# Answers

**1 (a)** Criminal law and civil law have different objects, participants and penalties as described fully below.

Criminal law concerns itself with wrongs punishable by the state, i.e. crimes which are regarded as wrongs against the state. These may be either common law or statutory crimes such as murder, theft, rape and criminal defamation – *S* v *Madondo* (1989) where the accused was convicted of assault and robbery.

Civil law on the other hand concerns itself with personal wrongs between individuals or between parties *inter se*. These wrongs may also be common law or statutory wrongs. Examples of civil wrongs include damages for wrongs like seduction, defamation, unlawful arrest etc. See the case of *Gort* v *Tinto Industries Ltd* (1985) in which the plaintiff claimed damages for breach of contract.

Whereas penalties for criminal law are to a large extent punitive and carried out by the state e.g. imprisonment, fines, community service or corporal punishment, penalties under civil law are usually meant to compensate the individual for harm or for injury suffered by him due to the actions of the other party as held in the case of *Boka Enterprises (Pvt) Ltd* v *Manatse & Anor* (1989) where the plaintiff claimed damages for defamation or the case of *UDC Limited* v *Bank of Credit and Commerce Limited* (1989) where the plaintiff claimed damage for negligence.

It is important to note that criminal offences may also give rise to civil liabilities as held in the case of *ZESA* v *Dera* (1998) in which the courts held that when an employee had stolen from the employer, the employer could sue him for recovery of the stolen property under civil law. This shows the interlink between criminal law and civil law. Under criminal law, the state is the main actor as it has the prerogative of prosecuting offenders though the individual has a limited right to prosecute in certain clearly defined circumstances. In civil law, however, the individual is the main actor and brings actions before the court. It should be noted that the state can also be a party to civil proceedings with the capacity to sue and be sued, see *Granger* v *Minister of State Security* (1985).

In criminal proceedings, the liability of the individual has to be proven beyond reasonable doubt while civil law demands that the liability be proven just on a balance of probabilities, something less onerous than the demands in criminal cases.

**(b)** An appeal is concerned with the substantive correctness of a judicial decision. On the other hand a review is concerned about redressing procedural irregularities. This distinction was explained by the court in the case of *Fikilini* v *AG* (1990). Proceedings for review are not limited to the contents of the original case. The court can use or refer to extrinsic material and evidence in deciding the validity and regularity of proceedings.

An appeal on the other hand is strictly limited to the record of the original case. The court is not allowed to look at external factors that do not appear on the record as was held in the case of *Ngani* v *Mbanje & Ano*r (1987). In a review the court allows for wide grounds to bring or challenge an action before it, what is commonly referred to as a general right of audience or *locus standi*. Whereas in an appeal only the parties to the original case can bring an appeal before the court. Other third parties are generally precluded from doing so. See the case of *Secretary for Transport & Another* v *Makwavarara* (1991).

A review can be brought before the court even before proceedings in the original matter have been completed while an appeal can only be brought to the court after proceedings in the original matter have been brought to finality. This decision was held in the case of *Maduna & Other*s v *Banditi* (1985). The procedure for bringing a review before the court is by way of court application or by the application procedure – *Chidyausiku* v *Nyakabambo* (1987) whilst an appeal can only be brought in terms of the rules of the court, see *Nyamuswa* v *Mukanya* (1987).

**(c)** The High Court has unlimited original jurisdiction in both civil and criminal matters. In civil cases, claims whose value exceed $2,000 automatically are dealt with in the High Court. Equally cases involving declarations of insolvency for both individuals and companies are done in the High Court. Certification of the mental status of individuals and the administration of deceased estates and estates of individuals who have been declared prodigals is administered by the High Court. Marriages registered under the Marriages Act, Chapter 5:11 (monogamous marriages) can only be dissolved by the High Court. Appeals from the High Court go to the Supreme Court.

In terms of criminal jurisdiction all serious cases in which the Magistrate's Courts have no jurisdiction are heard in the High Court. For example all capital cases in which the death penalty is a competent verdict such as treason or murder are heard in the High Court. Appeals go from the High Court to the Supreme Court.

**2** The general approach of our courts in the cases of breach of contract is that we are not concerned with the mental or bodily sufferings of the creditor. The action for damages in such a case is intended to place the creditor as much as possible in the same position as regards his property as he would have been in if the contract had been performed. Hence the damages must have been in satisfaction of some pecuniary or material loss.

