Latest update: 23 January 2013

CASES DECIDED JANUARY – JUNE 2012

Cases added since the last update are indicated by a vertical line in the left margin.

Administration of estates – estate – spouse under a putative marriage – spouse's entitlement to a share of the estate

Bhebhe v *Est Bhebhe & Ors* HB-136-12 (Ndou J) (Judgment delivered 14 June 2012)

The deceased B separated from his wife, the second defendant, and thereafter started a relationship with the plaintiff. Notwithstanding the fact that his civil marriage to the second defendant was not yet dissolved, B got "married" to the plaintiff in terms of the African Marriages Act [*Chapter 238* of 1974] (now the Customary Marriages Act [*Chapter 5:07*]). Until his death, B never disclosed to the plaintiff that his civil marriage to the second defendant was still in subsistence.
Before their separation, B and the second defendant had been allocated a stand in a township by the fourth defendant, the Bulawayo city council. On the date B "married" the plaintiff, he applied to the council for a rented dwelling house and recorded the plaintiff as his wife. As B was already the holder of the right, title and interest in and to the first stand number, the council allocated him a stand in another township by simply transferring his right, title and interest in and to the first stand to the second stand. The council issued B and the plaintiff a certificate of occupation and both B and the plaintiff signed it as husband and wife. B was not employed at the time that the second stand was allocated to him.
The plaintiff's case was that she single-handedly contributed towards the requisite deposit and loan repayments to the council through monthly deductions from her salary even up to the date she issued summons. When the second stand was allocated to B it was a four-roomed house. The property was been extended by an additional four rooms. Apart from the plaintiff's own three children by B, the three children B had with the second defendant lived in the house and were brought up by the plaintiff and B. All this was largely through the plaintiff's contributions. She sought an order declaring her marriage to B invalid, as well as an order declaring her the exclusive owner of all the assets acquired by herself personally and in the name of the deceased on the basis of the invalid marriage, including the second stand number. She also sought an order barring the second defendant from laying any claims against any assets that were acquired by plaintiff and the deceased from the date of their purported marriage. Her claim was amended by consent to add an alternative claim that the house be valued and she be awarded 50% of the value of the house.
Held: although the plaintiff was not aware of the existence of a monogamous civil marriage between B and the second defendant, there was no valid marriage between B and the plaintiff as the second marriage was bigamous. By embracing a monogamous regime, B was deemed by law to have waived his customary privileges in respect of polygamy and, for as long as he remained married, to have submitted to the general law of the land. He was precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from absolute incapacity to marry. This meant that B and the plaintiff's "marriage" was in fact a putative marriage. The plaintiff should benefit from the estate. If she did not, it would work an injustice and hardship on the plaintiff who laboured and contributed towards the marriage and the accumulation of the property of the estate under the impression that the marriage was valid. It would unjustly enrich B's estate simply because the property was registered in his name. Indirectly, it would unjustly enrich the second defendant who had made no discernable contribution towards the estate. Just as the provisions of s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] cover putative or bigamous marriages, so too the provisions of ss 3 and 3A of the Deceased Estates Succession Act [*Chapter 6:02*] cover putative marriage, such as the present one. If a putative marriage can give rights to an innocent spouse in her lifetime, it should equally do so after death of the husband. Accordingly, the plaintiff was entitled to the share she claimed of the property.

Administrative law – review – grounds for – *audi alteram partem* rule – breach of – tribunal rejecting one party's submissions in favour of those of party's opponent – not a breach of rule

Decimal Invstms (Pvt) Ltd v *Arundel Village (Pvt) Ltd & Anor* HH-262-12 (Mathonsi J) (Judgment delivered 27 June 2012)

A rent dispute arose between the applicant and the first respondent and was referred to arbitration in terms of the lease agreement. The second respondent was appointed as arbitrator. Following submissions made by both the

applicant and the first respondent, the arbitrator issued an award in terms of which he set the rentals for the leased premises. The applicant was not happy with that award and made an application in terms of article 34(2) of schedule to the Arbitration Act [*Chapter 7:15*] for the setting aside of the arbitral award on the basis that it offends the public policy of Zimbabwe. The applicant argued that the award was in conflict with public policy in that there was a breach of the *audi alteram partem* rule because, although it was given an opportunity to be heard, its submissions were rejected by the arbitrator in favour of those of the first respondent. Secondly, it argued that the arbitrator was biased, as well as having an interest in the cause, given that he was an estate agent himself and therefore benefitted from high rentals in the form of commission. Finally, it argued that the size of the rent increase awarded by the arbitrator was so unconscionable as to induce a sense of shock and that the increase benefitted elitist estate agents and militated against legitimate businesses, forcing them to overprice their goods and services. For that reason it was against public policy.

Held: (1) A tribunal does not breach the *audi alteram partem* rule by rejecting the story of one party in favour of that of its opponent. The rule connotes that both parties must be heard before a decision is taken. Where, in considering the submissions of the parties the tribunal favours those of one of the parties for reasons that it gives, there is full compliance with the rule. To hold otherwise would lead to an absurdity. Even if the arbitrator's conclusion is wrong, that does not equate to a breach of the *audi alteram partem* rule and does not entitle the court to interfere with the award.

(2) The claim that the arbitrator had an interest in the cause was not proved. The arbitrator he was appointed for his expertise as a valuer. It could be said that a valuer has an interest in the cause merely because he gets more commission from high rentals, without showing how this would benefit him.

(3) The court does not exercise an appeal power and cannot either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. In this case, the arbitrator made an award which took into account the perceptions of the market at the time and the ability of other tenants to pay. It could not be said that such an award resulted in the concept of justice in this country being "intolerably hurt".

Appeal – condonation – failure to comply with rules – alleged inadvertence on part of legal practitioner – when may be an reasonable explanation justifying condonation – repeated failure to comply for same reason – not a reasonable explanation

K M Auctions (Pvt) Ltd v *Samuel & Anor* S-15-12 (Gowora AJA, in chambers) (Judgment delivered 5 March 2012)

In October 2008 the applicant appealed against a judgment granted by the High Court. The appeal was not pursued timeously and in October 2010 the applicant filed an application for condonation and leave to file an appeal out of time. The applicant's legal practitioner averred that the notice of appeal which had been drafted by him did not specify if the appeal was against the whole or part of the judgment from the High Court. He also averred that the prayer in the notice was not "specific". He said that the defect on the notice of appeal was due to an oversight on his part. That application for condonation was granted and the matter set down for hearing in January 2012 but was struck off the roll on the hearing date for want of compliance with the Supreme Court Rules. In a further application for condonation, the same legal practitioner averred that the defects in the fresh notice of appeal had also been due an oversight on his part, in failing to check that his secretary had incorporated an amendment which included the matters that had been previously been omitted.

Held: There had been a lack of diligence on the part of the applicant and its legal practitioners. The court could not continue to be encumbered by applications for condonation caused by a legal practitioner's tardy performance of his work. The applicant was represented by a senior legal practitioner with considerable experience who was expected to be familiar with the rules of the court. Negligence or lack of attention to detail on the part of that legal practitioner could not be an explanation that the court should find satisfactory. There is a limit beyond which a litigant cannot escape the results of his lawyer's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of court. The legal practitioner is the representative whom the litigant has chosen himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. The fact that the legal practitioner's conduct caused the delay is not a reasonable explanation in applications such as this,

particularly where previously the applicant has been granted an indulgence in an application also premised on the inadvertent conduct on the part of his legal practitioners.

Appeal – execution ending appeal – application – when court should grant stay of execution – principles

Sub-Saharan Mgmt Consultants (Pvt) Ltd v *Sirituta Invstms (Pvt) Ltd & Ors* HH-249-12 (Chatukuta J) (Judgment delivered 6 June 2012)

The applicant obtained default judgment in the magistrates court for the eviction of the respondents from premises occupied by the applicant. The respondents obtained an *ex parte* order for rescission of the eviction order, as well as an order restoring them to occupation of the premises. The applicant appealed against both orders. The respondents obtained an order from the magistrates court that the earlier decision had been interlocutory and thus that there was no appeal pending, and a further order for the eviction of the applicant. The applicant noted a further appeal, this time against the magistrate's ruling that there was no appeal pending, and sought an order for stay of execution of the order evicting it from the premises. The respondents opposed the application, on the grounds that there was no valid appeal before the High Court. The decisions of the lower court were interlocutory, pending the determination of the applicant's application for the eviction of the respondent, and the applicant ought therefore to have set down the application for eviction.
Held: (1) The whole purpose of stay of execution proceedings pending an appeal is to prevent irreparable prejudice from being suffered by the prospective appellant. In an application of this nature the court must therefore be satisfied that injustice would be caused if a stay is not granted. In considering whether injustice might be occasioned, the court would also have regard to the prospects of success on appeal, the potentiality of irreparable harm or prejudice to either of the parties and the balance of hardship or inconvenience.
(2) If an order sought is effectively a final order, it may not be granted on an *ex parte* basis. Proper notice must be given to the other party. If it is granted, it may not be executed before the return day.
(3) The magistrate issued an order which was final in effect on an *ex parte* basis. While the order appeared to be interlocutory, it was in fact final in effect in that it provided for the ejectment of the applicant from the premises and the reinstatement of the respondents. Once a tenant is evicted from commercial premises through an order of the court, even where the order is wrongful, the tenant cannot regain possession of the premises. The principle is that, although an order may later be found to be wrongful, it is lawful and binding at the time of execution if it has not been set aside.
(4) In any event, the order rescinding the eviction order, even if interlocutory in effect, was appealable in terms of s 39(2) of the Magistrates Court Act [*Chapter 7:10*].
(5) It was not for the magistrates court to pronounce the appeal before the High Court a nullity. The appeal was before the High Court and only the High Court could determine whether or not the appeal was a nullity.

Appeal – noting of – effect – whether suspends judgment appealed against – appeal from arbitrator to Labour Court – award not suspended – appeal from Labour Court to Supreme Court – decision appealed against suspended

Kingdom Bank Workers' Cttee v *Kingdom Bank Financial Hldgs* HH-302-11 (Patel J) (Judgment delivered 10 January 2012)

See below, under EMPLOYMENT (Labour Court – appeal).

Appeal – notice of – defective – notice not complying with requirement to serve notice on respondent – whether High Court can declare notice of appeal a nullity

J G Construction v *Chadwick & Anor* HH-141-12 (Bere J) (Judgment delivered 26 March 2012)

The first respondent obtained summary judgment in the High Court against the applicant, who noted an appeal to the Supreme Court. The notice of appeal was subsequently served on the Registrar of the High Court. Despite the noting of the appeal, the first respondent proceeded with execution, prompting the applicant to lodge an application to interdict the first respondent from continuing with execution pending the finalization of the case. The first respondent argued, *inter alia*, that by failing to serve the notice of appeal on the him, the applicant had not complied with the peremptory requirements of r 29(2) of the Supreme Court Rules 1964, which requires that, once filed or noted, the notice of appeal must be served *inter alia* on the respondent. On that basis, he

contended that the notice of appeal was fatally defective and consequently the appeal itself must be rendered a nullity. The applicant argued that, once it noted its appeal, the first respondent was automatically barred from proceeding with execution in the absence of a successful application to execute pending the outcome of the appeal. It argued that it was not the function of the High Court to deal with the alleged shortcomings or defects in the appeal, but that of the Supreme Court itself.
Held: (1) it was questionable whether it was the function of the High Court to try and deal with the merits or demerits of an appeal, which for all intents and purposes was not before it but was intended for the Supreme Court. In terms of the Supreme Court Rules, that court has a wide discretion in dealing with the matter placed before it. For good and sufficient cause shown, it may decide to condone non-compliance with its own rules (see r 4). The right of granting any indulgence fell within the province of the Supreme Court and not the High Court, which was *functus officio*.
(2) Once an appeal is noted or filed it suspends execution. The High Court Rules provide a remedy in the event of the other party desiring to proceed with execution, despite the noting of an appeal. In the interim, the relief sought would be granted.

Appeal – record – defects in – effect – criminal case – conviction quashed and trial *de novo* ordered

S v *Ncube* HB-112-12 (Ndou J, Makonese J concurring) (Judgment delivered 10 May 2012)

In a criminal appeal, the record of proceedings produced by the trial magistrate was not a full and correct record of what transpired at the trial. The record gave the impression that the prosecutor's real participation in the trial started at his cross-examination of the appellant. The questions asked by the prosecutor and answers by the five State witnesses throughout the state case were not recorded; instead the magistrate merely produced a summary of what he probably believed was important. The appellant argued that this approach was prejudicial to his case as the magistrate left out vital information and that the record made it difficult to see how each witness responded to each and every question asked.
Held: judicial officers who preside at trials in which the facility of a mechanical recorder or shorthand writer is not available have a duty to write down completely, clearly and accurately everything that is said and happens before them which can be of any relevance to the merits of the case. A failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction. A fresh trial before a different magistrate would be ordered.

Appeal – right of – from High Court – application for summary judgment – order giving unconditional leave to defend an action – no appeal lies from such an order

Ashanti Goldfields Zimbabwe Ltd v *Nguwo* HH-58-12 (Mutema J) (Judgment delivered 29 March 2012)

In enacting the provision in s 43(2)(b) of the High Court Act [*Chapter 7*:*06*] that no appeal shall lie from an order of a judge of the High Court giving unconditional leave to defend an action, the Legislature intended to refer only to the granting of unconditional leave to defend in summary judgment proceedings in terms of rr 69 and 70 of the High Court Rules 1971 (RGN 1047 of 1971). Implicitly, from the provisions of s 43(2)(b), where conditional leave to defend is granted in summary judgment proceedings, the right of either party to appeal is restricted to a right of appeal (with leave of the court) only against the conditions imposed.

Appeal – validity – determination of validity of appeal – appeal from magistrates court to High Court – only High Court entitled to determine whether appeal validly before it

Sub-Saharan Mgmt Consultants (Pvt) Ltd v *Sirituta Invstms (Pvt) Ltd & Ors* HH-249-12 (Chatukuta J) (Judgment delivered 6 June 2012)

See above, under APPEAL (Execution pending appeal).

