Answers

1 **(a)** The three main courts of law in Zimbabwe are the Magistrates' Court, the High Court and the Supreme Court of Zimbabwe. At the top of the hierarchy is the Supreme Court, followed by the High Court and the Magistrates Court is found at the bottom of the ladder. Except in constitutional cases, the Supreme Court does not enjoy original jurisdiction – it is an appeal court.

In criminal matters, magistrates can be divided into four categories: ordinary magistrates, senior magistrates, provincial magistrates and regional magistrates. In a criminal trial, a magistrate may either sit alone or preside with the assistance of one or two assessors. The criminal jurisdiction of magistrates is dependent upon the seniority of the magistrate whereas the civil jurisdiction is not.

The High Court enjoys superiority over the Magistrates' Court. In a criminal trial, this court is considered duly constituted if composed of one judge and two assessors.

When reviewing any criminal proceedings of an inferior court, one or more judges are required, while in an appeal it is mandatory that it be constituted by at least two judges.

The High Court has 'full original criminal jurisdiction over all persons and over all matters in Zimbabwe'. However in terms of s.30 of the Constitution, the President enjoys immunity from 'any criminal proceedings whatsoever in any court'.

The Supreme Court is the highest court in the land and it consists of the Chief Justice, not less than two other judges and any acting judges who may be appointed. For exercising its jurisdiction, the Supreme Court is considered duly constituted if it consists of not less than three judges, one of whom must either be the Chief Justice or a permanent judge of the court.

In terms of jurisdiction, the Supreme Court is the final court of appeal in Zimbabwe. It has jurisdiction to hear appeals in criminal cases from any court or tribunal which, in terms of any Act of Parliament, an appeal lies to the Supreme Court. This court only sits as an appellate court and does not have original jurisdiction. There is one exception to this, namely, that it may sit as a first and final court under s.24 of the Constitution in matters where it is alleged that the Bill of Rights has been or is being infringed.

For the purposes of civil cases, the Magistrates' Court has the same jurisdiction regardless of the seniority of the magistrate presiding over the matter. In other words, in civil matters, unlike criminal cases, there is no division of magistrates into four classes of ordinary, senior, provincial and regional magistrates. A Magistrates' Court has jurisdiction to apply both customary law and general law in its determination of civil cases.

Regarding the composition, in a civil case, the magistrate sits alone. He/she may appoint one or more persons to sit as assessors and assist in an 'advisory capacity'. Any such appointment requires the approval of the Minister of Justice. The person appointed must be willing to serve and have skill and experience in any matter to be considered by the court.

Unlike in a criminal case, an assessor appointed in a civil case merely sits to advise and has no voice in the findings of the court on both matters of fact and of law.

In the case of the High Court, in civil cases, the judge sits alone. He/she may also appoint one or more persons to sit as an assessor(s) and assist in an 'advisory capacity'. Such an assessor 'shall act in an advisory capacity only and shall not be entitled to vote in the decision of the court'.

Concerning its jurisdiction, s.13 of the Act states that the High Court, 'shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.' The High Court also has appellate jurisdiction in civil cases. An appeal only goes to the High Court if there is a specific provision in a statute granting a right of appeal to the High Court. Appeals from the Magistrates' Court go to the High Court.

The Supreme Court is considered duly constituted if it consists of not less than three judges, one of whom shall be either the Chief Justice or a permanent judge of the court. It may be composed of two judges when hearing an appeal from any court other than the High Court, provided this happens on the directions of the Chief Justice.

If an appeal involves a difficult or important question of law, the presiding judge may direct that the appeal be heard by a greater number of judges. In such cases, the Chief Justice shall determine the size of the reconstituted court.

The minimum number of judges who must be appointed to the Supreme Court is three. There is no maximum number. The number of judges at any given one time is determined by the President in terms of s.80 of the Constitution.

This court has appellate jurisdiction only in civil matters, except where the issue is brought under s.24 of the Constitution. An appeal only lies with the Supreme Court where the provisions of the relevant statute say so. Specialised tribunals like the administrative and labour court are higher than the Magistrates' Court but rank slightly lower than the High Court.

In conclusion, the above research has outlined the hierarchy and structure of the courts of law in Zimbabwe. At the zenith is the Supreme Court, followed by the High Court while the Magistrates' Court anchors the hierarchical structure.

(b) The relevant pieces of legislation regulating the jurisdiction of the High Court are the Constitution of Zimbabwe and the High Court Act [Chapter 7:06] (hereinafter referred to as the Act).

The High Court has full original criminal jurisdiction over all persons and over all matters in Zimbabwe. This means that there is no limit to its jurisdiction regarding the nature of the crime, the possible punishment and the place within Zimbabwe where the crime is committed. The High Court may impose any lawful punishment, for example, life imprisonment or the death

sentence on convicted persons. It has jurisdiction to try cases such as murder, treason, for example in *S* v *Tsvangirai* (2004), banditry and insurgency as in *S* v *Bennet* (2010). Its jurisdiction over persons is limited by s.30 of the Constitution, which grants the President, while in office, immunity from any 'criminal proceedings whatsoever in any court'.

The High Court's extra-territorial jurisdiction is limited for statutory crimes; this depends on the provisions of the relevant statute. It has this jurisdiction over crimes committed wholly or partly outside Zimbabwe if the conduct which constituted the crime took place in Zimbabwe; if the crime is against public security in Zimbabwe or the safety of the state in Zimbabwe; or if the crime has produced, or was intended to produce, a harmful effect in Zimbabwe or was committed with the realisation that there was a real risk or possibility that it might produce such an effect. In *S* v *Mharapara* (1985), it was held that the High Court had jurisdiction to try a Zimbabwean diplomat who, while in a foreign country, stole money belonging to the Zimbabwean government.

The High Court also has automatic jurisdiction to review criminal proceedings in the Magistrates' Court wherever any person has been imprisoned for a period in excess of 12 months. In addition, it hears appeals in criminal cases from the Magistrates Court against conviction and sentence. For example, the High Court heard an appeal against conviction in *S* v *Nyirenda* (2003) and made a decision to set aside the trial court's decision.

In civil cases, the judge sits alone. He or she may also appoint one or more persons to sit as an assessor(s) and assist in an 'advisory capacity'.

Its original jurisdiction is unlimited; there are no monetary limits to claims that may be brought, and it can hear any civil dispute, whatever the nature of the claim. It enjoys what is called 'inherent jurisdiction', which means that the High Court is deemed to have jurisdiction unless to prohibited by some law. This kind of jurisdiction is superior to that of any other court because all other courts can only exercise the jurisdiction specifically granted by the enabling statute as stated in *Tuso* v *Harare City Council* (2003).

The fact that the High Court's original jurisdiction is unlimited means that all matters which may be heard by the Magistrates' Court can also at the first instance be heard by the High Court. A litigant is entitled to sue in the High Court, even in matters within the monetary limit of the Magistrates' Court. The High Court can only refuse to entertain the case if there is a law that prohibits it from exercising jurisdiction. The choice of court may be dictated by costs; it is more expensive to sue in the High Court than in the Magistrates' Court. Thus for small claims, it may make little economic sense to use the High Court.

The High Court also has 'appellate jurisdiction' in civil matters. An appeal only goes to the High Court if there is a specific provision in a statute granting a right of appeal to the High Court. Appeals may be from the Magistrates' Court to the High Court.

Apart from being an appellate court, the High Court has inherent review powers over the proceedings of all inferior courts and tribunals. A review is not concerned with the merits of the decision but with the decision-making process. In exercising its review powers, the High Court may set aside proceedings of an inferior court or tribunal.

In summary, it can be said that the jurisdiction of the High Court, both civil and criminal, is unlimited. In criminal cases the High Court can impose even the most dire or severe of sentences such as the death penalty for murder or treason cases. Whilst most progressive jurisdictions, for example South Africa, the European Union countries, etc, have abolished the death penalty, regrettably it is still part of the Zimbabwean law. However, there is a strong probability that the death penalty will be abolished under the new Constitution which is currently being written.

