Answers

1 (a) Judicial precedent (*stare decisis*) is perhaps the second most important source of law in Zimbabwe after legislation. The Latin maxim *stare decisis* means to stand by the precedents and not disturb settled points of law.

Most advanced legal systems all over the world apply the doctrine of judicial precedent to a greater or lesser degree. As Salmond puts it, 'the importance of judicial precedent has always been a distinguishing characteristic of English law …'.

'*Stare decisis* is a good maxim and one to be generally followed but it is possible that circumstances may arise which would render it a lesser evil for a court to override its own legal opinion, clearly shown to be wrong, than to indefinitely perpetuate its error. Save under the most exceptional circumstances however, a court should be bound by its own decisions unless and until they are overruled by a higher tribunal on appeal. To adopt any other rule would impair the dignity of the court, and would introduce a total uncertainty into business transactions and legal proceedings …'

In Zimbabwe the decisions of the Superior Courts (High Court and Supreme Court) are binding on all the lower courts. Where a case is applicable the lower courts do not have any discretion in this respect, the Supreme Court and High Court decisions must be followed even if patently incorrect. The decisions of the Supreme Court are binding on all other courts including the High Court. The Supreme Court is not bound to follow its own previous decisions although generally it will only depart from its previous decisions if convinced that it was clearly wrong.

In the High Court a single judge is bound by decisions of two judges sitting together and by decisions of what is called a full bench, which consists of three judges sitting together. In constitutional cases a full bench consists of five judges of the Supreme Court sitting together.

Decisions of the High Court are binding on all lower courts and the decisions of the lower courts are not binding on any other court, not even themselves. The lower courts are basically the magistrates court, the customary law courts and the traditional leaders' courts.

Since independence, one case has fundamentally changed the face of African customary law in Zimbabwe thereby establishing a precedent for hundreds of similar cases in the country. In the case of *John Katekwe* v *Mhondoro Muchabaiwa* (1984), the issue was whether the father of a girl who at the material time was of majority age (over 18 years) could sue in delict for damages for seduction from the former male lover of this adult daughter. Although it was common cause that the plaintiff's daughter Molly had been seduced by the defendant the Supreme Court dismissed the suit on the basis that since Molly was a major she was the proper plaintiff and not her father. Under customary law that hitherto applied for generations, a father could sue for a wrong done to his daughter.

The Supreme Court then made the following ruling which has become a binding precedent to all the other courts in the country including the High Court on numerous occasions.

'It's common cause that the effect of the Legal Age of Majority Act is that the old customary law concept that an African woman was a perpetual minor who needed a guardian to assist her in her contractual obligations has been done away with because every person acquires majority status on the attainment of the age of 18 years. It is also common cause that an African woman with majority status can contract a marriage without the consent of her guardian because she no longer needs a guardian.'

The court put it very bluntly by saying that there could be no major over another major. This case has had far reaching consequences on Zimbabwean jurisprudence and it is now firmly established as a precedent in our law.

(b) The advantages of the principle of *stare decisis* (precedent) are many and they are as follows:

1. It enables the citizens, if necessary with the aid of practicing lawyers to plan their private and professional lives with some degree of certainty, predictability and assurance as to their legal effects.
2. It cuts down the prospect of unnecessary litigation particularly with 'open and shut' cases where the law is reasonably predictable.
3. It keeps the weaker judicial officer along straight and rational paths, drastically limiting the space allowed for partiality, caprice or subjectivity thereby retaining public confidence in the judicial system through like cases being treated alike.
4. It conserves the time of the courts and reduces the cost of law suits. In short the advantages of judicial precedent are certainty, predictability, reliability, equality, uniformity and convenience.

The following are the disadvantages of judicial precedent:

1. Once a hierarchy of binding precedents has been established a certain amount of rigidity and inflexibility is introduced.
2. A strict principle of *stare decisis* prevents legal rules from changing with the times.
3. Proliferation of past situations gives rise to reports and far from the law becoming predictable, this might result in a great deal of uncertainty and obfuscation.
4. It is sometimes said that the development of the law through new precedents is sluggish and too irregular.

When all is said and done the advantages of judicial precedent probably outweigh the disadvantages.

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

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

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

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

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

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

(a) where damages would adequately compensate the injured party, for example, if the subject matter of the contract can easily be bought on the open market as is the case with items like cars, clothes, bicycles, shares, etc. On the other hand a rare and unique painting by a renowned and celebrated artist might not fall into this category.

(b) where it is impossible to effect

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

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

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

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

'The courts', said Jessel, MR 'have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relationship of master and servant, or whether they are agreements for the purpose of pleasure or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy.'

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

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

In conclusion it is quite clear that our courts will not grant specific performance anyhow as a remedy for breach of contract. Ultimately, it is a discretionary remedy which an aggrieved plaintiff might fail to get notwithstanding the fact that the defendant is clearly in breach of his contractual obligations towards the plaintiff. The court is enjoined by the law to use the discretion prudently and judiciously taking into account the facts on the ground and the larger interests of justice. The usual practice is for a plaintiff who desires to get the relief of specific performance to include an alternative prayer (request) for damages.

3 The doctrine of capital maintenance is essentially a clear statement by the law, that the central pool of funds contributed by shareholders (or creditors) should not be unlawfully diminished. That pool of funds known as capital, is the heart and soul of the company and forms the only guarantee to creditors that in the event of failure of the enterprise, they may recover what they are owed. This is especially pertinent given the separate personality of a company and the limited liability of its members. So, allowing unchecked reductions to capital would be disadvantageous for the creditor who knows full well that he cannot recover from the members of the company. The principle is that a company must maintain its capital and shareholders contributions cannot be given back to them. Any return of the company's reserve funds is generally unlawful reduction of capital and is proscribed by law.