Arbitration – award – labour matter – appeal to Labour Court – award not suspended by noting of appeal

Arbitration – award – registration – labour matter – no relief beyond registration provided for by Labour Act

Kingdom Bank Workers' Cttee v *Kingdom Bank Financial Hldgs* HH-302-11 (Patel J) (Judgment delivered 10 January 2012)

See below, under EMPLOYMENT (Labour Court – appeal).

Arbitration – award – setting aside of – application – no requirement to comply with award before bringing application

Pioneer Tpt (Pvt) Ltd v *Delta Corp Ltd & Anor* HH-18-12 (Gowora J) (Date of judgment 1 January 2012)

A dispute between the applicant and the respondent was referred to arbitration, and the arbitrator made an award against the applicant. The applicant brought an application to have the award set aside in terms of Article 34 of the First Schedule to the Arbitration Act [*Chapter 7*:*15*]. The applicant argued that the arbitrator had acted outside the provisions of the contract, which was contrary to the law on the privity of contracts and therefore contrary to public policy. It also argued that by awarding specific performance in favour of a party who, in terms of the contract, had bilateral obligations which it had itself not performed and was not in a position to perform, the arbitrator had unjustly enriched one of the parties at the expense of the other contrary to the law regarding bilateral obligations, which was also contrary to public policy. Accordingly, the applicant sought the setting aside of the arbitral award. The respondent argued, *in limine*, that the applicant had approached the court with dirty hands and ought not to be accorded a hearing, as, it claimed, the filing of an application for review had not suspended the operation of the award by the arbitrator and the applicant had not complied with the award. The applicant's counter-argument was that to deny it audience and opportunity to be heard would defeat the very basis of art 34. If the applicant were requested by the court to comply with the arbitral award first and then seek an order for its setting aside, any court order granted thereafter would be of academic interest, especially where the first respondent had sought and obtained an award for specific performance.

The second point made *in limine* by the respondent was that the agreement provided that the parties irrevocably agreed that the decision of the arbitrator would be binding upon each of them that the applicant could not have recourse against the award. Alternatively, even if they did have recourse, the application filed did not disclose a cause of action as contemplated in art 34, because only if the award was induced or effected by fraud that it can be said to have been contrary to public policy, and the applicant had made no such allegation.

Held: (1) the right of an aggrieved party under art 34 is unqualified other than that a party is not entitled to bring an application after the lapse of three months after the award has been made. The Act bestows upon a party the right to apply for the setting aside of an award on the grounds set out therein. To require a party to comply with the award before launching an application under the article would be tantamount to denying such party the right to have recourse in terms of the Article. The applicant had taken on review an arbitral award in terms of a right accorded under an Act which does not require compliance with the award before approaching the court for redress. This situation was distinguishable from that where a person who was acting in defiance of a statutory requirement approached the courts. The present case was not a situation where the applicant had dirty hands and was not entitled to be heard.

(2) Under the Act the court is empowered to set aside an arbitral award if the applicant can establish that the award is in conflict with the public policy of Zimbabwe. The concept of public policy covers fundamental principles of law and justice in substantive as well as procedural law. What the applicant needed to establish was that the decision and conclusions reached were so outrageous in their defiance of logic and reasoning that any fair minded person would have a conception that justice in Zimbabwe would be hurt by that award. In the circumstances, the applicant had failed to show meet this requirement.

Arbitration – award – setting aside of – grounds – award contrary to public policy – allegation that reasoning or conclusion outrageous in its defiance of logic – what must be shown

Decimal Invstms (Pvt) Ltd v *Arundel Village (Pvt) Ltd & Anor* HH-262-12 (Mathonsi J) (Judgment delivered 27 June 2012)

See above, under ADMINISTRATIVE LAW (Review – grounds for).

Association – voluntary association – constitution – interpretation – approach to be taken to – flexible approach, to ensure that object of rule in question is achieved

Mudzumwe & Ors v *MDC & Anor* HH-232-12 (Patel J) (Judgment delivered 12 June 2012)

The applicants contended that the congress of the first respondent political party was convened and conducted in violation of the party's constitution in three different respects, namely, the failure to send notices convening the congress to all provinces and districts, defects in the process of nominations for elections at the congress, and the unprocedural conduct of elections at the congress in the absence of the first applicant, the national chairman. They averred that the second respondent usurped various functions and powers vested in other officials and organs of the party for his own political interests and sought an order declaring the congress and all of its outcomes null and void, as well as an order directing the second respondent to reconvene the congress. The respondents averred that notices convening the congress were duly sent and delivered as required and that the procedures governing nominations for elections to the national council were substantially complied with. As regards the elections, they averred no elections actually took place at the congress, as all the appointees to the national council were declared to have been elected unopposed. It was common cause that the first applicant decided to boycott the congress.

Held: (1) In interpreting the constitutions regulating the activities and administration of voluntary associations and organisations, it is necessary to consider whether what was done is in fact what is prescribed in the governing rules, so as to achieve the object sought to be achieved by the rules. To command or compel slavish adherence to every jot and tittle of the rules may not necessarily and invariably secure the fulfilment of the intended objective. In many cases, it may even impede or frustrate that objective. In certain instances, however, strict or exact compliance with the prescribed procedures may be necessary, as in a case where what is at stake is something as fundamental as the amendment of the rules of the association or the dissolution of the association itself. In any event, having regard to the circumstances of each case, a flexible approach may be called for in order to advance the objects that the members of the organisation have associated together to attain. In the final analysis, this purposive or teleological approach commends itself as being the most appropriate one to the interpretation of domestic constitutions generally.

(2) The constitution of the respondent political party provided that a notice convening the congress of the party "shall be sent to all Provinces and Districts by the Secretary General with the approval of the National Council at least one month before the date of the Congress". The verb "to send" ordinarily denotes a variety of actions, *viz.* to consign, convey, direct, dispatch, forward or transmit. Applying any one or more of these synonyms to the words under consideration, taken in their context, they must be construed to mean that the notices in question must be dispatched, forwarded or transmitted to the Provinces and Districts. There was no justification for extending the phrase to encompass the actual receipt of notices by the Provinces and Districts. Apart from deviating from the ordinary grammatical meaning, any such construction would place upon the Secretary General the unenviable and intolerable burden of having to achieve what might be practically impossible to achieve on the ground. Similarly, there was no requirement that notices must be sent to the Districts directly and not indirectly through the Provinces. What matters, at the end of the day, is that notices are in fact sent to the Districts through an appropriate and acceptable form of transmission. There was nothing objectionable in the dispatch of notices to the Districts through the Provincial structures, as happened in this case, in the usual manner of communication within a pyramidal hierarchy.

(3) A person cannot rely on his own wrongful conduct to found a cause of action. Having deliberately absented himself from the congress, the first applicant could not then rely on his absence to argue that all of the proceedings at the congress were a nullity because he was not present in person to chair those proceedings. To allow him to do so would enable him to benefit from his own deliberate abstention to the extreme prejudice of the entire party membership. Indeed, such an approach would render unmanageable the convening and conduct of all political party conferences. It would also allow party leaders to circumvent and frustrate the electoral process and remain in office indefinitely through the simple stratagem of non-attendance.

Company – corporate veil – lifting of – when permissible – companies forming part of a single economic entity – when permissible to treat such companies as a whole instead of as separate units

Barnsley v *Harambe Hldgs (Pvt) Ltd & Anor* HH-84-12 (Mathonsi J) (Judgment delivered 22 February 2012)

The applicant was employed as group engineering director by the first respondent, which represented itself as a holding company, comprising several subsidies, with the second respondent as its chief executive officer. The applicant remained in employment for 11 months, and when he did not receive his salary and allowances in accordance with the employment contract, he referred the dispute to arbitration. An arbitral award was issued in

his favour. He was unable to execute against the first respondent's property to recover the judgment debt because, each time an attachment of property was made, such property was claimed by a third party, one of the holding companies.
Held: The cardinal principle of our company law is that a company enjoys separate legal personality, generally referred to as the legal *persona* principle. For that reason, its property and its liabilities should be maintained distinct and separate from those of its members. However, the courts have always readily lifted the corporate veil where the company is used as a vehicle for fraud or to justify wrong. Although the companies in a group are separate legal entities, the court have in the mercantile context dealt with the group as an economic entity. This lifting of the corporate veil is indicated, especially when a parent company owns all the shares of the subsidiaries, so much so that it can control movement of the subsidies. The present case was a classic one for the lifting of the corporate veil: not to do so would enable the first respondent to rely on its legal personality to defeat a lawful claim, to justify wrong and indeed to protect fraud. If this were to be allowed, an injustice would occur.

Editor's note: see also *Deputy Sheriff* v *Trinpac Invstms (Pvt) Ltd & Anor* HH-121-11 (a judgment of Patel J, delivered 14 June 2011), included in the summaries for 2011 (1), where the corporate veil was lifted in similar circumstances.

Company – director – liability – for acts of company – company in contempt of court order – director not cited in original proceedings – need to show that director was served with or aware of court order before committal for contempt permissible

Zellco Cellular (Pvt) Ltd v *NetOne Cellular (Pvt) Ltd & Ors* HH-32-12 (Gowora J) (Judgment delivered 1 February 2012)

See below, under COURT (Contempt).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 13(1) – right to personal liberty – curtailment of right where there is a reasonable suspicion that person has committed an offence – such suspicion based on information obtained from person by use of torture or inhuman treatment – charge and prosecution consequent thereon – such prosecution a breach of s 13(1)

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 15(1) – prohibition against torture or inhuman or degrading punishment or treatment – "torture" – "inhuman treatment" – "degrading treatment" – meaning – absolute nature of prohibition – person subjected to torture and inhuman and degrading treatment before being charged and prosecuted – such person not *ipso facto* entitled to stay of prosecution – prosecution lawful if based on evidence not obtained in violation of s 15(1) – prosecution not lawful if based solely on evidence obtained in violation of s 15(1) – onus – on whom onus of showing breach of s 15(1) lies – remedies for violation of s 15(1)

Mukoko v *Attorney-General* S-11-12 (Malaba DCJ, Chidyausiku CJ, Sandura JA, Ziyambi JA & Garwe JA concurring) (Judgment delivered 20 March 2012)

The applicant sought a permanent stay of a criminal prosecution because of torture and inhuman and degrading treatment to which she had been subjected by State security agents before being brought to court on a charge of recruiting or attempting to recruit a named person to undergo military training in Botswana in order to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe. She had been subjected, *inter alia*, to repeated beatings on the soles of the applicant's feet with a piece of a hosepipe and a metal object using severe force ("falanga"); being forced to kneel for a long time on mounds of gravel whilst being interrogated; prolonged periods of solitary confinement incommunicado on the occasions she was not being interrogated; being kept blindfolded each time she was out of solitary confinement and not being interrogated; and being blindfolded and driven at night to an undisclosed destination under threat of unspecified action.
It was argued, firstly, that the institution of the criminal prosecution was rendered invalid by the pre-charge ill-treatment to which the applicant was subjected. The manner in which she was apprehended and treated in detention before being brought to court on the charge constituted a violation of her fundamental rights not to be arbitrarily deprived of personal liberty guaranteed under s 13(1) and not to be subjected to torture or to inhuman or degrading treatment protected by s 15(1) of the Constitution. The undisputed behaviour by State security agents in kidnapping her from her residence and subjecting her to torture, inhuman and degrading treatment

whilst she was in their custody for nearly a month rendered the institution of the criminal prosecution an abuse of legal process.
Secondly, it was argued that the decisions made by the public prosecutor to charge the applicant with the criminal offence and to bring the prosecution proceedings were based solely on information or evidence of the crime obtained from her by infliction of torture, inhuman and degrading treatment and that the use of inadmissible information or evidence rendered the institution of the criminal prosecution invalid. The decision to charge the applicant with the criminal offence and the institution of the prosecution of it was not based on a reasonable suspicion of her having committed the criminal offence. The criminal prosecution was therefore not authorised by s 13(2)(e) of the Constitution.
Held: (1) under s 15(1) of the Constitution, the concepts of "torture"; "inhuman treatment" and "degrading treatment" make up the three key elements of the protection of a person's dignity and physical integrity from the prohibited treatment at the hands of public officials. The section enshrines one of the most fundamental values in a democratic society. It is an absolute prohibition which cannot be derogated from by the State even in a state of public emergency. The only derogations allowed are when Parliament, when properly constituted, exercises the power under s 52 of the Constitution to amend, add to or repeal any provision of the Constitution upon strict compliance with the procedure prescribed for the purpose. Using these powers, Parliament has provided six specific instances of treatment of individuals by the State which shall not be held to be in contravention of s 15(1). The fact that torture, inhuman and degrading treatment are prohibited by a peremptory provision serves to render null and void any act authorising such conduct. The prohibition protects the dignity and physical integrity of every person regardless of his or her conduct. No exceptional circumstance, such as the seriousness of the crime the person is suspected of having committed, or the danger he or she is believed to pose to national security, can justify the infliction of torture, or inhuman or degrading treatment.
(2) Section s 15(1) distinguishes between torture on the one hand and inhuman or degrading treatment on the other. The distinction between the notion of torture and the other two concepts lies principally in the intensity of physical or mental pain and suffering inflicted, in respect of torture, on the victim intentionally and for a specific purpose. Torture is an aggravated and deliberate form of inhuman or degrading treatment. What constitutes torture, or inhuman or degrading treatment, depends on the circumstances of each case. The definition of torture often adopted by courts as a minimum standard is that provided under article 1(1) of the United Nations Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment 1987. In terms of this definition, the torture must be inflicted for the purpose of obtaining information or a confession.
(3) Inhuman treatment is treatment which, when applied to or inflicted on a person intentionally or with premeditation, causes, if not actual bodily injury, at least intense physical or mental suffering to the person subjected thereto and also leads to acute psychiatric disturbance during interrogation. Degrading treatment is treatment which, when applied to or inflicted on a person, humiliates or debases him by showing a lack of respect for or diminishing his human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the person's moral and physical resistance. The relevant notions in the definition of degrading treatment are those of humiliation and debasement. The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate or fair treatment.
(4) Not every treatment which causes some discomfort to the person in detention violates s 15(1) of the Constitution, otherwise no one could be arrested, detained and interrogated in the investigation of crime. The treatment must reach the minimum level of severity before it constitutes a breach of the absolute prohibition under the section. The assessment of the minimum level of severity is relative and depends on such factors as the nature and context of the treatment, the manner and method of its execution, as well as the duration of the treatment, its physical and mental effects and in some cases the age, sex and state of health of the victim.
(5) What the applicant had undergone at the hands of State agents constituted a violation of her fundamental right not to be subjected to torture, or to inhuman or degrading treatment.
(6) However, ill-treatment *per se* has no effect on the validity of the decisions to charge the victim with a criminal offence and institute prosecution proceedings against him. It is the use of the fruits of ill-treatment which may affect the validity of the decisions, depending on compliance or non-compliance by the public prosecutor with the requirements of permissible deprivation of personal liberty under s 13(2)(e) of the Constitution. If a prosecution is based on a decision to charge the accused person with the criminal offence which complies with the requirements of permissible deprivation of personal liberty, it is a lawful measure. It cannot be a subject of an order of permanent stay on the ground that the accused person was kidnapped and subjected to torture, or inhuman or degrading treatment before the charge was brought against him.
(7) Failure to comply with the requirements for a valid decision to charge and prosecute an accused person is a violation of the principle of legality or rule of law enshrined by s 18(1) of the Constitution. The principle of legality requires that every decision or act of a public official which affects the rights or interests of an individual must be in accordance with an existing law otherwise it violates the rights of the individual concerned.

