Answers

1 The interpretation of statutes falls largely within the realm of the common law and the objective of interpretation is to arrive at the legal meaning of a statutory provision, that is, the meaning intended by the legislature. The interpretation of the Constitution, which is an Act of Parliament, is *sui generis* (of its own kind) because it is the supreme law of the land in terms of s.3 and cannot be interpreted in the same way that the courts interpret ordinary statutes. Statutory interpretation and common law have been positively impacted upon by human rights as the latter are interpreted so as to expand the rights of citizens and not to attenuate or take away those rights.

In *Smyth* v *Ushewokunze* (1997), the court said, 'arriving at the proper meaning of a constitutional provision should endeavour to expand the reach of the right rather than alternate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as the letter of the provision, one that takes full account of challenging conditions, social norms and values. The aim was to move away from formalism and make human rights a practical reality. This shows how human rights have impacted on the interpretation of statutes and the common law.'

Rights of citizens aptly provided for in the Constitution have been interpreted by the courts in such a way that exhibits reasonableness in a democratic society premised on freedom and equality. Section 15 of the Constitution provides for the right to dignity, not to be subjected to torture or inhuman, degrading punishment or treatment. In *S* v *Ncube and others* (1987), after duly being convicted, the accused persons were sentenced to corporal punishment. The court held that corporal punishment on male adults was in clear and flagrant violation of the right enshrined in s.15 of the Zimbabwean Constitution which guarantees citizens against inhuman or degrading punishment, which corporal punishment clearly is. The way the court interpreted the provision showed that it was intent on expanding rather than diminishing the fundamental rights of the applicants. Hence this was the position notwithstanding the fact that the court below had imposed this sentence on the applicants. In *S* v *A Juvenile* (1989), the court by a majority decided that the imposition of whipping or corporal punishment upon juveniles was an inhuman or degrading punishment that infringed s.15(1). Regrettably, as a result of constitutional amendment 13, a provision was inserted in s.15 providing that it is not inhuman or degrading to use a whipping cane on male juveniles.

The courts are enjoined to give supremacy to the Constitution. In *Rattigan and Others* v *Chief Immigration Officer* (1994), Gubbay CJ (as he then was) quoted *Dow* v *AG* [1992] LRC (Const) 623 (Botswana Court of Appeal) with approval, '... I conceive it that the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.' In that case, the court interpreted the right to freedom of movement in s.22 to include the right of the applicant women to have their foreign husbands reside in the country.

The former Chief Justice went on to state a powerful dictum, 'This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pendatic interpretation and to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed ... Courts cannot allow a constitution to be a 'lifeless museum piece' but must continue to breath life into it from time to time when opportune to do so...' That is the reason why in *Catholic Commission for Justice and Peace in Zimbabwe* v *AG et al* (1993), the court interpreted s.15 of the Constitution, which provides for the right to dignity, in such a way as to hold that inordinate delays in carrying out the death sentence on condemned prisoners amounted to inhuman, degrading treatment or punishment in direct conflict with s.15. Gubbay CJ observed that this right 'stands as a sentinel over human misery, degradation and oppression ...' In addition, the Supreme Court in *Blanchard* v *The Minister of Justice, Legal and Parliamentary Affairs and Anor* (1996) said, '... the aim of s.15(1) is to protect both the dignity and the physical and mental integrity of the individual. The prohibition relates not only to acts that cause physical pain but also to those that cause mental suffering to the victim.' This demonstrates the impact of human rights on both common law and statutory interpretation that when it comes to interpreting and making pronouncements on the Bill of Rights, it is not business as usual but the courts pay due regard to the interpretation of those rights so as to expand and not to curtail them. This is a very robust approach rather than a timid one and it has a profoundly positive effect on both statutory interpretation and the common law.

Section 18(2) of the Constitution provides that if any person is charged with a criminal offence, then unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. This right is seriously considered by the courts every time an application for a permanent stay of criminal proceedings is made. In *Mlambo* (1991) the court said, 'Trials held within a reasonable time have an intrinsic value. If innocent, the accused should be acquitted with a minimum disruption to his social and family life. If guilty, he should be convicted and an appropriate sentence imposed without unreasonable delay. His interest is best served by having the charge disposed of within a reasonable time so that he may get on with his life. A trial at some distant date in the future when his circumstances may have drastically altered, may work an additional hardship upon him and adversely affect his prospects of rehabilitation.' It was held that the inordinate delay of four years and seven months by the state in prosecuting the applicant was grossly unreasonable and ordered a permanent stay of proceedings. Again in this case, the notion of human rights was having a positive effect on both constitutional and statutory interpretation.

The courts, in giving a generous and purposive interpretation of the Constitution, have founded what has been referred to as 'the basic rights' doctrine. In *Bull* v *Minister of State (Security) and Others* (1987), persons detained under the then Emergency Powers Regulations were held to have certain basic rights in respect of the conditions in which they were incarcerated. Blackie J said, 'fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those taken

away from him by law, expressly or by implication or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. [There is] a substantial residue of basic rights which he cannot be denied and if he is denied them, then he is entitled .. . to legal redress.' The right to legal representation contained in s.13(3) of the Constitution. In *Paweni* v *Minister of State (Security) and Anor* (1984), the petitioner was prevented from communicating with his lawyer by officers of the Central Intelligence Organisation (C.I.O). Smith J said, '..C.I.O officers are apparently still denying detained persons .... a most important [constitutional right] .. it is inconceivable that the existence of this right is not known to C.I.O officers of any standing. This court takes a serious view of such deliberate flouting of the provisions of the Constitution by C.I.O officers [counsel] contended that the C.I.O officers had acted improperly in denying the petitioner the right to consult his legal representative in private. He said that if the petitioner had applied for a mandamus to secure his right the state would not have opposed it. I fail to understand, however, why it should be necessary for a detained person to apply to court for a mandamus before he can exercise the rights which are conferred upon him by the Constitution.' The court issued an order allowing the petitioner to see his lawyer. This shows that the courts regard as serious the right to legal representation to such an extent that the rights in the Bill are interpreted uniquely so as to benefit the aggrieved person and not to rob him of such right. In *S* v *Slatter and Others* (1983), a warned and cautioned statement made by an accused person who has been arrested will not be admissible at his trial, even if it has been confirmed by a magistrate, if the accused was denied access to his legal practitioner prior to and during confirmation proceedings. The late Dumbutshena JP (as he then was) said, '... if an accused person wants a legal practitioner before or during interrogation, the police investigators must stop their investigations and only resume after the accused has had consultations with his legal practitioner. .. if the police, in spite of the accused's request to have his lawyer present, continue with their interrogation thus denying him the protection of his constitutional rights and professional advice, it cannot be said the police have not brought to bear upon the will of the accused by external impulses undue influence. The denial of access to a lawyer is in itself a form of psychological coercion and inducement which is brought to bear on the will of the accused.' The above cases show that human rights have positively impacted on the common law and statutory interpretation particularly the Constitution.

On the whole, human rights embedded in the current Constitution have positively impacted on the common law and statutory interpretation, the interpretation of the Constitution being *sui generic* or unique. What is to be accorded is a generous and purposive interpretation of the Constitution when dealing with human rights. Equally with the common law, human rights has had a deep and fundamental effect.

2 Our law provides for various remedies in cases of breach of contract and they include specific performance, interdicts or injunctions, rescission, cancellation among others. Of these remedies, there are equitable and non-equitable remedies. Specific performance falls under the former while damages fall under the latter.

Specific performance is an equitable and discretionary remedy issued by the court which compels a contracting party to do that which he has promised to do. In general, the injured party has the right to claim specific performance if he is ready to carry out his own obligation under it, but the court has a discretion to order it or not. In *Farmers' Co-op Society* v *Berry* (1912), the court said, '*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 courts will exercise a discretion in determining whether or not decrees of specific performance should be made.'

This decree is a form of relief that is purely equitable in origin and is granted at the discretion of the courts on the basis that it is just and equitable to do so. The fundamental rule is that specific performance will not be granted if there is another adequate remedy at law. The purpose of such a decree is to ensure that justice is done. In *Wilson* v *Northampton and Banbury Junction Rail Co* (1874), the court said, 'The court gives specific performance instead of damages only when it can by that means do more perfect and complete justice.' Furthermore in *Flint* v *Brandon* (1803), it was stated, 'The court does not profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for courts of equity to interfere... In the present case complete justice can be done at law ...' In that case, the court refused specific performance of the defendant's promise to make good a gravel pit which he had quarried.

Where a contract contains interdependent and mutual undertakings, a plaintiff cannot obtain an order for specific performance if he is in breach of his own obligations or if he fails to show that he is ready and willing to perform his outstanding obligations in the future. This was aptly said in *Australian Hardwoods Pty Ltd* v *Railways Commissioners* (1961) and in *Intercontinental Trading* v *Nestle Zimbabwe* (1993), the court ordered specific performance, viz, the defendant company to deliver certain quantities of milk to the plaintiff since the plaintiff was willing and capable of performing its obligation under the contract.

The exercise of the equitable jurisdiction to grant specific performance is not a matter of right for the person seeking relief but a discretion of the court. This does not mean that the decision is left to the uncontrolled caprice or arbitrariness of the individual judge, but that a decree, which would normally be justified by the principles governing the subject, may be withheld, if to grant it in the particular circumstances of the case would defeat the ends of justice. In *Stickney* v *Keeble* (1915), the court said, 'Indeed the dominant principle has always been that equity will only grant specific performance if, under all circumstances, it is just and equitable so to do.'