2 (a) Parties frequently agree to arrangements which differ from those provided for in the residual provisions applicable to their contract or in the residual rules on breach. Their agreement may be expressed in more than one way. The contract may, for example, state each party's responsibility in precise positive language, or it may contain an express general provision and a limiting clause, or it may say nothing in general but have a clause limiting whatever the residual provision or rule on the topic may be. Such limiting clauses often state that one of the parties is exempt from specified responsibilities, or that a general provision applies except in specified instances. For example in *Gallon* v *Modern Burglar Alarms (Pty) Ltd* (1973), there was an exemption clause inserted into the contract between the parties saying, 'the lessor shall not be liable for any damage whatsoever, whether by burglary or any other means, caused to the lessee by non-operation of the alarm for any reason, and whether the lessor was aware of such non-operation or not.'

Zimbabwe law appears to state that an exemption clause may validly exempt from liability for unintentional but not intentional non-performance of a contractual obligation. In *Melfort Motors (Pvt) Ltd* v *Finance Corpn of Rhodesia Ltd* (1975), the court held that an exemption clause may validly give exemption from liability for delivering goods of the wrong description, which may properly be regarded as non-performance rather than mere performance. However, this cannot be so if the non-performance is intentional. In *Elgin Brown & Hamer (Pty) Ltd* v *Industrial Machinery Suppliers (Pty) Ltd* (1993), the court noted, 'an exemption clause, no matter how widely expressed, availed the party seeking to invoke it when he performed his contract in essential respects. It did not avail him when he was guilty of a breach going to the root of the contract ... the fact of fundamental breach is irrelevant and alien to the construction of an exemption clause and cannot govern its compass.'

A limit on the exemption clause is that a party may not exempt himself from liability for his own fraud, but under the common law may exempt himself from liability for his own negligence. In *South African Railways and Harbour* v *Lyle Shipping Co Ltd* (1958), it was said that where an exemption from liability clause in a contract is open to the interpretation that it bars actions arising from causes of one or more classes, leaving unaffected those founded on causes of one or more classes, the rule to be applied in construing it is that, generally speaking, where in law the liability of the damages which the clause purports to

eliminate can rest upon negligence only, the exemption must be read to exclude all liability for negligence, for otherwise it would be deprived of all effect; but where in law such liability could be based on some ground other than negligence, it is excluded only to the extent to which it may be so based and not where it is founded on negligence.

However, notwithstanding the oppressive nature of some of the exemption clauses, the *caveat subscriptor* rule sometimes is taken into account by the courts when dealing with cases where the clauses are being challenged. The *caveat* rule entails that it is a matter of common knowledge that a person who signs a contractual document thereby signifies their assent to the consents of the documents and if these subsequently turn out not to be to their liking, they have no one to blame but themselves. In *Burger* v *Central SAR* (1903), the court said, 'it is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.' Hence in *Wells* v *S.A Alumenite Co* (1927), the court said, 'No doubt the condition is hard and onerous, but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands.'

(b) The courts have tried to control exemption clauses by narrowly interpreting them and also measuring their tenability in relation to public policy.

The law cannot stand aside and allow such traps to operate unchecked and the courts have protected the public from the worst abuses of exemption clauses by setting limits of the exemptions they will permit and by interpreting exemption clauses narrowly. The basis on which the courts decide what is and what is not permissible under exemption clauses is public policy. In *Morrison* v *Angelo Deep Gold Mines Ltd* (1905), it was said, 'Now it is a general principle that a man contracting without duress, fraud and understanding what he does may freely waive any of his rights. There are certain exceptions to that rule, and certainly the law does not recognise any arrangement which is contrary to public policy.' For this argument to succeed on the grounds of public policy, it must be shown that the arrangement necessarily contravenes or tends to induce contravention of some fundamental principle of justice or of general statutory law, or that it is necessarily to the prejudice of the interests of the public. On this basis, the courts have had no difficulty in prohibiting exemption from liability for fraud. In *Wells* v *S.A Alumenite Co* (1927), the court said, 'on the grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud. Hence contractual conditions by which one of the parties engage to verify all representations. However wide the language, the court will cut down and confine its operations within these limits.' In *Magna Alloys and Research (SA) (Pty)* v *Ellis* (1984), the court said '… the court's concern is to assess the effect of an order enforcing the agreement in the light of the dictates of public policy.' Hence the court will violate the principle of freedom of contract and interfere where it feels that one of the parties is in shackles of the other party's exemption clauses in a contract.

The second method by which the courts endeavour to confine exemption clauses within reasonable bounds is by interpreting them narrowly. The method is particularly applicable to clauses which do not specifically set out the legal grounds for liability from which exemption is granted. In interpreting such clauses, the court must first examine the nature of the contract in order to decide what grounds of liability would exist in the absence of the clause, for instance strict liability, negligence, and the clause will then be given the minimum of effectiveness by being interpreted to exempt the party concerned only from the ground of liability for which they would otherwise be liable which involves the least degree of blameworthiness. In *Essa* v *Divaris* (1947), a garage keeper was contracted to garage a lorry 'at owner's risk'. The Appellate Division held that a parking garage keeper is not subject to the strict liability applied to *stabularri* by the praetor's edict, so the clause could not have been intended to apply to such non-existent liability. The minimum degree of blameworthiness for which he would be liable was negligence, so the clause was interpreted as exempting him from liability based on negligence only. Similarly in *Cotton Marketing Board of Zimbabwe* v *National Railways of Zimbabwe* (1988), the court held that in Zimbabwe the praetor's edict now covers carriers by water and carriers by land, 'while carriers may contract out of the strict liability imposed on them by the common law or by contract limit their liability, the clause exempting the carrier from liability must do so in clear terms, with an express reference to negligence. In the absence of such clear terms, the clause is to be construed as relating to a different kind of liability and not to liability based on negligence.' In that case the court held the respondent liable for the loss of the appellant's bales of cotton occasioned by the negligence of its employees.

Abuse of these exemption clauses is checked not only by the courts but also by Parliament. In some countries, the legislature has seen the problem as a whole and has passed legislation of general application to contracts of different types while others have preferred to tackle the problem with more specifity by statutes regulating particular types of contracts. For example, the common law rule permitting a party to exempt themselves from liability for their own negligence is completely abrogated.

On the whole, it can be said that the courts, with the above discussed mechanisms or aid at their disposal, have successfully curtailed the operation of exemption clauses perceived to be oppressive on the other party to the contract. In *Transport and Crane Hire (Pvt) Ltd* v *Hubert Davies & Co (Pvt) Ltd* (1991), the court reiterated the principle that, unless the scope of the exemption is clearly expressed, it must be interpreted as giving the minimum protection to the party in whose favour it operates. The approach of the courts is basically to limit the overarching nature of exemption clauses by giving them the narrowest possible interpretation.

3 In law an agent is a person who is appointed by their principal to enter into contractual relationships which are binding between the principal and the third party. The law of agency is basically concerned with the relationship between the principal and the agent and that between the principal and the third party. Mainly, the objective in appointing an agent is the performance of service for the benefit of a principal in circumstances where the principal finds it impossible, difficult or inconvenient.

(a) Express actual authority

In the typical case, express actual authority is conferred on an agent by agreement with the principal as Lord Displock L said in *Freeman and Lockyer* v *Buckhurst Park Properties* (1964):

'actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties'

Except in clearly defined circumstances, generally no formality is required in the appointment of an agent. The extent of the agent's actual authority will depend upon the true construction of the words of their appointment. If the agency agreement is oral, the precise limits of the agent's authority will be a matter of evidence. If, on the other hand, the agreement has been put into writing, then the relevant document will have to be examined.

(b) Implied actual authority

Implied authority empowers the agent to do everything which is necessary for or reasonably incidental to the effective execution of their duties. It must be noted that agents who practise a particular trade, business or profession are normally authorised to do everything which is usually or ordinarily done in such a trade, business or profession. In *Real and Personal Advance Company* v *Phalempin* (1895), it was held that the matron of the hospital had implied authority to pledge the credit of the institution in order to supply it with meat for its ordinary use and in *Walker* v *Great Western Railway Company* (1876), a station manager of a railway company was held to have implied authority to order medical attention for an injured servant of the company.

In conclusion it can be said that in addition to any such implied authority, the agent may also acquire authority to do certain things simply because they are operating within a particular locality or market. Such authority emanates from the local custom or usage.

(c) Ratification

This occurs where the principal affirms or ratifies acts of an agent already performed professedly for the principal. The net effect of ratification is to legitimise or clothe the act with authority, so that the position is the same as if the act had been originally authorised. The case of *Flood* v *Taylor* (1978) is a good example.

