Corbett AJA enunciated that in legal parlance the expression implied term is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is imposed by the law from without.

Terms implied by trade usage

The circumstances in which a trade usage of which one party has no knowledge will be implied in a contract were fully examined by Krause J in *Cook* v *Pederson Ltd* (1927):

(1) The implication must be a necessary and not merely a reasonable one. Where the implied term relied on is based upon a usage or custom, the evidence must be clear and consistent.

(2) The custom or usage must be long-established, reasonable, have been uniformly observed and certain.

(3) Generally speaking, no one is bound by a term in a contract of which they had or could have had no knowledge.

(4) Where, however, a custom is universal and notorious, a person may be presumed in certain circumstances or cases to have had knowledge of such custom and to have intended to include such custom in their contract.

(5) Circumstances which might lead to such a presumption are where a principal deals or employs a person to deal on their behalf with other persons, in a particular market, or where the transaction is peculiar to a particular locality, or where the persons engaged in such transactions belong to a particular class, who, for the better conduct of their business, are subject to certain customs and rules, or where the transaction itself is of a special nature. In *Golden Cape Fruits (Pty) Ltd* v *Fotoplate* (1973), the court noted that trade usage must not be in conflict with positive law (in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement).

Tacit terms, or terms implied from the facts

A tacit term was described in *Alfred McAlpine and Son (Pty) Ltd* v *Tvl Provincial Administration* (1974) 'as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the court, in truth declares the whole contract entered into by the parties.' In order to decide whether a tacit term is to be imported into the contract, one must first examine the express terms of the contract. Rumpff JA in *Pan American World Airways Inc* v *SA Fire and Accident Insurance Co Ltd* (1965) opined that 'when dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the contract, there is any room for importing the alleged implied term', *Marais* v *Van Niekerk* (1991).

The judgement of Scrutton L J In *Reigate* v *Union Manufacturing Co* (1918) is instructive. He enunciated that 'a term can only be implied if it is necessary in the business sense to give efficacy to the contract, that is if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties 'what will happen in such a case?' They would both have replied 'of course so and so will happen; we did not trouble to so say that it is too clear'.' This approach was also adopted by the Zimbabwe Supreme Court in *RB Ranchers (Pvt) Ltd* v *Mclean's Estate* (1986). What needs to be stressed is that the implication must be necessary and not merely reasonable. The tacit term sought to be imported must be capable of clear and exact formulation.

3 In the law of delict, negligence is concerned with the protection of society against the dangers posed by conduct which falls below the standard of the average prudent person. Negligence is 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. Where an allegation of negligence is made against a professional or skilled person such as an accountant or auditor, it would obviously be inappropriate for the court to use the standard of the ordinary reasonable person who has no expertise in that professional field. Thus the test which will be applied in this situation is how the ordinary, reasonable, skilful professional person operating within that field would have dealt with the situation. For example, the test which will be used to decide whether an accountant has been negligent is how would a reasonable accountant have dealt with that situation.

Auditors carry out audits of various institutions such as commercial companies in order to provide independent and reliable information of the true financial position of the institution in question at the time the audit is carried out. One of the main reasons for auditors is to uncover errors and fraud in commercial and other institutions which are handling money. The auditor is expected to perform these tasks with due care, diligence and competence. In *Re Kingston Cotton Milling Co Ltd* (1896), the court said, 'it is the duty of an auditor to bring to bear on the work they have to perform with skill, care and caution which a reasonable, competent, careful and cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case....' and in *New Plymouth Borough* v *R* (1951), it was said, 'An auditor is engaged for the purpose (among others) of detecting irregularities on the part of the employees.'

A person is said to have breached the duty of care when they fail to foresee and guard against harm which the reasonable person would have foreseen and guarded against. In *Donoghue* v *Stevenson* (1932), it was said that '... the liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.' In *Pacific Acceptance Corporation Ltd* v *Forsyth* (1910), auditors were held to be negligent in failing to check the security of the company's loans. The court commented that the process of investigating could not be 'properly carried out except by a procedure that takes account of the possibility that the affairs examined may not be true, due to errors, innocent or fraudulent appearing in the records.' The auditors were found to have breached the duty of care. It is clear that an auditor should adequately plan, control and record their audit. The court said, 'it is somewhat easier to infer that errors and omissions are the result of negligence.' It went on to say that the fact that the defendant's clerks were insufficiently supervised 'would tend to indicate that any shortcomings in their work were due to negligence.'

It is not always negligent for an auditor to fail to detect a fraudulent practice within the company they are auditing. The fraud may be so ingenious and difficult to uncover that no reasonable auditor performing their work diligently would have uncovered the fraud in question; if this is the case the auditor who failed to detect the fraud will be found not to have been negligent. This was also stated in *Pacific supra*. Pointing out that the auditors' duties must not be rendered too onerous, the court said that they should not 'be liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion and when those frauds are perpetrated by tried servants of the company and are undetected for years by the directors so to hold would make the position of an auditor intolerable.'

If, on the other hand, the reasonable auditor would have uncovered the fraud, the commercial corporation which employed them to carry out the audit could sue the auditor. In *Fomento (Sterling Area) Ltd* v *Selsdon Fountain Pen Co Ltd* (1958), the court said, 'an auditor's vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruth. To perform this task properly they must come to it with an enquiring mind – not suspicious of dishonesty ... but suspecting that someone may have made a mistake somewhere and that a check must be made that there has been none.' In *R* v *Wake and Stone* (1954), it was established that the auditor had breached the duty of care by being professionally negligent in the way he had handled a case of fraud. He and the managing director of a company which issued a prospectus in which an inflated value was placed on the company's stocks and work-in-progress, as given in the auditor's report, were found liable. It was deemed in court that this figure was 'false, deceptive and misleading' in that it was far too high. There had been several alterations in the inventory sheets and although the auditor asked for an explanation, they accepted, without attempting any independent corroboration, the managing director's statement that the alterations related to errors in the original valuation. In *Re Thomas Gerrard* & *Sons Ltd* (1968), the auditors were found liable for having discovered altered invoices, they failed to detect fraudulent accounting by the company manager. The court held them liable as 'suspicion ought emphatically to have been aroused by their discovery' and they ought then to have made a full investigation which would have revealed the deception.