The rules which are meant to protect the share capital structure of the company broadly can be stated as follows:

(a) **Restrictions on the payment of Commissions involving the sale of shares.**

Section 72 of the Companies Act, Chapter 24.03, allows payment of commissions to anyone as consideration for subscribing or agreeing to subscribe for its shares. The restrictions thereunder are that (i) articles must allow it, (ii) commission is under 5% of price of single share or such rate authorised by the articles, whichever is less (iii) this rate must be stated in the prospectus or in statement in lieu thereof.

Underwriting commission is also allowed, and may be paid from the share premium account, if any. Save for the above, s.72(2) prohibits applying any share or capital money to direct or indirect payment of commission, discount or allowances in consideration of subscription or agreement thereof, or procuring or agreeing to procure subscriptions of shares, regardless of manner of payment. In *Oregum Gold Mining Company of India* v *Roper* (1892), it was held that a company which issued preference shares of £1 each with 15s of the price credited as paid had exceeded its powers. Thus the rule prohibits selling shares at a discount because this leads to an unlawful erosion of the share capital of the company.

(b) **Prohibition of assistance by a company of the purchase of its own shares or in its holding company.**

The primary capitalisation method of a company is the sale of shares. If it were to purchase its own shares, capital would not increase neither would it do so if it assisted a buyer in purchasing its own shares. Thus s.73 prohibits a company from financing the purchase of its own shares or those of its holding company. Such assistance would amount to a back door reduction of share capital without following acceptable rules as set out in s.92–96. The competing interests recognised by the legislature are the need to allow companies more freedom of action while protecting creditors interests in the security of share capital. However under exceptional circumstances the law allows a company to provide assistance towards the purchase of its own shares. Briefly stated, s.73 says that it shall be unlawful for a company to give whether directly or indirectly, and whether by means of a loan or guarantee or some such other form of security any financial assistance for the purpose of purchasing the company's shares unless

(i) such assistance is given in accordance with a special resolution of the company and
(ii) immediately after such assistance is given on a fair valuation of the assets of the company the assets exceed the liabilities and the company is in a position to pay its debts.

Equally if the company's main business is the provision of funding for projects (for example a bank or finance house) then it can lawfully lend money for the purchase of its own shares in the course of carrying out its own business activities.

(c) **Prohibitions of loans to directors – s.177**

Section 177 generally prohibits loans to directors, though subject to certain exceptions. The major exception again is that if the company's core business is the lending of money, then directors can be considered for loans along with everyone else.

(d) **Company purchasing its own shares**

The rule that a company cannot buy its own shares enunciated in *Trevor* v *Whitworth* (1887) has been reversed by statute, namely s.78, provided the purchase is authorised by articles and a general meeting resolution. Further this purchase can only be made by funds which would otherwise be available for a dividend – s.82.

(e) **Dividends paid out of profit**

Both the common law and statute law are very clear on the issue of the payment of dividends, that it can only be done out of profits and not capital. Article 116 says 'no dividend shall be paid otherwise than out of profits'. To do otherwise would amount to an unauthorised reduction in share capital and this would be strictly contrary to the provisions of the law.

(f) **Application of share premiums**

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. In terms of Zimbabwean law, the share premium account cannot be used anyhow notwithstanding the fact that the company has made 'profits' on the sale of shares. The account is primarily used

(i) in paying up unissued shares to be allotted to directors, members or employees as fully paid bonus shares and
(ii) in writing off preliminary expenses associated with the formation of the company.

In summary it is quite clear that there are several provisions in the Company's Act (Chapter 24:03) which are designed to protect the integrity of the share capital structure of the company. Ultimately the rules are meant to prohibit or prevent the illicit or unauthorised reduction of share capital. What has been stated above are the major provisions or talking points but these are not exhaustive in any way.

4 (a) Sole Trader

This is when a businessman owns the business alone. A single owner of a business can commence operation free from any formalities. In fact, unlike a company which for it to exist needs to be registered by the Registrar of Companies, a sole trader as a businessman is not regulated by any provisions of the law because the law does not consider him as a separate entity from his business. As a result if the business suffers serious losses resulting in inability to pay creditors, the sole trader will be called upon to make good the losses from his private resources. Like a partnership, the sole trader has no limited liability.

In Zimbabwe there are numerous sole trading businesses. The reason is that unlike companies which require so many formalities, a sole trading business is easy to set up. Also a sole trading business does not need an injection of large sums of money or the drawing up of complicated documents like the memorandum and articles of association. Unlike a company which enjoys perpetual succession, a sole trading business has no perpetual succession. If the sole trader dies, or is declared insolvent that will be the end of the business as well. This means that a sole trading business has no perpetual succession. In this country most sole trading businesses are found in the informal sector of the economy where they operate a wide variety of cottage industries. They are basically small and usually family run businesses whose operations are not constrained by legislation unlike registered companies be they public or private. If the sole trader dies or becomes insolvent that usually leads to the termination of the business venture.

(b) Partnership

Unlike a sole trading business which consists of only one person, a partnership is an association of two or more persons, but not exceeding 20 which is formed for the purpose of carrying on business that has as its main object the acquisition of profit. A partnership is not a legal entity or persona separate from its members. Under a partnership, every partner brings or binds himself to bring something into the partnership. However, this contribution need not be measurable in any money's worth as shown in the case of *B* v *Commissioner of Taxes* (1957).

It is also the aim of partners to carry on business for the benefit of all partners. However in the case of a sole trading business the purpose of the business is to benefit the sole trader and his or her family. Furthermore, there is no Partnership Act in Zimbabwe, a partnership only depends on the agreement made with a view of gain and unlike the private business corporation, a partnership does not have a regulatory statute which requires such an agreement to be in writing. Thus, unlike the registration of a company, there are no formalities to be complied with if the partner wishes to enter into a partnership agreement. The partnership is normally governed by the ordinary rules of contract through a partnership deed and if there is no partnership deed regulating the activities of the partnership the relations between partners are automatically governed by the common law (through operation of law).