Where damages are an adequate remedy, specific performance will not be ordered. In *Beswick* v *Beswick* (1968), a contract provided for B to transfer property to his nephew and, in return, the nephew would make payments to B's wife after his death. The nephew failed to make the payments and B's estate sued the nephew. The court held that damages were an inadequate remedy as the estate itself had suffered no loss, since the payments were due to be made to the widow in a personal capacity. In the event, the court made an order for specific performance compelling the nephew to carry out his obligations. But in *Swartz & Sons (Pty) Ltd* v *Wolmaransstad Town Council* (1960), the court held that damages were an adequate remedy and refused the decree of specific performance, 'The right to elect specific performance is not an absolute one. The court has a discretion, when

specific performance is applied for, to leave the applicant to his remedy for damages ... it does seem to me that the probabilities on affidavit are so strong in the respondent's favour that it should not be obliged to perform a contract which it apparently has cancelled lawfully, whilst the applicant can adequately be compensated by means of damages.'

Specific performance will not be granted where it is impossible to effect. In *Shakinovsky* v *Lawson and Another* (1904), where a buyer, S, sued for the specific performance of a contract of sale of a shop and business with no alternative claim for damages, and it appeared from the evidence that the seller, L, could not give specific performance as the subject-matter of the sale had subsequently been sold to the second defendant who had no notice of the previous sale, the court allowed the buyer to amend his declaration by inserting an alternative claim for damages. In refusing specific performance the court said, '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.'

Where it would be difficult for the court to enforce its order, the decree of specific performance will be refused. In *Lucerne Asbestos* v *Becker* (1928), B undertook to form a company to purchase certain property from L and guaranteed to L that the company would pay an agreed price for the property. B, having failed to form the company because the property had subsequently proved to be valueless, was sued by L for specific performance or alternatively damages for breach of his contract. The court held that it would not order specific performance but would leave L to his remedy in damages. In addition, in *Barker* v *Beckett & Co Ltd* (1911), Barker, having let certain premises to a company, brought an action for the payment of rent and order on the company to keep the premises insured and in repair. The court would not specifically enforce a contract merely to repair or to insure a building, '... it would be difficult for the court if it were to give an order for specific performance to enforce its order and that of course is at the root of the doctrine of specific performance.'

Furthermore, where the thing claimed can readily be bought anywhere, the court will not order specific performance. In *R* v *Milne and Erleigh* (1951) the court said, 'In our law a grant of specific performance does not rest upon any special jurisdiction, it is an ordinary remedy to which in a proper case the plaintiff is entitled. But the court has a discretion whether to grant the order or not ... so in contracts for the sale of shares which are daily dealt in on the market and can be obtained without difficulty specific performance will not ordinarily be granted...'

The court also would refuse to grant this decree where the order would cause great hardship on the defaulting party or the public at large. In *Haynes* v *Kingwilliamstown Municipality* (1951), the plaintiff had entered into an agreement with the respondent company, in which the latter would deliver certain quantities of water to her but due to an unprecedented drought, the respondent company defaulted. She sought a decree of specific performance but the court refused it and said, 'There can be no doubt that in the present case to have ordered the respondent to release 250,000 gallons of water a day from their storage dam while the unprecedented drought continued and the water in the dam had sunk dangerously low, would have worked very great hardship not only to the respondent but to the citizens of Kingwilliamstown to whom the respondent owed a public duty to render an adequate supply of water ...'

In terms of our common law, where the subject matter of the contract is the rendering of services of a personal nature, the decree will be refused. In *Grundling* v *Beyers and Others* (1967), G, who had been employed by a mining company, had been summarily dismissed for inefficiency. G applied for an order of reinstatement. The court held that as the relationship between the company and G had been contractual, the order for his reinstatement, which amounted to a claim for specific performance, could not be granted but G was left to his remedy in damages for wrongful dismissal. In *Schierhout* v *Minister of Justice* (1926), the court underscored, 'the inadmissibility of compelling one person to employ another whom he does not trust in a position which imports a close relationship...'

Another example of a familiar equitable remedy for breach of contract is an interdict. It is an order in which a person is ordered to refrain from doing a particular act. It is an appropriate remedy where a party to a contract has good reason to fear a breach of contract by the other party, to prevent the threatened breach. In *Municipality of Bulawayo* v *Bulawayo Waterworks Co Ltd* (1923), the court said that an interdict was the appropriate remedy for such a threatened breach of contract, involving the supply of water to residents of the country's second largest town and the dispute primarily centered on the appropriate tariffs to be charged.

For the enforcement of negative provisions in a contract, an interdict would be granted. In *Pretoria City Council* v *Kontinentale Films* (1956), P, in letting a portion of its farm to K, for the purpose of a drive-in cinema, provided in the lease that the property should not be used for any other purpose without P's consent. One V, K's employee, on behalf of K applied for and obtained a licence to sell intoxicants at the cinema. P applied for an order interdicting K from conducting that particular business on the property leased. The court held that as it was never in contemplation of the parties, in granting the right to carry on a drive-in cinema, that there should be an inherent right to sell intoxicants which was a very special trade, the application should be granted. It is also an appropriate remedy in cases of restraint of trade covenants. In *Schwartz* v *Subel* (1948), Subel sold a business to Schwartz. A clause in the agreement of sale provided that the seller was not permitted to open up a store in opposition to the buyer within a radius of five miles. Subel purchased a business one and a half miles from that sold. The court granted the interdict stating that the restraint was reasonable.

An interdict can also be granted after a contract has been terminated, to prohibit interference with a party's other rights. In *Pougnet* v *Ramlakan* (1961), P and R were parties to a contract under which R was appointed manager on P's sugar farm. R had been dismissed for not delivering reaped sugarcane to a particular mill and when R refused to leave, P sought an interdict restraining him from remaining on the farm. The court held that the interdict should be granted. It observed that the parties were agreed that breach of the obligation to deliver to a particular mill would entitle P to cancel the contract. The value to P of his quota and the fact that the quota was at the particular mill in question gave that term of the contract an importance it would otherwise not have

had. This case is on a par with that of *Blismas* v *Dardagan* (1951) and the court reached a similar decision. In that case the court laid down the requirements for an interdict which have over the years been rigorously followed by the courts in Zimbabwe. Summarising the requirements the then Chief Justice, Mr Beadle said:

'now to obtain an interdict the applicant must satisfy the court either:

(a) he has a clear right and that injury has been committed or reasonably apprehended or
(b) that he has a *prima facie* right and that irreparable injury will be caused to him if the interdict is not granted and no irreparable injury will be caused to the respondent if it is. In either case he must show he has no other appropriate remedy.'

Another equitable remedy for breach of contract is cancellation or rescission. Where one party repudiates the contract or where there has been a breach of a material term, or of a certain term, breach of which the parties expressly agreed would entitle one of them to cancel, the injured party may cancel the contract. In *Swaartz and Son (Pty)* v *Wolmaransstad Town Council* (1960), a term in a building contract that the builder should provide security 'forthwith on the acceptance of the tender' was held to be a material term, breach of which entitled the other party to cancel the contract. The court said, 'the question now is whether failure to furnish security was a breach which justified the respondent from rescinding from the contract. It has not been stipulated in the contract as a sufficient ground for cancellation. The test is therefore the common law one for which various expressions have been used, such as whether the breach 'goes to the root of the contract' or affects a 'vital part' of the obligations or means that there is no 'substantial performance'. It amounts to saying that the breach must be so serious that it cannot reasonably be expected of the other party that he should continue with the contract and content himself with an eventual claim for damages... the provision of security is a vital matter in a building contract and continued failure to provide it after a month and seven days have elapsed since signing the contract which required security 'forthwith' is a breach justifying the other party in resiling.' In *Aucamp* v *Morton* (1949), the court made the observation that 'a breach by one party of the mutual obligations resting on him will only give the other party a right to treat the contract as discharged if the breach is one which manifests an intention on the part of the defaulter no longer to be bound by the terms of the contract for the future, or if the defaulter has broken a promise, the fulfillment of which is essential to the continuation of the contractual tie ...'

In one and the same action, the injured party may claim cancellation and restitution of what he has paid over or transferred under the contract. If he does so and if there is no agreement to the contrary, he is bound to restore what he received. In *Bonne Fortune Beleggings* v *Kalahari Salt Works (Pty) Ltd* (1974), as B, the purchaser of some properties, had not paid all the payments due under the deed of sale, the sellers, K, cancelled the contract and claimed, among other things, an order obliging B to return the property or their value. The court granted the order and B was granted leave to appeal in regard to the balance within two weeks of the date of judgement. B appealed. The court held that K was only entitled to judgement in terms of the above-mentioned claims against the repayment of the portion of the purchase price already paid, further K could not utilise their unliquidated claim for damages for the purpose of set-off, accordingly the appeal succeeded.

Provided that the claims are made in one action, the injured party may ask for damages in addition to cancellation or cancellation and restitution. The addition of such a claim does not relieve the injured party of his duty to restore what he received, a claim for damages is not a liquidated claim and set off cannot operate. This was stated in the *Bonne Fortune Beleggings* case and in *Custom Credit Corporation (Pty) Ltd* v *Shembe* (1972), the court said, ' ... The law requires a party with a single cause of action to claim in one and the same action what the law accords him upon such cause.'

In *Jardin* v *Agrela* (1952), J claimed an order cancelling a contract by which he had sold his interest in a partnership to A, and damages suffered by him as a result of A's breach of the contract of sale. In the alternative, he claimed payment by way of instalments due under the contract. A opposed this but the court held that J had a sustainable cause of action and in regard to the alternative claim, it was permissible for J to claim cancellation and damages and in the alternative, if A's breach did not go to the root of the contract, enforcement of the obligation to pay instalments of the purchase price which had fallen due. Thus an injured party who considers that a court may find that the breach is not a material one, and to whom performance of part of the other party's obligation is due, may claim cancellation, failing which, specific performance of that part of the other party's obligation which is due.