(8) Sections 13(1) and 15(1) of the Constitution protect two separate but related fundamental rights. These rights may be violated independently of each other. The infliction of torture or inhuman or degrading treatment on an accused person does not in itself affect his criminal liability. The accused may be a victim of ill-treatment by law enforcement agents whilst at the same time being a villain who has committed a criminal offence. The applicability of a particular constitutional provision should turn on the reasons it was included in the Constitution and the evils it was designed to eliminate.
(9) The existence of reasonable suspicion of the accused person having committed the criminal offence with which he is charged and prosecuted is critical to the determination of the validity of the decisions to charge and prosecute him. A charge is an official act by which notification is given by the competent authority of an allegation that the accused person has committed a criminal offence. It is the existence or absence of reasonable suspicion of the accused person having committed the criminal offence he is charged with which provides an answer to the question whether pre-charge ill-treatment of an accused person had anything to do with the institution of the criminal prosecution. Where the criminal prosecution meets all the requirements of permissible deprivation of the accused person of liberty, it cannot be impugned, even if the accused was kidnapped and subjected to torture or inhuman or degrading treatment before the charge was brought. A fair balance must be struck between the interests of the individual in the protection of his or her fundamental rights and freedoms and the interests of the public in having those reasonably suspected of having committed criminal offences tried and, if convicted, punished according to law. An order of permanent stay of the criminal proceedings cannot be justified by the pre-charge ill-treatment of the accused person; it can only be justified on the ground that there was no reasonable suspicion of the accused person having committed the offence with which he was charged.
(10) This does not mean that the accused person has no remedy for the pre-charge contravention of fundamental rights. Kidnapping a person is a criminal offence. Compensation under s 13(5) of the Constitution is payable to a person who is unlawfully arrested or detained. It is also an appropriate remedy for the redress of a contravention of a fundamental right, available to the court in the exercise of the wide discretionary power under s 24(4) of the Constitution.
(11) Decisions of the courts to decline jurisdiction in situations where the accused had been unlawfully abducted by State agents from another country are not relevant to the present situation and do not justify the court in impugning the validity of decisions by a public prosecutor to charge a person who is resident in the area of jurisdiction of the court with a criminal offence which the court has jurisdiction to hear.
(12) Section 15(1) of the Constitution imposes on the State, through its agents, the obligation not to admit or use, in any legal proceedings, information or evidence obtained from an accused person or defendant or any third party by torture, or inhuman or degrading treatment. That obligation is inherent in the general terms of the section and, like the general prohibition, is absolute and non-derogable. It is an exception to the general rule of evidence set out in s 48(1) of the Civil Evidence Act [*Chapter 8:01*], which states that evidence of violation of a fundamental right or freedom is admissible in legal proceedings unless its admission would bring the administration of justice into disrepute.
(13) At various stages in the whole process, the Constitution imposes duties for the protection of the fundamental rights of the suspect who is the custody of State agents: firstly, law enforcement agents are obliged not to abuse executive authority by torturing or treating suspects in an inhuman or degrading manner to extract information or confessions to be used against them in legal proceedings anticipated to follow the ill-treatment; secondly, public prosecutors have a duty not to admit or use information or evidence obtained from an accused person suspected of having committed a criminal offence or any third party by torture, inhuman or degrading treatment when making prosecutorial decisions; thirdly, a similar duty is placed on judicial officers; and finally, it lies with the Supreme Court to intervene through the exercise of its original jurisdiction to enforce or secure the enforcement of fundamental rights. The rationale for the exclusionary rule is the protection of any person suspected of a crime, who is in the custody of a public officer, from torturous, or inhumane or debasing invasions of his dignity and physical integrity. It has nothing to do with the fair determination of the guilt or innocence of the accused person based on lawfully obtained information. The admission of evidence obtained through the use of torture would compromise the integrity of the judicial process and bring the administration of justice into disrepute.
(14) The onus is on an applicant to establish, on a balance of probabilities, that the information or evidence of the crime used by the public prosecutor to charge him with the criminal offence and prosecute him for it was obtained by the infliction of torture, inhuman and degrading treatment at the hands of the State security agents prior to the charge being brought against him. The reason for this is that it is the accused person or defendant who has to raise the question of contravention of fundamental rights by the State. It is he who would have knowledge of what was done to him and what information was extracted as a result of the ill-treatment. It was then for the State to prove beyond reasonable doubt that the decision to charge the applicant with and prosecute the criminal offence was taken upon consideration of independent information or evidence of the crime lawfully obtained and on which reasonable suspicion of his having committed the criminal offence was based. *In casu*, the applicant discharged the onus on her.

(15) The effect of the finding that the public prosecutor relied on information or evidence of the commission of the alleged criminal acts obtained from the applicant by torture, inhuman and degrading treatment in deciding to charge her with and prosecute her for the criminal offence is that there was a breach of ss 15(1) and 13(1) of the Constitution. The criminal prosecution was a direct consequence of the violation of s 15(1) of the Constitution.

Constitutional law – Parliament – powers – standing orders – need for Parliament to obey such orders – motion passed in breach of standing order – such motion a nullity

Constitutional law – Parliament – privilege – Speaker's certificate – validity – need for certificate to be specific and detailed

Constitutional law – Parliament – staff – Clerk of Parliament – appointment of – appointed by Committee on Standing Rules

Zvoma v *Moyo NO & Ors* HH-23-12 Bere J) (Judgment delivered 20 January 2012)

The applicant, the Clerk of Parliament, filed an application seeking an interdict against the respondents, to prevent them from moving or accepting any motion from any member of the House of Assembly to dismiss him without the matter of his dismissal first being brought before the Committee on Standing Rules and Orders (CSRO) or its sub-committee or some other independent and impartial disciplinary authority. Members of Parliament had continued to debate the alleged shortcomings of the applicant when his matter was already awaiting determination in the High Court and passed a motion for the applicant's dismissal. The first respondent, the Speaker of the House, issued a certificate of privilege which, the respondents argued, ousted the jurisdiction of the court. The applicant argued that the certificate should not be accepted as it breached s 62(d) of the House of Assembly Standing Orders, which precluded members from debating or referring to any matter on which a judicial decision is pending. The applicant also argued that the certificate of privilege must be specific in its disclosure of the matters of privilege that it seeks to be protected and that the court should not have to speculate on such issues. The applicant also argued that the only body that supervised him in the execution of his duties was the CSRO, chaired by the Speaker, and that it was this committee which was mandated to initiate disciplinary proceedings against him should the need arise. He argued that s 48(2) of the Constitution, under which he was appointed, did not preclude s 57 of the Constitution, the House of Assembly Standing Orders, Officers of Parliament (Terms of Service) Regulations 1977 and the Labour Act [*Chapter 28:01*] from regulating his employment relationship with Parliament.

Held: (1) the court is empowered to consider the jurisdictional basis of a certificate of privilege first before it can be accepted to stay proceedings. The certificate produced was completely silent on detail and thus was incapable of ousting the jurisdiction of the court.

(2) The rules of natural justice would be seriously eroded if the applicant's dismissal were to be initiated by members of Parliament instead of by the CSRO which appointed him in the first place. He who hires must be empowered to fire or initiate disciplinary proceedings. The CSRO is provided for by s 57 of the Constitution of this country and may not be subordinated to any other committee appointed by the respondents in terms of their amended motion.

(3) While the three arms of government – Parliament, the executive and the judiciary – are separate and independent of each other in so far as the exercise of their powers is concerned, the power enjoyed by Parliament is not absolute. If it were, that would mean that Parliament would do virtually everything it desired with impunity, including violating its own rules and regulations to the detriment of its citizen. Under standing order 62(d), when a matter is pending before the courts or when a matter is *sub judice*, House members are obliged to respect the court process until a determination on that matter is made. The order did not mean that the members of the House can only be stopped from debating the issue if at the time there was a court order barring them from so acting. That disobedience by the House to its own standing orders must be visited with "nullity" over what it did.

(4) The applicant, being a constitutional appointee, was not covered by the Labour Act and his attempt to seek refuge in the Labour Act was misplaced. Section 3(1) of the Act made that quite clear. However, the legislature had given the CSRO the mandate to appoint the applicant and consequently the power to supervise him and other staff of Parliament. The CSRO was the administrative arm of Parliament and only it had the power to initiate the dismissal of the applicant by following due process. It followed that members of Parliament lacked *locus standi* to initiate, debate and vote on a motion to determine the fate of the applicant.

(5) The motion was simply to dismiss the applicant, but as it stood had no provision for proper disciplinary proceedings. The right to be heard is one of the core values of the rules of natural justice. The Officers of

Parliament (Terms of Service) Rules 1977 were approved by Parliament in terms of s 48 of the Constitution. These rules cover in sufficient detail the appointment procedure and conditions of service, including the procedure to be adopted in the termination of the employee's service should the need arise. There is no provision for the CSRO through the Speaker of the House of Assembly to relinquish or to delegate its administrative functions to the ordinary members of Parliament. Only when the CSRO has conducted a proper inquiry against the applicant and the applicant found to be guilty can the speaker then advise Parliament in terms of s 48(2) of the Constitution; and it is only then that the House can then resolve to have the applicant removed.
(6) The appointment by the House of a special committee to consider the applicant's case did not rectify the situation. The committee's terms of reference made it impossible for the committee approach the inquiry with an open or impartial mind; its mandate was simply to find the applicant guilty and consider the nature of punishment to be meted out. Such an approach would be a clear violation of the applicant's constitutionally recognised right to be afforded a fair hearing before an impartial body.

Contract – breach – remedies – specific performance – when may be refused – defendant not suffering any loss – specific performance should be granted

Astra Steel & Eng Supplies (Pvt) Ltd v *PM Mfg (Pvt) Ltd* HH-393-12 (Mutema J) (Judgment delivered 11 June 2012)

The *contra proferentem* rule, which requires a written document to be construed against the drafter on the ground that it was for him to express himself in plain terms, is invoked only where there is ambiguity in the use of a word or choice of expression leaving one unable to decide which of two meanings is correct. One must not use the rule to create the ambiguity – one must find the ambiguity first.
The plaintiff sought specific performance against the defendant for the delivery to it of 2000 tyres. The parties had entered into a written contract in terms of which the defendant, as the supplier, undertook to supply 2200 tyres to the plaintiff, as the customer. Payment was made in full. The tyres were not delivered by due date and the plaintiff demanded delivery. It was then contacted by a third party, which said that it was the defendant's supplier. The plaintiff also saw an acknowledgement of debt from the third party to the defendant in respect of 2200 tyres. The plaintiff did not deal with the third party, though a few months later 200 tyres were delivered by the third party.
The defendant argued that the plaintiff had entered into a tacit contract with the third party, thereby novating the agreement between itself and the plaintiff.
Held: (1) the agreement between the plaintiff and the defendant was clearly one of sale. It being common cause that the plaintiff fulfilled its part of the contract while the defendant breached its contractual obligation by failing to deliver the tyres, it followed that the defendant was liable. It was idle the defendant to urge the court to find a tacit contract between the plaintiff and the third party. Having regard to the express terms of the agreement, there is no room for importing the implied term alleged by the defendant. It could not be argued that the plaintiff knew that the defendant was not in the business of tyres, therefore the former entered into a tacit contract with the third party. For a *stipulatio alteri* to exist, the stipulator and the promiser must intend to create a right for the third party to adopt and became a party to the contract. Until acceptance of the benefit by the third party takes place, the contract remains one between the actual parties.
(2) Whilst the court retained a wide discretion to withhold the grant of specific performance, a wronged party to a contract had a right to select his remedy, and the court would enforce that right unless there were compelling circumstances to refuse the remedy and award damages only. The onus is on the party seeking to avoid specific performance to establish the facts and circumstances which the court should consider in the exercise of its discretion to refuse specific performance. The circumstances *in casu* were such that it would be an improper exercise of discretion to refuse specific performance thereby allowing the defendant to eschew its contractual obligations. The defendant had been paid in full and had obtained a default judgment against the third party for delivery of 2000 tyres, alternatively, damages representing the value of the tyres as at the date of judgment. Accordingly, the defendant would not feel any loss and specific performance would not operate unduly harshly on it at all.