In Zimbabwean law a partnership does not enjoy separate existence or perpetual succession. In *Shingadia Brothers* v *Shingadia* (1939) a local case, the courts re-affirmed the position that since a partnership does not enjoy *locus standi* or separate legal standing in the eyes of the law, litigation is to be done in the names of the individual partners, either as joint plaintiffs or co-defendants.

(c) Private business corporation

A private business corporation is an enterprise which can be formed by one or more persons but the membership must not exceed 20. Unlike sole trading business or partnership, the private business corporation, on registration becomes a juristic person distinct from its members. However, though it acquires a corporate status, there is no need to appoint directors or to have the founding documents like the memorandum and articles of association. There is a statement called 'incorporation statement'. In fact, on registration, the business becomes a corporate body with all the powers of a natural person without limitation of liability as is normally set out in the Companies' memorandum and articles of association.

Unlike sole trading business and partnership which do not have their own Act, the private business corporation is regulated by the Private Business Corporation Act Chapter 24.11 which requires those participating as members to complete an incorporation statement. This is different from a sole trader who does not need to comply with any formalities. Equally, a private business corporation can only operate if the Registrar of Companies is satisfied that the name of the private business corporation is appropriate. This is according to s.14 of the Act.

Section 23(3) of Private Business Corporation Act disqualifies, an un-rehabilitated insolvent from being a member of the corporation, any person who has been convicted in Zimbabwe or elsewhere of theft, fraud, forgery and has been sentenced to imprisonment without the option of a fine and any person who is the subject of any court order and disqualified by the Companies Act from being a director. However, these restrictions do not apply to a sole trader or partnership.

The liability of members of the private business corporation is in general limited to the amount they agreed to contribute. However, in cases where they have been reckless in dealing or in the disposal of assets to members, when the co-operation is unable to meet its debts the court will declare any member who took part in such activity to be personally liable for the debt. This is not the case with sole trading business and partnership where there is no limitation of liability. Partners and sole traders are wholly liable for the debts they have incurred during the operation of their business concerns. On the other hand, with limited liability companies, be they private or public, a member's liability is limited to the amount that remains unpaid on his shares. If his shares are fully paid the limitation of liability clause protects the shareholder from liability for debts incurred by the company. Naturally the law makes provision for exceptions to the limitation of liability where the concept of the separateness of the company is being abused.

5 **(a)** Most actions in delict are based on negligence. This is an allegation that a person acted carelessly, was thoughtless or imprudent because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him. The criterion adopted by our law to establish whether a person has acted negligently is the objective standard of the reasonable person. The defendant is negligent if a reasonable person in his position would have acted differently and if the unlawful act causing damage was reasonably foreseeable and preventable.

In *Kruger* v *Coetzee* (1966), Holmes JA formulated the test to be applied on negligence. He said liability on negligence arises if a reasonable person (*diligens pater familias*) in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps to guard against such occurrence and that the defendant failed to take such steps.

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

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

The first stage in any case of alleged negligence is for the court to decide the facts. After the facts have been decided, the court has to determine how an ordinary average reasonably careful citizen would have behaved in the circumstances.

Negligence is thus the failure to display the same degree of care in avoiding the infliction of harm which the reasonable person would have displayed in the circumstances. In *Gordon* v *Da Mata* (1969), it was held that it was not reasonably foreseeable that during the cutting of cabbage leaves, a small cabbage leaf would fly that distance and land under the plaintiff's foot causing her to slip and fall and be injured. The accident was so bizarre and freakish that a reasonable man would not have foreseen or taken steps to guard against it.

There are some situations where despite the fact that harm was reasonably foreseeable, a reasonable person might not necessarily have taken any steps at all to prevent that particular harm or might only have taken certain limited precautions. Therefore, in addition to reasonable foreseeability, the question of what steps, if any, a reasonable person would have taken has to be investigated. The enquiry can be broken down as follows:

(i) would a reasonable person placed in the position of the defendant have foreseen the possibility that harm would result from the sort of conduct in which the defendant was engaged?
(ii) if he would have foreseen harm, would the reasonable person have taken steps to prevent that harm from occurring?
(iii) If he would have taken steps what steps would he have taken?

When deciding whether a reasonable person would have guarded against harm which was reasonably foreseeable the court will take into account the following:

(i) the degree of risk that the harm would occur (was it probable or unlikely that the harm would occur?)
(ii) the nature of the harm that would occur (if the harm occurred would it be serious harm or trivial harm?)
(iii) the nature of the precautions required to prevent the harm (were these elaborate and expensive or easy and inexpensive)
(iv) The objective which the defendant was seeking to attain (was this legitimate or illegitimate).

In *Lomagundi Sheetmetal* v *Basson* 1973 (4) SA 523, during welding operations on a roof, molten metal dropped on dry material alongside the building and a fire broke out resulting in damage to property. Although the risk of fire being caused in this way was not substantial, the precautions needed to prevent risk were easy, namely to move the dry material away. The defendant was therefore held liable to the plaintiff in negligence.

In this regard, the law recognises that there are some members of the society who are rendered peculiarly weak by some particular ailments. It is thus considered to be still negligent to cause injury to such people as the law mandates everyone to take their victims as they find them, the so called thin skull rule.

The reasonable foreseeability test is certainly not without its difficulties as the sole determinant of liability in these sort of cases which span a wide spectrum of differing situations. The present position is that liability in all cases is to be determined simply by applying the ordinary test for negligence, namely reasonable foreseability of the average person.

(b) *Volenti non fit injuria* means, he who voluntarily exercises his will suffers no injury. The concept embodies the principle that a defendant is not liable where the injured person has consented to injury or the risk thereof. Thus if a person, knowing of the full nature and extent of the risks involved in an enterprise, voluntarily goes into the enterprise thereby assuming the risk of injury to himself, he should not be able to sue for injuries caused by that enterprise. *Volenti non fit injuria* thus constitutes a total defence in delict even in circumstances where the defendant was negligent.