If the injured party declines to cancel a contract and sues for specific performance and is awarded his decree it may happen that the decree cannot be enforced. In such a case he may cancel the contract. To avoid having to bring two actions he may claim in the alternative in the first action since, '... the law requires a party with a single cause of action to claim in one ...' as said in the *Custom Credit Corporation* case above.

Rescission of a contract is an equitable remedy, enabling the parties to a void contract to treat it as if it has never been made and to recover from one another any money or property which had changed hands before the defect came to light. In *Thorpe* v *Fasey* (1949), the court stated that there can be no rescission for breach unless the contract can be eliminated *in toto* and the parties put in *status quo ante* (the position which obtained prior to the conclusion of the contract).

Another equitable remedy is *quantum meruit* and it means reasonable remuneration. Instead of suing for the recovery of damages for the loss of the contract, he may claim on a *quantum meruit* basis for the value of the work that he has already done, a course that will be advisable if the value exceeds what would have been due to him had the contract been fully performed. In *Planche* v *Colburn* (1831), the plaintiff agreed to write articles for the defendants. When the work was partly completed the defendants abandoned the series. The court held that the plaintiff was entitled to recover reasonable remuneration for the work which he had completed on a *quantum meruit* basis.

If, for example, he has agreed to render personal services for a sum payable upon completion of this promise, he may recover remuneration for services already rendered up to the time when the contract is discharged. In *Luxor Ltd* v *Cooper* (1941), it was said if he adopts this course his claim is quasi-contractual in nature.

In conclusion, it can be said that, as already established in this answer, our law provides for a number of equitable remedies in breach of contract cases. These equitable remedies are not available as a matter of course, rather they are awarded at the court's discretion (depending on the equities of the situation) and the courts are enjoined to exercise that discretion judiciously.

3 **(a)** A delict has been defined as the breach of duty imposed by the law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in consequence of the breach. Others have defined a delict as a civil wrong in the sense that it is committed against an individual, which includes legal entities such as companies, rather than the state.

In England and America, the term used for what we call a delict is a tort. From these definitions, one can discern that the essential purpose of the law of delict is to afford a civil remedy, usually by way of compensation, for wrongful conduct that has caused harm to others. The essence of delict law is that a person has certain interests which are protected by law. It has been said that the law of delict or tort constitutes a body of liability rules. These rules signal when a person is to compensate another by the payment of damages, or to be restrained from doing certain acts by way of an interdict or injunction. Those rules, then, indicate whether or not losses by human conduct will be shifted from one party to another or the loss will be where it falls.

In terms of an obligation *ex delicto* the wrongdoer has a personal right to compensate the victim for the harm done and, *vice versa*, the victim has a personal right to claim reparation of harm done from the wrongdoer. In *Union Government* v *Ocean Accident and Guarantee Corp Ltd* (1956), it was held that, in general, the Roman-Dutch law of delict is founded on the basic principle that all harm caused by wrongful and blameworthy conduct can be recovered by delictual action, though criminal proceedings aimed at punishing the wrongdoer may also ensue, in some cases. For example theft, assault and malicious injury to property are wrongs which will ground civil as well as criminal proceedings.

The main types of loss, for which compensation can be claimed under the law of delict, are wrongs resulting in financial loss and wrongs to personality leading to sentimental loss. Wrongs of substance are wrongs that cause tangible harm, such as injury to person including psychological harm, damage to property and harm to economic interests. Wrongs to personality are those that cause intangible harm, for example, harming reputation, defamation or subjecting a person to indignity. It is trite law that, to succeed in such claims, a plaintiff must allege and prove that the defendant has been guilty of conduct which is both wrongful and culpable and which caused patrimonial damage to the plaintiff.

To summarise, in relation to the law of delict, a delict means a breach of a general duty imposed by law, giving rise to a civil action at the suit of the injured person. It consists of an act or omission by the defendant which causes damage to the plaintiff. The damage must be caused by the fault of the defendant and must be a kind of harm recognised as attracting legal liability.

(b) Passing off is a form of deception that consists of taking unfair advantage of a trade reputation that the plaintiff has built up. This delict is committed when the defendant, by means of a misleading name, mark or description or otherwise, represents that his business or merchandise is that of another, so that members of the public are misled. If the defendant uses a business name which he is not entitled to use so that his business is mistaken for that of the plaintiff's, and in this way he unfairly procures the plaintiff's customers, or the defendant packages his goods in such a way that they are likely to be mistaken for the plaintiff's goods, the latter can obtain an interdict to prevent the defendant from continuing this practice and can claim damages for any loss which he has suffered as a result of the public being misled.

The plaintiff's interest, which is protected, is his financial interest in his property. The principle is that it is akin to fraud for a trader to pass off his goods as those of his rival and thus, by deceiving the public, reap the benefit of his rival's reputation. The modern version of the delict was set out in *Even Warnick BV* v *Townend and Sons (Hull) Ltd* (1979), when the plaintiffs made a drink called 'advocaat'. The defendants began to make a drink called Old English Advocaat. Lord Diplock identified the essential elements of the tort: a misrepresentation, made by a trader in the course of his trade, to prospective customers of his or ultimate consumers of goods or services supplied by him, which is calculated to injure the business or goodwill of the trader by whom the action is brought or will probably do so. As the name which was used by the plaintiffs distinguished the plaintiffs' product from any others, the plaintiffs were entitled to the interdict.

The test applied by the courts when deciding upon whether the similarity in trade name or packaging was likely to mislead is: is there a reasonable likelihood that members of the public might be misled into believing that the business is that of the plaintiff, or the goods are the plaintiffs' goods? In *Capital Estates for General Agencies* v *Holiday Inns* (1986), the court stated,

'in order to determine whether a representation amounts to passing off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of one is confused with that of another.'

This delict can be committed by using the plaintiff's name or one which closely resembles that of the plaintiff. Usually the courts are reluctant to interfere with a person's right to trade under any name he chooses. Where, however, a person trades under a name the same as or closely resembling that of the plaintiff, he may be restrained from carrying on business under such name. In *Zambezi Conference of Seventh Day Adventist Church* v *Seventh Day Adventist Association of Southern Africa* (2000), the court held that the principles of a passing-off action apply also to the unauthorised use of the name of a non-trading body. Thus, a mother church which was a long established and well-known religious body, with branches world-wide, was entitled to the protection of the law insofar as its name is concerned.

In addition, adopting or imitating the substance of the plaintiff's goods amounts to passing-off. A trader has no monopoly in the substance of his goods, but where the plaintiff has selected a peculiar or novel design as a distinguishing feature of his

goods, and his goods are known in the market by that design and have acquired a reputation by reason of its peculiarities, the court will restrain any person from using that design, if such use is calculated to deceive the public.

Furthermore, adopting or imitating the trade name or mark of the plaintiff's goods amounts to passing off. A person may be restrained from selling his goods by the same name as that of the plaintiff as any colourable imitation thereof. As regards registration and protection of trade names and trade descriptions by legislation, the provisions of the Trade Marks and the Industrial Designs Act cover them. Sections 20 and 21 Companies Act (24:03) provides for the non-registration and de-registration of company names identical to, or similar to, other company names such that the public is likely to be misled.

Any person who is aggrieved by the incorporation of a company with a name which is likely to cause confusion in relation to his goods may be able to bring proceedings for an interdict to prevent the delict of passing off. The basis of the action is a right, not so much in the name itself, but in the goodwill engendered by the use of the name in connection with the plaintiff's business. However, a person may carry on business under their own name, even if it does cause confusion with competitors provided they do not intend to deceive the public in relation to the goods. The courts may infer such an intent. Thus in *Ewing* v *Buttercup Margarine Co Ltd* (1917), the plaintiff carried on an unincorporated business under the trade name Buttercup Dairy Co. The defendant company was incorporated to trade in similar products and had adopted the name innocently. The court held that, nevertheless, the plaintiff was entitled to an interdict since confusion must result. Furthermore, where the name of a new company may lead to the suggestion that it has taken over an existing business, this may be the ground for an interdict. Thus in *North Cheshire and Manchester Brewery Co* v *Manchester Brewery Co* (1899), the Manchester Brewery Company was granted an interdict against the North Cheshire Brewery Company on the basis that it was calculated to deceive.

4 The general rule is that the principal is bound by the acts of his agent, provided the latter has acted within the scope of his authority. In *Chappell* v *Gohl* (1928), it was held that this applies even where the agent has acted purely out of self-interest. However, an agent may be personally liable either on the contract or for damages of breach of 'warranty or authority'.

Even where the agent acts in his own name and does not disclose the existence of the principal, the latter will be bound as long as the agent was acting within the scope of his authority. Thus it is clear that where the agent properly acts on behalf of the principal, he drops out of the transaction altogether and the principal becomes the party thereto. In *Smith* v *Len's Agencies* (1992), the court held that it is not unlawful to be an undisclosed principal in a transaction or to act as agent for an undisclosed principal since there may be many reasons for the non-disclosure, some of which are legitimate. It is thus clear that the principal will be liable for the acts of his agent, regardless of the fact that he may be an undisclosed principal.