However, for ratification to be possible the following conditions have to be satisfied:

(i) The agent making the contract must profess at the time of making it to be acting on behalf of the principal;
(ii) The professed principal must be named and ascertained and the act must have been done in their name;
(iii) The act itself must be legal;
(iv) The principal must have been in existence at the time of the transaction.

Ratification may be express or implied. It would be implied if the principal so conducts themselves that a reasonable man would believe that they were ratifying the acts of the professed agency. The case of *Dreyer* v *Sonop* (1951) is an example. Ratification must take place within a reasonable time of the unauthorised act, otherwise it ceases to have effect and force.

The effect of ratification is to give a legal basis which hitherto had not been available. This amounts to conferring *ex-post facto* authority on the agent. Under Roman-Dutch law, it is possible for a person to contract for the benefit of a third party not yet in existence. Thus a person may validly contract on behalf of a company to be formed in as much as a parent can open a bank account for an unborn child in terms of Roman-Dutch law.

(d) Agency of necessity

This type of agency is discerned from the nature of circumstances or situation. An example of this type of agency is *negotiorium gestior*. A *negotiorium gestior* is a person who takes the business of another without the authority of the latter and in the latter's absence. This type of agency is commonly referred to as agency of necessity.

The *negotiorium gestior* uses their own resources for the benefit of the principal without their sanction. However, they retain a right of action to recover the necessary and useful expenses incurred by themselves in running the business of the principal. The onus is on them to show that the expenses so incurred were reasonable in the circumstances. Agency of necessity arises by operation of law in certain cases where a person is faced with an emergency in which the property or interests of another person are in imminent jeopardy. It becomes necessary in order to preserve the property or interests to act for that person without their authority.

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

In summary, the following issues relating to agency of necessity need to be highlighted:

(i) It is necessary to show that the agent was unable to obtain instructions from their principal;
(ii) The agent must satisfy the court that they acted in the interests of the principal in a *bona fide* manner;

(iii) The action taken by the agent must have been reasonable and prudent in the circumstances;
(iv) There must be some necessity or emergency to compel the agent to act in the way in which they did.

(e) Agency by estoppel – apparent or ostensible authority

This type of agency exists where a third party holds the principal liable on contracts entered into by the third party and the ostensible agent of the principal, if the principal's conduct is such that it amounts to a representation that the ostensible agent had authority from the principal, and that the third party has been induced to contract with the ostensible agent on the strength of such conduct.

Under this particular situation, there is no actual authority conferred on the ostensible agent by the principal. The principal is simply stopped from denying that the ostensible agent has authority. This is called agency by estoppel.

The principle of agency by estoppel was clearly enunciated in the celebrated case of *Monsali* v *Smith* (1929). In that case it was held that a person who seeks to set up agency by estoppel must establish that:

(i) There was a representation by the principal;
(ii) The representation was of such a nature that it could reasonably have been expected to mislead them;
(iii) They acted on the faith of the representation;
(iv) They were prejudiced by relying on the representation.

Apparent authority is really equivalent to the phrase 'appearance of authority'. There may be an appearance of authority whether in fact or not there is authority. In *Rama Corp* v *Proved Tin and General Investments Ltd* (1963), Slade G declared,

'Ostensible or apparent authority is merely a form of estoppel, indeed it has been termed agency by estoppel and you cannot call in aid an estoppel unless you have three ingredients:

(i) A representation
(ii) A reliance on the representation and
(iii) An alteration of your position resulting from such a reliance.'

It is very clear from the decision of *Mansali* v *Smith* (*supra*) that apparent or ostensible authority only becomes relevant where there is no express authority. This same principle of law was adopted with approval by the Zimbabwean Supreme Court in the case of *Gwafa* v *SEDCO* (1999).

4 **(a)** The statutory duties of an auditor are set out in ss.153 and 154 Companies Act (Chapter 24:03). These include the duty:

(i) to make a report to members on the accounts examined by them;

(ii) to state in their report that the accounts of the company and the group accounts are properly drawn up in accordance with the Companies Act so as to give a true and fair view of the company's affairs;

(iii) to include in their report statements which in their opinion are necessary if they have not obtained all the information and explanations which to the best of their knowledge were necessary for the purpose of their audit;

(iv) to attend any general meeting of the company. To this end an auditor is entitled to receive notices of company meetings.

The common law duties of an auditor include the duty:

(i) to act honestly and with reasonable skill, diligence, care and caution. In *re Kingston Cotton Mill Company* (1896) the court made the following observation:

'it is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use ...'

(ii) to show the company's true financial position as shown by the books, *Tokwane Sawmill Company Ltd* v *Filmalter* (1975);

(iii) to make sure that the amount of stock stated to exist is a reasonably probable figure but the auditor has no duty to take stock unless there are suspicious circumstances;

(iv) to act as a watchdog but not a bloodhound.

In *re Kingston Cotton Mills* (1896), the court made the observation that an auditor is not bound to be a detective or to approach his work with suspicion or with a foregone conclusion that there is something wrong.

Lord Denning's remarks (*Fomento* v *Selsdon Fountain and Others* (1958)) are equally instructive. He remarked that an auditor is not to be confined to the mechanics of checking vouchers and making arithmetical computations. His vital task is to take care to see that errors are not made, be they errors of computation or errors of omission or commission of downright untruths. To perform this task properly, he must come to it with an enquiring mind – not suspicious of dishonesty – but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none.

(b) **(i)** The Companies Act [Chapter 24:03] deals with the appointment of an auditor by two types of companies: a public company and other types of companies, for example, private companies.

With respect to public companies, s.150(i) decrees that the first auditor(s) shall be appointed by the directors within one month of the issue of the certificate to commence business. In the case of other companies (e.g. private), the appointment of the auditor(s) shall be made within one month of the certificate of incorporation being issued. In either case, an auditor so appointed shall hold office until the conclusion of the first annual general meeting. If the directors fail to appoint the first auditor(s), the company in general meeting may effect the appointment and if neither the board of directors nor the company appoints the auditor(s), the Minister of Justice, on the application of a member of the company, may do so.

Section 150(2) says that every company shall at each annual general meeting appoint an auditor to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting. Special notice shall be required for a resolution at a company's annual general meeting appointing as auditor a person other than a retiring auditor or providing expressly that a retiring auditor shall not be reappointed (s.151).

In certain circumstances a private company need not appoint an auditor. Such situations include the following, if:

(a) the number of members in such company does not exceed ten;
(b) such company is not a subsidiary of a holding company which has itself appointed auditors; and
(c) all the members in such company agree that an auditor shall not be appointed.

(ii) Eligibility for appointment as auditors is governed by s.152 Companies Act (Chapter 24:03).

The sole purpose behind the legislation is to ensure that only persons who are properly supervised and appropriately qualified are appointed company auditors and that audits by a person so appointed are carried out properly, with integrity and with a proper degree of independence.

In short, auditors must be recognised as qualified by the institutes regulating the accountancy profession and be registered auditors. The Companies Act [Chapter 24:03] does not specifically deal with the qualifications of auditors but it does disqualify certain persons from being appointed as auditors of a company. So as to ensure their independence, auditors must have no connection with the company and not be an officer or employee of it.

By and large all disqualified persons are those whose objectivity or independence in auditing the accounts of a company may be affected by their association in one way or another with the company. These are:

(a) an officer or servant of the company;
(b) a person who is a partner of an officer or servant of the company;
(c) a person who is an employer or an employee of an officer or servant of the company;
(d) a body corporate;
(e) a person who is an officer or servant of a body corporate which is an officer of the company;
(f) a person who by themselves or their partner or their employee regularly performs the duties of secretary or bookkeeper to the company.

5 The Companies Act [Chapter 24:03] contains a number of provisions which are meant to preserve the share capital structure of the company. The general principle is that a company must maintain its capital, it cannot give money which has been contributed by the shareholders back to those same people and there are a number of strict rules which seek to maintain adherence to that principle. If such money is returned to shareholders, except in a few specific and clearly defined situations, then it becomes an unlawful reduction of share capital. Some of the rules which are meant to maintain the capital structure of a company are the following:

(a) Prohibition of financial assistance by the company for the purchase of its own or its holding company's shares

It is unlawful for the company to give, whether directly or indirectly, whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of buying shares in the company or where the company is a subsidiary company in its holding company, unless:

(i) such assistance is given in accordance with a special resolution of the company;

(ii) the company's assets exceed its liabilities and it is able to pay its debts as they become due in the ordinary course of its business.