To establish a duty of care to members or to establish any duty of care to other persons, there must be an additional 'special' relationship with the person who suffered loss as a result of relying on the auditors' report. To succeed in establishing that, the plaintiff must show that the defendant knew that the report, 'would be communicated to the plaintiff either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind, for example, in a prospectus inviting investment and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that 'kind'' as was said in *Caparo Industries plc v Dickman* (1990). Hence, apart from their contractual duty of care to the company, auditors owe a duty of care to third parties with whom they are not in a contractual or fiduciary relationship if, as a reasonable person, they know that they are being trusted or that their skill and judgement are being relied on and they do not make it clear that they accept no responsibility for advice or information which they give. Thus this liability applies not only to persons to whom auditors show the accounts and those to whom they knew the company would show them but also to persons whom they ought reasonably to have foreseen at the time the accounts were prepared might rely on the accounts.

Accountants are responsible for keeping accurate books of accounts and they also give financial advice on matters such as investment and taxation. If they perform their work carelessly this can result in financial loss, for example, their client asks an accountant whether they should invest money in a certain corporation. They say the investment would be a good investment and acting on this advice, the client invests in the company. The company goes insolvent soon after the client has invested. In these circumstances, the accountant would be liable to the client if a reasonable accountant would not have given the advice to the client that they gave, as the reasonable accountant would have known of the bad financial position of the company or would have found it out had they taken reasonable care.

Accountants like auditors, apart from their contractual duty of care to the company, owe a duty of care to third parties with whom they are not in a contractual or fiduciary relationship if, as reasonable accountants, they should know that they are being trusted or that their skill and judgement are being relied on and do not make it clear that they accept no responsibility for information or advice which they give. The scope of this duty was defined in *Candles* v *Crane, Christmas* & *Co* (1951), '... to whom do these professional people owe this duty? ... accountants ... owe the duty of course, to their employer or client and also ... to any third person to whom they themselves show the accounts or to whom they know their employer is going to show the accounts, so as to induce them to invest money or take some other action on them.' Hence in *JEB Fasteners Ltd* v *Marks, Bloom* & *Co* (1981), the accountants knew at that time that outside finance, was needed by the company and they ought to have foreseen that the accounts would be used by someone providing such finance, for example, in the form of a take-over and owed a duty accordingly. Hence they were found to be professionally liable and to have breached the duty of care.

It can be safely said that the law of delict also covers professional negligence committed by professional people, for example, accountants and auditors in the course of carrying out their duties. They owe a duty of care to their employers or clients and immediate parties who will be affected by their manner of carrying out their mandates. Where they are found to have breached this duty of care, they would be held civilly liable.

4 Company promoters have certain duties towards the company and these are dictated by both common law and statute law. Here is an outline of the duties:

Equitable duty of disclosure

The duty requires that a promoter should disclose any interest they may have in any contract or any profit they may make during the promotion of a company.

This duty arises since promoters undoubtedly stand in a fiduciary position to the company in so far as they are called to define how, when, in what shape and with what supervision a company should come into existence. See *Elanger* v *New Sombrero Phosphate Company* (1878).

A fiduciary duty has been defined as a duty of utmost good faith. This duty requires promoters to make full disclosure of any interests they might have in the company either to potential members by making a declaration in the prospectus or disclosing the same to an entirely independent board of directors or through some other effective method. See *Salomon* v *Salomon and Co Ltd* (1897).

The rationale behind this duty is to guard against the danger of promoters defrauding a newly formed company. Often, promoters become the directors of the company and hence the need to guard against abuse.

Duty not to make secret profits

What is prohibited here is not the making of profits *per se*, but the making of secret profits, for example, in the case of *Leeds and Henley Theatres of Variety* a promoter purchased property for £24,000 and then converted it to his nominee. Through the nominee and after the formation of the company, the same property was sold to the company for £75,000 without disclosing that the promoter was the real vendor. It was held that the promoter was liable to pay the undisclosed profit to the company as damages.

Similarly in *Whaley Bridge Calico Printing Company v Green and Smith* (1880), Green had purchased Calico printing works and premises for £15,000 shortly before Smith promoted the plaintiff's company to take over at a cost of £20,000; Green entered into a sham contract whereby he transferred the printing works and premises to Smith so that he would re-sell it to the company at a cost of £20,000. Smith, as a promoter of the company, was prevented from making a secret profit because the said agreement (i.e where Green was to pay £3,000 out of the purchase money to Smith) was not communicated to the directors of the company when the sale to the company was effected and it thus amounted to the making of a secret profit on the part of Smith (the company's promoter). See also *Erlanger* v *New Sombrero Phosphate Co (supra)* and *Gluckstein* v *Barnes* (1900).

Duty of care

A promoter also has a common law duty to exercise reasonable skill and care in the promotion of the company. In *Jacobus Marler Estate Ltd* v *Marler* (1913), it was held that, 'a promoter who negligently allows the company to purchase property, including their own, for more than it is worth is liable to the company for the loss it suffers.'

In *Re Jubilee Mills Ltd* (1924), the defendant was in breach of a fiduciary duty, the court found him liable at common law when he sold his own property to the company he was promoting at a price in excess of its real value and took shares as payment of the property.