If the agent has been authorised to make representations which were considered true by the principal, and the agent subsequently acquires knowledge of the falsity of the representations, but nonetheless makes them, knowledge of the falsity is imputed to the principal, provided the agent acquired the knowledge in the course of his employment, and there was a duty upon him to communicate it to the principal, and the principal will be liable for the fraud of his agent. This was clearly stated in the case of *Pathescope (Union) of South Africa* v *Mallinick* (1927).

In addition, the principal may be held vicariously liable to the third party for the acts of his agent. He is liable for the delictual acts of his agent only if the delictual act was actually authorised by the principal, or if the agent is a servant and not an independent contractor and the act is done in the course of, and within the scope of, his employment as was held in *Colonial Mutual Life Assurance Society Ltd* v *McDonald* (1931), and more recently in the Zimbabwean case of *National Social Security* v *Dobpropoulis* (2005).

Furthermore, a principal may be liable to a third party on the ordinary doctrine of unjustified enrichment. If he is enriched at the expense of the third party as a result of an unauthorised act by a person purporting to be his agent, he will be liable to the extent to which he has been enriched. In *Reid and Ors* v *Warner* (1907), the court stated,

'it seems to me a sound principle that where an agent has, without authority, borrowed money on behalf of a principal and where that money has been spent for the use and benefit of the principal, the latter is liable to repay it …'

In *Guarantee Investment Corp Ltd* v *Shaw* (1953), the court said,

'… no one shall be unjustly enriched at the expense of the another … a principal shall not repudiate a loan borrowed on his behalf by his agent without authority and at the same time accept the benefit of that loan.'

When an agent contracts on behalf of his principal with a third person, no contractual liability or right in respect of the agreement can attach to the agent, if he has acted with his authority. The agent drops out of the transaction altogether. However, as noted above, there are exceptions to this rule and an agent may be personally liable either on the contract or for damages for breach of 'warranty or authority'. Where an 'agent' contracts on behalf of his 'principal' without authority or in excess of his authority, the agent, in effect, warrants to the third party that he has authority to bind his principal. The third party contracts on the faith of the warranty and the agent intends that he should do so. There is, therefore, an implied undertaking by the agent that his principal shall be bound by the contract and, if he is not so bound, the agent will place the third party in as good a position as if he were. If the principal, therefore, does not ratify the unauthorised act, the agent is not liable on the contract but on his 'warranty or authority.' In *Blower* v *Van Noorden* (1909), the court stated,

'… an agent who has exceeded his authority in contracting for a named principal is liable for damages to the other contracting party on the ground that, from his representation of authority, a personal undertaking on his part is to be implied that his principal will be bound and that if not, the other party will be placed in as good a position as if he were.'

Moreover, as stated in *Trotman and Anor* v *Edwick* (1951), in the case of fraud, the third party may, if he wishes, hold the agent liable on the warranty or authority, but he may also make use of his ordinary delictual remedies against the agent and claim damages for any loss he has sustained because of the fraud. This therefore illustrates how an agent may become liable to a third party.

Additionally, where an agent contracts with a third party and does not disclose that he is acting for a principal, the third party may hold him personally liable on the contract. In *Edelson* v *Greenfields Estates* (1955), the court noted,

'... it seems the embodiment of common sense to say that when the other party deals with an agent who tells him that he is an agent, but the other party does not trouble either to get the name of the alleged principal or even to remember his name or identity, then that third party gives credit to the agent for the due performance of the contract and relies on the agent for that, and so makes the agent a party to the contract.'

As shown above, the general rule is that where an agent has acted within the scope of his authority (express, implied or ostensible) or where his previously authorised act has been ratified by the principal, the latter is liable to any third party with whom the agent is contracted and no contractual liability to the third party attaches to the agent. However, in the case of fraud, for instance, the agent may be held liable to the third party as the latter has an option to sue either of the two.

In relation to the issue of vicarious liability, the principal would be liable for the delicts committed by an agent towards a third party under the following circumstances:

(a) The agent must be a servant rather than an independent contractor.

(b) The delict must have been committed by the agent in the course of the performance of his duties.

In *Hendrickz* v *Cutting* (1937), the employee was a lorry driver. While he was doing his work he stopped at a filling station for fuel. He lit a cigarette, causing a fire in which the pump attendant was severely injured. The principal was held liable.

In *Minister of Justice* v *Khoza* (1966), two police constables were going about their work. They were, *inter alia*, guarding prisoners. One of the constables aimed a pistol at the other in jest, the pistol went off and the second constable was injured. The principal was held liable. It is established practice in Zimbabwe, in such cases, for the aggrieved third party to sue for damages both the agent and the principal as co-defendants, the one paying, the one absolving the other.

5 **(a)** A partnership may refer either to the contract between the parties or to the relationship brought about by that contract. One author has defined it as a contract between persons, in which the persons concerned agree to contribute money, labour or skill to a common stock and to carry on business with the object of making a profit for their joint benefit. There can be no partnership unless there exists a mandate between the contracting parties as illustrated in *Blumberg and Anor* v *Brown and Anor* (1922).

A partnership may be established through a legally binding agreement between the intending partners, commonly referred to as a contract. In *Oblowitz* v *Oblowitz* (1953), it was held that it is essential that there should be a valid contract between the parties, otherwise no partnership can arise. All essentials of a contract must therefore be present, for example, the contract must not be illegal or contrary to public policy.

In accordance with the ordinary rules of contract, the agreement need not be express but may be implied from the facts. Thus a partnership may be established by conduct, provided the conduct of the parties is such that, according to the rules of common sense, it admits to no other interpretation but that they intended to create a partnership. In *Fink* v *Fink* (1945), the spouses were married out of community of property. They bought cows and, the milk produced being in excess of what they needed for their own use, the surplus was sold. From that small beginning a very substantial milk-producing and distribution business was established. To that business, both had contributed money and labour. The court held a partnership existed between the spouses. Moreover, in *Delyannis* v *K* (1942), X advanced some money to Y in the common contemplation that a contract of partnership would be drawn up. Meanwhile, they carried on certain activities that would eventually ensue to the benefit of themselves as partners when the partnership materialised. The court held,

'... it was a partnership in truth whatever views the parties may hold on this subject ... though they regarded their activities as provisional, pending the conclusion of a more elaborate agreement.'

A partnership may also be established through estoppel. It has long been established that a person who is not a partner becomes liable as if he were one to people towards whom he so conducts himself as to lead them to act upon the supposition that he is a partner in point of fact. If he gives such impression and acts towards third parties as if he were in partnership, he would be estopped from denying the same.

(b) A number of factors, such as death of one partner, mental incapacity and the happening of some other event or a supervening impossibility, lead to the termination or dissolution of a partnership agreement.

(i) A partnership has a contractual basis and so it is perfectly possible for the agreement itself to provide express terms as to when that agreement can be terminated.

(ii) Dissolution can come about if a partnership is entered into for a fixed term by the expiration of that term, if for a single adventure or undertaking by its termination and if for an undefined time, by a notice at any time given by one partner to his fellow partner or partners.

(iii) The end of an agreed venture may also lead to the termination of the partnership agreement. This entails that if the partnership is for a single agreed project, such as the exploitation of certain rights until a company is formed to take them over, the partnership will then be dissolved without any formal act of dissolution. This shows that termination of partnership may be actuated by operation of law or on contractual grounds.

(iv) A partnership agreement can be terminated by the death of one partner. The death of any partner dissolves the whole firm unless there is agreement to the contrary. In *Craven* v *Craven* (1908), a partner's will left his share to his wife, with the remainder to his partner. The court held that the partnership had still dissolved at his death. However, it may be highly inconvenient, according to some legal commentators, for a large modern partnership to subject itself to the whole dissolution process every time one partner dies or becomes insolvent. In either case, it will be much easier to value the relevant partner's share and provide some method of 'sorting things out' whilst preserving the partnership business. This was aptly stated in *Gordon and Co Ltd* v *Thompson Partnership* (1985), the company was the landlord of two fields let to the defendant firm. The firm had three partners, one of whom died in 1981. The landlords argued that by operation of law, her death had dissolved the firm and so terminated the lease and they now sued the remaining partners for possession of the fields. The remaining partners relied on a clause in the partnership agreement that on such a death, 'the remaining parties shall decide within two months of the death ... either to wind up the partnership business or to take over the estate and assets of the partnership business and to carry on the business to the exclusion of the representatives of the deceased ... with exclusive rights to the goodwill and use of the firm's name'. The chosen alternative allowed by the deed was not to wind up the firm but, on the contrary, to carry on the partnership business and was thus another way of saying that the surviving partners could choose to carry on with the partnership. Hence the death of one partner need not automatically warrant the dissolution of the partnership where it would cause inconvenience and undue hardship.

(v) Automatic dissolution or termination of the partnership agreement may be due to illegality. Illegality can be defined as an act done contrary to, or which flies in the face of, existing laws, common law or statute law. This *ipso facto* leads to an end of the agreement. The common law position is that a partnership is dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership. Most of the cases involve enemy aliens in times of war. In *R* v *Knupfer* (1915), the court said that,

'The declaration of war had the effect of dissolving the partnership by operation of law.'

This, in other words, entails the termination of the partnership agreement due to *vis major* or superior force, legislation, an act of God, etc. In *Yeates and Co* v *Watson* (1978) one of the three solicitors in a firm forgot to renew his practising certificate without which he was forbidden to practise under the law. The Court of Appeal was quite clear that this automatically ended the partnership, even though the partners were all unaware of the circumstances and, in fact, had continued as before. Waller LJ held that the provision operates by force of law and not by an intention of the partners.