Contract – formation – offer and acceptance – need for acceptance to be unequivocal – offeree recalculating purchase price – offeree thereby leaving negotiations open – no contract formed

P G Industries (Zim) Ltd v *Machawira* HH-255-12 (Mathonsi J) (Judgment delivered 20 June 2012)

When the respondent resigned from her employment with the applicant, she asked whether she could purchase the car that had been allocated to her. She received a letter from the applicant, which stated that she could purchase the motor vehicle for 10% [*sic*] of the market value less 10% or at net book value, whichever was the lesser. The letter then set out the sum that she should pay. The respondent, instead of accepting the offer made by the applicant as it was, re-calculated what she considered to be the purchase price, a figure that was 10% of the amount asked for by the applicant. The applicant refused to accept that figure, refunded the sum the respondent had paid and demanded the immediate return of its motor vehicle. When the respondent failed to return the vehicle, the applicant filed an urgent application seeking an order directing the respondent to surrender the vehicle. The respondent argued that she exercised her option to purchase the vehicle in terms of the existing policy of the applicant.

Held: for a contract to exist, the parties must be of the same mind, there must be a coincidence of wills or *consensus ad idem*. In determining whether such meeting of the minds occurred, a court is not equipped with a magical crystal ball but must find the answer from the conduct of the parties. It is also trite that for a contract to exist there must be an offer made by one party which is accepted by the other. For an acceptance to conclude a contract, it must be unequivocal. A purported acceptance in the form "Yes, but …" will not do, because by seeking to add to or subtract from the terms of the offer it does not create the necessary agreement but leaves the negotiations still open. The respondent did not give an unequivocal acceptance. In fact, she did not accept the offer at all. She said she had recalculated the price, which then left the negotiations wide open and did not result in a coincidence of wills or a contract of purchase and sale. Until such time that an agreement was reached, the applicant was entitled to the motor vehicle.

Contract – formation – offer and acceptance – need for offer to be positive and unambiguous – need for court to ascertain from external facts whether minds of parties had come together with requisite *animus contrahendi*

Victoria Falls Municipality v *Nyathi & Ors* HB-2-12 (Ndou J) (Judgment delivered 19 January 2012)

The plaintiff sought the eviction of the defendants from the various houses they occupied in the town of Victoria Falls. The plaintiff claimed that these were pool houses for use by the plaintiff's employees and that the defendants were given these pool houses by virtue of their employment with plaintiff. It was further contended that upon termination of such employment, each individual defendant will cease to occupy the property in issue. The defendants' counter claim was for an order directing the plaintiff to take all necessary steps to transfer the various stands to each defendant on the basis that the defendants purchased the stands on a rent-to-buy scheme.

Held: Agreement by consent is the foundation of contract. In order to decide whether a contract exists one looks first for the true agreement of two or more parties and, because such agreement can only be revealed by external manifestations, one's approach must of necessity be generally objective. The court can only judge from external facts whether the minds of the parties have come together. The most helpful way of determining whether there has been agreement, true or based on quasi-mutual assent, is to look for an offer and an acceptance of that offer. A binding contract is as a rule constituted by acceptance of an offer. But offer and acceptance must never be sought for their own sake but as aids in deciding whether an agreement has been reached. A true offer means an express or implied intention to be bound by the offeree's acceptance – the *aminus contrahendi*. The offer must be unequivocal i.e. positive and unambiguous.

Looking at the evidence led by the plaintiff there was no meeting of minds that these houses were being sold to the defendants. There was no such offer to the defendants. The rent cards produced did not constitute an offer made with the requisite *animus contrahendi*. There were no unequivocal offers of sale made to the defendants. That fact it was not easy to ascertain the alleged purchase price points to the relationship between the parties as being one of lease and not purchase and sale. On the evidence, there was no agreement by consent or true agreement, or a meeting of minds, or a coincidence of wills, or *consensus ad idem* between the parties and the only credible explanation is that these houses were pool houses for use at the discretion of the plaintiff. The plaintiff was therefore entitled to the order it sought.

Contract – interpretation – *contra preferentem* rule – when may be applied – need for ambiguity to exist

Astra Steel & Eng Supplies (Pvt) Ltd v *PM Mfg (Pvt) Ltd* HH-393-12 (Mutema J) (Judgment delivered 11 June 2012)

See above, under CONTRACT (Breach – remedies).

Contract – sale – option – when option can be said to exist – need for certainty in terms – where offer is vague or capable of more than one meaning, no option exists

Firstel Cellular (Pvt) Ltd v *Sefaidiga & Anor* HH-70-12 (Hungwe J) (Judgment delivered 22 February 2012)

An option is an "offer" which is irrevocable by the grantor during the period stipulated in the contract or, if there is no such provision, within a reasonable time. If the option is exercised, the potential contract contemplated by the parties to the option agreement is complete. The option holder has merely to accept the offer in the manner and within the time prescribed by the contract, and a new contract comes into existence between him and the other party. An option constitutes nothing more than an offer coupled with an arrangement (express or implied) to keep the offer open for a certain period of time. It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, it must be made with the intention that, when it is accepted, it will bind the offeror. If an offer, which is an essential element of any option, is vague or at all capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby convert it into a binding contract. Where there is an "offer" which provides that certain terms were to be "renewed" or to be "negotiated" or to "stand over" for decision at a later stage, then, pending agreement on such outstanding terms, neither party has any rights against the other. Similarly, where no time is specified and no price is fixed or ascertainable, no option can be said to exist.

Contract – sale – validity – jointly owned matrimonial property – wife not consenting to sale – sale to innocent purchaser – whether specific performance should be granted – wife having right to her share of sale price – specific performance granted to purchaser

Stupendis Entprs (Pvt) Ltd v *Kasi & Ors* HH-72-12 (Hungwe J) (Judgment delivered 22 February 2012)

The applicant company bought a house from the first two respondents, who were husband and wife. Litigation ensued over the sale, and default judgment was obtained, ordering the transfer of the property to the applicant. The default judgment was rescinded on the application of the wife. The applicant then sought specific performance of the contract of sale. The wife objected, on the basis that she was joint owner of the property and had not agreed to the sale and that the power of attorney in which she had purportedly agreed to the sale was a forgery. She averred that the marriage had foundered and that a divorce was pending.

It was argued for the applicant that the court should order specific performance as the wife would not suffer any prejudice since she could still call upon the husband to account for the sale of the proceeds of the sale of the matrimonial assets in the pending divorce action. Since at common law she was regarded as co-owner of the asset in issue, she would be entitled to a share in the property proportionate to her shareholding. The husband need not have obtained his wife's consent before disposing of his half-share and the sale of his half share to the applicant could not be impugned. If the applicant did not obtain transfer, the result would be that the applicant, a company, and the wife would become co-owners of a residential property, which would be absurd.

The wife applied for an order declaring the sale to be null and void.

Held: a co-owner may not purport to alienate the property which is jointly co-owned without the consent of the other owners; and that alienation of jointly owned property can only be effected by the joint action of all the owners. However, there may be circumstances in which a court may be called upon to consider whether or not to recognise an alienation which violates this principle of law. A common occurrence of such a circumstance occurs in matrimonial property, where a court, in the interest of justice and fair play, has the power to take part of a spouse's share in property jointly owned to give it to the other spouse if, by doing so, it could place the spouses in the position they would have been had a normal marriage relationship continued between them.

In this case, the husband misrepresented that he had the power of attorney to enter into the agreement of sale in respect of his wife's half share in the property. However, the applicant had no reason to suspect that there was such a misrepresentation and there was no reason to find that the applicant was not an innocent party. A plaintiff is always entitled to specific performance and, if he makes out a case, his claim will be granted, only subject to the court's discretion. Although this discretion must be exercised judicially, it is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.

In favour of the granting of an order of specific performance were the following: (a) the applicant entered into the agreement of sale without any suspicion that the first defendant may have forged his wife's signature to the agreement; (b) the applicant had made full payment for value to the husband, who was obliged to disgorge his ill-gotten gains in favour of his estranged wife; (c) in view of the pending divorce proceedings, the wife would not suffer any prejudice by making a claim for her share in those proceedings, taking into account the findings against her husband made in this matter; and (d) the balance of convenience favoured the applicant.

Contract – *stipulatio alteri* – formation – need for contracting parties to intend to create right for third party and for third party to accept benefit of contract

Astra Steel & Eng Supplies (Pvt) Ltd v *PM Mfg (Pvt) Ltd* HH-393-12 (Mutema J) (Judgment delivered 11 June 2012)

See above, under CONTRACT (Breach – remedies).

Contract – validity – exemption clause in contract – clause purporting to indemnify one party against all claims – only entitled to be protected in respect of honest mistake or honest representations

Musundire v *OK Zimbabwe* HH-94-12 (Bere J) (judgment delivered 6 March 2012)

The plaintiff took part in a promotional draw sponsored by the defendant company, having bought various groceries at one of the defendant's shops, as a result of which he got coupons enabling him to participate in the competition. He and a few other persons emerged as the winners of the items on offer and they were invited to a presentation ceremony. At the hotel where the ceremony was to take place, he two of his colleagues (also winners of the promotion) were lured into a car and arrested for having committed fraud in the acquisition of the coupons which they had used in participating in the competition. For the next four days they were shoved from one police station to another, and made to endure extremely difficult and painful experiences as they were forced to sleep in squalid condition, being routinely transferred barefoot and in handcuffs. The arrest had been instigated by the defendant's risk and services manager, a former senior police officer. He had received an anonymous telephone call alleging fraud involving coupons for the competition. He had not investigated the veracity of the allegation before having the plaintiff arrested, nor had he investigated the plaintiff's explanation of his innocence. The plaintiff and the other arrested persons were released only after the manager had submitted an affidavit which established the plaintiff's innocence in the whole exercise. The plaintiff claimed damages for defamation, *injuria* and *contumelia*, and unlawful arrest. The claim in respect of defamation was abandoned. The defendant argued that the plaintiff could claim for *injuria* and *contumelia* or for unlawful arrest, but not under both heads. It was also argued that the defendant was not liable because of a clause in the competition rules, which read: "All participants and winners indemnify [the defendant], the advertising agencies and partners against any and all claims of any nature whatsoever in the promotion (including as a result of any act or omission, whether negligent or otherwise on the part of [the defendant]."
Held: (1) in a claim for damages one may not refer to unlawful arrest without triggering the aspect of the injury to the plaintiff's feeling caused by such an act. Damages for unlawful arrest are awarded in recognition of the *injuria* associated with that unlawful conduct. It would be quite superfluous to claim for *injuria* under one heading and unlawful arrest under another heading. The claim should basically be under one heading.
(2) The courts will protect the public from the worst abuses of exemption clauses by setting limits to the exemptions they will permit and by interpreting exemption clauses narrowly. Contractual conditions by which one of the parties engages to verify all representations for himself and not to rely upon them as inducing a contract must be confined to honest mistake or honest representations. However wide the language, the court will cut down and confine its operations within these limits. The risk manager was both reckless and malicious in the manner he dealt with the plaintiff and the defendant should not be allowed to avoid liability by seeking refuge in the exemption. Allowing it to do so would offend public policy considerations which demand that innocent and unsuspecting individuals be protected by the law.

Costs – legal practitioner and client scale – when may be granted – unsuccessful party's conduct completely unreasonable

Zimbabwe Online (Pvt) Ltd v *Telecontract (Pvt) Ltd* HH-206-12 (Mutema J) (Judgment delivered 9 February 2012)

Whilst the courts will not lightly accede to a prayer for an award of costs on a legal practitioner and client scale, such an award will be granted where the unsuccessful party's conduct has been completely unreasonable and reprehensible. Where a party's attitude has been that of a man who has deliberately and stubbornly refused to bring a dispassionate mind to bear on the dispute, which could have been resolved quite amicably and inexpensively if he had showed the slightest co-operation, it would in such circumstances be quite unfair for the

successful party to be put out of pocket in the matter of costs. The party's conduct could rightly be described as vexatious or reckless or frivolous, any one of which could be a ground for the award of costs on the higher scale.

Costs – taxation – review – when taxing master's decision may be interfered with on review – whether strict compliance with r 314(2) of the High Court Rules is necessary before court may consider grievance

Medical Invstms Ltd v *Daka NO & Anor* HH-279-12 (Kudya J) (Judgment delivered 29 June 2012)

The applicant sought a review of the taxing officer's decision in which she declined to consider the costs incurred by the deputy sheriff in effecting an order of execution. The High Court had granted judgment in favour of the applicant against the second respondent requiring her to hand over a certain motor vehicle, failing which the deputy sheriff was empowered to seize the vehicle. The deputy sheriff made 5 abortive visits to the second respondent's premises in order to seize the vehicle, which was later handed over by the second respondent herself. She disputed the sum charged by the deputy sheriff for his visits. The taxing officer agreed with the second respondent that the attempts at execution by the deputy sheriff infringed r 322 of the High Court Rules, in that they were not carried out under a writ of execution. The second respondent, in answer to the current application, argued that the applicant had not complied with r 314(2) of the Rules, which requires that "the court application shall specify the items forming the subject of the grievance".
Held: (1) the court has power to interfere with or alter a taxing master's ruling on two grounds: (a) on the application of common law rights on review which involve a finding that he was grossly unreasonable or erred on a point of principle or law. In such a situation the court would be at large and entitled to substitute its opinion for that of the taxing master. However, even when such grounds for interference exist it need not follow that the taxing master's decision must necessarily be set aside or altered. (b) Even if there is no common law ground for interference, the court has a duty to interfere if satisfied that the taxing master was clearly wrong in regard to some item.
(2) The wording of the High Court's order did not require that a writ of execution be raised before the deputy sheriff could execute. The court had the authority under r 4C to depart from r 322. The wording of the order indicates that it did so. It specifically empowered the deputy sheriff to dispossess the second respondent of the motor vehicle. Had the court wanted the applicant to execute through a writ, it would not have empowered him to seize the vehicle in the order.
(3) The disallowed fees of the deputy sheriff could very well have been necessary execution costs properly incurred in giving effect to the court order. The taxing master was legally bound by the court order to consider them in terms of r 307.