This principle has been restated in a number of cases. Corbett JA in *Holmdene Brickworks* v *Roberts Construction* (1977) made the following observation:

**'The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship on the defaulting party …'**

To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage. In addition, the defaulting party's liability is limited in terms of the broad principles of contractual causation and remoteness of damages to:

(a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplate as a probable result of the breach;

(b) those damages that although caused by breach of contract are ordinarily regarded in law as being too remote to be recoverable unless in the special circumstances attending the conclusion of the contract the parties actually or presumptively contemplated that they would probably result from its breach. *Shartz Investments Ltd* v *Kalovyrnas* (1976).

In the well-known case of *Victoria Falls and Transvaal Power Co Ltd* v *Consolidated Mines Ltd* (1915) the court made the following observation in relation to the approach to take towards the issue of damages for breach of contract:

**'The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money and without undue hardship to the defaulting party. The reinstatement cannot invariably be complete for it would be inequitable and unfair to make the defaulting party liable for special consequences which could not have been in his contemplation when he entered into the contract …'**

The general approach of our courts would appear to be that in an ordinary commercial contract damages may not be claimed for sentimental loss or injured feelings unlike in actions founded in the law of delict or tort.

In *Jockie* v *Meyer* (1945), J, a Chinese and second officer on a British ship, having reserved a room at M's hotel in Port Elizabeth was allotted the key to a room and took occupation. A few minutes later M sent for J, told him that there was a mistake as to the room number and asked him to return the key. J did so and was then told that the hotel was full and there was no room for him. The real reason for the breach of contract was J's race. J sued M in the Magistrate's Court for £200 damages and was awarded £50 damages, £40 of which was in respect of the humiliation and annoyance felt by J. The appeal court set aside the portion of the damages relating to J's humiliation and annoyance.

On appeal, the Judge said:

**'I have come to the conclusion that the …. magistrate was not entitled to award damages for the injury to the plaintiff's feelings which he suffered as a result of the refusal of accommodation by the defendant.'**

As an exception to the general rule it can be said that where the pleasure to be obtained from proper performance is an important aspect of the contract, as it is when a travel agent makes specific representations about the facilities and entertainment available at a hotel, or a photographer undertakes to take wedding photographs, the courts may take mental distress into account in awarding damages. The argument then would be that emotional and mental satisfaction is an important aspect of the contract.

In *Jarvis* v *Swan Tours Ltd* (1973) J, a solicitor aged about 35 years, booked a 15 day Christmas winter sports holiday. He did so on the strength of S's sales brochure, which described the holiday in very attractive terms. In that event, the holiday was a great disappointment and most of the things that had been advertised in the brochure like a house party, skiing, etc were not provided. Awarding damages for sentimental loss, Lord Denning MR said:

**'In a proper case damages for mental distress can be recovered in contract … One such case is for a holiday or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and the frustration caused by the breach.'**

In *Diesen* v *Samson* (1971), Mrs D engaged S, a professional photographer to take photographs for her wedding. She paid a deposit for which she was given a receipt. S failed in breach of contract to appear at the wedding or at the reception. As a result Mrs D had no photographs of her wedding and claimed damages for the resulting injury to her feelings. The court ruled that damages could competently be awarded.

**'If the contract is not primarily a commercial one in the sense that it affects not the plaintiff's business interests but his personal, social and family interests, the door is not closed to awarding damages for mental suffering should the court think that in the particular circumstances the parties to the contract had such damages in their contemplation …'**

In summation, it can be noted that although the general rule is that our courts will award damages for patrimonial or material loss in breach of contract cases, in appropriate and limited cases an exception is made to award damages for sentimental loss as well. Such exceptions to the general rule are admitted very sparingly and with a lot of circumspection and care.

**3** A partnership is an association of two and not more than 20 people, which is formed for the purposes of carrying on business the object of which is to make gain – *Rhodesia Railways & Other*s v *Commissioner of Taxes* (1925). Once the legal requirements of a partnership are met, there is in existence a partnership, the designation given to it by the parties notwithstanding. A partnership can come into existence as a result of express or implied interaction but it does not assume a separate legal personality as a company does. *Shingadia Brothers* v *Shingadia* (1921).

Two types of partnerships have come to be realised i.e. limited and unlimited partnerships. Limited partnerships, which are also called extraordinary partnerships, are further divided into two, namely partnerships *encommandite* and anonymous/dormant/sleeping partner. The philosophy underlying the distinction into limited and unlimited partnerships is the corporate principle of limitation of liability, losses and profits. An exposition into these types in order to unearth the differences between them follows.