This duty is often linked to a promoter's duty to refrain from making wilful false statements and also their duty to actively disclose the whole truth.

The primary common law remedy of breach of promoter's duties to the company is rescission of any contract made and the recovery of any secret profits which were made. It should be noted, however, that the right to rescind is exercisable in accordance with the normal principles of contract, i.e.

– The company should have shown nothing which could be deemed as intention to ratify the agreement after finding out about the promoter's transgressions.
– *Restitutio in integrum* must still be possible, i.e. the company must be able to restore to the promoter what they gave to the company in essentially the same condition it was given, fair wear and tear expected.

However, it should be noted that in the decision of *Erlanger, New Sombrero Phosphate Co* and *Spence* v *Crawford* (1939) it is doubtful whether the court would strictly enforce this rule whenever the promoter has been fraudulent or when they themselves are responsible for making restitution impossible.

It should be noted that rescission will extinguish the secret profit complained of.

In terms of the Companies Act, the statutory duty of the promoter relates to wrongful statements which may be contained in a company's prospectus.

It is one of the fundamental duties of a promoter to issue a prospectus in terms of s.54 Companies Act [Chapter:03].

Remedies for breach of promoter's duties

A company may sue for damages as was done in *re Leeds and Hanley Theatres of Varieties Ltd (supra 1)*; the promoters had failed to disclose in the prospectus the fact that they were vendors of music halls which they had bought for the company which they were promoting and the profit of £12,000 they had made from that transaction.

It was held that the company was entitled to damages assessed at the profit made by the promoters on the basis that the breach of duty involved also amounted to breach of promoter's common law duty of care.

Rendering of an account, where there has been non-disclosure by a promoter and there have been secret profits made or where the promoter has profited from auxiliary transactions, which cannot be affected by rescission of the primary contract, then the proper remedy for the company would be to require the promoter to be accountable for that profit; per *Gluckstein* v *Barnes* (1900).

One of the remedies in terms of statute, which a company may have against wrongful statements in the prospectus by the promoter is to institute civil proceedings in terms of s.58 Companies Act [Chapter 24:03]. Criminal liability also attaches upon certain categories of persons, including the promoter for wrongful statements contained in the prospectus of a company they promote as per s.59 Companies Act.

5 **(a)** A company can borrow money and give security for the loan in any manner in which a person having contractual capacity may do so. Article 78 of Table A to the First Schedule of the Companies Act [Chapter 24:03] provides that the directors of the company may exercise all the powers of the company to borrow money and to mortgage, or charge, its undertaking, property and uncalled capital, or any part thereof, and to issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party.

The articles frequently limit the authority of directors to exercise the borrowing powers of the company. Article 78 limits the amount to one-half of the amount of the issued share capital without the prior sanction of the company in a general meeting.

This provision must be interpreted in the light of the rule in *Royal British Bank* v *Turquand* (1956) or the 'indoor management rule'. This rule is to the effect that where a company has borrowing powers, but the articles provide that certain preliminaries, internal to the company, must be gone through before those powers can be exercised, borrowing by the company will render the company liable in contract in terms of the loan, notwithstanding the fact that these preliminaries have not been observed, provided that the external acts are in accordance with the memorandum and articles as held in *Mahony* v *East Holyford Mining Company* (1875). For example, if directors have power to borrow such sums as the company by ordinary resolution may authorise, a lender is entitled to assume that the directors have, in fact, been authorised to borrow and the company will be bound by the loan.

Where the authority of directors to borrow on behalf of the company is established, whether expressly as in Article 78, impliedly or ostensibly, the company is bound by the loan.

A company, therefore, is usually empowered by its memorandum or articles to borrow money for its operations. When authorised a company may exercise this power by issuing debentures. Section 106(1) Companies Act [Chapter 24:03] provides that a company, if authorised by its memorandum or articles, may create and issue debentures.

(b) Share capital is the fund belonging to the company contributed by shareholders and the term 'capital' has been used to indicate the particular type of assets in which the funds of the company are invested. Loan capital, on the other hand, refers merely to money which has been raised by the issue of debentures – money which has been borrowed by the company at a fixed rate of interest on certain terms and conditions.

A share, which is a type of share capital, is a share in the capital of the company and it represents a complex of rights and duties and is transferable in the manner prescribed in the Articles and the Act. Section 2 Companies Act defines a share as meaning a share in the share capital of a company and includes stock, except where a distinction between stock and shares is expressed or implied.

Another example of share capital is a preference share and the hallmark of a preference share is that its holder is entitled to a preference as to dividend. A debenture is an example of loan capital and a debenture holder will be entitled to claim the interest on their loan whether the company prospers or not, but the preference shareholder can get their dividend only when a dividend is declared and return of their capital and possibly residual assets when the company is wound up, see *In Re Buenos Aires Great Southern Railway* v *Preston* (1947).

A debenture holder is not a member of the company because they have only given the company loan capital. They are, therefore, not entitled to attend meetings of the company. They are only a creditor of the company. By contrast in share capital, a shareholder is a member of the company and enjoys a complex of rights and bears certain duties which flow from special relationships which exist between shareholders and the company.

In summation, it can be said that 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 be, 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.

6 (a) (i) Quorum

A quorum is the minimum number of qualified people or members whose presence at a meeting is considered necessary before any business can be validly transacted. The articles normally would specify the quorum needed for a meeting to be valid but if they are silent, the minimum number of persons required to form a quorum is usually two but these two people must be entitled to vote and obviously be present in person.

(ii) Minutes

Section 138 Companies Act, Chapter 24:03 requires every company to keep minutes of all proceedings of general meetings, all proceedings at meetings of its directors and where there are managers, all proceedings at meetings of its managers to be entered in books kept for that purpose. Any minute signed by the chairman is *prima facie* evidence of the proceedings. The minutes of general meetings must be kept at the registered office of the company and must be open to the inspection of members free of charge.