Court – contempt – contempt committed *in facie curiae* – summary punishment for – procedure to follow – need for formality and to observe *audi alteram partem* rule – approach court should take – when alleged contempt should be ignored

S v *Dube* HB-133-12 (Ndou J) (Judgment delivered 31 May 2012)

The magistrate presiding over civil proceedings adjourned the court after the parties claimed that they needed an interpreter for another language, as they were not conversant with the languages spoken by the court interpreter. In the corridor outside the court, the accused was allegedly heard by the interpreter to have uttered words to the effect that the court was "fake". This was reported to the magistrate, who had the accused brought into court, where the interpreter made an unsworn statement about the incident. The accused gave a different story, saying that his remarks were directed at the parties, because, he said, they could speak the language spoken by the interpreter. The magistrate nonetheless convicted the accused of contempt of court and sentenced him to 7 days' imprisonment. On review:
Held: the alleged offending words having been uttered outside the court and in the absence of the magistrate, the alleged contempt was committed *ex facie curiae*. In the case of contempt committed *in facie curiae*, the magistrate would have heard the offending utterances himself and there would be no need for evidence to introduce the contemptuous utterances. Where the magistrate was not privy to the contemptuous utterances, some degree of formality would be required to bring the offender before the court and put the allegations to him and allow him to challenge the witness's statement. The *audi alteram partem* principle applies to all cases in which magistrates try an offender summarily for contempt of court in terms of s 71 of Magistrates Court Act [*Chapter 7:10*]. In any event, magistrates should summarily convict for contempt of court only as last resort and when it is absolutely necessary. Very often, conduct which, strictly speaking, constitutes contempt of court can quite fittingly merely be ignored without really impairing the dignity or the authority of the court or the orderly

conduct of the proceedings. Too liberal a use of the court's powers to punish persons for contempt can undermine the very reason for the existence of such power. A restrained reaction to insult should be the first step in the process of asserting the decorum of the court where contempt occurs *in facie curiae* because the judicial officer acts to protect his office and not himself personally. Trivial instances of contempt are best ignored.

Editor's note: in view of the provisions if s 9A of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the proceedings in this matter were probably invalid from the outset. The section provides that, while a court or tribunal may "may, on its own motion, institute proceedings for contempt of court against any person who is alleged to have impaired its dignity, reputation or authority *in the presence of* the court or tribunal" (italics supplied), proceedings for contempt in other circumstances (i.e. *ex facie curiae*) may only be instituted by the Attorney-General or someone acting on the express authority of the Attorney-General.

Court – contempt – failure to obey court order – application for order holding respondent in contempt – what applicant must show – need to show that respondent was served with or aware of court's order – company director – not cited in original proceedings – application against – need to show that director was served with or aware of order

Zellco Cellular (Pvt) Ltd v *NetOne Cellular (Pvt) Ltd & Ors* HH-32-12 (Gowora J) (Judgment delivered 1 February 2012)

The applicant sought orders holding the respondents in contempt of court, following the disobedience by the first respondent, a company, to an order granted against it. The second and third respondents, who were respectively the chairman and managing director of the first respondent, and the fourth respondent, who was the company secretary, had not been parties to the initial litigation but were cited in the current application.
Held: The principal object of contempt proceedings is to compel compliance by a party to an order given by a court of competent jurisdiction. Before an applicant can be granted an order for committal on the basis of contempt of an order of court, he must establish (a) that an order was granted against the respondent; (b) that the respondent was either served with the order or informed of the grant thereof against him and can have no reasonable ground for disbelieving that information; and (c) that the respondent has either disobeyed the order or neglected to comply therewith. A party cannot be found to be in contempt of an order which has not been addressed to it or which has not been served upon it. The provisional order granted against the first respondent was an order *ad factum praestandum,* that is, an order to do or refrain from doing a thing. By its nature, such an order is an order *in personam* and consequently is only binding upon the person against whom it has been issued.
An officer of a company is not liable for acts done by the company unless he is a member of the board of directors. Thus, no liability attached to the fourth respondent.
The affairs of corporate entities are managed and run by their directors and any disobedience of court orders must be attributed to the directors of the company. A corporation can only comply with a court order through its officers. Thus it can be convicted of contempt if its officers have refused or neglected to comply with the court order. A person who also contributes to the commission of the offence, can, without being a principal, be punishable as an accomplice. Consequently, a director who has knowledge of the order and causes the company to refuse to obey the order is guilty of contempt. Since the applicant was seeking an order for the incarceration of the second and third respondents, it should have ensured that the court order be served upon each of them personally. It did not do this. It addressed a letter to the fourth respondent, but there was no evidence that the second and third respondents themselves received copies. The applicant had thus failed to establish personal knowledge of the order on their part and a wilful decision to disregard it or disobey it.

Court – contempt – failure to obey court order – when application for holding defaulter in contempt may be granted – order must be one *ad factum praestandum* – need for court to determine true nature of order granted – failure to obey orders *ad pecuniam solvendam* not punishable as contempt – need for court also to consider whether order *ad factum praestandum* can be complied with and whether other remedies available

Evans & Anor v *Surte & Ors* S-4-12 (Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 13 February 2012)

Orders of court are, generally speaking, divided into two categories: orders to pay a sum of money, namely, orders *ad pecuniam solvendam*; and orders to do, or abstain from doing, a particular act, or to deliver a thing, namely, orders *ad factum praestandum*. The remedy of committal for contempt is available only in the latter

category of cases. These definitions notwithstanding, the distinction between the two types of orders is in practice not as clear cut as it may seem. Thus, certain orders for the payment of money, namely maintenance orders (which one would have regarded as orders *ad pecuniam solvendam*) have been classified by the courts as orders *ad factum praestandum* on the basis that they are not really money orders at all. Essentially, they are orders that the defendant do something, namely, maintain the wife or the children. The key determinant is not the act directed but the nature of the obligation to be enforced. Where the true nature of an order was one for the payment of a debt, albeit in kind, the fact that the court ordered the delivery of fuel would not convert the order from an order for payment of a debt into an order *ad factum praestandum*. In view of the dire consequences attendant upon the failure to obey an order *ad factum praestandum*, namely, committal to prison, before granting an order which is *ad factum praestandum,* a court ought to satisfy itself as to the ability of the defendant to comply with the order, otherwise it takes the risk of issuing a hollow and unenforceable order. Another consideration is that orders *ad factum praestandum* are usually granted only where there is no other remedy available to the applicant, the rationale being that the successful party has other options to enforce an order *ad pecuniam solvendam*.

Court – customary law court – jurisdiction – powers of court limited by Customary and Local Courts Act [*Chapter 7:05*] – matters over which court has jurisdiction – venue of court – court only entitled to sit at place fixed in terms of Act

Court – customary law court – process – where and by whom summons must be served – service must be by messenger of court and at place within court's jurisdiction – any other service fatally defective

Court – judicial officer – conduct – presiding officer at customary law court cited as plaintiff in summons – impermissibility of such action – process fundamentally flawed

Nyikadzino v *Tsvangirai* HH-166-12 (Patel J, Kudya J concurring) (Judgment delivered 25 April 2012)

An action was brought against the defendant, the Prime Minister, arising from a highly publicised customary law marriage that occurred in November 2011. It was claimed that the marriage was taboo because it took place in November, a "sacred" month under customary law. One Chief Negomo personally served summons on the defendant in Harare, requiring him to attend his court at a named business centre. The chief himself was cited as the plaintiff in the summons. Although the defendant's lawyers questioned the chief's authority and jurisdiction on various grounds, the chief proceeded to hear the matter, in which another person was now named as plaintiff. This person claimed two bovines and two sheep from the defendant, on the grounds that the defendant had got married in November, which was taboo, the spirits needed appeasement and the rains had failed to fall. The chief found against the defendant, who was in default. A local magistrate confirmed the proceedings, but when the defendant's lawyers wrote requesting that the matter be reviewed, the provincial magistrate found several flaws in the proceedings, but because another magistrate had confirmed them referred the matter to the High Court. The defendant's lawyers raised several issues about the chief's authority and jurisdiction: (i) that the summons that he issued cited him as both presiding officer and plaintiff; (ii) that service of the summons was effected unlawfully outside his area of jurisdiction; (iii) that he is not authorised to convene a local court and the business centre was not a designated court; and (iv) that he did not have jurisdiction over the defendant by dint of residence, consent or cause of action.

Held: (1) the summons cited the chief as the plaintiff, while in the record of proceedings the other person was named as the plaintiff. There was nothing to explain this change in identity of the plaintiff. In any event, and more critically, the citation in the summons of the plaintiff and the presiding officer as being one and the same person was an affront to every acceptable notion of justice and procedural fairness. Indeed, it hearkens back to feudal forms of justice that have no place whatsoever in any modern legal system. It should be blindingly obvious to any judicial officer that he cannot institute a claim or complaint and also adjudicate it himself. It followed that the summons issued by the chief was fundamentally flawed.

(2) It is clear from r 4 of the Local Courts Rules 1991 (SI 115 of1991) that a summons may only be served by the messenger of court, and not by the presiding officer; and that the messenger must serve the defendant (or other responsible person) at his residence or place of work only within the area of jurisdiction of the court. Service of the summons was thus irregular and fatally defective, and the defendant could not be held to have been "in wilful default" as was determined and recorded by the chief's court.

(3) Every community court, being a creature of statute, is subject to the strictures not only of the Customary and Local Courts Act [*Chapter 7:05*] but also of its subsidiary legislation. Whatever powers chiefs' courts may claim by anointed custom and tradition, such powers must be closely circumscribed and exercised within the confines of the constitutive provisions that presently govern their functions. This must also apply to the places of sitting fixed by statute: firstly, because the location fixed and published by warrant enables litigants and other

affected members of the public to know precisely where to attend the sessions of the court; and secondly, to permit a chief to choose any place of sitting that he deems fit may well lead to the selection of a *situs curiae* that is entirely inappropriate and inconsistent with the dignity and decorum of judicial office.
(4) In terms of s 15 of the Act, the criteria for founding the jurisdiction of a local court are (a) normal residence by the defendant within the area of jurisdiction of the court; (b) that the cause of action or any element thereof arose within that area; or (c) the defendant's consent to jurisdiction. These criteria are clearly disjunctive and not conjunctive, so that the establishment of any one of them suffices to found jurisdiction. Two of these criteria were absent *in casu* but there was nothing in the papers relating to the origin of the cause of action.

Editor's note: s 15 of the Act states that a local (customary law) court has jurisdiction in a matter "in which customary law is applicable" if any one of the three criteria mentioned in the judgment are present. Under s 3(1)(a), customary law is applicable where –

> "(i) the parties have expressly agreed that it should apply; or
> (ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
> (iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply".

In every other case, the general law of Zimbabwe applies. The issue of whether customary law was in fact applicable in this matter was not determined.

Court – judicial officer – when *functus officio* – magistrate granting bail – becomes *functus officio* when determination on bail is made – no basis on which to recall decision

Khumalo & Anor v *Mukondiwa-Mazhandu NO & Anor* HB-68-12 (Ndou J) (Judgment delivered 8 March 2012)

The applicants were granted bail by the first respondent. The prosecutor was not opposed to the granting of the bail. For some reason the first respondent wanted the prosecutor to check with the police. This was done and the prosecutor indicated that the police were not opposed to the granting of bail. The first respondent granted the application, but in spite of the applicants' relatives having paid the bail money, the applicants were not released. It emerged that the first respondent had directed the prison staff at the courts not to release the applicants. She had done this, she said, because the police were alleging that she had been bribed by the applicants' relatives. It was this approach by the police that caused her to revoke the bail that she had granted earlier on.
Held: when the first respondent granted bail, she then became *functus officio*. There was no legal basis for denying the applicants their liberty. If the police or the applicants' relatives alleged that she had been bribed, that was not a legal ground to recall the matter and alter the decision that she had already taken. She should have dealt with the allegations of bribery levelled against her without denying the applicants their liberty. Magistrates should not be having informal discussions elsewhere on issues that took place in court.

Court – magistrates court – jurisdiction – divorce – court having no jurisdiction to deal with divorce other than in respect of a registered customary law marriage – claim under general law – must be within court's monetary jurisdictional limit

Mauchaza v *Nota* HH-120-12 (Gowora J, Patel J concurring) (Judgment delivered 28 March 2012)

The respondent (plaintiff in the court *a quo*) issued summons in the magistrates court against the appellant (defendant) claiming "sharing of property." The summons was in the form used for instituting divorce proceedings in the magistrates court for the dissolution of a marriage solemnised in terms of custom, although a decree of divorce was not sought. The particulars of claim made reference to a customary union which resulted in the establishment of a universal partnership. The plaintiff sought an order that a house shared by the parties during the partnership be sold and the proceeds jointly shared between the parties.
The evidence showed that the parties had an unregistered customary union which resulted in the birth of one child. They stayed together for four years before the plaintiff left the matrimonial home. During the relevant period, despite the absence of a formal relationship, the parties conducted themselves and treated each other as husband and wife. A customary marriage ceremony took place where the defendant paid part of the bride price (*lobola*). The defendant had not finished paying all of it when they separated.
It was argued on behalf of the defendant that, if the plaintiff's claim was premised on a tacit universal partnership, then the trial court lacked the jurisdiction to entertain the matter as the value of the property in dispute was in excess of the magistrate's civil jurisdiction.

The magistrate awarded the plaintiff a 50 per cent share of the immoveable property.
Held: In terms of s 11(1)(b)(iv) of the Magistrates Court Act [*Chapter 7:10*], the magistrates court would not have the jurisdiction to deal with this matter as a divorce in the absence of solemnisation of the union under the Customary Marriages Act [*Chapter 5:07*]. The only circumstance under which the court would have jurisdiction would be if the matter were an ordinary civil dispute which was within the monetary jurisdictional limit of the court. Assuming that a choice of law had been properly made and that choice was general law, a valid cause of action had been pleaded, either universal partnership or unjust enrichment. Although the plaintiff appeared to have chosen to have the dispute settled as a claim for distribution of assets under a tacit universal partnership, the matter was actually disposed of as if the court was considering a divorce under customary law. In the absence of a marriage under customary rites the court had no jurisdiction to determine the plaintiff's claims unless premised under general law. With regard to the court's monetary jurisdiction, the likelihood was that the claim exceeded the court's jurisdiction, but this was not conclusively established.