Limited partnerships as has been noted come in two types, a partnership *encommondite* and one that has a dormant/sleeping/anonymous partner. In a partnership *encommandite*, one or more of the partners agree to contribute a certain fixed sum of money in return for a disclosed share of profits and liability to third parties for that fixed sum – *Estate Davison* v *Auret* (1905).

In an anonymous partnership, the anonymous partnership is unknown to the whole world. He only establishes a relationship with the other partner(s) and usually only contributes money or some behind the scenes expertise. As a result he is only liable to the other partners if any partnership debts arise and not to third parties. Such liability is not limited to contribution but to the full share of the debt – *Sigel and Freikel* v *R* (1943).

The position is, however, relaxed if the sleeping partner appears on the scene and interferes with or gets himself involved in the activities of the active partners – *Hall* v *Miller* & *Hutton* (1915). This the sleeping partner will do by either demonstrating an express involvement or giving a reasonable impression that he is involved. Mere interference does not, however, attract such liability – See *Bale and Greence* v *Bennet* (1907).

Liability in the above context is not only confined to contractual obligations but also to obligations arising from or out of delict. Thus, if a partner whose method of operation is such that he has not assumed the status of an independent contractor causes a delict in the performance of his work in furtherance of the partnership objectives, then the partnership will be held liable in delict.

An unlimited partnership on the other hand is also referred to as a general partnership. Most authors do not define what this type of partnership is about but only what it is not. One description refers to it as a partnership that is not extraordinary (limited). Its nature is that the rights and liability of partners accrue to them personally as the partnership is not endowed with legal personality.

In an unlimited partnership, a partner is obliged to pay partnership debts either contractually or delictually incurred to the last penny after exhaustion of partnership property. Liability is unlimited and every partner is liable jointly and severally. The question centres on whether or not there is a partnership. If the question is answered in the affirmative liability attaches – *Sparke* v *Pale Ltd*. Thus partners can be sued jointly and severally, the one paying the other to be absolved. As indicated above, the partnership property should be proceeded against first before properties belonging to the individuals are executed upon – *Vulian Trading Co (Pvt) Ltd* v *Ayliffe* & *Others*. The partner who pays the entire partnership debt can recover the *pro rata* share from the other partner(s). Partners thus owe debts in equal proportions and this is as against themselves.

The effect of this position as relates to the difference between these two types of partnership is illustrative. In a limited partnership and for purposes of debt recovery and share of profits, a partnership effectively assumes separate personality as relates to the partners that constitute it. That shield is lowered, however, in unlimited partnerships in as far as third parties are concerned and the partners are left to put their own house in order.

There are additional effects of the above position which highlight further differences between these two forms of partnerships. It is necessary when proceeding against an unlimited partnership to join all parties as defendants as any court order might have effects that assume personal dimensions – *Uys* v *Le Roux* (1906). This is not particularly the position as relates especially to anonymous partnerships and it has limited effects when one considers the partnership *encommandite* in which even if a court order assumes personal effects, such effects can only be to a limited extent.

Thus it clearly appears that the unlimited partnership is the norm and the limited partnership the exception – *Eaton* & *Como* v *Arcade Properties (Pty) Ltd* (1961). This is because the ordinary legal position is that a partnership does not constitute a separate legal entity. This position, the limited partnership tries hard to change. This attempt to change the essential character of partnerships is at the heart of the distinction between limited and unlimited partnerships.

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

1 to make a report to members on the accounts examined by him;
2 to state in his 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;
3 to include in his report statements which in his opinion are necessary if he has not obtained all the information and explanations which to the best of his knowledge were necessary for the purposes of his audit;
4 to attend any general meeting of the company. To this end an auditor is entitled to receive notices of company meetings.

(ii) The common law duties of an auditor include the duty:

1 to act honestly and with reasonable skill, diligence and care and caution. In *re Kingstone 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 …'**

2 to show the company's true financial position as shown by the books – *Tonkwane Sawmill Company Ltd* v *Filmalter* (1975);

3 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;

4 to act as a watchdog but not a bloodhound.

In *re Kingstone 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 or downright falsehoods. 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)** According to the Companies Act [Chapter 24:03] a company reserves the right and power to remove any such persons appointed as auditors for the company in terms of s.150 Companies Act.

In terms of s.150(1), a company may at a general meeting remove an auditor and appoint in his stead any person who has by special notice been nominated for appointment by any member of the company. As provided by this proviso therefore, a company may at its general meeting remove any such person(s) they would have earlier appointed as auditor(s) prior to the general meeting.