(iii) Chairman's casting vote

Assuming that a meeting has been called, notices have been sent and the proper quorum is present at the company's meeting, that meeting must now be held under the supervision of the chairman. The chairman of the meeting has no casting vote unless the articles so provide. However, Table 'A' provides that in the case of equality of votes, whether on a show of hands or on a poll, the chairman of the meeting shall be entitled to a second or casting vote in addition to any vote they may have. The idea is for the deadlock or impasse to be broken.

(b) Resolutions of meetings

Resolutions refer to expressions of opinion or intention by a meeting. It is a formal decision of a general meeting following a motion moved by the members. There are three types of resolutions:

Ordinary resolution

This resolution is passed by a simple majority of votes cast by members who are present and with voting rights and constituting a quorum. This means 50 + 1% of members, therefore the majority rule principle applies. As such, the minority must subject themselves to the wishes of the majority. An ordinary resolution operates from the date of its adoption but may also operate from a different date if it is so provided.

Ordinary resolutions require 14 days' notice period to all those entitled to attend as regulated by s.133(4) Companies Act [Chapter 24:03].

Special resolution

This is a resolution passed by a majority of not less than three-quarters of the members of the company present and entitled to vote at a general meeting at which not less than one-quarter of the total votes of the company are represented.

21 days' written notice must be given specifying the intention to propose a resolution, the terms and effect of the resolution and the reasons for it as governed by s.133 Companies Act [Chapter 24:03]. A shorter period of notice may be given if a majority of members entitled to attend and vote and holding not less than 95% in nominal value of the shares of a company agree to a shorter period of notice.

Instances which require a special resolution are varied and are scattered all over the Companies Act [Chapter 24:03], including changing the company name, alteration of the company's objects, reducing the company's capital, making a loan to a director, winding up of a company, etc.

The chairman's declaration that a special resolution has been passed is effective and acts as conclusive evidence thereof.

According to s.136 Companies Act [Chapter 24:03] the special resolution so passed together with a notice copy attached must be lodged with the Registrar within 30 days after it was passed, failure of which penalties will follow.

Resolution requiring special notice

These are governed by s.135 and they apply in two instances, namely:

(a) For the removal of a director before the expiry of his period of office.

(b) Not to reappoint a retiring auditor or the appointment of some other person as an auditor.

The special notice is supposed to be sent out not less than 28 days to the company which in turn must give 21 days' notice to its members of such an intention.

7 **(a)** The appointment, duties and removal of a liquidator are governed by statute law in Zimbabwe and other jurisdictions such as England and South Africa. In Zimbabwe, this is governed by the Companies Act [Chapter 24:03].

A liquidator in the compulsory winding up of a company is appointed by the Master of the High Court for the purpose of conducting the proceedings in a winding up. He or she is in effect an agent of the company for this purpose as held in the *re Anglo-Moravian Hungarian Junction Railway Co; Ex pate Walkin* (1897). The very object of liquidation is to wind up the affairs of the company and effect its dissolution.

Section 218(1) Companies Act (Chapter 24:03] provides that in conducting the proceedings in a winding up of a company by the court, the Master of the High Court shall appoint a liquidator or liquidators. Before the appointment is made, the property of the company shall be deemed to be in the custody of the Master in accordance with s.218(2)(a) Companies Act.

In terms of s.219(1)(a) and (b) Companies Act, the creditors and contributories of a company to be liquidated may convene a meeting with the Master for the purpose of determining the person or persons whose names shall be submitted for appointment as liquidator or liquidators.

Section 218 (4)(a) and (b) provides that where no name of any person has been submitted to the Master for appointment as liquidator after meeting with creditors or contributories, the Master may appoint any fit person as liquidator of the company or authorise the provisional liquidator of the company to carry out the winding up of the company.

Section 272(1) provides a list of persons disqualified for appointment as a liquidator and they include an insolvent, a minor or any other person under legal disability, a body corporate, a person who resides outside Zimbabwe.

In *re Greatex Footwear (Pty) Ltd) (II)* (1936), the court held that as a general rule a liquidator should be some independent person, who is entirely disinterested and unconnected with the company. It went on to hold that it is undesirable that a director should be appointed as a liquidator.

In terms of s.246 Companies Act, the appointee may not act as liquidator until they have given security to the satisfaction of the Master. However, no security will be required in the case of a member's voluntary winding up if the company so resolves.

For a voluntary winding up of a company, s.248(1) Companies Act provides that the company in a general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company. In addition, s.252(6) states that the creditors and the company at their respective meetings may nominate a person to be liquidator, if it is a creditors' voluntary winding up of the company.

(b) The liquidator normally holds office until the winding up process has been completed. There are, however, a number of instances in which this would not be the case and provision is made in the Act for the setting aside of the appointment of the liquidator, their resignation and their removal.

In terms of s.273(1)(a) Companies Act, the court, upon the application of the Master or person having an interest in the winding up, may declare a liquidator removed if they were not qualified for appointment, for example, if a person residing abroad was appointed a liquidator, or has become disqualified or their appointment was, for any other reason, illegal.

Section 273(1)(b)(i) provides that the court may remove any liquidator from their office for absence from Zimbabwe, ill-health or any other factor tending to interfere with the performance of their duties as liquidator. In *Re North Molton Mining Co Ltd* (1866), the court held that insanity on the part of the liquidator is a good ground for removing them from the office of a liquidator. In *Re Sir Johan Moore Gold Mining Co* (1879), the court held that general unfitness for the office of the liquidator is a sound reason. However, where it is in the interest of the parties that a particular person should not act as liquidator, they may be removed although there is no question of general unfitness for the office or of misconduct.