(b) The share premium account (s.74)

If a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account called the 'share premium account'. The share premium account cannot be used any how and in terms of the Act, its use is restricted to the following (among others):

(i) in paying up unissued shares to be allotted to the company's members, directors, employees or to a trustee for such persons, as fully paid bonus shares; or

(ii) in writing off the company's preliminary expenses or the expenses of or the commission paid or discount allowed on any issue of shares or debentures of the company.

(c) Power to issue shares at a discount (s.75)

Whilst it is permissible for a company to issue shares at a discount of a class already issued, this has to be done in accordance with strictly laid down criteria which are as follows:

(i) the issue of the shares at a discount must be authorised by a special resolution of the company and must be sanctioned by the court; and

(ii) the special resolution must specify the maximum rates of discount at which the shares are to be issued.

(d) Prohibition of loans to directors (s.177)

It shall not be lawful for a company to make a loan to any person who is its director or a director of its holding company, unless:

(i) the company's ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons to anything done by the company in the ordinary course of that business; or

(ii) where the company is a non-subsidiary company and the consent of members holding at least nine-tenths of the issued share capital has been secured.

(e) Prohibition of company from purchasing its own shares (s.78)

Section 78(s) places a bar on companies from purchasing their own shares if the net result is a diminution in the share capital structure of the company. It reads as follows:

'A company shall not purchase its own shares if as a result of the purchase there would no longer be any member holding shares other than redeemable shares.'

(f) Rules relating to payment of dividends (article 116)

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

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

'no dividend shall be paid, otherwise than out of profit...'

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

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

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

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

Romer J made the following observation:

'having regard to the articles it is clear that the dividends on the ordinary capital were payable only out of the profit of the company in the sense that the powers of the company or the board to carry profits to reserve override the rights of the shareholders to dividend. The procedure would be that the board would consider the profits of the company on the one hand, its requirements as to maintenance and so on, on the other. Having decided the amount of profit, if any which was available the directors would make the necessary recommendation to the company and the company would consider the matter ...'

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

In conclusion, it is quite clear that there are a number of provisions in the Companies Act [Chapter 24:03] that relate to capital maintenance and dividend law. The specific provisions mentioned in the discussion, whilst very prominent, are by no means the only ones – the list is not exhaustive.

6 **(a)** One of the fundamental principles upon which corporate law is predicated is the concept of separate personality. Once a company is properly and duly registered, it acquires juristic or legal personality, a separate personality that is different from that of a natural person. The common law position on the subject was lucidly articulated in the well-known landmark case of *Salomon* v *Salomon and Company* (1897).

The House of Lords stated that:

'when the memorandum is duly signed and registered ... the subscribers are a body corporate capable forthwith of exercising all functions of the incorporated company. The company is a different person altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands received the profits, the company is not in law the agent of the subscribers or trustees for them.'

It is now universally accepted that once a company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself.

In *Lee* v *Lees Air Farming (Pvt) Ltd* (1960), the appellant's husband formed a crop spraying company of which he was its majority shareholder, managing director and chief pilot. He died in an accident whilst working for the company as its chief pilot and the question that arose was whether he could be regarded as having been the company's worker for the purpose of the New Zealand Workers Compensation Act. The Privy Council held that he was a worker notwithstanding that he virtually owned the company. The fact that one or two persons are in full control of the company does not by itself deprive the company of its distinct identity which is separate from the person who controls it.

This position was reiterated in the Zimbabwean case of *Crees (Pvt) Ltd* v *Woodpecker Industries (Pvt) Ltd* (1975). Goldin J said:

'Thus a company can be under the control and its activities entirely dictated by another person but that does not deprive it of its distinct legal personality ...'

The statutory position in Zimbabwe basically reaffirms the common law position. The Companies Act [Chapter 24:03] (s.9) reads as follows:

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

Some of the major advantages associated with corporate personality are as follows:

1. Perpetual succession of the company despite the retirement, bankruptcy, mental disorder or death of members.

   As was aptly observed by Lord Parker of Waddington in *Daimler Company Ltd* v C*ontinental Tyre and Rubber Company (Ltd)* (1916):

   'No one can question that a corporation is a legal person distinct from its corporators, that the relationship of a shareholder to a company, which is limited by shares is not in itself the relation of principal and agent or the reverse, that the assets of the company belong to it and the acts of its servants and agents are its acts while its shareholders as such have no property in the assets and no personal responsibility for those acts ...'

2. Liability of the members for the company's debts limited to the amount of the respective shareholding. In liquidation of the company, a member's liability would be determined by the amount that remains unpaid on his shares.
3. Contractual liability of the company for all contracts made in its name.
4. Ownership of property vested in the company is not affected by a change in shareholders.
5. The company may obtain finance by creating a floating charge with its undertaking or property as security, yet may realise assets within that property without the consent of the lenders during the normal course of business until crystallisation.

   In the lengthy judgement of *Salomon* v *Salomon and Company* (1897) Lord MacNaghten observed that:

   'among the principal reasons which induce persons to form private companies is the desire to avoid the risk of bankruptcy and the increased facility afforded for borrowing money. By means of a private company a trade can be carried on with limited liability and without exposing the persons interested in it in the event of failure to the harsh provisions of bankruptcy law. A company too can raise money on debentures which an ordinary trader cannot do....'

(b) The phrase 'lifting the veil of incorporation' is one that is familiar to students and practitioners of company law. Company law recognises exceptions to the principle of separate personality. The exceptions are a departure from the principle of the separate existence of a company and are commonly described as 'lifting the veil of incorporation'.

Statutory exceptions tend to penalise breaches of specific legislative provisions and exceptions under the common law or those provided by case law tend to involve a situation where special or unique circumstances obtain such that the veil of incorporation (corporate veil) is a mere convenient façade or alibi concealing the true facts.

A common thread runs through both types of exceptions (statutory and common law), that is to say the ends of justice would be undermined or probably altogether defeated if the principle of corporate personality was 'cast in stone' and admitted of no exceptions. In *Woolfson* v *Strathclyde* (1976), the House of Lords stated that it is appropriate for the courts to lift the veil of incorporation only where special circumstances exist indicating that it is a mere façade concealing the true facts. The

Zimbabwean courts will not lightly depart from the principle of corporate personality unless there are compelling reasons to do so.

In the case of *Gloria Mkombachoto* v *Commercial Bank of Zimbabwe and the Registrar of Deeds* (2002), Justice Ndou observed that:

'in my view, the court has no general discretion to disregard the company's separate legal personality whenever it considers it just to do so. The court may lift the veil only where otherwise as a result of its existence fraud would exist or manifest justice would be denied.'

Both in English law and equally in Roman-Dutch, one of the most talked about phrases (in corporate law) is 'lifting the veil of incorporation'. South Africa and Zimbabwe share a common legal historical background which resulted in the adoption of Roman-Dutch law in the 17th Century in South Africa and in 1890 in the then colony of Southern Rhodesia (now Zimbabwe).

The South African Law Journal, Volume (vi) (1987) at page 684 has this to say:

'Take the doctrine of piercing the corporate veil. The authorised sources of company law lay down that a company has a separate legal personality. But the courts have arrogated to themselves the right to disregard the separate personality rule in certain circumstances ...'

As a general rule, for the courts to disregard the time honoured principle of corporate personality, there must be a conviction that the applicant has suffered an unconscionable injustice and this as a consequence of something which is to the right-minded person clearly improper conduct on the part of the defendant. Judicial inroads into the principles of separate personality are numerous. Some of the more familiar common law exceptions include the following:

(i) **Fraudulent or unjust behaviour**

Where a manifest injustice and unfairness would occur if the veil of incorporation were not disregarded. In the famous case of *Creasey* v *Breachwood Motors* (1993), where assets had been removed from company A to company B leaving a former employee with a worthless judgement against company A, the judge thought it in the interests of justice and also found practical reasons to lift the veil by substituting company B as defendant.

However, it is difficult to be precise about the circumstances in which a judge will lift the corporate veil. However, it is fair to say that the power to do so is a strategy used by the judiciary in a flexible way to counter fraud, sharp practice, oppression, breach of trust relationships and illegality.