(vi) Dissolution by the court which entails that even if there is nothing in the agreement, express or implied, one partner may apply to the court for a dissolution order. On application by a partner, the court may decree a dissolution of the partnership in the case of mental incapacity. The incapacity must be permanent. In *Whitwell* v *Arthur* (1865), evidence of an improvement in the affected partner's condition, who had been subject to a stroke, prevented an order being made. However, in other jurisdictions, this is regarded as a happening of some other event which will trigger termination. In *Bagshaw* v *Parker* (1847), the partnership agreement provided for dissolution as regards the defendant partner in the event of such severe illness as should oblige him to quit India for more than one year. He returned to India but became an incurable lunatic on the way. The court held, on the construction of the agreement, that the partnership had dissolved in accordance with the deed of partnership.

(vii) Persistent breach of the agreement may lead to the termination of the partnership agreement. It entails that where the offending partner wilfully or persistently commits a breach of the partnership agreement, that will warrant a dissolution of the partnership by the court. In *Cheese* v *Price* (1865), the offending partner had failed to enter small sums of money received from customers into the accounts as he was required to do under the agreement. This had happened 17 times and that was sufficient to tip the scales in favour of the dissolution.

(viii) An order may be made whenever circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be terminated. In *Re Yenidge Tobacco Co Ltd* (1916), the following were suggested as examples of such circumstances: refusal to meet on matters of business, continued quarrelling and a state of animosity that precludes all reasonable hope of a reconciliation and friendly co-operation. Similarly in *Ebrahim* v *Westbourne Gallaries Ltd* (1973), the House of Lords, in the company context, allowed a winding up where a company was formed on the basis of management participation by all and on the basis of mutual trust and one member had been excluded from management unlawfully.

(ix) In partnership agreements, there are many examples of express dissolution clauses which expand the available grounds for dissolution. These are particularly important for professional partnerships, such as doctors, lawyers, architects, etc, where reputation and professional integrity are paramount. Thus in *Clifford* v *Timms* (1908), one dentist in a firm was held to be entitled to a dissolution under a clause in the deed allowing him to do so if his partner was 'guilty of professional misconduct', where the other partner became involved in a company which produced scurrilous pamphlets etc, as to the activities, both dental and sexual, of other dentists. Lord Loebum LC held,

'for my part, is this not disgraceful conduct, if it be not professional misconduct, I know not what the term means.'

(x) A partnership agreement, like other contracts, may have been induced by a misrepresentation by one partner to another, be it a fraudulent, negligent or innocent misrepresentation. In this respect, the partner so induced can rescind the contract which has the effect of terminating the partnership. In addition, he may sue for damages if the misrepresentation is either fraudulent or negligent. However, the right of rescission applies even though there is no fraud or negligence. In *S* v *Cheng* (1966), a statement that the business was a 'goldmine' when in fact it had enormous irrecoverable debts, enabled the court to rescind the contract.

(xi) Another consequence of a partnership being essentially a contractual agreement is that the contract may be ended by a repudiating breach of one party which is accepted by the other. Acceptance of repudiation amounts to a rescission of the contract.

(xii) A partner may abandon his interest in the firm and a whole partnership may similarly be abandoned by total inactivity over a long period of time. In addition, if one partner leaves the business and goes into hiding, the partnership can be treated as ended. In *Bothe* v *Amos*, the parties were husband and wife who conducted a business which was a joint venture. The wife committed adultery, left the matrimonial home and abandoned the business. In sharing the assets and goodwill of the business, the Registrar had held that she was entitled to a one-third share. The wife appealed, contending, *inter alia*, that she was entitled to a half share in the assets. The Court of Appeal dismissed this appeal and held that the partnership had been effectively ended by her conduct and what the husband had carried on since was a different business. The Registrar had therefore erred in taking that contract into account in assessing what the wife was entitled to.

A partnership can be terminated in a variety of ways.

6 (a) A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place and of interest in the second. It was held in *Standard Bank of South Africa Ltd* v *Ocean Commodities Inc* (1987) that shares constitute a bundle of personal rights which entitle the holder to interest in the company. The main types of shares are ordinary shares, preference shares and redeemable shares.

Ordinary shares or the equity typically carry normal rights without special definition. If the company's shares are issued without differentiation they will be ordinary shares. If the shares are divided into classes and the special rights of other classes are set out, the remaining shares will be ordinary shares. In contrast, redeemable shares carry a right by the company to redeem or buy back the shares. A company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles, issue shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder. This may be viewed as a difference between redeemable shares and ordinary shares.

Preference shares carry rights in preference to other shares. They will usually be entitled to have dividends paid, at a predetermined rate, in priority to any dividend on the ordinary shares. They are different from ordinary shares when it comes to liquidation.

On the other hand, an ordinary shareholder is considered a residual heir and carries the greatest risk as well as greatest potential advantages. Preference shareholders have no right to anything out of the surplus assets upon liquidation and in *Re Crichtoris Oil Co* (1902) the court held that preference shareholders are not entitled to be paid the arrears once winding up commences unless the articles of the company stipulated that a dividend was payable even if not declared, once profits have been earned, or a dividend had in fact been declared when the winding up commenced.

Ordinary shares only come into consideration for a dividend after provision of the dividend on preferred shares has already been made. There is no limit to the amount of dividend which the ordinary shareholder can receive if divisible profit is available except where preferred shares exist and have to be paid out. In contrast, deferred or founders' shares come into consideration for a dividend after a prescribed minimum has been paid to ordinary shareholders, a relationship comparable to that existing between preferred shares and ordinary shares.

Deferred shareholders have more voting rights than those enjoyed by ordinary shareholders and preference shareholders. Deferred shareholders enjoy disproportionately large voting rights as compared to other shareholders because they are basically 'founders' shares. Preference shares may even at times not have voting rights. This, however, does not apply if the preference dividend is in arrears and if there is a resolution which directly affects the right attached to the same or the interests of that group of shareholders.

Non-voting shares can be of any class. They may be issued where it is sought to restrict control of the company to the holders of the remaining shares. In addition, in *Heron International Ltd* v *Lord Grade* (1983), the court held that a capital structure which includes non-voting shares may also be imposed on a company by an outside body, for example, as a condition for obtaining a broadcasting licence. Preference shares differ in the sense that a company may have more than one class of preference shares, ranking one behind the other.

Ordinary shares are the riskiest, that is they have been referred to as 'equities' or 'risk capital'. This risk is clearly appreciated when ordinary shares are contrasted with other forms of securities, particularly preference shares which are referred to as 'prior charges'. The risk lies in the fact that the ordinary shareholder is postponed for payment of his dividend when one is declared. In other words, a preference shareholder is paid his proportion of the dividend before the ordinary shareholder receives his own. Preference shares are entitled to receive the first slice of the profits that have been declared as a dividend.

Ordinary shareholders have more advantages than other types of shareholders. Whilst the preferential dividend is fixed, if the company makes a huge profit, the preference shareholders shall be paid their fixed dividend percentage and the residual distributable profit will be divided proportionally by ordinary shareholders.

Preference shareholders do not receive dividends which are similar or equal to those received by ordinary shareholders. Thus they receive different percentages of dividends.

Considerable risk attaches to deferred or founders' shares as compared to that attaching to preference shares. Deferred shareholders usually take a large share of surplus assets after the ordinary shareholders have been paid their minimum dividend or repaid their capital on a winding up or a reduction of share capital. On the other hand, on a winding up after the preference shareholders have been repaid their capital or assets, the company will distribute the remaining capital or assets among the ordinary shareholders.

Shares with limited voting rights or enhanced voting rights may be created, even to the extent of giving one shareholder a right of veto in specified circumstances as laid out in *Investment Trust Corporation Ltd* v *Singapore Traction Co Ltd* (1935). In contrast, preference shares may be subject to restrictions, for example, voting rights.

In difficult times, the ordinary shareholders run the risk that the profits available for distribution will be inadequate and will not extend beyond the payment of the dividend due to the preference shares, but in prosperous times, while the preference shareholders will be restricted in their fixed dividend, the ordinary shareholder will enjoy all the surplus distributable profits. By and large, these are the critical salient points in relation to the differences amongst the major classes of shares.

(b) Debentures

A debenture means a document, which either creates a debt, or acknowledges it, and any document which fulfils either of these conditions is a debenture. Debentures are defined as loan capital given to a company at a specified rate of interest. Debenture holders are entitled to their specified interest on the due date, whether or not the company has made any profits.

Debentures arguably offer the safest form of investment as the fluctuations on the company profits do not affect their repayment or the payment of interest due on them.

Where a company is to be liquidated or wound up, debenture holders are entitled to first payment and to recovery of their capital contribution and interest therefrom before shareholders or other members of the company are paid out. Debentures can either be secured (for example through a mortgage bond) or unsecured.

At the same time, debentures may be redeemable at the option of the company or irredeemable. At common law, when a debenture was redeemed or transferred to the company, the debt was discharged and the debenture ceased to exist. In general terms, a company may not issue shares at a discount unless the memorandum or articles permit it. Indeed they are usually issued at a discount in the case of large scale issues by public companies. However, it is not possible to use convertible debentures to avoid the rule applicable to shares. Thus, in *Mosely* v *Koffyforntein Mines Limited* (1904), a debenture issued at a discount provided for immediate conversion into fully paid shares equal to par. It was held to be objectionable and inadmissible.

7 **(a)** Section 169 (2) Companies Act (24;03) identifies the company secretary as an indispensible officer of the company. The same section stipulates that they should be ordinarily resident in Zimbabwe. The secretary is, unless the articles of association provide otherwise, appointed by the board of directors. The modern secretary, unlike their old counterpart, is not a mere servant of the company (*Panaroma Developments (Guilford) Ltd* v *Fidelis Furnishing Fabrics Ltd* (1971)), but is one of its officials. The duties of a secretary are not universal but they appear in every concern as the chief administrative officer.