The court may also remove the liquidator from their office on the ground of misconduct, including any failure to satisfy a lawful demand of the Master or of a commissioner appointed by the court, in terms of s.273(1)(b)(iii) Companies Act.

In accordance with s.273(1)(b)(iv), failure to perform any of the duties imposed on them by the Act is good ground for removal of the liquidator by the court on application by the Master or person interested in the winding up of the company.

In terms of s.273(1)(b)(ii), the court may remove any liquidator from office on the ground that they have accepted or offered or agreed to accept or solicited from an auctioneer, agent or other person employed on behalf of the company any share of the commission or remuneration or any other benefit whatever accruing to such auctioneer, agent or other person.

In *Spurlng* & *Anor* v *Brewer* (1955), a majority shareholder who used their voting strength to remove the liquidator of a company which was being wound up and secured appointment of themselves as liquidator of the company was removed by the court when their action led to a dispute between them and another shareholder regarding the extravagant and expense they received for acting as liquidator. Hence the court may remove a liquidator on any other good cause in terms of s.273(1)(b)(v).

The liquidator themselves can apply for their removal. In terms of s.225(1) Companies Act, upon realising all the assets of the company and having distributed a final dividend, if any, to the creditors of the company and adjusted the rights of the contributories among themselves and made a final return, if any, to the contributories, the liquidator may apply to the Master for their release. The liquidator shall put in the Gazettee an advertisement and the Master shall consider any objection raised by any interested party against the application made by the liquidator.

Section 286(1) Companies Act provides that at the request of any liquidator the Master may permit them to absent themselves from Zimbabwe or may relieve them of their office in either case upon such conditions as the Master may think fit to impose and subject to their giving notice to absent themselves from Zimbabwe or to resign as the Master may direct.

(c) **Duties of a liquidator**

In terms of s.221(1)(a), in carrying out their duties a liquidator may execute in the name and on behalf of the company all deeds, receipts and other documents using the company's seal.

In terms of s.221(1)(b), the liquidator may also prove a claim in the estate of any contributory or debtor and receive payment in full or a dividend in respect thereof. In addition, they have the power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company in terms of s.221(10(b)(c) and they may do this on their own initiative.

Section 221(2)(a) provides that the liquidator, with the authority of a resolution of creditors and contributories or with the leave of the court, may bring or defend in the name and on behalf of a company any action or other legal proceedings.

In accordance with s.221(2)(b), the liquidator may agree to any reasonable offer of composition made to the company by any debtor or contributory and take any reasonable part of the debt in the discharge of the whole or give reasonable time.

In terms of s.221(2)(c), the liquidator may compromise or admit any claim or demand against the company.

Section 221(2)(d) provides that the liquidator may submit disputes to arbitration.

In terms of s.221(2)(e), the liquidator has the power to carry on or discontinue any part of the business of the company in so far as may be necessary for beneficial winding up.

In the case of a company unable to pay its debts, the liquidator may adopt or abandon any contract entered into by the company before the commencement of the winding up to buy or receive in exchange any immovable property, transfer of which has not been effected in favour of the company. This is in accordance with s.221(2)(f).

In terms of s.221(3), the liquidator shall also have the power with the leave of the court to raise money on the security of the assets of the company or to do any other thing which the court may consider necessary for winding up the affairs of the company and distributing its assets.

In terms of s.222(1), the liquidator in a case of compulsory winding up shall, in the administration of the assets of the company, take into account any directions which may be given by resolution of the creditors or resolution of the contributories at any general meeting.

Section 224(1) Companies Act provides that immediately after their appointment, the liquidator in a compulsory liquidation shall open an account, in the name of the company in liquidation, with a bank within Zimbabwe and shall deposit therein to the credit of the company from time to time all moneys received by them on its behalf.

In terms of s.258, every person appointed liquidator in voluntary liquidation shall, within seven days after their appointment, lodge with the Master a notice of their appointment in the prescribed form. Failure to comply with this section amounts to a criminal offence.

In a voluntary liquidation, the liquidator may summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution or for any other purpose they may think fit in accordance with s.263(1) Companies Act.

Section 277 provides that the liquidator shall, not later than three months after the date of their appointment, submit to general meetings of creditors and contributories a report as to the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities and as to the progress and prospects of the liquidation among other issues.

Section 278 requires the liquidator from the beginning of their appointment and during the whole period of their office to punctually keep proper books and records of all transactions of the liquidation.

Section 279(1) Companies Act provides that every liquidator shall, unless they received an extension of time as hereinafter provided, frame and lay before the Master, not later than six months after their appointment, an account of their receipts and payments and a plan of distribution or, if there is a liability among creditors, to contribute towards the costs in the winding up, a plan of contribution apportioning their liability.

The liquidator is also required in terms of s.285(1) to lodge, without delay, with the Master the receipts for dividends. Subsection (2) provides that if any dividend remains unpaid for a period of three months after the confirmation of the account, the liquidator shall immediately pay into the Guardian's Fund for account of the creditor or contributory.

In addition, s.262(1) provides that where a company is being wound up voluntarily, the liquidator may apply to the court to determine any question arising in the winding up or to exercise, as respects the enforcing of calls or any other matter, all or any of the power which the court might exercise if the company were being liquidated compulsorily.

Section 281(1) calls upon the liquidator to make sure that their account lies open for inspection by creditors, contributories or other persons interested for a period not less than 14 days and in terms of subsection (2), they shall give due notice thereof by advertisement in the Gazette, and shall state in that notice the period during which and the place for inspection and shall post or deliver a similar notice to every creditor who has proved a claim against the company.