(ii) **Groups of companies**

Groups of companies – the human and commercial reality of the group. The court has on occasion lifted the veil of incorporation to allow a group of companies to be regarded as one because in reality they were not independent either in human or commercial terms. *Re Hellenic and General Trust Limited* (1975). A company called MIT was a wholly owned subsidiary company of Hambros Ltd and held 53% of the ordinary shares of Hellenic. A scheme of arrangement was put forward under which Hambros was to acquire all the ordinary shares of Hellenic for a cash consideration of 48p per share. The ordinary shareholders included MIT, with MIT voting in support. However, the National Bank of Greece, which was a minority shareholder, opposed the scheme because it would be liable to meet a heavy tax burden under Greek law as a result of receipt of cash for its shares. Templeman J refused to approve the scheme on a number of grounds. However, the one which interests us here is that he ruled that there should have been a separate class meeting of ordinary shareholders excluding MIT, thus in effect regarding the holding company, Hambros, and the subsidiary MIT, as one economic unit in the class meeting and not two independent companies with independent interests.

(iii) **Nationality**

In many countries, it is illegal to trade with the enemy in times of war. That being the case, it may be possible to lift the veil of incorporation so as to impute to a company the same nationality as its members. In *Daimler Company Limited* v *Continental Tyre and Rubber Company (Great Britain) Ltd* (1916), at the outbreak of war between England and Germany in 1914, the plaintiff sued the defendant company for payment of a trade debt. The defendant company alleged that the plaintiff company was an enemy alien company and that payment of the debt would amount to trading with the enemy during the times of war. The court observed that since effective control of the company was in enemy hands, to pay the debt would be to trade with the enemy.

(iv) **Mere façade (or puppet companies)**

Where an incorporated company is operating as a mere façade, sham or front for certain individuals or entities, in order to effect simple justice between citizens, the courts would not be averse to 'unmasking' the natural person(s) operating under the cloak of incorporation.

In *Gifford Motor Company* v *Horne* (1933), a restraint of trade clause was binding on a former employee. He set up a company in an attempt to circumvent its provisions. He claimed that the company could not be bound by the restraint clause because it was a separate legal person from himself and not a party to the contract between himself and his former employer. It was held that the company was a sham and an injunction was granted against the former employee and the company.

Equally in the case of *Jones* v *Lipman* (1962), L agreed to sell some land to J. L then changed his mind and, in order to evade specific performance of the contract, sold the land to a company of which he was the controlling shareholder. The court held that the company was a sham and specific performance extended not only to L but also the company.

The common law list of instances in which the veil of incorporation has been lifted is not exhaustive. At the end of the day each case will depend on its own facts.

Statutory exceptions

There are many specific statutory situations where the legislators saw it fit to lift the veil of incorporation, it being the only effective method of protection to those who need such protection. Some examples of lifting the corporate veil which are to be found in the Companies Act [Chapter 24:03] include the following:

(i) liability of misstatements in the prospectus (s.43 and 44);

(ii) liability of directors for allotments of shares without receiving minimum subscription (s.50(5));

(iii) liability of directors for allotments of shares without issuing prospectus or statement in lieu of prospectus (s.51(4));

(iv) liability of directors for irregular allotment (s.52(2));

(v) liability of the company and its officials severally for irregular issue of shares at a discount (s.57(2)(5));

(vi) liability for failure to notify the Registrar of the consolidation of share capital and its conversion into stock (s.65);

(vii) liability for failure to notify the Registrar of increase of share capital (s.66);

(viii) liability of directors, managers and a secretary for concealment of names of creditors entitled to object in the case of reduction of capital (s.74);

(ix) liability for failure by the company to send notice of refusal to a member who wants to transfer his shares or debentures (s.78);

(x) liability of officers of the company for failure to issue share capital for debenture certificates (s.92);

(xi) liability of company officers for failing to keep a register and index of all its members (s.92);

(xii) liability of any officer of the company who made or took part in a transaction which exceeded the company's objects (s.9(b)).

Finally s.318(1) attributes personal liability to a number of officials for misfeasance and other forms of fraudulent conduct of business. It reads as follows:

'If at any time it appears that any business of a company was carried on –

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

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

7 (a) The Companies Act [Chapter 24:03] says that winding up can either be voluntary or compulsory. Section 206 specifies the circumstances under which a company may be wound up by the court (compulsory winding up). The relevant circumstances are as follows:

(i) If the company has by special resolution resolved that the company be wound up by the court.

(ii) If default is made in lodging the statutory report or in holding the statutory meeting. Since s.124 Companies Act exempts private companies from holding statutory meeting for all intents and purposes, this provision only affects public companies.

(iii) If the company does not commence its business within a year from its incorporation or suspends its business for a whole year.

An instructive case which exemplifies this section is *Nakhooda* v *Northern Industries Ltd* (1950). A company had been incorporated in 1946. Its objectives were to establish a modern mineral water factory and a large dry cleaning business. By 1949 it had not done either and the court granted a winding up petition on the basis that the company had not 'commenced business'.

(iv) If the company ceases to have any members – since the minimum membership of a company is one person, if that person dies and his shares are not transferred to his heirs, the company ceases to have members.

(v) If 75% of the paid-up share capital of the company has been lost or has become useless for the business of the company. This basically means that in that event, the company cannot justify its existence to have members.

(vi) If the company is unable to pay its debts.

This is probably the most common ground upon which compulsory winding up is granted in Zimbabwe. Section 205 Companies Act defines the concept of 'inability to pay debts' and the requirements are very easy to satisfy. A creditor who sends a demand involving a sum of at least a hundred dollars and that sum remains unpaid for three weeks or more in circumstances in which the company has no lawful or reasonable defence will have proved his case.

(vii) If the court is of the opinion that it is just and equitable for the company to be wound up.

This is the second most important ground upon which the compulsory winding up of companies is based in Zimbabwe. The ground covers a very wide range of situations and a comprehensive analysis of the 'just and equitable' principle was done by the court in the well-known English case of *Ebrahim* v *Westbourne Galleries* (1972).

Some of the situations which fall into the 'just and equitable' network among others, include (the list is not exhaustive):

(1) the disappearance of the substratum
Rhenosterkop Copper Company (1933) in which the substratum of a company, which was formed to mine copper, was held to have disappeared when it was found that the ground which it was to mine contained no copper.

(2) deadlock or paralysis in the management of the company. *Re Yenidge Tobacco Company* (1916).

(3) Oppression of minorities
in which the conduct of the majority is unlawful, harsh, burdensome and unfair.

(4) Lack of probity in the company's affairs
In *Woolmack* v *Commercial Vehicle Spares (Pvt) Ltd* (1968), where the minority shareholder complained that the majority shareholder and director had perpetrated a fraud on him by falsifying the minutes, illegally issuing shares and illegally declaring and paying dividends and that this constituted dishonesty in the conduct of the company's affairs.

In summation it can be said that the reasons which justify compulsory winding up as per s.206 Companies Act [Chapter 24:03] are clearly spelt out and preconceived and some of the instances involve open and shut cases. With specific reference to the 'just and equitable' principle as per s.206(g), Chatikobo J in the famous *La Gallerie* case (2000) made the apt observation that that particular section has been said to postulate not facts but only a broad conclusion of law, justice and equity as a ground for winding up. He observed that:

'in its terms and effect (the section) confers upon the court a very wide discretionary power, the only limitation originally being that it had to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned.'

(b) A company which is experiencing difficulties may either be wound up or, at the discretion of the court, be placed under judicial management if certain circumstances are proved. Judicial management has been referred to as a halfway house between life and death of a company.

It is the discretion of the court to issue a winding up order or a judicial management order. For example, when a petitioner has established a case for winding up a company to the satisfaction of the court, the court may, instead of granting a winding up order, issue an order for judicial management if it has been requested to do so. However, this should be done if the court is of the opinion that the company will be able, during the judicial management, to recover from its difficulties and that it has reasonable opportunity to do so.

When, by reason of mismanagement or for any other cause, a company is unable or probably unable to meet its obligations but it has not become or is prevented from becoming a successful concern and there is a reasonable probability that if placed under judicial management it will recover, the court may, if it appears just and equitable grant a judicial management, s.300(b)(ii) Companies Act [Chapter 24:03]. Synman J in the case of *Lief* v *Western Credit (Africa) Ltd* (1963) (3) SA 344 argued that a winding up order, in its nature, is intended to bring about the dissolution of the company, whereas the purpose of the judicial management order is to save the company from dissolution.