The secretary is responsible for keeping the statutory books, submitting the annual returns to the Registrar, and ensuring compliance with any various administrative regulations which may be made in terms of the Companies Act. In this regard, the register of the members of the company, that of directors and officers of the company, the register of directors' and officers' interests, that of allotments, the one of debentures if any is available and the minute books of all meetings fall under the custody and care of the secretary.

The secretary also attends to the preparation of allotment letters, letters of regret and share certificates, opinion certificates and renounceable letters of allocation amongst others. This is done if there has been any rights offer or capitalisation issue. The duty to submit the annual returns is usually undertaken subject to the unavailability of an accountant who is answerable to the secretary. It clearly appears in this regard that the secretary ought to be knowledgeable in the law and meticulous in the execution of their duties.

The other common duty of the secretary is linked to the public nature of their office in relation to the state. In this regard, they are usually seen as the public officer of the company in its dealings with the receiver of revenue and generally in all areas of intercourse between Government departments and the company. This function entails that they submit returns to the receiver of revenue for income tax purposes so that the company discharges its liabilities.

With regard to workers' compensation schemes and insurance, they are required to submit the necessary monthly and annual returns so that all the company's employees remain covered. The duty to comply with the Labour Act in relation to the period of work of workers and their leave days is also reposed upon the company secretary. He thus constitutes the necessary link between the company and the outside world and has a supervisory role over the company and its activities. The secretary is the public face of the company.

Quite a sizeable part of the secretary's duties and responsibilities are concerned with the convening and holding of meetings such as board meetings, Annual General Meetings and other such meetings that should lawfully be held. As the chief administrative officer, the secretary draws up the agenda for the meetings and ensures that relevant reports and documents of reference are placed before the directors.

The idea is simply that they have to oversee the smooth running of the meeting. In notifying the concerned parties of the meeting it is their duty to see that all the necessary proxy forms are attached and after they have been completed see to it that they are duly completed and signed. At the meeting they ensure that the attendance register is signed by those in attendance or in the case of a general meeting they may arrange for admission cards to be collected at the door. Should there arise any area which needs clarification especially procedural and legal matters, they act as the chairperson's adviser during the meeting. The minuting of the proceedings is also their duty. Finally, if any resolutions are made at the meeting, it is their duty to see to it that there has been an implementation of those resolutions.

Wtih regard to the running of the entity, the secretary is the senior administrative officer responsible for its running in terms of the actual carrying out of the work. Basically the secretary ensures that adequate contact is maintained between the directors, executives on the one hand and employees on the other hand. As the secretary is effectively the senior employee, they are required to ensure the board's policy is consistently and correctly implemented in every department of the business that is affected by such policy.

Thus in small concerns, they exercise a direct supervisory role in that regard. In larger entities, however, departmental heads can be appointed who in turn report to the secretary. The secretary is thus normally an administrator responsible for ensuring that the everyday routine activities of the company are properly carried out. They effectively, thus, require the characteristics expected of a manager and executive.

In relation to the board, the secretary assumes the function of the right hand of directors. This function is discharged in two major respects. In the first place, the secretary works effectively as a legal and financial adviser to the directors. As a secretary must be knowledgeable in the law, there are situations when that knowledge is required, such as when they have to remind the directors of their legal obligations or to warn them on the illegality of some proposed courses of action. They can also be called upon to provide ingenuous financial advice based on their knowledge of the way the concern or some other concerns in the same business are operating.

In the second place the secretary also provides relevant information to management and the board on which wise decisions may be based. The board clearly has to be kept informed by an official who is always in touch with the activities of the business. Thus, before any policy may be formulated or resolutions made, it is the duty of the secretary to bring the board's attention to the information available to him which may tend to affect the decisions to be taken.

With regard to the company's relations with the shareholders and the outside world generally, the secretary assumes the function of the company's voice. The secretary in this regard should seek to keep open the channels of communication between the board on the one hand and the company's customers and shareholders, the investing public and the outside world in general on the other. They will keep in close contact with the more important institutional investors in his company and must be at all times conversant with the policy of the company on whose behalf he speaks.

In all these areas, the secretary is the voice of the company both by word of mouth and also the written word in correspondence. The idea is to make it their aim to project and promote the most accurate and favourable image of the company as much as possible.

The secretary has a host of other functions. It is their duty to comply with the legal requirements regarding directors, secretaries and auditors. It is also their duty to issue, transfer and keep a record of shares and stock, the duty to arrange a public issue or offer for sale of shares and the duty to declare and pay dividends.

To summarise, the secretary's office is the nerve centre of the company's activities.

(b) **(i)** An ordinary resolution is one that is passed by a majority of persons present at a general meeting. The resolution is passed in the ordinary way by a simple majority of votes cast in person or by proxy and entered in the minute book by the company secretary on behalf of the chairman.

On the other hand, a special resolution is a resolution which has been passed by not less than three-fourths 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, specifying the intention to propose the resolution as a special resolution and the reasons for it and 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 (s.133 Companies Act, Chapter 24:03). The declaration by the chairman that an ordinary or special resolution has been carried is conclusive unless a poll is demanded.

(ii) Special resolutions are necessary for the following purposes, among others:

(a) change of the company's name (s.25).
(b) to alter the articles of the company (s.20.)
(c) to alter the memorandum (s.20).
(d) to reduce the share capital of the company with the leave of the court (s.92).
(e) to increase the share capital of the company (s.87).
(f) voluntary winding up of the company (s.242(b)).
(g) winding up of the company by the court (compulsory) (s.206(a)).

8 An offer is a statement of the terms on which the offeror is willing to be bound. A person is said to make an offer when he puts forward a proposal with the intention that upon its mere acceptance, without more, a contract should be formed. On the other hand, an invitation to treat is an indication that a person is willing to enter into negotiations, but not yet willing to be bound by the terms mentioned. In *Spencer* v *Harding* (1870), the court held that as a general rule, a request for tenders is regarded as an invitation to treat. This is similar to the case of Mamhepo. When a large organisation, such as a company, hospital or government ministry, needs to find a supplier of goods or services, it will often advertise for tenders as done by Torerai, the managing director of Northern Star Investments (Pvt) Ltd. A tenderer who responds by submitting a tender to supply would be making an offer, hence in this case Mamhepo is the offeror and the company (Northern Star Investments) is the offeree. The common law position is that it is up to the offeree to accept the offer or to decline it.

The offer must be more than a mere declaration by the offeror, it must be a statement of his willingness to do business. In *Effroiken* v *Simon* (1921), the court decided that an offer which does not include the intention to do business cannot result in a valid contract.

Equally, an advertisement (just like tender invitations) is merely an invitation to do business and not a firm offer. The leading case on the subject in our jurisdiction is probably the case of *Crawley* v *Rex* (1909), in which a shopkeeper advertised a particular product at a special price. Crawley purchased the product and returned later to buy some more. When the shopkeeper refused to serve him the question which the court had to determine was whether the advertisement constituted a valid offer.

Smith J ruled as follows:

'The mere fact that a tradesman advertises the price at which he sells goods does not appear to be an offer to any member of the public to enter the shop and purchase goods ... nor is a contract constituted when any member of the public comes in and tenders the price mentioned in the advertisement ...'

The common law provides that a termination of an offer can be by revocation before acceptance. An offer may be revoked by the offeror at any time before it is accepted, provided that the revocation is brought to the notice of the offeree as was held in *Phillips* v *Aida Real Estate (Pty) Ltd* (1975). In this case, Torerai knew that Mamhepo had withdrawn his offer. The law is not on Torerai's and the company's side because it entails that, in the ordinary course of events, if at any time before acceptance the offeree receives notification that the offer is withdrawn, or revoked, he loses his opportunity to accept. In this case, this effectively means that there was not a contract between the parties, hence, on Mamhepo's side, no contractual liability towards Torerai arises and the latter cannot successfully sue for breach of contract. In *Routledge* v *Grant* (1828), the defendant offered to take a lease of the plaintiff's premises, giving the plaintiff six weeks to make up his mind. Three weeks later, the defendant withdrew the offer and afterwards, the plaintiff purported to accept within the six weeks period. It was held that there was no contract, as the defendant was free to withdraw the offer at any time before acceptance by the offeree. Despite the defendant's promise, the offer did not have to remain open for six weeks unless it was accompanied by an option. Torerai knew that the defendant had revoked the offer but purported to accept it and he cannot succeed in damages. In *Dickinson* v *Dodds* (1876), the court held that a plaintiff who purports to accept the offer when he knows the defendant has changed his mind by effectively revoking the offer cannot succeed. Hence, Mamhepo is not in any way contractually liable to Torerai.

In Roman-Dutch law the widely held view is that it is enough that reasonable steps be taken to notify the revocation of the offer by publication in as far as possible the same way in which the offer was notified. Equally, revocation is ineffective until brought to the knowledge of the offeree. In this case, to find Mamhepo contractually liable to Torerai would be not only illogical but unjust. In *Greenberg* v *Wheatcroft* (1950), on 6 June Wheatcroft signed a written offer to buy certain land from G, the owner. On 7 June, Wheatcroft telephoned G's agent revoking the written offer. On 8 June, Greenberg signed an acceptance on the document containing the written offer. The court held the offer had been effectively revoked on 7 June and was no longer open for acceptance. This case is similar to the present case and similarly, Torerai's claim should fail.