By giving effect to the provisions of s.150(2) Companies Act, where the company does not reappoint a person to serve another term as auditor, such a person would be effectively removed in office as the section specifically provides that 'every company shall at each annual general meeting appoint an auditor'.

Also, if a person in some way becomes disqualified from or incapacitated to hold office as provided by s.152 Act, he shall be held to be automatically removed from office and dismissed. If he continues to hold office despite the disqualifications laid out in s.152, he shall be guilty of an offence and his office shall be null and void in terms of s.152(3) Act.

Reasons for the removal of an auditor can be many and varied. They can range from inability or ineptitude in the discharge of an auditor's responsibilities, to insolvency, loss of contractual capacity, for example through intervening mental incapacity, or for any other good and sufficient cause.

**5** As is the case with general cases of agency, the essence of an employment contract is that an employee performs services for an employer in cases where the employer lacks expertise, finds performance impracticable or inconvenient, or just out of mere preference. Broadly speaking, there are two types of employees; namely an employee who is an independent contractor and one who is a servant. Differences of acute proportions abound between the two groups and the common law has traditionally highlighted them.

Roman Dutch law draws a distinction on the one hand between a *locatio conductio operanum*, which is a contract of services and under which a servant is employed, and on the other a *locatio conductio operis* which is a contract for service, which covers an independent contractor. The differences in the scope of these contracts imply acute differences in their effects. These distinctions between them have largely been a common law affair led by the judgement in *Colonial Life Assurance Society Ltd* v *McDonald* (1931). For the sake of clarity and convenience the term ordinary employee would refer to a servant in this answer.

The first distinction between these two employees is to be found in the idea of subjection to orders – *R* v *Feun* (1954). An ordinary employee is subjected to the orders of the employer as to the time, place and the work to be done. The employee's duty is simply to apply his skill in doing that work at the place and time chosen. An independent contractor is, on the other hand, not subject to such orders. He is independent, he is his own master. Although the period within which the work to be done can be specified, he is largely free to exercise greater discretion and latitude in doing such work. The idea of subjection is, however, not absolute and each case will depend on its own special circumstances – *Norton* v *Canadian Pacific Steamships Ltd* (1961).

Linked with the idea of subjection to orders is the question of supervision and control. In *Smith* v *Workers' Compensation Commission* (1979), it was held that supervision and control are a *sine qua non* for a contract of employment. An independent contractor is, thus, subject to less or no supervision and control from the employer. He is independent – *De Beer* v *Thomson and Son* (1978) and the employer does not follow him around. An ordinary employee is put on a 'leash' so to speak as the employer determines such things as the time to start the work, when to break for lunch and when to finish work. An independent contractor determines all these issues without reference to the employer.

Yet another difference comes when one considers the part/space occupied by the ordinary employee in the principal's organisation – see *Stevenson Jordan and Harrison Ltd* v *McDonald & Evans* (1952). An employee forms part of the employer's organisation, he is on his payroll, and nowadays commonly on his medical aid. He is counted amongst those that form the employer's organisation and in essence constitutes it. An independent contractor is, on the other hand, detached from the principal's organisation. He comes once to do a particular task and leaves after its completion. To all intents and purposes, he is an outsider.

Linked with the foregoing is the fact that an independent contractor practises a calling distinct from that of the employer. He has his own business which he runs and contracts with the employer so that the employer derives benefits from that calling.

Certain other obligations that the employer has towards these employees highlight yet further differences between them. In *R* v *Feun* (1952), it was observed that the employer has a duty to provide equipment to the employee for the performance of his work – he does not have such a duty in relation to an independent contractor. Failure to provide the servant with necessary equipment may amount to constructive dismissal. There is no such duty as regards the independent contractor who is himself obliged to have his own equipment. Further, the employer has additional statutory obligations in relation to an employee which he does not have concerning an independent contractor. Thus, he is obliged to put in place pension schemes for employees, workers compensation

schemes and to meet certain health requirements. As observed, statute does not lay such requirements on an employer regarding independent contractors. In some cases the employer may be contractually obliged to provide accommodation and transport allowance to a servant.

The regularity and continuity of service also shows yet another difference between the two agents. In *Performing Rights Society Ltd* v *Mitchell and Booker* (1924) it was held that an employee, unlike an independent contractor, either has a regular or continuing service contract. An independent contractor, on the other hand, performs his mandate for a specific season and can only be engaged in future to carry out a different mandate altogether.