8 **(a)** The employer in this case has violated s.8 Labour Act [Chapter 28:01] which provides that an employer who obstructs or prevents an employee from membership of a trade union or workers' committee commits an unfair labour practice. The right to belong to a trade union of one's choice is covered by the right to freedom of association in the current Constitution. Section 4 Labour Act provides that any provision in a contract of employment, which seeks to waive this right of the employee, shall be a nullity. In *POSB* v *Chimanikire* & *Ors HH* (2005), the court stated that an employer is not privy to a trade union to which employees belong and therefore has no right to unnecessarily interfere with their activities pertaining to that union. In the present case, Lilian's employer's contention that her membership of the union was contrary to company policy cannot stand, because membership of trade unions is essential since it is usually the union which engages the employers for the improvement of working conditions of its members. It ensures that employees' rights are respected. Punishing her for belonging to a labour union is contrary both to the Labour Act and the Constitution of Zimbabwe which guarantees among other things, freedom of association and assembly.

Section 18(1) Labour Act provides that an employer is required to grant maternity leave for a period of 98 days on full pay to a female employee who has served for at least one year. Since Lilian had served for two years, she was entitled to maternity leave.

The employer disregarded Lilian's legitimate expectation in that it did not notify Lilian of its intention to transfer her from the department she used to work before she went on maternity leave. Legitimate expectation entails that before a right or benefit is taken away from a person, that person has to be notified of the development so that they state their own side of the story. It is an extension of the right to be heard. This was enunciated in *Administrator Transvaal* v *Traub* & *Ors* (1989) and in *Kanonhuwa* v *COTTCO* (1998), a female employee recently married requested for and was granted a transfer from one town to another to join her husband. But shortly thereafter, she was instructed to return to the first town and refused and was dismissed. The court reversed the dismissal as a violation of the employee's legitimate expectation. In all the company has committed a series of unfair labour practices and Lillian can obtain relief.

The concept of unfair labour practice has a broad meaning and definition within the context of the relevant legislation, namely the Labour Act [Chapter 28:01]. The underpinning rationale is to protect the worker from acts of commission or omission on the part of the employer, which have a tendency to undermine or negate the interests of the worker. The spirit of the legislation is to promote as far as possible a harmonious and conducive working environment and to discourage arbitrary and high handed behaviour.

Section 8 Labour Act [Chapter 28:01] gives a broad meaning to the notion of unfair labour practices by the employer. An employer who obstructs or prevents an employee from membership of a trade union or workers' committee commits an unfair labour practice. The employer, Norton Paper Products (Pvt) Ltd, has committed unfair labour practices in arbitrarily transferring Lillian to another unit and also by trying to unduly interfere with Lillian's right to belong to a union.

(b) It is important to note that at law, an employer has no duty to provide work to an employee, but only to pay full remuneration, benefits and other entitlements in terms of the contract of employment and/or law. This was stated in *Commercial Careers' College (Pvt) Ltd* v *Jarvis* (1989).

In the present case, it is clear that the employer is trying to frustrate Nelly by not giving him work so that he resigns. This is because it does not approve of his membership of the trade union and this will amount to constructive dismissal in breach of s.12B Labour Act [Chapter 28:01]. Constructive dismissal takes place when an employer creates conditions which are so unfavourable to the working environment and employment relationship that an employee will be left with no choice but to resign from the employment.

Nelly cannot compel his employer to give him work, since doing so would be contrary to the common law position. In *Kandemiri* v *DDF* & *Anor* (1998), a driver was involved in an accident causing damage to the employer's vehicle. The employer suspected that the accident was caused by negligence but had no evidence and in an apparent effort to frustrate the worker, stopped giving him actual work, although he continued to receive wages. The employee was dismissed when he stopped coming to work. The court held the employee to have repudiated his contract. This is similar to Nelly's case since his employer does not approve of his membership of the trade union, but if he stops coming to work he is likely to be dismissed as the employer will take that as an excuse to dismiss him.

There are, however, limited circumstances under the common law when an employer is required to provide actual work, such as when the employee's remuneration depends on actual work being given as when the employee is paid by way of commission or the job provides an opportunity for advancing the employee's professional or artistic development or when the employer had undertaken to train the employee. In *Standard Chartered Bank* v *Matsika* (1997), an employer who denied a reinstated employee actual work was held to be in breach because the employee's remuneration depended on actual work. Therefore if Nelly is to succeed in getting work from the employer, he has to show that his remuneration depends on actual work done. Unless he has done this, he cannot be heard to complain that he is not being accorded work since this is the position at law. In *Muzondo* v *University of Zimbabwe* (1981), the employer was held liable to pay special damages including for lost income from potential published work to a lecturer who was denied the right to work although he had continued to draw a salary. In summary, it should be noted that unless Nelly can show that his level of remuneration at the workplace depends on the amount of work he has done or alternatively that his professional development depends on regular exposure to work, the company may not be liable to provide him with work as long as he is not prejudiced financially.

9 **(a)** The problem question relates to the law of agency. Rufaro as agent has been 'commissioned' by the principal, Ratidzo, to secure a car for her which matches a certain description and has certain specifications. Below is an account of the law of agency and an explanation of the law in light of the facts of the case after an exposition of the law has been done. The conclusion which necessarily is to be derived from the discussion will then be made.

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 involved in the original action.

Agency being a form of service, it is clear that agents are bound to do what they have been instructed to do and 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 they have undertaken to do is not entitled to claim remuneration. *National Screenprint (Pvt) Ltd* v *Campbell* (1979) and *Esse Financial Services* v *Cramer* (1973).

The authority given by the principal to the agent is the essence of the contract of agency. In this particular case, the agent has not been able to discharge his duties conscientiously and with utmost care and diligence.

The principal gave specific instructions as to the exact type of car she wanted purchased on her behalf, a Mercedes Benz ML, and not 'E' class. Furthermore, she desired to have a car which is no more than three years old and whose mileage is 50,000 kilometres or less. All those specifications were disregarded.