Revocation, according to common law, is only effective if it is communicated to the offeree, whether by express words or by conduct which shows a clear intention to revoke. It is not sufficient for the offeror merely to change his mind without informing the offeree. Mamhepo should be absolved from contractual liability because he did both by sending a registered letter to Torerai and on top of that he telephoned him informing him of his intention to revoke the offer. This communication was effective and even made before Torerai accepted the offer. In *Payne* v *Cave* (1789), the court held that an offer made in response to an invitation to treat may also be withdrawn if not yet accepted. Hence these submissions would entitle Mamhepo to successfully defend himself against Torerai's claim.

9 In this case there are various issues to be discussed which are pertinent to employment law. Essentially we are looking at breach of employment contracts by Tambaoga Investments (Pvt) Ltd through unfair labour practices, constructive dismissal of John and the possible remedies that may be available to the two aggrieved employees.

Breach of contract occurs when one party to the contract fails to perform their obligation either by default or design, whilst the other party has already performed or is willing and able to perform their part of the agreement. In this case, the employer breached the employment contract by unfairly dismissing the employees.

Under the Labour Act [Chapter 28:01], employees have a right to belong to any trade union of their choice and to perform its activities. This is also provided for by the Constitution which is the supreme law of the country. However, a balance should be struck between doing the employer's work and participating in trade union activities. The court in *POSB* v *Chimanikire and Others* (2005) stressed this right. The Act provides that every employee has the right not to be unfairly dismissed. The law stipulates that certain reasons are inherently invalid for termination and they include the employee's union membership or participation in union activities when outside working hours or with the consent of the employer, within working hours. Hence in James's case, the court

will have to examine these aspects in order to ascertain whether or not he was unfairly dismissed. In *Makanyisa* v *Securitas* (2005), a workers' committee chairperson was dismissed for calling a strike in a workers' meeting. The court reversed the dismissal on the basis that workers have the right to form and conduct workers' committee and trade union business. One of the purposes of the Labour Act (Chapter 28:01) is to give effect to such rights. Hence any dismissal based on a violation of this fundamental right is inherently unfair. Thus in *ARDA* v *Murwisi* (2004), an employer who dismissed an employee on notice, whilst she was on maternity leave was deemed to have unfairly dismissed the employee.

Similarly, the decision to dismiss James was harsh and unwarranted under the circumstances. Dismissal should be a last resort. Our law stipulates that in determining the fairness of a dismissal, an adjudicating authority shall consider the nature and gravity of the misconduct concerned as well as mitigation factors peculiar to that employee, such as the length of service, disciplinary record, nature of employment and any other special circumstances of the employee. It is clear that, in the present case, the employer did not pay attention to these issues. Equally, our employment law provides that disciplinary action in the first instance should be 'educational', then corrective and punitive action only taken in the failure of such steps and that the dismissal penalty should not be resorted to lightly. Hence in *NEI Zimbabwe (Pvt) Ltd* v *Makuzva* (2004), the court said, '... the Legislature meant to ensure that employers did not rush to dismissals merely because the acts of misconduct were dismissable ... any disciplinary action taken must be largely corrective and reasonable.'

Under the law, a dismissal may only be accepted as 'fair dismissal' if it is substantively and procedurally fair. The law provides for requirements of substantive fairness in all forms of dismissals. It states that employment contracts shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. The onus of proving the existence of a valid reason shall rest with the employer. Therefore, in this case, Tambaoga Investments should prove that the dismissals of James and John were fair in accordance with the law. In *Musumbu* v *BP Shell Marketing* (2005), the court reversed the dismissal of an employee for failing to follow standing instructions on minimising the occurrence of car accidents involving the company's fleet of vehicles, where previous cases had attracted a lesser penalty. Hence, if the employer in the present case previously had treated cases similar to James's less harshly, it should have done the same here.

An employee who faces disciplinary proceedings should be given an opportunity to defend himself before an impartial body. The law provides for the right to notification and to be heard before any decision is made. In *Minerals Marketing Corporation of Zimbabwe* v *Mazvimavi* (1995), the court stated that a disciplinary authority is required to apply 'the elementary tenets of natural justice, namely to act fairly and honestly'. These requirements are also reiterated in the well known case of *Professional Security (Pvt) Ltd* v *Mazoe* (2005) in which the court reversed the dismissal of employees 'simply fired without any hearing' on allegations of theft. It would appear that Tambaoga Investments have failed to meet these basic legal requirements and therefore James's dismissal was unfair and unprocedural.

Constructive dismissal may be defined as 'a situation in the workplace which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee – to such an extent that the employee has no other option available but to resign.' This is sufficiently addressed in the Labour Act. In *Fonda* v *Mutare Club* (1989), Fonda was employed by the respondent company as a manager. He incurred some shortfalls in the stocks of a product under his control. In considering evidence, the court noted that Fonda had been told to 'resign or be fired'. The court referred to both English and local case law and determined that Fonda had, in fact, been constructively dismissed. In *Jooste* v *Transnet Ltd t/a South African Airways* (1995), it was held that, for such an allegation to succeed, one of the requirements would be that the employee must prove that he had not intended to terminate the employment relationship, but was faced with no option but to do so because of the employer's unacceptable, intolerable and burdensome behaviour. The same was stated in *Pretoria Society for the Care of the Retarded* v *Loots* (1997) and the court went further to state that when an employee resigns and claims constructive dismissal, he is in fact stating that under the intolerable situation created by the employer, he can no longer continue to work, and has construed that the employer's behaviour amounts to a repudiation of the employment contract. In that case, it was found that 'the appellant (employer) had rendered the working environment intolerable for the respondent, by *inter alia*, throwing a book at her, finding her guilty of matters for which she could not be held responsible, humiliating her by publishing the news of her final written warning to the parents of inmates and depriving her of keys.' In the present case, there is no doubt that John suffered harassment from the employer and was constructively dismissed. In *Beets* v *University of Port Elizabeth* (2010), it was stated that the constructive dismissal takes place only if the employee resigned because of the employer's harsh, antagonistic and hostile conduct.

The aggrieved employees can apply for either reinstatement or damages to the court so as to get some relief. Our law stipulates that when an employee is dismissed unlawfully or wrongfully, the principal remedy for the worker is reinstatement. In *Art Corporation* v *Moyana* (1989), the court said, 'The obvious remedy for unjustified (unfair) involuntary termination is re-employment, if the employee so wishes, otherwise compensation can be awarded though reinstatement is clearly the primary remedy for unfair dismissal.' It should, however, be noted that the court retains a wide discretion as to whether or not to order reinstatement. In *Hama* v *NRZ* (1997), it was stated that at common law an employer cannot be compelled to retain in employment an employee with whom the employment relationship had soured beyond reconciliation. In the present case, this should be taken into consideration in trying to establish the most appropriate and suitable remedy which the circumstances of the case permit.

The court considers factors such as the working relationship in order to award either reinstatement or damages. Where there is an untenable working relationship, the court will deny reinstatement in favour of damages. In *Muringi* v *Air Zimbabwe Corporation* (1997), the court held that there was a complete loss of confidence by the board in the managing director and refused to order reinstatement. This was also held in *Winterton, Holmes and Hill* v *Paterson* (1995), where a legal professional assistant engaged in a dispute with the employer, traded insults with senior partners of the firm and tried to get an order for civil imprisonment against them for contempt of court. All in all, the working relationship had become intolerable and unsustainable.

In addition, the size of the company should also be considered. The bigger the company, the less likely it will be held that the relationship is no longer tenable, since personal contact is minimal and *vice versa*. This was also considered in *Zupco* v *Chisvo* (1999). If Tambaoga Investments (Pvt) Ltd is a big company, personal contact is likely to be minimal and the aggrieved parties may be awarded reinstatement.

The nature of the breach or unfair labour practice should also be taken into account. Where it involves breach of a fundamental right of the worker, then reinstatement is the most appropriate remedy. In the present case, the right breached is a fundamental one and it would be just, equitable and reasonable to award James reinstatement. This is similar to the case of *ARDA* v *Murwisi* (2004).

The seniority of the employee and the nature of the job should also be considered in this case. The courts are more likely to rule that the employment relationship is no longer tenable in relation to a very senior member of management than would be the case with lower level employees. In this case, nowhere is it stated that James and John were senior members of the company. Quite to the contrary, they were employed on the shop floor as machine operators and in terms of established practice in Zimbabwe, usually it is lower level employees who are active members of trade unions.

The law provides that if the determining authority finds that termination is unjustified and if they are not empowered or do not find it practicable to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate. Whilst reinstatement is the preferred remedy, it is not the only one. Under common law, damages were the main remedy available to workers for unlawful or wrongful dismissal. In this case, James and John can be awarded damages as an alternative remedy by the court if it determines that reinstatement is impracticable. An employee who is aggrieved by some substantial breach of the contract by the employer may accept the breach as repudiation of the contract, thereby terminating the contract and sue for damages. In *Gauntlet Security Services (Pvt) Ltd* v *Leornard* (1997), the court said, 'the employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach ...' Similar remarks were made in *RBZ* v *Siwawa's Estates Executor* (1999).

The Labour Act states that damages may 'be awarded to the employee as an alternative to his reinstatement or employment.' In *Ruturi* v *Heritage Clothing (Pvt) Ltd* (1994), the court held that the appropriate damages should be 'substantial damages as would ameliorate (the employee's) suffering...' In *PTC* v *Swabata* (1999), the court ordered the employer to pay the worker, 'damages in lieu of reinstatement equivalent to his salary and benefits from the date of dismissal to the date he would have been retrenched had he remained in employment, plus the retrenchment package he would have been paid had he not been unlawfully dismissed.' In *Zupco* v *Chisvo* (*supra*) the court said, 'the quantum of damages in cases like the present should be sufficiently high to suggest to the employer that reinstatement is the more appropriate and equitable alternative.' Hence, instead of awarding the remedy of reinstatement in this case, the court can award punitive damages to James and John.