In the same light, because of the continuity of the relationship a servant is bound to serve one master at a time (at least at a time when he should be doing the master's work), but an independent contractor is not bound to exclusively serve one employer – *Templeton* v *William Parkin & Co Ltd* (1929). An ordinary employee is, thus, paid regularly, say when the month ends, but an independent contactor receives a lump sum either as a deposit or upon the completion of the mandate – *Imperial Cold Storage* v *Feo* (1927).

A further distinction lies when one considers the question of vicarious liability under the law of delict. As an ordinary employee is essentially the employer's hand, the employer is liable for the delicts committed by the employee within the course and scope of his employment. In *Banda* v *Gamegone (Pvt) Ltd and Anor* (2003), the court held that such liability does not attach as against an independent contractor i.e. to say the employer is not liable for the delicts committed by an independent contractor in the performance of his mandate. The independent contractor would personally have to be liable for delicts committed during the course of performing work for the employer. It would then be prudent for the independent contractor to insure himself for possible mishaps whilst the employer would do the same for his ordinary employee or servant.

It appears from the above that an employer's relationship with the servant is governed by labour laws which do not govern his relationship with an independent contractor. Thus an employer can dismiss an employee but needs to follow relevant procedures laid out in the statutes. Further, an employee can be retrenched if he becomes excess to requirements. This does not apply to an independent contractor whose relationship with the employer is governed by the contract of agency. If that relationship is to be severed, the law of agency as opposed to employment comes to the fore.

The above constitutes an outline of the differences that exist between an independent contractor and an ordinary employee. Not a single distinction completely brings out the picture but all the differences taken together bring out the real difference, not only in the terms of the nature of the respective capacities but also in terms of the effects brought about by the disparity in such nature.

**6** Although a company has a separate legal personality – *Salomon* v *Salomon* (1897) it has no mind of its own and cannot transact its business by itself. It thus acts through the agency of some natural persons who are called directors and who are bound to it in a legal relationship. The directors run the company and are divided into executive and non-executive directors. They form the board of directors, which is the controlling body of the company. Differences abound between executive and non-executive directors and below is an illustration of such differences.

In addition to their basic role as directors, executive directors constitute the management of the company. An executive director is thus an officer of the company or an employee, so to speak, with a service contract and obliged to work full time. In *Stevenson Jordan and Harrison Ltd* v *McDonald & Evans* (1952) it was pointed out that the contract for such a director is one of services and not for services, meaning that he is not an independent contractor.

On the other hand, non-executive directors do not form part of the management of a company. They only play a modest role in its activities which include attending and voting at board meetings and any committees that may be established. They are not full-time employees, not servants of the company and do not have separate service contracts, but their relationship with the company is only regulated by the articles of association. The controlling stake that these directors have in relation to the company accordingly accounts for one of the major differences between them.

This position should, however, not be overstated as in small private companies this distinction is blurred and at times even non-existent. It is normal for some small private companies to only have in their ranks the mandatory two directors who virtually 'own' the enterprise. Both of the directors are normally the managers i.e. are executive and one does not usually see non-executive directors in such concerns. The difference is, however, properly maintained in big private companies and in public companies.

As the above differences in involvement, non-executive directors are usually full-time employees elsewhere and only come to the company to perform their board tasks. As a result, they rely heavily on the expertise and knowledge of executive directors who are full-time employees and are acquainted with all the goings on. It is thus not an overstatement to say that in board meetings, executives have a larger controlling stake than non-executives except in exceptional circumstances. Non-executives only concentrate on broad issues such as the policy framework but the detailed implementation belongs to the executives.

It should also be noted that as executives are engaged by the board, the non-executives have a say in the appointment of the executives but the reverse is not always true – see *R* v *Mall & Others* (1959). This is by virtue of the fact that the articles of association make provision for the appointment of all directors and it is under them that non-executives assume office. Thus, there is this further distinction that all directors will invariably have a say in the appointment of executives but the reverse is not normally the case.

A further difference comes in the area of remuneration. As the executives are virtually employees, they are entitled to be remunerated unless the articles or the separate contract under which they are engaged expressly provide to the contrary. Thus, they are usually salaried employees who are paid competitive salaries, taking into account what other executives in other companies get. The only caveat is that the quantum of their salaries should not be unrealistically high as to constitute an erosion

into possible dividends. The non-executives do not, on the other hand, receive salaries but only fees. These fees are either a fixed annual sum or based on attendances and are as pegged by the company in a general meeting. This level of remuneration is consistent with their modest role. The only exception, however, is that if the further duties of a director go outside these modest parameters, he is entitled to additional fair and reasonable emoluments. Such further duties may be conferred upon him by the board of directors e.g. consultancy work.