Criminal procedure – bail – grant of – factors to be considered – when bail should be refused – need for court to be satisfied that accused not likely to stand trial – factors indicating likelihood of not standing trial

S v *Madzokere & Ors* S-8-12 (Malaba DCJ, in chambers) (Judgment delivered 13 February 2012)

The purpose of the exercise of the discretionary power vested in the court considering a bail application under s 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is to secure the interest of the public in the administration of justice by ensuring that a person charged with a criminal offence upon a reasonable suspicion of having committed it will appear on the appointed day to stand trial. It is for that purpose that the section provides, in effect, that upon sufficient evidence being available to justify it, a finding that an accused person is likely not to stand trial when released on bail is a relevant and sufficient ground for ordering continued detention of him or her pending trial. Section 117 is also based on the principle that, regard being had to the presumption of innocence which is a fundamental right guaranteed under the Constitution to an accused person awaiting trial, he must be released on bail on appropriate conditions if the same object of ensuring his appearance at the trial can be achieved.
The question for determination is whether, on the facts available and regard being had to the presumption of innocence to which the accused is entitled, the court would be justified in finding that there is a likelihood that the accused would not stand trial if released on bail, even with stringent measures to ensure close monitoring by the police. Only if such a finding is justified by the available evidence can it be said that the likelihood of the accused not standing trial if released on bail is a relevant and sufficient ground for depriving him of his liberty pending trial. The following factors are a useful guide in deciding whether an accused person would abscond if released on bail:

- the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction
- the apparent strength or weakness of the State case
- the accused's ability to reach another country and the absence of extradition facilities from that country
- the accused's previous behaviour when previously released on bail; and
- the credibility of the accused's own assurance of his intention and motivation to remain and stand trial.

Criminal procedure – charge – particulars – allegation of misrepresentation – misrepresentation to a juristic person – not necessary to specify natural person to whom misrepresentation was made

S v *Kurotwi & Anor* HH-106-12 (Bhunu J) (judgment delivered 28 February 2012)

The accused were charged with fraud. The charge made allegations of misrepresentations to the Ministry of Mines and the Zimbabwe Mining Development Corporation, but did not specify to which natural person the misrepresentation was made. The accused excepted to the charge, arguing that, both entities being artificial persons, they could only act though natural persons. It was therefore necessary to specify the natural persons to whom the misrepresentation was made, otherwise the accused would be prejudiced in their defence if they were left in the dark or to speculate as to which natural person they are alleged to have made the misrepresentation.
Held: s 146 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] requires the State so to frame a charge among other things as to inform the accused person of the offence, he is facing together with the particulars or essential elements of that offence. The section also requires the State to inform the accused of the person against whom the offence was committed and the nature of the property involved if any. The allegation against the

accused was that they defrauded the government of Zimbabwe of two billion United States dollars. The Government of Zimbabwe is a legal entity with full legal personality, capable of suing and being sued in its own name. It has a separate legal existence from its officials and servants. The government of Zimbabwe is, therefore, undoubtedly a juristic person. As such, it ought to be treated like any other juristic person. The law makes no distinction between the framing of charges involving natural persons and those involving artificial persons. Thus, the Government of Zimbabwe, like any other juristic person, has full *locus standi in judicio* to appear and be heard as the complainant in any court without being carried on the back of any natural person. It is therefore sufficient for the State to allege that the misrepresentation was made to a juristic or artificial person, without naming any natural person. The failure to mention or specify the natural person to whom the alleged misrepresentation was made could not possibly prejudice the accused in their defence because the State elaborated, in its summary, that the misrepresentation was made to the juristic persons through written letters which would be produced in court through named competent witnesses, including the permanent secretary in the ministry of mines.

Criminal procedure – charge – validity – charge based on evidence obtained in violation of s 15(1) of Constitution – prosecution not lawful

Mukoko v *Attorney-General* S-11-12 (Malaba DCJ, Chidyausiku CJ, Sandura JA, Ziyambi JA & Garwe JA concurring) (Judgment delivered 20 March 2012)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 –Declaration of Rights – s 13(1)).

Criminal procedure – discharge at close of State case – when may be granted – court's duty to order discharge if there is no evidence that accused committed offence charged – court not entitled to put accused on defence to bolster up an inadequate prosecution case – accused being wrongly put in his defence – refusal to grant discharge not in itself a ground to set aside conviction – appeal court entitled to look at all the evidence led

S v *Noormohamed* HH-162-12 (Hungwe J, Mavangira J concurring) (Judgment delivered 27 March 2012)

There is no longer any controversy in our law as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by defence evidence. Section 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that if, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it *shall* return a verdict of not guilty. There is a sound basis for ordering the discharge of the accused at the close of the case for the prosecution, where (a) there is no evidence to prove an essential element of the offence; or (b) there is no evidence on which a reasonable court, acting carefully, might properly convict; or (c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it. However, once an accused person is put on his defence, albeit wrongly, and is ultimately convicted, the refusal to discharge the accused is not in itself a sustainable ground for appeal against the ultimate conviction. When the appeal is heard, the court cannot close its eyes to the evidence lead on behalf of the accused or a co-accused which, taken in conjunction with the State evidence, proves the accused's guilt conclusively. The question which the appeal court must consider is whether, on the evidence and the findings of credibility (if any), unaffected by the irregularity, there is proof of guilt beyond a reasonable doubt. If the court does so consider – and the onus is on the State to satisfy it – there is no resultant miscarriage of justice and the irregularity will be ignored.

Criminal procedure -- discharge at close of State case – when should be ordered – what State must have established before an answer is called for from the accused – matter within peculiar knowledge of the accused – need for accused to explain his conduct

S v *Mpofu* HB-81-12 (Cheda J) (Judgment delivered 5 April 2012)

A trial court has no discretion but to acquit at the end of the State case if there is was no evidence upon which a reasonable court would convict the accused. The court is not entitled to place him on his defence in the face of

inadequate evidence in the hope that the accused would incriminate himself during his defence. It is the duty of the State to place evidence of probative value before the court in order for the court to hold that the State has established a *prima facie* case against the accused, meaning proof of the commission of the offence which implicates the accused to such a degree that as to call for an answer. Less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required. The State need not, however, prove the commission of a crime at this stage, but must have adduced evidence which will justify the transfer of the onus to the accused on the basis of his special knowledge of the incident. Where this knowledge is shown, it then becomes the accused's duty to explain his conduct and he can only do so in his evidence-in-chief which should be tested by cross-examination by the State.

Criminal procedure – review – incomplete proceedings – High Court's power to interfere in incomplete proceedings – limited circumstances when such power may be exercised

S v *Rose* HH-71-12 (Hungwe J) (Judgment delivered 22 February 2012)

The statutory powers of review under ss 26, 27 and 29 of the High Court Act [*Chapter 7:06*] can be exercised at any stage of criminal proceedings before an inferior court. In any event, the High Court has inherent powers of review. A wrong decision of a magistrate in circumstances which would seriously prejudice the rights of a litigant would justify the court at any time during the course of the proceedings in interfering by way of review. This principle would apply with greater force in criminal proceedings, where a miscarriage of justice might result from a wrong decision of the magistrate or where the rights of an accused person are seriously affected thereby.

Ordinarily the High Court's power of review is exercised only after termination of the criminal case, but the court is entitled to exercise that power before the termination of the case, if there is a gross irregularity in the proceedings. It is, however, a power that is sparingly exercised. While the attitude of the Attorney-General is obviously a material element, his consent does not relieve the High Court from the need to decide whether or not the particular case is an appropriate one for intervention. In addition, the prejudice inherent in the accused being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the High Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not in itself necessarily justify the High Court in granting relief before conviction.

Under s 29(4) of the High Court Act, the High Court could set aside a conviction on the grounds of irregularity if a substantial miscarriage has actually occurred. It could do this after conviction but before sentence. The irregularity would, however, have to be so gross that it is incapable of correction by way of ordinary review or appeal. The High Court could also interfere where it would be unconscionable to await the conclusion of the proceedings before seeking redress in the normal way.

Criminal procedure – public prosecutor – decision to prosecute – validity of – decision based on evidence obtained in violation of s 15(1) of Constitution – prosecution not lawful

Mukoko v *Attorney-General* S-11-12 (Malaba DCJ, Chidyausiku CJ, Sandura JA, Ziyambi JA & Garwe JA concurring) (Judgment delivered 20 March 2012)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 –Declaration of Rights – s 13(1)).

Criminal procedure – trial – record – duties of judicial officer where full recording facilities not available

S v *Ncube* HB-112-12 (Ndou J, Makonese J concurring) (Judgment delivered 10 May 2012)

See above, under APPEAL (Record – defects in).

Criminal procedure (sentence) – offences under Criminal Law Code – possession of a dangerous drug (s 157(1)) – possession not necessarily less serious than dealing – substantial amount of drug in accused's

possession – permissible to infer that drug not only for personal use – sentence requiring treatment for addiction – need for evidence of addiction

S v *Sikoti* HH-283-11 (Zimba-Dube J, Bhunu J concurring) (Judgment delivered 25 January 2012)

The appellant pleaded guilty to a charge of contravening s 157(1)(a) of the Criminal Law Code [*Chapter 9:23*]. He had been found in possession of dagga weighing 2 kg hidden in a maize field. He was sentenced to 18 months' imprisonment, of which 6 months' imprisonment were suspended for 5 years on appropriate conditions. He appealed against sentence only.
Held: Whilst the legislature did distinguish between the offences of possession and dealing by creating two different offences, this did not necessarily make the offence of possession more trivial than dealing, deserving in every case a fine or community service. Each case has to be determined on its own circumstances. The appellant was found in possession of 2 kg of dagga, which is a substantial amount. He was a repeat offender. It is permissible for the court, at the sentencing stage, to infer on the basis of possession of large quantities involved that the dagga was not for personal use. The onus would be on the appellant to displace the inference that the large quantity of dagga was not for supply or sale. It would not be incompetent for a court to impose a sentence requiring treatment for addiction in terms of s 157(2) of the Code in the absence of evidence of proof of addiction, and there was no such evidence in this case.

Criminal procedure (sentence) – offences under Criminal Law Code – rape – appropriate sentence – ordinarily should not exceed sentence for murder or culpable homicide – when maximum sentence might be appropriate

S v *Ndlovu* HB-104-12 (Kamocha J) (Judgment delivered 12 April 2012)

The maximum sentence for rape is life imprisonment but that is reserved for the worst examples of the crime. Where the court considers that the offence does not warrant a sentence of imprisonment for life, the sentence it does imposed must not be out of step of sentences which are expected to be imposed for that type of offence. In cases of murder with actual intent, where the court is of the opinion that there are extenuating circumstances, the convicted person is usually sentenced to imprisonment for a period ranging from 21 years' imprisonment upwards. For murder with constructive intent, where there are extenuating circumstances, the sentence is usually between 14 years and 20 years. In the bulk of cases of culpable homicide handled by the regional courts, where there has been violence causing death, the sentences, depending on the circumstances of the case, range from 18 months to 10 years for the bad cases. Rape is a terrible crime. It is traumatizing, dehumanizing, humiliating and abominable; but so are murder and culpable homicide involving causing death violently. A single count of rape is should attract a sentence from 5 years up to 10 years. Only the rare, very bad, cases of rape should attract sentences beyond 10 years and the worst ones should attract imprisonment for life.

Criminal procedure (sentence) – statutory offence – domestic violence – need for deterrent sentences to be passed

S v *Muchekayawa* HB-42-12 (Makonese J) (Judgment delivered 23 February 2012)

Cases of domestic violence are on the increase and in some instances death has resulted. Unless sufficiently deterrent sentences are imposed by the courts as provided for under the Domestic Violence Act [*Chapter 5:16*], the whole purpose of this piece of legislation will never be realized. Men will continue to brutalize their wives and, equally so, some men will continue to be subjected to physical abuse by their spouses in the knowledge that they will go to court and pay a small fine. Whilst each case should be decided on its own merits, in serious cases custodial sentences are appropriate.

Customary law – chief – appointment of – by President – customary principles of succession – President only obliged to give due consideration to such principles – not obliged to follow them

Moyo v *Mkoba & Ors* HB-7-12 (Ndou J) (Judgment delivered 19 January 2012)

Although chiefs are envisaged as hereditary holders of office, it is only official recognition by the President that carries with it the title of chief. In practice the President frequently appoints the person holding traditional title to the chieftainship, but he is not obliged to do so. Section 3(2) of the Traditional Leaders Act [*Chapter 29:17*] obviously implies that the President "should give due consideration to the customary principles of succession, if any, applicable to the community over which the chief is to preside", as investigated by Ministry of Local Government officials in particular the district administrator. However, he is not obliged to follow those principles in making his choice. Once the investigation has been made, the President is free to act as he thinks best in the interests of good governance of the community.

Customary law – chief – appointment of – selection of candidate – clan selecting a candidate – government officials having no right to interfere with nomination process and nominate another person

Machaka v *Min of Local Govt & Ors* HH-37-12 (Mathonsi J) (Judgment delivered 25 January 2012)

In compliance with s 3 of the Traditional Leaders Act [*Chapter 29:17*] a nomination process was embarked on to select a candidate for appointment as Chief Ngezi. That process came up with the name of the applicant as the candidate for appointment by the President. Notwithstanding the selection of the applicant as a candidate for appointment, the Minister of and the Secretary for Local Government commissioned a commission to investigate the selection of the applicant. This halted the process under circumstances suggesting interference with the process of selection. The commission proposed putting forward the name of the third respondent to the President for appointment. The applicant sought an order interdicting the respondents from doing so.
Held: The process of nominating a candidate is the province of the clan and s 3 of the Act does not envisage a situation where government officials interfere with that process and dictate what should be done, whether in the form of commissions or otherwise. It was clear that the commission had rejected the selection process and the outcome of the meetings held by the clan. That commission was therefore unlikely to do anything favourable to the applicant. The order would be granted.

Customary law – court – customary law court – jurisdiction – powers of court limited by Customary and Local Courts Act [*Chapter 7:05*] – matters over which court has jurisdiction – venue of court – court only entitled to sit at place fixed in terms of Act

Customary law – court – customary law court – process – where and by whom summons must be served – service must be by messenger of court and at place within court's jurisdiction – any other service fatally defective

Nyikadzino v *Tsvangirai* HH-166-12 (Patel J, Kudya J concurring) (Judgment delivered 25 April 2012)

See above, under COURT (Customary law court).