The defence would thus cover injuries sustained by sportspersons engaged in sports that inevitably cause harm such as boxing and in some such other circumstances. Thus in *Lampert* v *Hefer NO* (1995), the defence was maintained under circumstances where a passenger was aware that the motorcyclist with whom he was travelling was under the influence of alcohol, which intoxication led him into an accident and resultant injuries to the plaintiff.

There are two approaches to the *volenti* defence which are, the narrow so-called bargain or bilateral agreement approach and the extensive voluntary assumption of risk approach. The basic difference between the two approaches is as follows: with the bargain approach, nothing less than an advance communication leading to an express or implied agreement between the parties is required whereunder, the plaintiff agrees to waive or give up his legal right to claim in respect of that type of harm, should it eventually occur. The approach thus postulates that there be a clear and unequivocal acceptance of a known risk in advance and a resultant waiver of the right to recover.

On the other hand, the voluntary assumption of risk approach does not require that the plaintiff must have agreed in advance of the enterprise to surrender his right to sue in the event of him being injured. All that is required is that the plaintiff having full knowledge and appreciation of the nature and extent of risk involved in an enterprise, nonetheless voluntarily goes into it thereby assuming the risk of injury. Though these approaches differ, the idea of voluntariness cuts across both of them.

Our courts are yet to rule authoritatively on the approach to be adopted and followed by them. The one case that has dealt with the defence, *Mutandiro* v *Mbulawa* (1994), seems to cast doubt on the approach to be adopted. In that case the plaintiff who was a passenger in a vehicle which was being driven by the defendant had been seriously injured when the vehicle had overturned, apparently caused by the defendant's drunken state. The court held that the defence could not apply because there was no express advance agreement between the parties. This holding was in line with the narrow approach. It however went on to add that the defence could still not apply as the plaintiff had no full knowledge of the nature and extent of the risk involved – which seems to remind one of the extensive approach. The above notwithstanding the defence still forms part of our law and a case could be made for the application of the extensive approach as it is in line with the South African position enunciated in *Santam Insurance* v *Vorster* (1973).

The defence is however difficult to raise and sustain because of its requirements. Whichever approach one looks at, it seems clear that there is a requirement that there be at least an appreciation of the nature and extent of the risk involved and this leads to an inquiry of subjective foresight. By way of illustration, in the *Santam case (supra)* a race between two cars on an ordinary road resulted in one of the cars overturning and leading to the plaintiff sustaining very serious injuries. The court noted that if the plaintiff had subjectively foreseen the risk of injury to himself that would ordinarily suffice as consent debarring him from recovering damages. It however, went on to refer to the practical difficulties of establishing subjective foresight.

In order to overcome this difficulty a two stage approach is utilised. The first stage involves the court asking itself what objectively were the inherent risks of the activity in question. Having determined that, it then applies the subjective test and the court makes a factual finding as to whether the plaintiff must have foreseen the risk and whether he will be held to have consented to it despite his protestations to the contrary.

There are however, limitations to the idea of voluntariness. There are two situations where the plaintiff will be acting under an obligation or constraint such that his conduct may not be termed voluntary with the result that the defence cannot be raised against him. Thus in rescue situations and in situations where an employee has to undergo a danger negligently caused by his employer, the defence will not be raised to evade harm caused under such circumstances.

The *volenti* defence is justified on the grounds of public policy. The purpose of the law of delict being to protect people from harm negligently caused, it then makes no sense to extend the protection to those who actually go out to seek the harm. In the circumstances, the voluntary undertaking of risk thus constitutes a good defence and a total one too.

6 **(a)** A partnership is not a separate entity from the partners who form it. The general rule is therefore that partners are jointly and severally liable, each for the whole of the debts of the partnership provided that the debts are incurred with the authority of the partnership and in its name. However, the general rule is not cast in stone, an individual partner cannot be sued personally on a partnership obligation while the partnership is in existence. This is well underscored in the case of *Standard Bank of South Africa Ltd* v *Pearson and Another* (1961), where it was argued that it is only after the dissolution of a partnership that a creditor of the partnership can sue the members of the firm as individuals jointly and severally for the debt the one paying the other to be absolved, and if execution be necessary proceed to execute on the assets of each member. However in terms of our common law the partner who has paid off the debt is entitled to look to the other former partners for their own contribution to offset their liability.

The basis of partnership is that each partner is the agent of the others as shown in the case of *Bain* v *Barclays Bank* (1937). In this case, the plaintiff was in partnership with Collins and Croxford from 1922 until 1925. In 1925 the partnership was re-constituted, Collins and Croxford being the partners and the plaintiff an employee. The new partners did not however, inform their bank of this new development and continued to deal with it as if they still retained their pre 1925 status. The partnership then incurred an overdraft after which one of the partners then died. The bank (defendant) then sought to set off the sums due in favour of the plaintiff arguing that death had dissolved the partnership and as one of the partners he was thus individually liable for the debt (overdraft) as it did not have any knowledge of the change in the partnership structure. The court held that since each partner is the agent of the other, the plaintiff was bound as the bank still reasonably believed that he was still a partner. However, the acts of a partner are binding not only on his fellow partners but also on himself.

A third party who obtains judgment against a partnership may execute against the partnership property, and if that is insufficient he may execute against the property of the individual partners.

The extent of a partner's authority to bind the partnership to third persons is governed by the ordinary rules of agency. His authority may be express or implied. It may be conferred subsequently by ratification or it may be ostensible. In other words, each partner becomes an agent of each of the others and the partnership for the purpose of carrying on the partnership business in the usual way. It follows therefore that each partner has authority to do all acts incidental to the proper conduct of the business and such acts will bind partners and the firm.