The office of the executive director is also not a legal pre-requisite i.e. it is not legally essential – *R* v *Mall* (*supra*). The position is not defined by law and is a question of fact i.e. an evaluation of what the executive is and the functions he performs. On the other hand, it is mandatory to have non-executive directors by virtue of the fact that they are drawn from the collective board of directors who are themselves a mandatory institution. Even if all the directors of a company are executive, they would have assumed their office by virtue of them having been on the board in the first place. Thus one is a prerequisite for the other but the reverse is not necessarily true.

There is, however, a downside to the above discussion which in its presented state mirrors the broad and rigid distinctions between the two groups. It appears the non-executive director of the modern company now undertakes considerably more detailed administration than his conventional office. This is seen more in that policies are now made and implemented at board level. The implementation part brings non-executives very close to the overall administration of the company. However, different outcomes will depend on different situations and in particular the provisions of the articles of association.

The above constitutes a survey of the differences that exist between executive and non-executive directors. The differences are pronounced in practice but a lot depends on individual cases which include the size of the concern and the provisions of the companies' governing instruments.

As executive directors are full-time employees of the company, they are liable to be governed by the ordinary labour laws and disciplinary regime pertinent to their industry or trade, whereas non-executives are only governed by their service agreement with the company.

**7** **(a)** Section 242 Companies Act [Chapter 24:03] spells out the circumstances under which the voluntary winding up of a company can be done. A company may be wound up voluntarily:

(i) when the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved and the company in a general meeting has passed a resolution requiring the company to be wound up voluntarily;

(ii) if the company resolves by special resolution that the company be wound up voluntarily.

A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.

When a company is wound up voluntarily, the company shall from the commencement of the winding up cease to carry on its business, except in so far as may be required for the beneficial winding up thereof. However, the corporate powers of the company shall, notwithstanding anything in its articles, continue until it is dissolved, see s.245 Companies Act [Chapter 24:03].

**(b)** 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 meetings 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'.

An application by an aggrieved shareholder for the winding up of the company was granted.

(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 as a trading entity.

(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)

(i) 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.

(ii) deadlock or paralysis in the management of the company
in *re Yenidge Tobacco Company* (1916)

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

(iv) 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.

**8** The law of delict recognises as a valid defence the doctrine of contributory negligence. Under this defence, the courts generally look into the conduct of both parties involved in the dispute before apportioning blame and liability to either, or both, of them. In given situations, the courts usually find that the plaintiff may to a certain extent have contributed to the resultant injuries he himself would have suffered.

A defendant in such a position can raise the defence of contributory negligence and allege that the plaintiff was also responsible for the injuries that he suffered himself and should be held to have contributed to the causing of the accident from which injuries were sustained. As a result, the plaintiff will also be held to be delictually liable for his own injuries.

If, for example, a vehicle driven by the defendant collides with the plaintiff, a pedestrian, and it turns out that both parties were negligent in causing the accident in that the plaintiff tried to cross the road without carefully ensuring that it was safe to do so, and that the defendant was driving at an excessive speed and was not keeping a proper lookout, the court will take into account the respective degrees of fault on the part of each party before apportioning damages.

The doctrine of contributory negligence is therefore an equitable precept that provides that a person should not recover in full for damage caused partly by his own fault. In terms of s.4(1) Damages (Apportionment and Assessment) Act (Chapter 8:06);

**'Any person who suffers damage which was partly by his own fault and partly by the fault of the other person … the damages awarded in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable having regard to the respective degrees of fault of the claimant and of such other person in so far as the fault of either of them contributed to the damage.'**

If, for instance, P was 20% at fault and D was 80% at fault, P the plaintiff will be able to recover only 80% of his damages from D the defendant. As for D, he in turn will be able to recover 20% of his damages from P.

The court may also adopt the approach whereby it calculates the percentage of deviation by each party from the norm of the reasonable person and then reduce the figures to proportions. If, for example, P deviates from the norm by 20% and D by 40%, when reduced to proportions, this will be 1:2. Therefore P is liable to pay one third of D's loss and D is liable to pay two thirds of P's loss.