An important feature of a winding up order is that upon such an order being granted, creditors must be paid off. However, judicial management, on the other hand, usually provides for a moratorium in respect of the company's debt in the hope that it will lead ultimately to the payment of all creditors and the resumption by it of normal trading. Furthermore, a winding up order is usually granted where a company is in fact insolvent, whereas a judicial management order is usually granted where a solvent company has run into financial difficulties because of mismanagement and because there is hope that with better management it will overcome its difficulties. The idea is to give the company a fighting chance.

Judicial management is a substitution by the court of a new management of a company in place of the directors. The judicial management order is granted in a situation where to grant a winding up order may cause unnecessary prejudice to the shareholders and the creditors of the company. In fact, the court will be of the opinion that, although the company may be suffering financial embarrassment due to mismanagement, it may be basically sound.

There are two types of judicial management orders which can be made: the provisional judicial management order as per s.300 Companies Act and the final judicial management order in terms of s.309 of the Act. For the court to grant either a provisional order or a final order, it will in both cases consider whether there is a reasonable probability of success. So the discretion is with the court to grant a provisional order as a final order (s.300(9)(ii) of the Act).

In *Tenowitz* v *Tenmy Investments (Pty) Ltd* (1979), the court refused to grant a final order of judicial management because it considered that the applicant had not discharged the onus of proving that the company would become a successful concern in a reasonable time if such an order was granted. There are so many reasons which can lead to a company to be put under judicial management. A company can be placed under judicial management if it is unable to pay its debts, if there is mismanagement of the company. In this case, the attitude of the courts is generally that a company should manage its own affairs freely. Unless there has been something illegal, oppressive or fraudulent on the part of the company, the court will not

interfere in its internal management. In *Reich* v *Harthon Syndicate (Pty) Ltd* (1930), the judge observed that the court has a discretion in deciding whether it is desirable that a company should be put under judicial management.

The other reason for judicial management is the inability of the company to meet its obligations. A company may be able to meet its current trade debts but unable to timeously fulfil its obligations. In such a case, the court will be justified to place the company under judicial management. Also if the court finds it just and equitable, the company can be under judicial management. Thus the just and equitable ground is intended to indicate that there must be a balancing of interests of creditors, in not delaying, for example, their right to obtain money by calling a halt to an apparently failing company and the interest of members by continuing their concern despite present difficulties.

The concept of the company becoming a successful concern presupposes that it will be able to pay its debts and meet its obligations.

8 Passing off is an actionable wrong which occurs when one represents to the public, whether by means of a misleading name, mark, label or otherwise, that one's business or merchandise is that of another. The principle is that it is akin to fraud for a trader to pass off his goods as those of a rival, and thus by deceiving the public reap the benefit of his rival's reputation. In *Capital Estates and General Agencies and Ors* v *Holiday Inns Incorporated and Anor* (1977), the court said, 'the wrong known as passing off consists of a representation by one person that his business or merchandise as the case may be is that of another or that it is associated with that of another...' This delict falls under those relating to lawful trading practices. In *Policansky Bros Ltd* v *L & H Policansky* (1935), the court in explaining the source of our law of passing off said, 'The Roman-Dutch law was well acquainted with the general principle that a person cannot, by imitating the name, marks or devices of another, who had acquired a reputation of his goods, filch the former's trade ...'

Passing off is based on injury to property; the right of property being the plaintiff's goodwill in his business. In *Draper* v *Trist and Trisbestos Brake Lining Ltd* (1939), it was said, '... in passing off cases the true basis of the action is that the passing off by the defendant of his goods as the goods of the plaintiff injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business. The law assumes, or presumes that if the goodwill of a man's business has been interfered with by the passing off of goods, damage results therefrom. He need not wait to show that damage has resulted, he can bring his action as soon as he can prove the passing off; because it is one of the class of cases in which the law presumes that the plaintiff has suffered damage.'

In order to successfully prove passing off, the plaintiff must establish that he has acquired repute in the sale of his goods to the public. There is no right of property in a word or label, a right of action arises only when the word or label has acquired a repute and where, by reason of that repute, used by others might result in deception which will cause injury to the goodwill of the business to which the repute attaches. The right of action flows, not from rights in the word or label, but from the injury or possible injury to the goodwill of the business. Other persons may use the mark or label, provided only they do not cause deception. The greater the degree of novelty or ingenuity in the word or label, the more readily will the requisite repute be acquired. In *Licensed Victuallers' Newspapers Co* v *Bingham* (1967), the court said, 'Property in the word, for all purposes, cannot exist, but property in that word, as applied by way of stamp upon a stick of liquorice, does exist the moment the liquorice goes into the market so stamped and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public.'

The identity of the plaintiff need not be known. In *Glenton and Mitchel* v *Kersharjee and Sons* (1918), the court held, '... it is essential in a case of passing off to satisfy the court that the goods which the applicants wish to protect are well-known by the label and the name which they use.' It is not, however, necessary to show that purchasers of the goods are aware of the identity of the plaintiff or that they know of him at all, it is sufficient that they associate the plaintiff's trade mark with goods of a particular kind or class and that those goods are the goods of the plaintiff. In *John Waddington Ltd* v *Arthur E Harris (Pty) Ltd* (1968), it was said, 'it is admittedly, not necessary for the success of a passing-off action to prove that a purchaser consciously had in mind the manufacturer of the particular article. But what is necessary is that he must be shown to have been misled into buying one article for another article which he knew to have been of a certain standard or quality. If the known article of quality is the product of a certain manufacturer and a purchaser should buy the passed off article, there is deception, whether the manufacturer is known or not, because the purchaser thinks he buys the article of quality.'

There is contributory passing off. In a number of English cases, it has been held that supplying 'instruments of deception' to enable another to pass off his goods as the goods of the plaintiff constitutes passing off even though the defendant, in supplying such instruments of deception, did not deceive the recipient thereof. In *Singer Manufacturing Co* v *Loog* (1880), the court noted, '... no man is permitted to use any mark, sign or symbol, device or other means, whereby without making a direct false representation of himself to a purchaser who purchases from him, he enables such person to tell a lie or to make a false representation to somebody else who is the ultimate customer.' The position is substantially the same under the Roman-Dutch Law. In *McKenzie* v *Van der Merwe* (1917), the court said, 'Under the Lex Aquilia not only the persons who actually took part in the commission of a delict were held liable for the damage caused, but also those who assisted them in any way, as well as those by whose command or instigation or advice the delict was committed.'

Evidence of actual deception is not necessary. In *Glenton supra* it was said, 'Evidence of actual deception is not necessary, it may assist the court where there is doubt but it is not necessary. It is sufficient if the plaintiff can establish the likelihood of deception.' When an interim interdict is sought in a case where there is a likelihood of deception, evidence of actual deception is of great assistance. In *John Waddington supra* the court said, 'if, on the face of it, the judge sees that the thing is calculated to deceive, he does not wait for the evidence of somebody who has been deceived. But if the judge is not satisfied that on the face of it the thing is calculated to deceive, he cannot but be influenced by the question of whether there has been any actual deception.'

There are three requirements for the delict of passing off. First, the plaintiff must establish goodwill. In *FW Woolworth & Co Zim (Pvt) Ltd* v *In stores and Anor* (1998), the Supreme Court of Zimbabwe said, 'goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business.' According to that judgement, the components of goodwill include the locality of the business, personality of the driving force behind the business, business licences and the reputation of the business. Reputation is the one threatened or interfered with by passing off. In *Polaris Zimbabwe (Pvt) Ltd* v *Zapchem Detergent Mfr(s) cc* (2004), the court said, 'The only component of goodwill of a business that can be damaged by means of a passing-off is its reputation and it is for this reason that the first requirement for a successful passing-off action is proof of the relevant reputation.'

Another requisite for this action is representation as discussed above. The representation may be any act by one trader that is calculated to deceive or cause confusion between his goods or business and those of the plaintiff. The act may include the adoption or use of a trade mark or get-up or any distinguishing sign or slogan. In addition, 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 plaintiff's goods? In *FW Woolworth and Co supra*, the court stated, 'in assessing the likelihood of deception, one is enjoined to take into account the class of persons who are likely to be purchasers of the goods in question.'

The principles of passing off have been extended to non-trading organisations including churches. In *Zambezi Conference of Seventh Day Adventist Church* v *Seventh Day Adventists 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 the world over, was entitled to the law in so far as its name was concerned.