Although the general rule is that the partners are jointly and severally liable for the debts of the partnership there are situations in which the general rule does not apply. There are two forms of extraordinary partnership in which the liability of certain partners to third parties is limited. The first extraordinary partnership is the anonymous partnership. This is where two or more persons agree to share in some business, which will be conducted by one of them in his own name. Such an anonymous partner is then not liable to third parties for the debts of the partnership but only to his partner. The second extraordinary partnership is the partnership *en commandite*. This is a partnership in which business is to be carried on in the name of one partner only, but to which the undisclosed partner or partners contribute a specific sum of money and the partners agree that the undisclosed partner is to have a share of the profits, if any, and to bear losses if any, but in no case is their liability to exceed their specific contributions. Therefore the liability of the undisclosed partner is limited only to the extent of his contribution.

In conclusion, it is quite clear that in our law partners act as each other's agent. The partnership's debts are jointly and severally owed to creditors, the one partner paying, the other partners being absolved. The chief attribute of a partnership is the concept of brotherhood and the principle of utmost good faith amongst the partners.

(b) The termination of a partnership is largely a common law affair. Broadly, a partnership is dissolved either by the parties with, or without consent, or by operation of the law, the intentions of the partners notwithstanding.

A partnership relationship may be terminated by the agreement of the parties. The agreement can either be express or implied as spelt out in *Fink* v *Fink and Another* (1945) as long as the intention of the parties is clear.

A partnership that was brought into existence for a specific period will terminate when the said period expires. In the same vein, if it was formed to deal with a particular task, it will end upon the conclusion of the task.

If the object/purpose of the partnership becomes illegal or impossible, that will be a sufficient reason to bring it to an end. In *Euseleit* v *Euseleit* (1952), a partnership between a South African and a German national was rendered illegal and thus terminated when South Africa, which was then a British colony was officially at war with Germany during both the first and second world wars and the German national became an enemy alien. In *Peters Flamman & Co* v *Kokstad Municipality* (1991) the position that an arrangement which is impossible to perform is ineffectual was outlined. In other words impossibility of performance can terminate a partnership.

The death of a partner will also constitute sufficient ground for the termination of a partnership – *ex Parte Whaley* (1962). This is so because it has the effect of essentially changing the partnership membership – *Erasmus* v *Havenga* (1979). A partnership contract normally involves a personal element and the death or insolvency of a partner terminates the partnership.

A partnership that was formed for an indefinite period can be dissolved by a party tendering a notice of renunciation. In *Wegner* v *Surgeson* (1910), the court emphasised that since a person cannot be tied to an arrangement he is no longer comfortable with, this ground constitutes an effective expediency in that regard. It was however, noted that such renunciation must not be *mala fide* (in bad faith) otherwise an action for damages will lie.

In the same vein, if a partner retires or a new one is introduced, the old partnership is set aside and another one comes into being. The law recognises that there is a difference between the old and new partnerships under these circumstances.

Insolvency of a partnership is another recognised method of bringing a partnership to an end. Thus upon the sequestration of the estate of a concerned partner, there is an automatic termination of the partnership.

A court order can also be granted terminating a partnership. Broadly such order will be handed down if the court deems it fair and just. Usually this will be done regardless of whether the partnership has a set life span or not.

The grounds for such an order include irreparable damage to the trust relationship between the partners, breach of a material term of the partnership contract, the fact that the partnership has ceased to be a lucrative venture and the loss of legal capacity by one of the partners. The grounds, as appears, includes the other grounds stated above.

In other words if it is just, reasonable and equitable to terminate a partnership our courts will certainly do so. For example if the substratum (the reason for the partnership's existence) is gone, that would be a reasonable basis upon which to dissolve a partnership. At the end of the day it is important to remember that a partnership is only but a specific type of contract and the general principles relating to termination of contracts apply as well.

7 In terms of Roman-Dutch common law the agent owes the principal a number of obligations and duties. He is obliged to fulfil all obligations which he expressly or impliedly undertook to fulfil. Likewise the principal owes the agent certain duties which he is enjoined by the law to observe.

In the main, the primary obligations of an agent are the following:

(a) **To execute the mandate.**
Agency being a form of service, it is trite that agents are bound to do what they have been instructed to do. Should he fail to perform the mandate, he would be in breach of contract and the principal enjoys the normal remedies for breach of contract. In addition, an agent who does not do what he has undertaken to do is not entitled to claim remuneration. However, it must be noted that if the principal claims damages, these must be proved in the ordinary way. Damages will not be presumed, they must be proved.

It is not sufficient merely to prove the terms of the mandate and the amount received but also to prove the value of the goods sold (that is if the service is improperly rendered) (*Umtali Farmers' Co-op* v *Sunnyside Coffee Estates (Pvt) Ltd* (1972)).

When executing the mandate, the agent must confine himself to the parameters given by the principal in his instructions. If for example, the agent exceeds the principal's instructions the latter may disown and repudiate the contract.

(b) **To exercise due care, skill, attention and diligence**

According to ancient legal authorities, such as Van Leeuwen, a mandatary agent was bound 'to prosecute the mandate which he had undertaken with diligence and in good faith'. Equally, Pothier had this to say:

'the mandatory has the right to demand of the mandatary not only his good faith, but also all the care and skill required in the execution of the mandate …'

In modern times the law is still more or less the same as it used to be in the olden days referred to by Van Leeuwen and Pothier.

In *S* v *Heller* (1971) the court observed that 'the principal bargains for the exercise of the disinterested skill, diligence and zeal of the agent …'

An agent will act with the necessary care and diligence if he exercises his duties with reasonable caution. The degree of care, skill and diligence required of him will depend on the nature of the transactions in which the agent is involved. If the transaction requires a high degree of care and skill, the test to determine whether he acted with the necessary care and skill would be more stringent. As was observed by Milne J in *Bloom Woollen (Pvt) Ltd* v *Taylor* (1961),

'In the course of time the law has implied into every contract of agency an undertaking by the agent that he will act with the care and diligence of the ordinary prudent man when he engages upon his principal's business …'

An agent who fails to exercise the degree of care and diligence required of him is in breach of contract. His principal has the normal remedies for breach which, in appropriate circumstances, include forfeiture of remuneration, *Esse Financial Services* v *Cramer* (1973).