It is quite clear that, in law, Ratidzo, the principal, can repudiate the contract which purportedly was made by Rufaro on her behalf. If the principal has suffered financial prejudice as a result of the actions of her agent, she can claim damages that represent the amount of the financial prejudice, in addition to her costs. She is not bound by a contract which clearly falls outside the parameters of her instructions.

(b) In general, it can be said that there must be some urgent necessity arising from an accident for this form of agency to arise and by necessity it is meant that what is done is reasonably necessary.

Agency of necessity arises by operation of law in certain cases where a person is faced with an emergency in which the property or interests of another person are in imminent danger and it becomes necessary in order to preserve the property or interests to act for that person without their authority.

Lord Diplock in *China Pacific SA* v *Food Corporation India* (1982) observed as follows:

'Whether one person is entitled to act as agent of necessity for another person is relevant to the question whether circumstances exist which in law have the effect of conferring on them authority to create contractual rights and obligations between that other person and a third party that are directly enforceable by each against the other…'

In our law, agency of necessity arises as a result of the operation of law and the consequence is that:

(a) the agent can bind the principal.
(b) the agent will have a defence if sued by the principal.
(c) the agent will in appropriate cases be entitled to claim reimbursement from the principal.

In order to establish the existence of an agency of necessity, the following factors must be established:

1. first, it is necessary to show that the agent was unable to obtain instructions from their principal.
2. second, the agent must satisfy the court that they acted in the interests of the principal and in a *bona fide* manner.
3. third, the action taken by the agent must have been reasonable and prudent.
4. fourth, there must be some necessity or some form of emergency (*Australian Steam Navigation Company* v *Morse* (1872)).

In conclusion, it can be said that it is quite clear that Morgan is legally bound to reimburse Nelson the amount of $3,000 representing the expenses necessarily incurred in order to preserve Morgan's property. The type of agency involving Nelson and Morgan is called *negotiorium gestior* and is also commonly referred to as agency of necessity. The *negotiorium gestior* uses their own resources for the benefit of the principal without their sanction. However, they retain a right of action to recover the necessary and useful expenses incurred by themselves in running the business of the principal. The onus is on them to show that the expenses so incurred were reasonable in the circumstances. Agency of necessity arises by operation of law in certain cases where a person is faced with an emergency in which the property or interests of another person are in imminent jeopardy. It becomes necessary in order to preserve the property or interests to act for that person without their authority.

Unlike a proper agent, a *negotiorium gestior* is not entitled to any remuneration for their services save their necessary and useful expenses. But though not entitled to remuneration, they are still delictually liable, if they cause loss to the principal by negligence in their voluntary administration of the principal's affairs.

Therefore Morgan is liable to pay $3,000 to Nelson on the basis that Nelson acted as a *negotiorium gestior* or agent of necessity to preserve Morgan's property which was in danger of utter destruction. All the requirements needed to establish agency of necessity are present in the case under discussion.

10 The facts of the problem relate to the broad topic of governance and ethical issues relating to business, in particular the topic of money laundering. Money laundering has become one of the world economy's most pressing challenges. It is a vice which exists on all continents and it feeds on other criminal activities such as drug trafficking, trafficking in human beings, illegal commercial sex work and illegal trafficking in human organs, etc.

In this case, Wiseman Finances (Pvt) Ltd are illegally boosting the company's revenue by being active players on the foreign exchange market. Money laundering is detrimental to good business ethics. What now follows is a detailed treatment of the topic of money laundering and the law pertaining to the issue.

Money laundering is a serious offence and is largely regulated by the Serious Offences (Confiscation of Profits) Act [Chapter 9:17] and the Bank Use Promotion and Suppression of Money Laundering Act [Chapter 24:24]. The statutes referred to above contain various provisions which define and seek to counter and combat money laundering in Zimbabwe. The controls range from administrative mechanisms to those which are part of the criminal justice system.

In terms of s.63 Serious Offences Act [Chapter 9:17], money laundering is committed where there is either:

(i) removal into or from Zimbabwe, money or other property which is the proceeds of a crime; and/or

(ii) when a person receives, possesses, conceals, disposes of, brings into or removes from Zimbabwe, money or other property which is the proceeds of a crime.

Money laundering thus finds expression in the dealing with money or property which has not been cleanly made.

In *S* v *Mlambo* (1995), the court noted that the definition under s.63 is wide and all encompassing. It not only covers a person who launders money coming from the illegal activities of another but also launders money from the illegal activities in which he was party to. By their nature, financial institutions play a 'midwife' role in money laundering although it is possible to have cases which bypass them.

Thus when money is illegally cleared, for example, through being deposited into the formal banking market as proceeds from a legitimate business transaction, money laundering is committed. It is also committed when 'dirty' money is deposited into an ordinary clean account in order to give the false impression that it is clean money. The essence of the offence therefore consists in the legitimisation of illegal proceeds, breaking the law to make money as it were and trying to hold oneself as having made the money through legitimate and lawful economic activities.

Part IV of the Bank Use Promotion and Suppression of Money Laundering Act [Chapter 24:24] contains direct provisions on suppression of money laundering. Under s.24 designated institutions are mandated to verify the true identity of their customers, the so called 'know your customer policy'. This enables them to query extraordinary, huge and suspicious deposits. In terms of s.25 the financial institution must establish and maintain customer records. These records should contain personal and business details, transactions and the amounts involved.

Section 26 casts an obligation on the institutions to report suspicious transactions. In that respect, they should prepare and forward the reports within three days of the arising of the suspicion. Section 27 mandates them to establish and maintain internal procedures for the reporting of suspicious transactions by employees and shields them from civil liability in the event of such reporting.