In conclusion, it is quite clear that there is a *prima facie* case of passing off against the defendant company for the following reasons:

(a) the names of the two trading entities closely resemble each other in such a way that Uchi Delights can be mistaken for Huchi Delights.

(b) the names of the fruit juice are almost identical. One is Fruittree and the other one is Fruitric.

(c) the colours of the packaging are the same, blue and purple.

(d) the company logos are identical. Ultimately Huchi Delights (the plaintiffs) are in a very strong position to obtain an interdict against the defendants.

9 (a) A worker has a duty to obey lawful orders given by the employer. This duty is in terms of both the Labour Act [Chapter 28:01] and the common law and is codified in s.4(b) and allows the dismissal of a worker guilty of 'wilful disobedience'. At common law, this duty has been held to be one of the cornerstones of the employment relationship. In the present case of Maria, it is important to assess this duty *vis-à-vis* her health condition since she was doing rather poorly.

In *Matereke* v *CT Bowring & Associates (Pvt) Ltd* (1987), it was held that disobedience means a deliberate refusal to obey an instruction or intentional defiance of an order given by the employer. In this case, the chairman of a Workers' Committee felt the employer was refusing to promote him into a vacant post, previously occupied by another person, and proceeded to occupy the office and refused to vacate despite instructions to do so. He was held properly dismissed for insubordination. In Maria's case, it is admitted that she disobeyed an order but she did this out of necessity as she needed to get treatment since her health was in jeopardy. Hence the court is likely to decide that her dismissal was unlawful in the circumstances concerned.

However, dismissal for insubordination is only justifiable where it is 'wilful' and serious and going to the root of the contract. In *National Foods Ltd* v *Masukusa* (1994), the court said, 'while there is no fixed rule as to what will justify summary dismissal, it is generally accepted that wilful disobedience to the lawful and reasonable order of the employer … may justify summary dismissal.'

The case of Maria is almost similar to that of *PTC* v *Chihoro* (1986) and in this latter case, the court held that the refusal to deliver telegrams by an ailing employee constituted disobedience since delivery of telegrams was an important part of his work. However, the court held that a sick employee would only be justified in refusing to carry out an order relating to the character or capacity of his contract of employment if their illness were such as to make compliance with the order impossible or impracticable. Hence in this case, the court is likely to grant Maria relief and order her reinstatement since the reason why she refused to carry out the lawful order of the employer was due to her ill health. This is not the case of a flagrant disregard of a lawful order by the employee.

What constitutes 'serious' or gross disobedience will depend on the circumstances of the particular case. The order of the employer must be lawful, otherwise the worker is not obliged to obey it. In *ZCTU* v *Makonese* (2004), it was held that an order is lawful where it is given by an employer, it is capable of being carried out by a worker, it is for the advancement of the employer's business, it is closely linked to the duties of the employee. In Maria's case, these requirements are no doubt met but the court is likely to grant her relief in the form of reinstatement as she disobeyed the order due to her sickness which needed urgent medical attention. In the *PTC case*, the court said that the facts did not warrant a finding that the order given to the respondent was one which jeopardised his health or life. His state of health was not such as to make performance of his duties impossible or even difficult. The most that could be said was that the respondent had a moral excuse for his disobedience or that his immediate superior may have been somewhat stringent and uncharitable. This is not similar to the present case and would entitle Maria to get relief from the court in the form of an order for re-employment. In Maria's case,

the illness, a serious stomach complaint, could have had fatal consequences if not urgently treated, hence it would be justifiable to order her reinstatement.

If it is established that the order given to Maria was one which could jeopardise her health or life, the court would be inclined to order her reinstatement. If it is, however, found that her state of health was not such as to make performance of her duty impossible or even difficult, she would not be entitled to remedy due to disobedience of a lawful order without a convincing excuse. From the facts of the case, it is clear that her fears for her health were not foolish or unreasonable but very genuine. Reinstatement would be the most appropriate remedy under the circumstances. Even if the court were to make a finding (which is very unlikely) that there was a wilful disobedience to lawful orders, the circumstances surrounding Maria's case are highly mitigatory and no reasonable court or tribunal would be dismissive of her fears and claims. All things considered, the prospects of reinstatement as a remedy available to Maria are high.

(b) John and Samson should be advised that according to retrenchment law, as long as the procedure is carried out in the manner provided for in the Labour Act [Chapter 28:01], then their retrenchment would be lawful. Under retrenchment, employment is terminated not because of the employee's conduct or capacity but rather because of reasons relating to business operational difficulties. The law provides that regardless of the number of years in service, employees are not entitled to have any say in the termination process or to be reinstated in their jobs, should the fortunes of the enterprise subsequently improve.

Section 2 of the Labour Act [Chapter 28:01] defines retrenchment as follows:

'retrench, in relation to an employee, means terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological change, reorganising the undertaking in which the employee is employed, or for similar reasons, and includes the termination of employment on account of the closure of the enterprise in which the employee is employed.'

In *Continental Fashions (Pvt) Ltd* v *Mupfururi & Ors* (1997), the court said 'retrenchment, when used in the context of labour relations, means a cutting back of expenditure on the employment of workers by reducing their number.' Hence the first thing is to explain the law of retrenchment to the two employees before explaining how the retrenchment will affect them.

Retrenchment involves termination on account of 'operational requirements of the business' and one of the underlying reasons for the dismissals is because of the economic difficulties faced by the firm, with the main objective being the survival of the firm through reducing expenditure and includes instances of judicial management or curatorship. In the case before us, as long as the employer satisfies this requirement, he will be entitled to retrench them. If he fails, the law will protect them from unfair dismissal. In *Chidziva & Ors* v *ZISCO* (1997), the court said, 'the clear and broad intention of the said law is to serve employees from employers. And where retrenchment has been justified, to ensure that this had to be done in a fair and transparent manner taking into account all the personal circumstances of the persons to be affected.'

An employer who wishes to retrench five or more employees within a period of six months must comply with the requirements of s.2(c) and (d) of the Labour Act. One of the requirements is consultation on special measures to avoid retrenchment. In *Mutare Board and Paper Mills P/L* v *Kodzanai* (2000), the forced early retirement of 30 employees was held unlawful. If the employer in this case fails to meet this requirement, then John and Samson would be entitled to a remedy for unlawful or unfair dismissal. In addition, they should be given a notice of intention to retrench. In this case, this was done. In *Stanbic* v *Charamba* (2005), it was held that a notice that does not provide adequate details is fatally defective in the same way an application to a Labour Officer that failed to disclose the grounds on which the employer sought permission to dismiss an employee had previously been held to be a nullity.

From the foregoing it is clear that, *prima facie*, John and Samson will have no remedy against the looming retrenchment if it is subsequently carried out. However, if the employer does not follow the procedure provided for in the Act, the workers will be entitled to approach the court for a remedy against unfair dismissal. To be substantively fair, the reasons for retrenchment must be valid, not inherently unfair and fall within the definition of 'retrench', reducing expenditure or costs. If this is the paramount reason, then the requirements of fairness dictate that the employer must produce evidence showing that it is factoring in overall costs and not just labour costs. Further, the cuts must not only be aimed at the ordinary workers, but other categories of employees including supervisory and managerial employees. On the issue of technological changes, the employer has to show that technological changes resulting in loss of jobs are a last resort absolutely necessary for the survival or significant profitability of the firm.

In conclusion, it can be said that the facts of the case disclose a *prima facie* case in favour of retrenchment and therefore John and Samson might find it extremely difficult to fend off retrenchment.

10 A director owes the company a number of common law and statutory obligations.

The duties of a director can conveniently and usefully be broken down into the following categories:

(1) fiduciary duties
(2) the duty to exercise powers '*bona fide* in the company's interest'
(3) the duty not to make 'secret profits'
(4) the duty not to have personal interest conflict with those of the company
(5) the duty to disclose
(6) the duty of care and skills
(7) the duty to act *intra vires* the company's statutes (memorandum and articles of association).

At common law, a director is subject to certain fiduciary duties which require him to exercise his powers *bona fide* and for the benefit of the company. A person possesses fiduciary duties when he is in a position of trust or occupying a position of power and confidence with respect to another person, such that he is obliged by law to act solely in the interest of that other person's rights which he is to protect. It cannot be doubted that directors occupy a position of trust as is usually stated, a fiduciary position towards the company similar in some respects to that of an agent entrusted with the control and management of the money or effects of another person.