It is not the law that a person is required to have skills that he does not possess, but that if he does not have the requisite skill he should not, in the absence of agreement exculpating him, undertake a task which requires that skill – (*Mead* v *Clarke* (1992)).

(c) **To impart information**

An agent is bound to give the principal all the information which a reasonable man in his (the agent's) position would be expected to give (*Town Council of Barberton* v *Ocean Accident and Guarantee Corporation Ltd* (1945)).

The second American Restatement of the law of agency very much reflects the Roman-Dutch position on the subject and it reads as follows:

'An agent who is appointed to sell property at a fixed price to a particular person may learn that another person is willing to pay a higher price. Unless he has reason to believe that his employer desires to sell at a fixed price to the particular person … it is his duty to inform the principal of the facts if this can be done without violating a confidence …'

If a principal employs a skilled agent particularly one who has skills which the principal lacks, the agent is bound to advise the principal of the probable consequences of a course of action which he, the principal proposes to follow:
(*Union Government* v *Chappel* (1918)).

(d) **The Duty to Account**

An agent is liable to account for all his activities falling within the ambit of the mandate to the principal.

The agent must at all times give his principal full and accurate information of what he had done in the execution of his mandate. This involves the agent keeping the principal's property separate, keeping up-to-date and allowing the inspection of his books in giving information when necessary and when the transaction is complete, in rendering an account and handing over any balance in his hands plus anything to which the principal is entitled.

As per the observation of the court in *Pretorios* v *Van Beeck* (1926), it is the duty of the agent 'where the business in which he is employed admits of it or requires it, to keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements but also of his receipts and to render such accounts to his principal at all reasonable times without any suppression, concealment and or overcharge'.

Equally in the case of *Mead* v *Clarke* (1922) the court made the apt observation that it was the plain duty of the agent, once he accepted the mandate to perform his work in connection with the principal's affairs in such a manner that the plaintiff could at any time he demanded, obtain a full and accurate statement that would enable him to ascertain with precision the exact dealings of the agent with his affairs.

On termination of the relationship of principal and agent, the latter is obliged to account, to pay over any balance remaining in his hands and to hand over any property which he acquired either from the principal or from third persons for the purposes of or in pursuance of the agency. Documents which belong to the principal are also covered by this rule.

(e) **The duty to act in good faith**

The duty to exhibit utmost good faith is arguably one of the most important and exacting duties owed by an agent towards his principal. Agency creates a fiduciary relationship between agent and principal and he is enjoined by the law to conduct the affairs of his principal in the best interests of the principal and not for his own benefit.

An agent holds a position of trust and confidence and the nature of fiduciary obligations has a number of ramifications. In a nutshell, an agent breaches the fiduciary relationship if he makes secret profits, if there is conflict of interest, if he abuses confidential information and if he delegates the authority granted to him without authorisation.

(f) **Secret Profits**

One of the major implications of an agent's fiduciary obligations towards the principal is that he should avoid receiving secret benefits/rewards at the expense of the principal. 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 the principal …'

In *Gerry Bouwer Motors Ltd* v *Preller* (1940), the respondent was employed as a salesman 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 principal. 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 or 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.

In the well known case of *Robinson* v *Randfontein Estates Gold Mining Company* (1921) Chief Justice Innes stated that:

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

Whenever an agent has arranged to make or has made a secret profit the principal has a number of remedies available. He may terminate the relationship of principal and agent. He may also claim the profit which the agent arranged to make or made. At the same time he forfeits any commission on the transaction in connection with which he acted improperly. Ultimately an agent who acts in a fraudulent or duplicitous manner might pay heavily for his transgression.

Equally, no agent may place himself in any position where his interest and his duty may conflict. By way of practical examples, an agent employed to sell cannot legally purchase the property entrusted to him for sale and his principal, on discovery of the fact, is entitled to repudiate the sale.
(*Transvaal Cold Storage Co* v *Palmer* (1904))

8 (a) The memorandum of association is the constitution of a company. The articles then give internal rules for the governance of that entity. When these two documents are registered, they form a binding contract on the company and its members as per s.27 of the Companies Act Chapter 24.03. However, the effect of this contract is that only those privy to it can sue or be sued under it. In the present case Nhidza and Mujere are being sued for the acts of the company. This is bad in law and impermissible since a company assumes separate legal personality on the day of incorporation. It is thus the company named in the articles and memorandum which must be sued as it is a legal entity capable of suing and being sued in its own name. Section 9 of the Companies Act Chapter 24.03 gives powers to the Registrar to incorporate a company. Upon incorporation, the company attains legal personality. Section 9 reads as follows:

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

In *Salomon* v *Salomon and Company Ltd* (1897), Mr Salomon was a boot and shoe manufacturer trading on his own account. He registered a company whose only shareholders were Mr Salomon himself, his wife, a daughter and four sons, who subscribed for one pound per one share each. He then sold his boot and manufacturing business for what appeared to have been an excessive price of £40,000. When, a year later, the company was wound up, it was found that if the amount realised from the assets of the company would be in the first place applied in payment of Mr Salomon's debentures, there would be no funds left for payment of the ordinary creditors. It was held by Lord Halsbury LC that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself. The court made the following observation

'It seems impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself …'

The principle of the company's separate existence has been reaffirmed over many years by a whole series of cases in many different jurisdictions. In *Lee* v *Lee Air Farming Ltd* (1960) the court observed that the fact that one person is in full control of a company does not by itself deprive the company of its persona, separate from the person who controls it.