At the end of the day, the court may be drawn much closer to awarding the remedy of reinstatement than that of damages and the words of the court in the *Zupco* case above are apposite, '... there must be cases and this appears to be one of them, where reinstatement is the obviously equitable solution ... And one may also venture to say that no amount of damages can make up for a long-term job unjustifiably lost'.

It is clear from the facts of the case that there were unfair labour practices by Tambaoga Investments (Pvt) Ltd towards its two employees, James and John. It is also clear that these aggrieved employees should be awarded some sort of relief. All in all it is abundantly clear that the two aggrieved employees have a number of options (as a remedy) that are available to them in terms of Zimbabwean employment law.

10 Directors are agents of the company. As agents they stand in a fiduciary relationship to their principal, the company. The office of a director can be compared to that of a trustee. The duty of the trustees of a fund or settlement is to be cautious and to avoid risks to the trust fund. The duties of a director can be discussed under two headings:

Fiduciary duties of loyalty and utmost good faith, and duties of care and skill.

It should be noted that the authority of the directors to bind the company as its agents normally depends on their acting collectively as a board of directors. Their duties of good faith are owed by each director individually. It is also argued that fiduciary duties are owed to the company and to the company alone. Most authorities argue that the directors owe no duties to the individual members as such, or to a person who has not yet become a member, for instance, a potential purchaser of shares in it. See *Percival* v *Wright* (1902).

Acting in Good Faith

Directors are required to act *bona fide* in what they consider is in the interests of the company. This duty requires a director to display good faith. However, the question of whether what a director has done is in the interests of the company is always left open. See *Kent KeW and M. Roth Ltd* (1967). This is also confirmed in the case of *Charterbridge Corporation* v *Lloyds Bank* (1970), where the directors of a company forming part of a group had considered the benefit of the group as a whole without giving separate considerations to that of the company alone. It was held that:

'The proper test ... in the absence of actual separate considerations must be whether an intelligent and honest man in the position of a director of the company concerned could ... have reasonably believed that the transactions were for the benefit of the company.'

As one of their duties, directors should not exercise their powers for a purpose other than those for which they were conferred. Often where the purpose will be to further the directors' own interests or to preserve their own control, it will be a breach of the duty to act honestly and for the benefit of the company as a whole.

Conflict of Duty and Interest

As fiduciaries, directors must not place themselves in a position in which there is a conflict between their duties to the company and their personal interests or duties to others. Good faith must not only be done but must manifestly be seen to be done. In the case of *Aberdeen Railway Company* v *Blaikie Brothers* (1854) Lord Cranworth LC said

'A corporate body can only act through agents and it is of course the duty of those agents to act as best to protect the interests of the corporation whose affairs they are conducting …. And it is a rule of universal application that no one having such duties to discharge, shall be allowed to enter into engagements in which he has or may have, a personal interest conflicting or which possibly may conflict, with the interests of those whom he is bound to protect.'

In terms of s.186 Companies Act (Chapter 24:03) it is a statutory duty to declare interests in contracts. Section 186 (I) of the Act reads,

'Subject to this Section, it shall be the 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 his interest at a meeting of the directors of the company.'

A director needs to comply with this proviso. If he fails to, he shall be guilty of an offence and liable to a fine in terms of s.18b(4) of the Act. Clearly this statutory obligation is merely a reaffirmation of the common law obligations and duties of a director.

In the case of *Aberdeen Rail Company* v *Blaikie Brothers* (1854) the defendant company entered into a contract to purchase a quantity of chairs from the plaintiff partnership. At the time that the contract was concluded, a director of the company was a member of the partnership. The court held that the company was entitled to avoid the contract. It made the observation that a director as

'an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that on one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.'

Equally, in the case of *Imperial Mercantile Credit Association* v *Coleman* (1871) the court held that,

'No director of a company can in the absence of any stipulation to the contrary be allowed to be a partaker in any benefit whatever from any contract which requires the sanction of a board of which he is a member. The company have a right to the services of their directors … they have a right to the voice of every director and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration.'

Whilst the older generation of cases were more stringent in placing an embargo on either direct or indirect dealings between a director and the company on whose board the director sits, the relevant statutory provisions (s.186(2)) makes clear the nature of information a director must provide when declaring his interest in a proposed contract with the company.

The concerned director is enjoined by law to give a general notice to his fellow board members. The notice would be to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may after the date of notice be made with that company.

In the declaration of interest, it is essential for the director who is giving the notice to state the nature and extent of the interest of the said director in such company or firm.

From the facts of the case, it is quite clear that both the chairman and his deputy at Samaita Holdings Limited are in breach of company law provisions. They are involved in a flagrant violation of both common law and statutory duties of directors. There is a serious breach of the principle of utmost good faith, and equally directors must refrain from placing their personal interests ahead of the company's (Samaita Holdings Limited) interests. This is a conflict of interest situation, which must be avoided. The commercial favours by way of trade discounts and credit facilities are completely inappropriate, if not illicit. There is a whole array of remedies against the two miscreant directors, such as dismissal from the board and damages for the financial prejudice occasioned to Samaita Holdings Limited.

Related to this duty is the act of competing with the company. A situation which might give rise to a conflict between director's interests and his duties is where a director comes on, or is associated with, a business competing with the company. See *Thomas Manhatt (Exporters) Ltd* v *Gunle* (1978).

It is also one of the duties of a director not to use corporate property, opportunity or information for his own benefit.

There are many other statutory duties and responsibilities placed upon a director by the Companies Act.

In terms of s.189, in the exercise of their duties and functions, directors may have regard to the interests and welfare of the company's employees and the dependants of the employees as well as the interests of the company's members.

In terms of s.318 of the Act, it is the responsibility of directors to see that at any time the company business is not being carried out recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. Breach of this obligation would result in action of misfeasance against the concerned director, not only during the company's lifetime but even after winding up proceedings have commenced.

1 7–10 marks Marks in this bracket would clearly demonstrate how the notion of human rights in the Zimbabwean jurisdiction has had a profoundly positive impact on statutory interpretation and the common law.

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

0–3 marks A below average to poor answer with fundamental shortcomings.

2 7–10 marks Marks in this bracket would clearly identify the various equitable remedies for breach of contract. There should be a full discussion of the various remedies and appropriate case law should be cited.

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

0–3 marks A deficient answer with fundamental shortcomings.

3 **(a)** 3–5 marks A good answer which adequately explains the meaning of delict backed by authoritative texts and/or relevant judicial decisions.

0–2 marks A rather superficial answer.

(b) 3–5 marks A detailed answer showing an exhaustive analysis of the delict of passing off. Relevant case law is useful.

0–2 marks An inadequate answer.

4 7–10 marks Top range marks will be awarded to candidates who give a comprehensive treatment of the subject. A thorough knowledge of the liability of both principal and agent towards third parties is imperative.

4–6 marks A lukewarm answer.

0–3 marks An answer which is rather deficient in all material respects.

5 **(a)** 3–5 marks A reasonable knowledge of the law of partnership evidenced by an adequate explanation of how partnerships are formed.

0–2 marks An inaccurate answer which clearly shows a lack of knowledge of the subject.

(b) 3–5 marks A comprehensive answer discussing fully the various ways in which partnerships are ended. Citation of relevant case law is useful.

0–2 marks An inadequate answer which clearly shows a lack of knowledge of the subject.

6 **(a)** 3–5 marks Answers in this bracket clearly show the distinction between the various classes of shares.

0–2 marks An inadequate answer.

(b) 3–5 marks Answers in this bracket clearly show the nature of debentures.

0–2 marks An inadequate answer which clearly shows a lack of knowledge of the subject.

7 **(a)** 3–5 marks Answers in this bracket will give a comprehensive overview of the duties of a company secretary.

1–2 marks An average answer.

(b) **(i)** 2–2½ marks A good answer which clearly describes the differences between an ordinary and a special resolution. Reference to s.133 is of critical importance.

0–1 mark A lukewarm answer.

(ii) 2–2½ marks A good answer will simply mention at least five examples from across the Companies Act (Chapter 24:03) which require the passing of a special resolution.

0–1 mark A not so impressive answer.

8 7–10 marks A comprehensive answer which clearly shows the distinction between a firm offer and an invitation to treat and the question of termination of offers including revocation prior to acceptance. Citation of case law is useful.

4–6 marks An average answer with important gaps in it.

0–3 marks A very inadequate answer.

9 7–10 marks Top range marks will be awarded to candidates who show a clear understanding of the workers' right to join trade unions under employment law. Citation of relevant provisions of the Labour Act and decided cases is useful. Equally it is important for candidates to appreciate the concepts of unfair and constructive dismissal.

4–6 marks Answers in this bracket show an appreciation of the legal position relating to the facts but lack detailed explanation and relevant sources of law, for example case law.

0–3 marks An inadequate answer with many inaccuracies and deficiencies.

10 7–10 marks Answers in this range would show a clear appreciation of company law by clearly identifying the legal problems emanating from the issue and solutions. Citation of relevant decided cases is useful. It is critically important to be able to appreciate the duties of directors.

4–6 marks Answers which show an appreciation of the subject matter but lack detailed identification and explanation of the legal problems arising from the facts and their solutions.

0–3 marks A deficient answer in all material respects.