Customary law – succession – heir – responsibilities – duty to support surviving family dependants – who are dependants – when persons who have attained age of majority may be dependants

Mutara & Anor v *Mutara & Ors* HH-205-12 (Guvava J) (Judgment delivered 3 May 2012)

An heir at customary law administers the estate for the benefit of deceased's dependants. In customary law, succession is intestate, universal and onerous. Upon the death of a family head his oldest son (if the deceased had more than one wife, it would normally be the oldest son of his first wife) succeeds to the status of the deceased. Emphasis on the term "status" implies that an heir inherits not only the deceased's property but also his responsibilities, in particular his duty to support surviving family dependants. These would include children who are majors, including male children, who are as subordinate to the patriarch as females until they are "liberated". The liberation generally comes with the death of the patriarch and the male taking over, or with a male moving away from the family and founding his own family. In recognition of the onerous nature of the heir's responsibilities, the legislature limited the range of persons who could be regarded as "dependants". Under s 2 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*], a "dependant" is defined as: a surviving spouse; a divorced spouse who was entitled to maintenance at the time of deceased's death; a minor child; a major child who suffers a mental or physical disability; a parent who was being maintained by the deceased; or any other person who was being maintained by the deceased. However, where, before the passing

of the Act, an heir had responsibility for a dependant in the wider sense, the heir's responsibility remains as it was under customary law.
Where two children of the deceased, though majors, were living with the heir in their mother's house, and the heir was responsible for them under customary law, he was obliged to find alternative accommodation for them if he sold the house.

Damages – assessment – delict – claim for *injuria* and for unlawful imprisonment arising out of same facts – not permissible to claim under both heads

Musundire v *OK Zimbabwe* HH-94-12 (Bere J) (judgment delivered 6 March 2012)

See above, under CONTRACT (Validity – exemption clause in contract).

Damages – delict – defamation – purpose of award of damages – factors to be taken into account when assessing quantum

Makova v *Masvingo Mirror (Pvt) Ltd & Ors* HH-241-12 (Mavangira J) (Judgment delivered 13 June 2012)

See below, under DELICT (Defamation – defences)

Delict – Aquilian action – pleadings – what plaintiff must allege and prove – need to plead fault – failure to do so – normally fatal

Ndlovu v *Debshan (Pvt) Ltd & Anor* HH-362-12 (Mutema J) (Judgment delivered 14 June 2012)

In an Aquilian action, a plaintiff must establish a wrongful act or omission as well as fault, in the form of intention or negligence, in addition to causation and patrimonial loss. Failure to specifically plead fault renders a declaration fatally defective as not disclosing a valid cause of action. *In casu*, the defendants pleaded to the claim as couched. They saw it fit not to raise any complaint pursuant to r 140(1) of the High Court Rules to have the defect rectified. The matter proceeded through a pre-trial conference, where the parties agreed that what was being pleaded was the *lex Aquilia* and that the real issue for determination was whether the first defendant was vicariously liable for the second defendant's wrongful and unlawful act of discharging a firearm at the plaintiff. Where a trial is held, the defendant having pleaded without complaint and having agreed to the issues at the pre-trial stage, fault can be implied from the evidence led or to be adduced despite the plaintiff not having specifically pleaded it in the declaration.

Delict – defamation – defences – fair comment on a matter of public interest – what defendant must show for defence to succeed

Delict – defamation – defences – justification – publishing defamatory material in spite of denial by plaintiff of truth of allegations – no defence that plaintiff has been given opportunity to respond

Delict – defamation – defences – truthfulness of allegation – defendant relying on particular witness as being an impeccable source – defendant thereby associating itself with allegations made by such person

Makova v *Masvingo Mirror (Pvt) Ltd & Ors* HH-241-12 (Mavangira J) (Judgment delivered 13 June 2012)

The plaintiff, a member of Parliament, claimed damages for defamation following the publication of an article about him in a weekly newspaper that circulated in the Masvingo area. The article was headed "Big War in Bikita: Makova cited as problem: Mine workers terrorized". It referred to a letter which it said the newspaper was in possession of, which was written to Bikita Minerals top management "from a suspected highly placed ZANU PF official threatening them that they are likely to be abducted, tortured and even get killed for betraying the party in the area". The allegation that the plaintiff was terrorising mine workers in the name of ZANU PF is attributed to unnamed "impeccable sources". The allegation that the plaintiff was the major problem and cause of unrest in Bikita is also attributed to the same sources. The defendants claimed the article constituted fair comment on a matter of public interest.

Held: (1) For a newspaper to describe its sources as "impeccable" means that the newspaper has associated itself with the allegations allegedly made by the sources. It in fact validates and associates itself with the allegations through its description of the sources as "impeccable".
(2) For the defence of fair comment to succeed, the allegation must amount to a comment; secondly, the comment must be fair; thirdly, the factual allegations on which it is based must be true; fourthly, the comment must be on a matter of public interest and finally, the comment must be based on facts expressly stated or referred to in the document or speech concerned, or generally known to the relevant audience.
(3) The fact that the defendants confronted the plaintiff with a defamatory allegation against him did not mean that they were then entitled to go ahead and publish that allegation and that they would have protection against being sued for defamation even if the story turned out to be without foundation. The purpose of confronting a person with an allegation is to try and check the story. If, when confronted, he admits the allegation, the press can go ahead safely and publish the story. But if he completely denies the allegation or refuses to comment on it and the press still publishes it, the person will be able to sue for defamation if the defamatory allegation is without substance.
(4) It is also no defence to say that someone else made the statement or that the statement has already been published in, say, another newspaper. Anyone who further disseminates a defamatory statement is also guilty of defamation, because the action of spreading the story around causes more harm to the plaintiff's reputation. Merely putting the offending words in quotes is no defence.
(5) The award of damages for defamation is more as a solace for injured feelings, rather than as a way of repairing all the damage that has been done. This is the approach the courts take because once the defamatory statement has been published, it is very difficult to rehabilitate a reputation completely even if it is proved that the statement was misguided and a full apology is extracted.
The factors that the courts take into account in assessing the level of compensation are: the character and status of the plaintiff, the nature of the words used and the intended effect thereof, the extent of the publication, and whether or not the defendant has subsequently made attempts to rectify the harm done by way of retraction and apology. The fact that the plaintiff is a politician and a public figure, whose life is necessarily in the public domain and open to criticism, does not divest him of protection against harm to his dignity and reputation. He is entitled to protection.
Also amongst the factors that guide the court in assessing an appropriate award is the consideration of comparable awards of damages in other defamation suits**.**

Delict – liability – vicarious liability – employer's liability – principles – employee carrying out employer's work but using wrong means to do so – employer liable

Gwande v *Matonhodze & Anor* HH-123-12 (Mathonsi J) (Judgment delivered 14 March 2012)

After being involved in a minor accident, the plaintiff was instructed by the police to bring his car to a named police station, as the police wanted to impound it "for further investigations". He duly delivered the car. Four days later, the first defendant, a constable at the police station, took the plaintiff's car on a patrol. Other policemen travelled in the vehicle. Very soon after setting out, the first defendant crashed the car, which was damaged beyond economic repair. The plaintiff sued the first defendant personally, as well as the responsible minister for the replacement cost of the vehicle. He averred that when the first defendant drove the vehicle, he was acting within the course and scope of his employment by the second defendant and as such the second defendant was vicariously liable for the actions of his employee. As the first defendant wrongfully, unlawfully and negligently drove the vehicle, both defendants were jointly and severally liable for the loss that the plaintiff sustained. The second defendant claimed that the first defendant was engaged in a frolic of his own.
Held: (1) That the first defendant acted unlawfully, wrongfully and indeed negligently when he drove the plaintiff's motor vehicle could not be disputed. The plaintiff did not authorize him to drive his vehicle and there is no way a police officer can lawfully drive a motor vehicle held at a police station, either as an exhibit or pending further investigations, while on patrol duties. Such vehicle is not a patrol vehicle and should be kept in custody only for the purpose for which it was impounded. The plaintiff had established all the requirements for an action under the *Lex Aquiliae*. The first defendant's conduct was unbelievably unreasonable, irresponsible, childish and reprehensible in the extreme.
(2) An employer is liable for the delicts of his employee committed in the course of his duty or service, unless the employee, in committing the delict, was pursuing his own interests. Provided the employee is doing his employer's work or pursuing his employer's ends, he is acting within the scope of his employment even if he disobeys his employer's instructions as to the manner of doing the work or as to the means by which the end is to be attained. The first defendant was doing the second defendant's work when he received the station property, which included the keys and the motor vehicle belonging to the plaintiff. He was still about his employer's

business when he went on patrol that night. He clearly did not have any authority from his employer to use the plaintiff's motor vehicle when going on patrol. He disobeyed his master's instructions as to how he was to perform his duties. He was still acting within the scope of his employment even though the manner in which he went about his work was perverted. This was a classic example of the situation where an employee used the wrong means to attain his employer's ends, leaving him firmly within the scope of his employment.

Employment – appeal – against arbitrator's award – grant of stay of execution pending appeal – subsequent registration of award with High Court – effect

Zimbabwe Open University v *Magaramombe & Anor* S-20-12 (Chidyausiku CJ, in chambers) (Judgment delivered 16 April 2012)

The applicant formerly employed the respondent, whose contract of employment the applicant terminated. The respondent disputed the lawfulness of the termination and the matter was referred to arbitration. The arbitrator decided in favour of the respondent and ordered reinstatement or damages in lieu thereof.
The applicant appealed to the Labour Court in terms of s 98(10) of the Labour Act [*Chapter 28:01*]. It also applied to the Court in terms of s 92E(3), as read with s 89(1)(a), of the Act for an order suspending the arbitral award pending the hearing of the appeal.
The respondent decided to accept damages in lieu of reinstatement and requested the arbitrator to quantify the damages due.
The applicant appealed against the award of damages and also applied for a review of the award. The following day the respondent applied to the High Court for registration of the arbitral award. The applicant did not oppose the application for registration, as it was of the view that there was no need to oppose the application, since it had already applied to the Labour Court for the suspension of the award.
The Labour Court granted the applicant a stay of execution of the arbitral award pending the hearing of the appeal but about 10 days later the High Court registered the arbitral award. The respondent sought execution of the award. The High Court dismissed an urgent application to stay the execution on the grounds that the matter was not urgent and that the execution of the arbitral award could not be stayed because the award, by being registered, had become a High Court judgment whose execution could not be suspended by the Labour Court, a court inferior to the High Court.
The applicant noted an appeal against the dismissal. It also brought a chamber application to have the appeal heard as a matter of urgency and for a stay of the sale in execution of property which had been attached. The respondent argued that the matter was not urgent and that there was not valid appeal because the High Court's order was interlocutory.
Held: (1) while the High Court's ruling as to urgency was interlocutory, the ruling that the Labour Court could not interfere with the decision of the High Court was not. Leave to appeal was not required.
(2) The applicant had a *prima facie* right to a stay of execution pending the determination of the appeal. If the appeal court found in favour of the applicant on the issue of whether the Labour Court's order suspending execution of the judgment was *intra vires*, the applicant would have a clear right or entitlement to a stay of execution of the arbitral award pending the hearing of the appeal by the Labour Court.
(3) In any event, the applicant had very good prospects of success on appeal. Section 98 of the Act gave the applicant the right of appeal against the determination of the arbitrator on a question of law. Having noted the appeal, the applicant also applied to the Labour Court for a stay of execution of the arbitral award. The Labour Court granted the application, as it was entitled to do. It was questionable whether the subsequent registration of the arbitral award with the High Court had the effect of erasing or rendering null and void the order of the Labour Court suspending execution of the award.

Employment – contract – termination – dismissal – grounds for – misconduct going to root of contract of employment – employer's discretion as to whether or not to dismiss – appeal to arbitrator or Labour Court – right of arbitrator or Labour Court to alter penalty of dismissal – no right to alter penalty in absence of misdirection or unreasonableness

Mashonaland Turf Club v *Mutangadura* S-5-12 (Ziyambi JA, Garwe JA & Gowora AJA concurring) (Judgment delivered 6 February 2012)

The respondent, a managerial employee employed by the appellant for 20 years, participated as spokesman in, and facilitated, an unlawful industrial action by the employees of the appellant. Following a disciplinary hearing, the respondent was found guilty of two acts of misconduct namely, conduct inconsistent with the

express or implied terms of his contract and disobedience to a lawful order as a result of which he was dismissed from employment. The arbitrator to whom the matter was referred for compulsory arbitration found that the appellant could not be faulted in finding that the respondent's conduct warranted his dismissal from employment and that the two offences of which the respondent was found guilty and in respect of which he was dismissed by the appellant went to the very basis of his contract of employment with the respondent. He found the appellant's decision to dismiss the respondent to be "unassailable". In spite of that finding, he found that the dismissal was unfair in the circumstances, principally because only the respondent, out of all the employees who participated in the industrial action, had been singled out for disciplinary action. He found to be mitigatory the fact that the unlawful industrial action consisted of a peaceful sit-in which lasted only 2½ hours; that the workers had genuine grievances; and that the record of service of the respondent had been accorded little weight. He therefore set aside the penalty of the dismissal and imposed in its place a final warning. The Labour Court agreed with the arbitrator and upheld his award. It found that, in terms of s 12B(4) of the Labour Act [*Chapter 28:01*], the arbitrator was correct in setting aside the penalty of dismissal imposed by the appellant. On further appeal to the Supreme Court:
Held: The law is clear that in a situation such as this the employer is entitled to dismiss the employee. The fact that the respondent was singled out for disciplinary action becomes irrelevant once it is accepted that his misconduct went to the root of his employment contract. In the exercise of their powers in terms of s 12B(4) of the Labour Act, the Labour Court and arbitrators must be reminded that that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it. In the absence of a misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer's discretion to dismiss an employee found guilty of a misconduct which goes to the root of the contract of employment. Both the Labour Court and the arbitrator erred in substituting their discretion for that of the employer in setting aside the dismissal.