In *Dadoo Ltd* v *Krugerdorp Municipal Council* (1920), the court held that a South African statute which prohibited Asiatics owning immovable property in the Transvaal did not apply to companies controlled by Asiatics since a company is separate and distinct from its members.

It is quite clear from the foregoing, that the proper defendant in this case is the company itself and not the two directors, Nhidza and Mujere. No issue pertaining to the lifting of the veil of incorporation has been raised and therefore the bank's action is ill-conceived.

(b) A dividend is a share in the profits of a company. The manner in which profits are to be distributed is determined by the articles of the company as the internal regulator of the affairs of the company. According to Article 114 of Table A of the Companies Act, the company in a general meeting may declare dividends. Article 115 of Table A of the Act gives the directors the discretion to pay members interim dividends as it appears to them to be justified by the profits of the company.

The articles usually prescribe that no dividend may be paid otherwise than out of profits. This is well supported by Article 116 which restates that position. In fact, it is now settled 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.

However, though Simoni could get his dividend from the profits made by the company, Article 117 of Table A of the Companies Act Chapter 24.03 provides that the directors, before recommending any dividend, may set aside, out of profits of the company, such sums as they think proper, as reserves 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. It is undoubted in this case that the directors invested the profits in the company for the best interests of the company. As a result, Simoni cannot compel the directors to pay his dividend out of the profits of the company.

In the case of *Buenos Ayres 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 their dividends.

The learned Judge 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 dividends. The procedure would be that the board would consider the profits of the company on the one hand and 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 necessary recommendations to the company and the company would consider the matter ...'

A dividend becomes due if and when declared. This is supported by Article 118 of Table A of the Companies Act Chapter 24.03. Generally, the shareholder has no right to any payment until the corporate body through its directors has determined that the money can properly be paid. However, while it is true to say 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, in this case Simoni has no right to claim because the dividends have not been declared, so the company is not yet indebted to him.

In conclusion, it can be said that Simoni cannot compel the directors to pay him his dividends until they declare the dividend. If they declare the dividends the company will become indebted to Simoni and even then, no interest on the dividend will bear against the company.

9 This is a typical case of unfair dismissal and the normal remedies of reinstatement or alternatively, damages are available.

It should be noted that the dismissal is outrightly illegal as the facts do not disclose any wilful disobedience by Irene Moyo. It is essential to a charge for wilful disobedience that there be established an intention to hold superior authority in disdain. As it is, such an intention cannot be established from these facts as there was no lawful order disobeyed since the employee's actions were aimed at the exercise of the right to health, which is provided for in terms of labour law and the Constitution. There clearly was no intention to defy lawful authority but only to get medical attention. It cannot be said on the basis of the facts that her request was frivolous or insincere.

In light of the foregoing, reinstatement is a possible remedy that is available. The words of Mcnally JA in *Zupco* v *Chisvo* (1999) are in this regard apposite. The former Judge of Appeal states,

'… there must be cases, and this appears to be one of them, where reinstatement is the obviously equitable solution … and one may venture to say that no amount of damages can make up for a long term job unjustifiably lost.'

In the above quoted case, a bus conductor had been dismissed for two offences namely, (i) that he had stolen a small amount of money by overcharging the passengers on the tickets and pocketing the difference and (ii) that he had been short of a small amount at the end of the day when the tickets and takings were reconciled. It was held by the Supreme Court that neither count had been proven and in any event on the second count the court noted that shortages must be common occurrences on busy routes and this could not amount to a dismissible offence except in special circumstances. In the circumstances, the court declared that the dismissal was wrongful and ordered reinstatement.

This position applies without reserve in this case as no dismissible offence was committed and the conclusion thus seems inescapable that Irene should be reinstated.

However, in Zimbabwean law, before the court can grant reinstatement, it will consider the possibility of the restoration of a normal working relationship between the parties. If that objective cannot be achieved reinstatement will not be ordered. In some cases because of hostilities and antipathy between the parties, restoration of a normal working relationship becomes impossible.

In the event that reinstatement can not be ordered the issue of damages becomes a viable alternative. In this regard Irene will be entitled to damages in lieu of reinstatement, backpay and other benefits. She however, has an obligation to mitigate her damages.

Mitigation of damages means that Irene has to take steps that a reasonable and prudent person would take to minimise her loss or to stop any loss at all from accruing – *Hazis* v *Transvaal and Delagoa Bay Investment Co Ltd* (1939). As a consequence, she has a duty to find alternative employment and to take any such employment as may be offered her but is not obliged to take a position of a subordinate or inferior character to the one she had – *Bulmer* v *Woollens Ltd (in liquidation)* (1926). She thus may not sit idly by and watch damages accrue but the onus of proving that she has failed in this duty lies with the employer.

In summation, the foregoing are the available remedies, but reinstatement seems to be the more appropriate as the dismissal was outrightly unlawful and there is no indication that a normal working relationship may not be resumed.

10 The main issue for determination in this case is whether or not the builders or the owner of the building were negligent in delict and thus liable. This broad issue encompasses the adequacy or otherwise of the exemption sign posted on the building.

A person is liable in delict, if a reasonable man would have foreseen that a particular state of affairs (caused by him) would result in harm to the person of another party and would take efficient steps to avert such harm – see *Musadzikwa* v *Minister of Home Affairs* & *Anor* (2000) for that general proposition.

In *Hague* v *Abroath Football Club Ltd* (1978), it was stated that a person who is in control of some objects that poses a danger has a duty to prevent any harm from occurring. A similar conclusion was reached in *Smith* v *Littlewood Organisation Ltd* (1987). These cases show that failure to take necessary preventive measures amounts to negligence and makes a person liable in delict.

It is beyond doubt that the building in its dilapidated state constituted/posed a serious risk of danger and harm to passers-by. In the circumstances, there was a duty upon the owner to prevent such harm and also upon the builders as they were in control of the building. A warning sign which was also an exemption notice was however posted on the building. The matter has to be determined on the adequacy or otherwise of this sign/warning.