Statute law also recognises the concept of contributory negligence, under s.4(1) Law Reform (Contributory Negligence) Act (Chapter 8:06). Failure by a passenger to wear a seatbelt can amount to contributory negligence as this failure will aggravate P's injuries in the event of an accident, injuries which could have been avoided had proper care and caution been exercised. In the case of *Koen* v *Keates* (1989) the court held that the failure to wear a seatbelt by a passenger despite express instruction to do so by the driver amounted to contributory negligence.

Under the Zimbabwean law of delict, contributory negligence is not a full defence as defined in apportionment legislation but instead the courts will apportion blame between the two parties and reduce the amount of damages payable to a claimant proportionately, considering the extent of his fault. If, however, the defendant was the sole and proximate cause of the plaintiff's harm, the defence of contributory negligence will not apply and the defendant will be held liable to pay all of P's damages.

The coach driver, Fambai, owed all his passenger a duty of care to drive the coach with care and skill. The conditions under which the bus was travelling were risky and hazardous. It was raining heavily and, to compound the situation, the driver was speeding.

In relation to Dennis Dube's claim for damages in the sum of $4,000·00, it would appear that as long as he is able to justify the damages the bus company has no defence to the claim. In respect of James Moyo's claim the bus company has a partial defence of contributory negligence. As a reasonable person he should have heeded the various warnings about fastening his seatbelt. The bus company has a partial defence in the form of contributory negligence and for that reason James Moyo will not be able to recover the amount of the full claim.

If, for example, the level of his fault or contributory negligence is pegged at 50%, the net effect would be for him to recover damages to the quantum of 50% of his total claim. This is roughly how the principle of contributory negligence operates although the process of quantifying the appropriate level of damages due to the plaintiff can be complex and involving.

**9** **(a)** Promoters of a company are those people who are responsible for its formation. According to s.2 Companies Act [Chapter 24:03], a promoter in relation to a prospectus means any person who is a party to the preparation of the prospectus but does not include any person by reason of his acting in a professional capacity (such as lawyers or accountants) for persons engaged in procuring the formation of a company.

In *Twycross* v *Grant* (1877) the court ruled that

**'a promoter is one who undertakes to form a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose.'**

Promoters owe a number of duties and obligations towards the company and in certain situations towards third parties such as the companies' shareholders.

Briefly some of the more notable common law duties include:

(i) the equitable duty of disclosure
(ii) duty not to make secret profits
(iii) duty to take care.

Statutory duties of promoters relate to misstatements which may be contained in a company's prospectus.

According to s.58(1)(c) Companies Act [Chapter 24:03] it is an offence to give misstatements in a prospectus. Both civil and criminal liability is imposed so as to protect the public.

Section 58(1) reads as follows:

Subject to this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement included therein, that is to say-

(a) every person who is a director of the company at the time of the issue of the prospectus; and
(b) …….
(c) every person being a promoter of the company; and
(d) every person who has authorised the issue of a prospectus.

It is quite clear that in terms of civil liability for misstatements that were contained in the prospectus, John Brown is accountable to Mupfumi and other aggrieved shareholders on the basis that he is a promoter and also that he has authorised the issue of the prospectus.

A person who has been induced to subscribe for shares or debentures on the faith of a prospectus, which contains an untrue statement, may rescind his contract to take shares and claim return of the amount paid for them irrespective of whether the false statement was made innocently, negligently or fraudulently.

This was underscored in the case of *Directors of Central Railway Company of Venezuela* v *Kirsch* (1867).

Equally in terms of s.59(1) John Brown and his associates would be criminally liable to Mupfumi and other shareholders for the misstatements contained in the prospectus.

**(b)** There is nothing in the Act that prevents John Brown from being a promoter of a company on account of his acts of past misconduct. However in terms of s.173(1)(f) Act, John Brown is ineligible to be a director because of what transpired when he was the liquidator of Direstraits Limited in 2008.

The section reads as follows:

S173(1) any of the following persons shall be disqualified from being appointed a director of a company –

(a) ……
(b) ……
(c) ……
(d) ……
(e) ……
(f) save with the leave of the court any person removed by a competent court from an office of trust on account of misconduct.

Since John Brown was removed from the position of liquidator (which is a position of trust) by the High Court, he needs a special dispensation from the court for him to act as a director of the mining company which he assisted in promoting and founding.

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

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

**'no dividend shall be paid, otherwise than out of profits …'**

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

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

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

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 net 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. This is as a result of article 122 of Table A, which states that no dividend shall bear interest against the company. Whilst the legal position is that dividends may only be paid out of profits it is also clear that if the directors have, without negligence, formed the *bona fide* belief that the company has earned sufficient profits to pay a dividend when in fact it has not, no liability will attach to them. On the other hand, if they were negligent in declaring a dividend, they can be held liable.