The fiduciary duties are owed to the company and to the company alone and not necessarily to individual shareholders (*Pergamon Press Ltd* v *Maxwell* (1974)).

The fiduciary duty of directors in respect of the shareholders is akin to the duty owed by the trustees to their beneficiaries and thus the fiduciary duty can conveniently be broken down into two parts:

(i) the directors must act *bona fide* for the benefit of the company and not for an ulterior motive and

(ii) the director must refrain from embarking upon an act which will lead to a conflict of his interests with those of the company (*Roodpoort Limited Main Rep* v *Du Toit* (1928)).

An important consequence of the relationship between a director and his company is the director's duty to exhibit utmost good faith in his dealings with the company. He must refrain from placing himself in a position where his own interests clash with those of the company and he must never take an improper advantage of his position by acquiring for himself assets or opportunities that rightly belong to the company.

In *Robinson* v *Randfontein Estates Gold Mining Company Ltd* (1921), the managing director of a company, using information he acquired in the course of his official duties, bought immovable property worth £60,000, which the company was interested in acquiring and, using a front, immediately resold it to the company for £275,000·00. The court held that the plaintiff company was entitled to claim from the defendant the profit of £215,000·00 made by him on this transaction. Innes CJ said:

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

In *Magnus Diamond Mining Syndicate* v *Macdonald and Hewthorne* (1909), the defendants, while directors and managers of a company, acquired information as to the value of certain diamondiferous property. They thereupon purchased the property in competition with the company without disclosing their intention to the company. The court decided that the defendants were obliged to transfer the property to the company and to account to it for profits already received. The court made the following observation that 'it is the duty of all agents including directors of companies to conduct the affairs of their principal in the interests of the principal and not for their own benefit.'

By trading with Hatco (Pvt) Ltd through another company, Madhiri (Pvt) Ltd, Jongwe has involved himself in a conflict of interest. He has unlawfully placed his personal interests above those of Hatco (Pvt) Ltd. He has probably made illicit use of personal information which he acquired in his capacity as managing director and has made secret profits as well. By defrauding the company and giving huge trade discounts to Madhiri (Pvt) Ltd in an irregular manner, he has failed to exhibit utmost good faith to Hatco (Pvt), his principal. Neither has he acted with due diligence, care and skill that is required to manage the company.

One of the major statutory obligations of a director is their duty to disclose any interest in contracts between themselves and the company. Section 186(1) Companies Act [Chapter 24:03] says that '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 this interest at a meeting of the directors of the company.'

In the case of *Aberdeen Railway Company* v *Blaikie Bros* (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. In this case, Jongwe has been in flagrant breach of his common law and statutory duties.

In the event of winding up at law, the liquidators have a claim against Jongwe for misfeasance (misapplication and or fraudulent application of company assets). His personal assets can be judicially attached in order to satisfy the company's claim against him. By way of statutory remedy, in terms of s.318 Companies Act [Chapter 24:03], the law provided relief as follows:

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

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

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

The facts of this case relate to a director who violates one of his cardinal obligations towards the company, i.e. the duty to observe utmost good faith and avoid a situation of conflict of interest.

One of the major implications of a director's obligations towards the principal is that he should avoid receiving secret benefits/rewards at the expense of the company. In *Levin* v *Levy* (1917), the court said that:

'the mere fact of an agent receiving and retaining a secret profit or commission arising out of and in connection with the performance of his duty constitutes unfaithfulness and dishonesty towards his principal...'

In *Gerry Bouwer Motors Ltd* v *Preller* (1940), the respondent was employed as a sales director by the appellant company. His duty was to sell used cars and if a sale was on hire-purchase terms for over a certain sum, the car was to be insured by the purchaser. On several occasions the respondent arranged the insurance with a certain company and received small money payments for which he did not account to the company. After reviewing the evidence, the trial judge said:

'I do not think there is any doubt that the respondent was not entitled to receive the gift from Mordant, the Dominion Company's representative and that it was the acceptance of 'a secret profit or commission arising out of and in connection with the performance of his duty ...'

In Roman-Dutch law, as is the case with several other jurisdictions, a director must never place himself in a position where his own interests clash with those of the company and he must never take an improper advantage of his position by acquiring for himself assets or opportunities that rightly belong to his company.

Whenever a director has arranged to make or has made a secret profit, the company has a number of remedies available. It may terminate the directorship. It may also claim the profit which the director arranged to make or made. At the same time the director forfeits any commission on the transaction in connection with which he acted improperly.

In a very old English case of *Alexander* v *Automatic Telephone Company* (1900), Lindley M.R. said:

'the court of Chancery has always exacted from directors the observance of good faith towards shareholders and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders without informing them of the fact cannot retain those benefits and must account for them to the company...'

All in all, it is quite clear that Jongwe has violated his fiduciary duties towards the company.

1 **(a)** 4–6 marks Good answers in this bracket would give a good overview of the structure of the courts in Zimbabwe.
1–3 marks An average answer.

(b) 3–4 marks A good answer which gives a comprehensive outlay of the civil and criminal jurisdiction of the High Court.
1–2 marks A poor to average answer.

2 **(a)** 3–5 marks An answer which fully explains the meaning of exemption clauses.
1–2 marks A poor to average answer.

(b) 3–5 marks A good explanation of how the courts control exemption clauses.
1–2 marks A poor to average answer.

3 **(a)** 1 mark A correct answer which explains express actual authority.

(b) 1 mark A correct answer which explains implied actual authority.

(c) 2 marks A correct answer which accurately explains the concept of ratification.
1 mark A weak answer.

(d) 2–3 marks A good answer which accurately explains the concept of agency of necessity. The essential requirements when establishing this type of agency must be set out.
1 mark A rather weak answer.

(e) 2–3 marks A good answer which correctly explains the concept of agency by estoppel – apparent or ostensible authority as it applies to Zimbabwe law. The answer should outline the various requirements that must be proved to be in existence in relation to this type of agency.
1 mark A rather weak answer.

4 **(a)** 3–4 marks A detailed answer which explains the duties of an auditor.
1–2 marks A rather weak answer with a lot of inadequacies.

(b) **(i)** 2–3 marks A good answer will fully explain the law which relates to the appointment of an auditor. In this regard s.150(i) and s.150(2) Companies Act [Chapter 24:03] are very instructive.
1 mark A rather poor answer.

(ii) 2–3 marks An impressive answer which makes reference to s.152 Companies Act [Chapter 24:03] and gives an inventory of the categories of persons (natural or artificial) who are disqualified from acting as auditors.
1 mark A rather feeble answer.

5 5–7 marks A good answer which explains specific statutory provisions that relate to a company's capital maintenance and dividend law.
4–6 marks An average answer which is rather lacking in specific details.
1–3 marks A poor to average answer which lacks detail and clarity on a number of issues and points.

6 **(a)** 3–4 marks A good answer which explains the concept of separate personality and its major advantages.
1–2 marks A rather deficient answer.

(b) 4–6 marks A good answer which explains the various situations when the courts will lift the veil of incorporation.
2–3 marks A not so good answer.
1 mark A poor answer.

7 **(a)** 4–5 marks A good answer which fully explains the circumstances involving winding up by the court.

2–3 marks An average answer.

1 mark A poor answer.

(b) 4–5 marks A good answer which fully explains judicial management as an alternative to winding up.

2–3 marks An average answer.

1 mark A poor answer.

8 7–10 marks A comprehensive answer on the law relative to passing off. A good analysis of the various instances involving passing off is necessary. Citation of case law is helpful.

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

1–3 marks A poor answer which is deficient in many respects.

9 **(a)** 3–5 marks Answers in this bracket would determine whether Maria willfully disobeyed lawful orders or not.

The conclusion is probably that her chances of being reinstated are very high.

1–2 marks An average answer.

(b) 3–5 marks Sound advice on retrenchment laws should be given to John and Samson.

1–2 marks The answer involves inadequate or inaccurate advice on retrenchment to John and Samson.

10 7–10 marks Answers in this bracket would give a comprehensive survey of the law which regulates the operations of directors – in particular the duty to observe utmost good faith and to avoid a conflict of interest.

Citation of relevant case law is helpful.

4–6 marks An interesting answer with gaps here and there.

1–3 marks A below average answer with a lot of inaccuracies.