The steps that must be taken by a person who is responsible for the creation of a dangerous state of affairs are determined by the following factors. The degree of risk that harm would occur, the nature of harm that would occur and the nature of the preventive measures needed. These factors were spelt out in *Lomagundi Sheetmetal* v *Basson* (1973) where a person who had been carrying out welding operations on the top of a building was rendered liable as a result of the destruction caused by fire sparked by molten metal which had dropped on dry material alongside the building.

It seems clear that the risk that befell Aimless was reasonably foreseeable and also that serious injuries would be caused under such circumstances. Though Aimless had a legitimate desire to get shelter, the warning that had been posted was adequate to put him on his guard. A reasonable person approaching a dilapidated building under windy weather conditions would certainly be on his guard. There was no duty upon the builders/owner to do more than they did i.e. they had no duty to protect a person who falls below the level of a reasonable man.

This case should be contrasted with what happened in *Burton* v *Cotton Research Board* (1950). In that case a new factory had been built and a hazardous alleyway sunken alongside the factory. The factory owner was held liable when a curious member of the public approached the factory at night to look inside and fell into the alleyway. The main difference between these two cases is that no warning sign had been posted in the Burton case and thus no preventive measures had been taken.

In addition, the rule in *Kritzinger* v *Steyn* (1997) adds weight to the above view. In that case it was held that an owner or person in control of property is not liable to trespassers as there is no duty upon him to anticipate the presence of trespassers and avail them protection. This is further fortified by the fact that, as happened in *Langly Fox Building Partnership (Pty) Ltd* v *De Valance* (1991), the owner and builders had actually taken very strong preventive measures to forestall harm.

It should however, be noted that a contrary conclusion is not necessarily out of step with legal principles. This is because the criterion of negligence upon which the law of delict is based is inherently vague and broad.

Whilst authorities seem divided, one can make the following observations:

1. That the builders of the building were in control of a dangerous object (the dilapidated building).
2. That there was a warning which should have been heeded by members of the public including Aimless Murombo.

In light of this and on balance of the warning sign might just be enough to give legal protection to the builders of the building in the event of litigation being mounted against them.

1	**(a)**	3–5 marks	Answers in this bracket will adequately explain the concept of judicial precedent and how it operates as a source of law in Zimbabwe. Citation of case law is important.
		1–2 marks	An average answer.
	(b)	3–5 marks	Answers in this bracket will give a full inventory of the advantages and disadvantages of precedents.
		1–2 marks	A lukewarm answer that is not adequate.
2		7–10 marks	A comprehensive answer which defines and explains the nature of specific performance as a remedy. The discretionary remedy of specific performance has to be underscored and appropriate case law must be cited.
		4–6 marks	An average answer with some omissions.
		1–3 marks	A deficient answer in many respects.
3		7–10 marks	Answers in this bracket would give a comprehensive list of rules and provisions that are meant to preserve the share capital structure of the company. The spirit behind the need to preserve the share structure of the company has to be appreciated and relevant sections of the Act must be cited.
		4–6 marks	Some of the relevant aspects of the answer have not been fully appreciated.
		1–3 marks	An inadequate answer with important omissions.
4	**(a)** & **(b)**	2–3 marks	An answer which accurately defines the major features of a sole trader and partnership business.
		0–1 mark	A poor answer.
	(c)	2–4 marks	A good answer which correctly defines a private business corporation.
		0–1 marks	An average answer.
5	**(a)**	3–5 marks	An answer which comprehensively defines the concept of negligence in relation to the law of delict in Zimbabwe. Citation of relevant case law is a must.
		1–2 marks	A rather lukewarm answer with omissions here and there.
	(b)	3–5 marks	Answers which appreciates the concept of *volenti non fit injuria* and how it operates. Citation of case law is a must.
		1–2 marks	An average answer which does not fully address the pertinent issues.
6	**(a)**	3–5 marks	A comprehensive answer which discusses fully the notion of joint and several liability on the part of partners for partnership debts.
		1–2 marks	A rather deficient answer.
	(b)	3–5 marks	A detailed answer which gives a full recitation of the methods through which a partnership comes to an end.
		1–2 marks	An average answer.
7		7–10 marks	Answers in this bracket should show an appreciation of the various duties which an agent owes the principal. It is imperative to cite relevant case law.
		4–6 marks	An average answer with a few omissions here and there.
		1–3 marks	A rather inadequate answer with very little case law (if any) being cited.

8	**(a)**	3–5 marks	Answers in this bracket would clearly appreciate the concept of the separateness of a company from its shareholders and directors. Citation of case law such as *Salomon* v *Salomon and Company* (1897) is mandatory. On the basis of this concept the conclusion that the two directors Nhidza and Mujere are not liable for the company's debt is inescapable.
		1–2 marks	A rather poor answer which fails to fully appreciate the concept of separate legal personality of a company.
	(b)	3–5 marks	Answers in this bracket would show an appreciation of the fact that dividends can only be declared at the sole discretion of the directors. As a result Simoni's case against the company is very weak. Citation of relevant statutory and case authorities is very important.
		1 –2 marks	A weak answer in which the law relating to dividend payments is not fully understood.
9		7–10 marks	A good answer in which the employment law relating to dismissal is correctly explained. Case law is cited properly.
		4–6 marks	An average answer with weaknesses here and there.
		1–3 marks	A below average answer which has major omissions.
10		7–10 marks	A good answer in which the pros and cons of Aimless Murombo's action against Vavaki Vahombe (Pvt) Ltd are fully explained. Relevant case law relating to the law of delict is cited.
		4–6 marks	An average answer in which appropriate case law has not been cited.
		1–3 marks	A rather weak answer in which the wrong conclusions altogether have been drawn.