By s.29, the director of the unit can issue disclosure orders as against financial institutions in a bid to have them disclose criminal activities. In terms of s.30, compliance orders can be issued where the director believes that the designated institution has not complied with a disclosure order or any provision of the Act. Under s.31, inspectors and police officers have the power to request an institution to suspend a transaction so that they can come in and investigate fully. Section 32 provides various offences for failure to comply with these suppressive mechanisms.

The Serious Offences Act, on the other hand, contains general provisions for the suppression of serious offences, which provisions are also applicable to money laundering. There is provision for search powers, interdicts, seizure of cash, confiscation and forfeiture where there is money laundering. Further various obligations are cast upon financial institutions. Under s.60 they should retain and maintain records of customers and their transactions. Further they should report any suspicious or underhand activities to the concerned enforcement authorities.

There are also penalty provisions found in the statute. Section 63 specifically criminalises money laundering. Section 64 also prohibits dealing in tainted property which measure is aimed at curbing the continued use of proceeds from money laundering. The penalties imposed on offenders are heavy and deterrent, although there is still room for improvement.

The above constitutes a brief and broad summary of what money laundering is and the main controls laid out for its suppression. As it continues to evolve, it is foreseeable that it will find expression in less orthodox but sophisticated forms, more so in view of the cyber season which the modern world is in.

Due to the interdependence of the world's economies, some of the more devastating forms of money laundering often take place transnationally and extra-territorially. Fragile economies such as Zimbabwe's are very vulnerable to money laundering activities, be they domestic or extraterritorial.

The facts of the case disclose a clear case of money laundering and other dishonest activities on the part of the quasi-financial institution, Wiseman's Finances (Pvt) Ltd. The company operates, at face value, a legitimate business such as micro-financing to small businesses and the underwriting of short and medium-term insurance policies. However, it is its dealings on the parallel or foreign exchange black market which are bound to put it on a collision course with the law. In typical 'money laundering' fashion proceeds from the company's illegal and irregular financial dealings are being used to promote and grow some of its activities which under normal circumstances would fall within the confines of the law. John can be advised that the two pieces of legislation which have been cited, namely the Serious Offences (Confiscation of Profits) Act [Chapter 9:17] and the Bank Use Promotion and Suppression of Money Laundering Act [Chapter 24:24] combined, contain provisions which can adequately deal with the mischief of money laundering which the company is apparently involved in. The law contains both civil and criminal sanctions as a remedy. In many jurisdictions including Zimbabwe, the law takes a very stern and dim view of money laundering and John as a shareholder can activate the process of putting an end to the illegal activities. Heavy penalties and sanctions are likely to be invoked by the authorities. Besides financial sanctions, the law provides for withdrawal of a company's operating licence.

1 **(a)** 3–5 marks A comprehensive answer which identifies and explains the concept of human rights as entrenched in the Constitution of this country and supported by case law.

1–2 marks A deficient answer.

(b) 3–5 marks A good answer which adequately explains the various duties and responsibilities of the Human Rights Commission provided for in the relevant legislation.

1–2 marks An incomplete answer.

2 **(a)** 3–5 marks A good answer which clearly explains and distinguishes terms and mere representations with reference to decided cases.

1–2 marks An average answer.

(b) 3–5 marks A good answer which explains fully the implied terms of a contract.

1–2 marks A poor to average answer.

3 7–10 marks A comprehensive answer which clearly explains and analyses professional negligence and the duty of care of accountants and auditors in performance of their duties. Reference to decided cases is very useful.

4–6 marks An average answer with some omissions.

1–3 marks A poor answer.

4 7–10 marks Top band marks will be awarded to candidates who give a full explanation of the duties of a promoter and of the remedies available to the company where such duties have been breached. Citation of decided cases is useful.

4–6 marks A rather lukewarm answer in which some aspects of the answer are not properly explained.

1–3 marks An inadequate answer.

5 **(a)** 2–3 marks A correct definition of a company's borrowing powers supported by statute law and/or relevant judicial decisions.

0–1 mark A vague answer.

(b) 5–7 marks A good answer which clearly explains and distinguishes loan capital and share capital.

2–4 marks A poor to average answer.

0–1 mark A poor answer.

6 **(a)** **(i)** 1 mark Correct answer.

(ii) 1 mark Correct answer.

(iii) 2 marks Correct and reasonably detailed answer.

(b) 4–6 marks A good answer which fully explains and distinguishes the three main types of resolutions. Reference to relevant statute law will be useful.

2–3 marks A average answer with gaps.

0–1 mark A poor answer.

7	**(a)** 2–3 marks	An accurate and full answer with reference to statutory provisions.	
	1 mark	A weak answer.	
	(b) 2–3 marks	A comprehensive answer on the removal of a liquidator.	
	1 mark	A poor answer.	
	(c) 3–4 marks	A good answer which clearly explains the duties of a liquidator with the aid of relevant provisions in the Companies Act [Chapter 24:03]	
	1–2 marks	A weak answer.	
8	**(a)** 3–5 marks	Answers in this bracket would correctly identify the legal issues at stake.	
	1–2 marks	A weak answer.	
	(b) 3–5 marks	Answers in this bracket would correctly identify the issue of when an employee is entitled to be provided with work by the employer.	
	1–2 marks	A weak answer.	
9	**(a)** 3–5 marks	A good answer which correctly discusses the facts of the case in the context of the law of agency.	
	1–2 marks	A rather weak answer.	
	(b) 3–5 marks	A good answer which touches on all the relevant issues raised by the facts of the case.	
	1–2 marks	A below average answer.	
10	7–10 marks	A good answer which correctly identifies the problem of money laundering.	
	4–6 marks	An average answer with some omissions.	
	1–3 marks	A very lukewarm answer.	