Finally directors may deduct from any dividend payable to any member all sums of money, if any, presently payable by him to the company on account of calls or otherwise in relation to the shares of the company. In relation to the specific facts of the problem, members of the company in general meeting were completely out of order in purporting to recommend higher dividends than the directors of Marange Steelmakers Ltd had recommended. Article 114 of Table A reads as follows:

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

In a nutshell, what the members have done is completely illegal and without force of law.

**1** **(a)** 3–4 marks Answers in this bracket correctly spell out the various differences between criminal law and civil law.

Citation of illustrative cases is important.

0–2 marks An average to poor answer.

**(b)** 2–3 marks Answers in this bracket spell out succinctly the differences between an appeal and a review.

0–1 mark An inadequate answer.

**(c)** 2–3 marks Answers in this bracket show in very brief and broad terms the jurisdiction of the High Court in both civil cases and crimes. It is important to note that save where a particular statute imposes a maximum or minimum sentence, the High Court's jurisdiction is unlimited. Appeals lie from the High Court go to the Supreme Court.

0–1 mark A poor answer.

**2** 7–10 marks Answers in this bracket would clearly spell out the distinction between material/patrimonial loss on the one hand and emotional/sentimental loss on the other hand.

The general approach of the courts in awarding damages for breach of contract would have to be explained. Citation of case law is imperative.

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

0–3 marks A deficient answer in all respects.

**3** 7–10 marks Answers in this bracket would clearly spell out the differences between a limited and an unlimited partnership. Since this is a topic which is entirely governed by the common law, it is absolutely essential for candidates to cite relevant case law.

4–6 marks An average answer which could have been better with citation of relevant case law.

0–3 marks A clearly inadequate answer with a number of inaccuracies.

**4** **(a)** 3–6 marks Answers in this bracket should fully explain both the statutory and common law obligations of auditors.

0–2 marks A lukewarm answer.

**(b)** 3–4 marks A good answer would cite the relevant statutory provisions on the removal of auditors.

0–2 marks An indifferent answer.

**5** 7–10 marks Answers in this bracket clearly show the distinction between an independent contractor and a servant.

Citation of case laws is an absolute must.

4–6 marks An average answer that has a few gaps here and there.

0–3 marks A lukewarm answer which either omits to cite relevant cases or where they are cited they are the wrong ones altogether.

**6** 7–10 marks It is important to point out the fact that whilst executive directors form part of the senior management of the company, non-executive directors are not employees.

Citation of case law that illuminates the differences between executive and non-executive directors is a must.

4–6 marks An average answer which does not clearly spell out the required differences.

0–3 marks A poor answer that is deficient in many respects.

**7** **(a)** 3–4 marks A good answer which adequately explains the circumstances around which voluntary winding up is available.

Citation of s.242 Companies Act [Chapter 24:03] is a must and the effects of voluntary winding up must be explained.

0–2 marks A lukewarm answer.

**(b)** 4–6 marks An answer that comprehensively spells out the circumstances leading to compulsory winding up.

Citation of s.206 Companies Act is an absolute necessity.

2–3 marks An average answer

0–1 mark An answer with many shortfalls.

**8** 7–10 marks A good answer that discusses fully the concept of contributory negligence that is available to the bus company owner as a partial defence.

Citation of relevant case law is a must.

4–6 marks An average answer that does not adequately explain the concept of contributory negligence as a partial defence under the law of delict.

0–3 marks A lukewarm answer with a few inaccuracies here and there.

**9** **(a)** 5–7 marks Answers in this range show an appreciation of the fact that promoters are liable at law for misstatements which appear in a prospectus. Citation of the relevant sections of the Act is imperative.

2–4 marks An average answer with omissions here and there.

0–1 mark A totally deficient and inadequate answer.

**(b)** 2–3 marks A good answer which clearly shows that whilst John Brown can be a promoter of the company, he cannot be a director because of S173(1)(f).

Citation of relevant statutory law is important.

0–1 mark An inadequate answer.

**10** 7–10 marks Top band marks will be given for answers which fully explain the law relative to a dividend declaration. It is imperative to cite article 114 of Table A which makes it very clear that 'The company in general meeting may declare a dividend but no dividend shall exceed the amount recommended by directors'.

4–6 marks An average answer that does not properly and accurately capture the law.

0–3 marks A poor answer which incorrectly states the law.