Employment – disciplinary proceedings – code of conduct – employer having its own registered code of conduct – any disciplinary proceedings not conducted in terms of that code invalid – employer not entitled to conduct proceedings under National Employment Code of Conduct where registered code of conduct exists

Chikomba RDC v *Pasipanodya* S-26-12 (Garwe JA, Gowora JA & Omerjee AJA concurring) (Judgment delivered 26 June 2012)

The appellant company dismissed the respondent after conducting disciplinary proceedings against him. The proceedings were conducted in terms of the Labour (National Employment Code of Conduct) Regulations (SI 15 of 2006), although the appellant had its own code of conduct. In terms of the respondent's contract of employment, his conduct at the workplace was to be "regulated through the Staff Code of Conduct and the Labour Act [*Chapter 28:01*] as well as other related Statutory Instruments". The Labour Court set aside the dismissal on the grounds that the disciplinary proceedings should have been held under the appellant's employment code of conduct and ordered the respondent's reinstatement. The only issue on appeal was whether at law, the appellant, which had a registered code of conduct, was entitled to discipline the respondent using the National Employment Code of Conduct.
Held: under s 12B of the Labour Act, an employee is unfairly dismissed if his dismissal is not in terms of an employment code of conduct or, in the absence of such a code, in terms of the model code made under s 101(9). This model code, contained in the Regulations referred to above, stipulates that the National Employment Code of conduct can only be invoked where there is no registered code of conduct. Since the appellant had a registered code of conduct, the termination of a contract of employment of any of its employees had to be in terms of its code of conduct and not the National Employment Code of Conduct. Any contractual agreement to the contrary would be against the law and a termination of employment based on such agreement would be null and void.

Employment – Labour Act [*Chapter 28:01*] – applicability – Act not applicable to staff of Parliament appointed in terms of Constitution

Zvoma v *Moyo NO & Ors* HH-23-12 Bere J) (Judgment delivered 20 January 2012)

See above, under CONSTITUTIONAL LAW (Parliament).

Employment – Labour Court – appeal – appeal to Labour Court – decision or arbitral award not suspended by noting of appeal – appeal from Labour Court to Supreme Court – decision of Labour Court suspended by noting of appeal

Kingdom Bank Workers' Cttee v *Kingdom Bank Financial Hldgs* HH-302-11 (Patel J) (Judgment delivered 10 January 2012)

The applicant sought the registration of an arbitral award made in its favour, as well as an order for the payment of the sum awarded. The respondent had previously filed an appeal-cum-review of the award before the Labour Court. The Labour Court dismissed both the appeal and review. The respondent then appealed to the Supreme Court against the Labour Court's decision. The appeal was still outstanding. The respondent argued that the registration of the award was premature, as it would render the appeal academic and cause irreparable prejudice to the respondent if the award were to be enforced. The applicant argued that the noting of the appeal did not suspend the award and that it was entitled to register and enforce the award, unless and until the respondent took appropriate steps to stay its execution. At the hearing, the following issues arose for determination: (a) the grounds upon which the court could exercise its discretion to decline registration of an award in terms of s 98 of the Labour Act [*Chapter 28:01*]; (b) whether the remedies sought by the applicant beyond registration are competent under s 98; and (c) whether the noting of the appeal to the Supreme Court had the effect of suspending the award. Under s 92E(2) of the Act, an appeal in terms of subs (1) shall not have the effect of suspending the determination or decision appealed against; and under s 92E(3), pending the determination of an appeal, the Labour Court may make such interim determination in the matter as the justice of the case requires.
Held: (1) any relief beyond registration is not competent under subss (14) and (15) of s 98 of the Act.
(2) An appeal to the Labour Court against an arbitrator's decision under s 98(10) is an appeal in terms of the Act. The provisions of s 92E are unambiguous and unequivocal and apply to every appeal in terms of the Act, including an appeal under s 98(10). Section 92E precludes the suspension of the decision appealed against. The common law presumption against the operation and enforceability of judgments appealed against has thus been explicitly ousted by s 92E in the case of arbitral awards rendered under s 98.
(3) The appeals to the Labour Court provided by ss 92E(1) and 98(10) are not materially different. Under s 92E(1), an appeal to the Labour Court may address the merits of the decision appealed against, in addition to any question of law, while an appeal against an arbitrator's award under s 98(10) is confined to questions of law..
(4) The heading of s 92F reads "Appeals against decisions of Labour Court" and differs from the heading of s 92E which reads "Appeals to the Labour Court generally". While headings cannot control the plain words of a statute, they may be regarded as preambles in order to explain ambiguous provisions or words in the statute. This approach is consistent with the provisions of s 7 of the Interpretation Act [*Chapter 1:01*].
(5) The language of subss (1) and (2) of s 92E encompasses every appeal made in terms of the Act, including one from the Labour Court to the Supreme Court. However, s 92E(3) appears to be limited to the interlocutory powers of the Labour Court in relation to appeals pending before it. This would indicate that the appeals referred to in subs (1) and (2) of that section are also appeals before the Labour Court, as distinct from appeals before the Supreme Court. This apparent ambiguity can only be resolved by having regard to the context of ss 92E and 92F. Given the factors of their juxtaposition and the contemporaneity of their enactment, it is virtually impossible to disregard their headings. Taking those headings into account, it becomes clear that s 92E is confined to appeals made to the Labour Court generally, while s 92F deals specifically with appeals from the Labour Court to the Supreme Court. An appeal under s 92F is thus not an appeal "in terms of this Act" for the purposes of s 92E. Consequently, an appeal from the Labour Court to the Supreme Court would, in accordance with the general common law rule, operate to suspend that decision, subject to the right of the successful party to apply for execution pending appeal.
(6) The application for the registration of the award under s 98(14) and (15) of the Act was therefore premature and could not be granted at this stage. The applicant must await the outcome of the respondent's appeal to the Supreme Court.

Employment – workers committee – legal status of – not a legal *persona* – workers committee not entitled to litigate in its own name

C T Bolts (Pvt) Ltd v *Workers Committee* S-16-12 (Garwe JA, Omerjee & Gowora AJJA concurring) (Judgment delivered 27 March 2012)

A workers committee may, in terns of s 23(1) of the Labour Act [*Chapter 28:01*], be appointed or elected by the employees employed by any one employer to represent their interests. It is the function of the workers committee to represent the employees in any matter affecting their rights and interests and to negotiate with the employer a collective bargaining relating to the terms and conditions of the employees concerned. The Act has not, however, made provision for the workers committee to operate as a legal *persona*. Had this been the intention, the Act would have said so.

Under the common law, an unincorporated association, not being a legal *persona*, cannot, as a general rule, sue or be sued in its name apart from the individual members, whose names have to be cited in the summons. A *universitas*, on the other hand has the capacity, apart from the rights of the individuals forming it, to acquire rights and incur obligations. A body that has no constitution is not a *universitas*, for it is the constitution that determines whether an association is or is not a *universitas*.

On a proper interpretation of s 24 of the Act, it is clear that a workers committee exists to safeguard and champion the interests and welfare of the workers at the work place. It has no other function. There is no provision in the Act requiring a workers committee to adopt a constitution, nor is there a requirement for a workers committee to acquire rights apart from the rights of the individuals forming it and the employees they represent. There is also no provision for a workers committee to acquire assets in its own name. In contrast, s 29 of the Act provides that, upon registration, every trade union, employers' organisation or federation shall become a body corporate and in its corporate name shall be capable of suing and being sued. Such bodies are required by s 28 to adopt a written constitution. No such requirement is imposed upon a workers committee, which suggests that suggests that the intention of the legislature was not to give the committee any other additional rights.

Enrichment – unjust enrichment – deputy sheriff exacting fees under wrong statutory instrument – fees payable under correct instrument less than those levied – payer entitled to recover excess

Gold Driven Invstms (Pvt) Ltd v *Matipano NO* HH-266-12 (Kudya J) (Judgment delivered 27 June 2012)

The deputy sheriff had levied fees and commission under the wring statutory instrument. The statutory instrument under which the fees and commission were calculated had been repealed and replaced, and the correct fees would have been less than those paid. The applicant sought the recovery of the excess. The deputy sheriff argued that the applicant would only have been entitled to recover if it had protested before payment.

Held: the right of recovery requires neither mistake nor compulsion. The simple fact that the fees and commission were exacted unlawfully was enough to require their repayment. The applicant was entitled to a refund of the excess amount. It would be unconscionable for the deputy sheriff to insist on keeping an amount that was wrongfully and unlawfully levied.

Evidence – alibi – need for State to disprove alibi if raised – need for accused to furnish State with material details in time for truth of alibi to be investigated

S v *Manuwa* HH-47-12 (Mavangira J, Hungwe J concurring) (Judgment delivered 2 February 2012)

In his defence on a charge of rape, the appellant raised an alibi. In the defence outline, it was merely stated that, at the time in question, he had been out drinking with his friends. However, no specific mention was made of the place or places where the drinking took place, nor of the names of his drinking companions, nor of the specific times. He gave a detailed account only when he gave evidence. There was no indication that he had given this full story from the very beginning, i.e. from the time of his arrest.

Held: where the accused raises the defence of alibi, it is not for him to prove it but for the State to disprove it. This principle does not, however, give the accused the option to keep his cards close to his chest until the very end. The State would have no opportunity to be able to discharge the onus on it if it is not, at the outset or at a stage that allows the police or the State to investigate its veracity, furnished with the material details of such defence of alibi as the accused relies on.

Family law – child – child born out of wedlock – legal relationship to father – no right to succeed to its father

Fitzgerald v *Chong & Ors* HB-135-12 (Cheda AJ) (Judgment delivered 7 June 2012)

The applicant sought an order setting aside the third respondent's appointment as executor of her father's estate and declaring her to be the sole beneficiary of the estate. She admitted that her mother was never legally married to the deceased. She lived with the deceased for a period of more than a year. He supported her and her mother. Her birth certificate bore his name and he made sure that she got a passport in terms of the legislation in his country of origin. After the deceased's death, she and her mother went to a great deal of effort to bury him, there being no relatives of his who could assist. She later reported the deceased's estate and filed his death notices.
Held: An illegitimate child is one whose father and mother were never married. An illegitimate child does not, and is not entitled to, inherit from its father. Illegitimate children do not succeed to their natural father and his relations, but do succeed to their mother and her relations. Some writers have gone as far as to say that an illegitimate child is related to its mother and her relations and not to its natural father. This legal position has remained so for a long time in Zimbabwe. On this basis the applicant had no *locus standi* to make the application.

Editor's note: the judgment does not say so, but presumably the deceased died intestate.

Family law – husband and wife – divorce – division of property and related matters – agreement on such issues – need for such agreement and details thereof to be recorded

Moore v *Moore* HH-233-12 (Chitakunye J) (Judgment delivered 7 June 2012)

Where parties to a matrimonial action have reached agreement on any issue regarding the division of property, access to children, maintenance and so on, the nature and extent of such agreement must be recorded. It may even be in the form of a deed of settlement on those particular issues. A general statement that parties have reached agreement on any issue or issues, without endorsing the details of such agreement, is a disservice to the parties and to the court and so must be avoided.

Interest – rate – rate greater than prescribed rate – interest may be charged at such rate if parties have so agreed

Chikomo v *Yehudah* HH-29-12 (Mavangira J) (Judgment delivered 8 February 2012)

The respondent borrowed a sum of money from the applicant. The loan agreement provided that if he did not repay within the agreed period of a week, interest would be charged at 25%. It was also agreed that the respondent would pay "collection charges as well as costs of suit for the legal practitioner and any other costs incurred by [the applicant]". When the applicant sought summary judgment, the respondent, although admitting that he was indebted to the applicant for the capital debt, averred that the applicant was claiming usurious interest as the applicant was not a lending institution or a registered money lender in terms of the Moneylending and Rates of Interest Act [*Chapter 14:14*]. Furthermore, the claim for collection commission was not within the ambit of the Law Society tariffs and has no legal basis. Under s 8 of the Act, "No lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest."
Held: (1) under s 4 of the Prescribed Rate of Interest Act [*Chapter 8:10*], "if a debt bears interest and the rate at which interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run". As there was an agreement governing the rate of interest, the respondent could not escape from the provisions of the agreement.
(2) There was no agreement to pay costs on the legal practitioner and client scale. The statement merely provided for "costs of suit for the legal practitioner". There was no ground for costs on the higher scale.

Editor's note: this decision would, with respect, appear to render s 8 of the Moneylending and Rates of Interest Act ineffectual and allow for usurious interest to be charged simply by contracting for such interest. As to what the "prescribed rate of interest" is, Chinhengo J held, in *Niri* v *Coleman & Ors* 2002 (2) ZLR 580 (H), that the rate of interest under the Moneylending and Rates of Interest Act is not that set by the Prescribed Rate of Interest Act, but that set by the Moneylending and Rates of Interest Regulations, 1985 (SI 53 of 1985).
The last time the rates (which vary according to the amount lent) were set was by SI 126 of 1993. Based on those Regulations, a rate of 35% per annum would have been permissible in respect of the sum lent in this matter. The rate set in the contract, of 25% over five months, would have exceeded the rate prescribed by the Regulations.
The rate set by the Prescribed Rate of Interest Act is currently 5% per annum. See ss 2 and 7 of the Act.

Interpretation of statutes – headings – extent to which may be use to resolve ambiguity

Kingdom Bank Workers' Cttee v *Kingdom Bank Financial Hldgs* HH-302-11 (Patel J) (Judgment delivered 10 January 2012)

See above, under EMPLOYMENT (Labour Court – appeal).

Local government – urban council – councillor – suspension of by Minister of Local Government – investigation into grounds in which councillor suspended – when must be held

Nyambi & Ors v *Min of Local Govt & Anor* HH-324-12 (Zhou J) (Judgment delivered 25 June 2012)

The applicants, the mayor and two councillors of Chinhoyi, were suspended in December 2011 by the first respondent in terms of s 114(1) of the Urban Councils Act [*Chapter 29*:*15*]. Thereafter the first respondent commissioned an investigation into the conduct of the applicants, which investigation produced a report dated 13 February 2012. The applicants were not given the report. On 3 April 2012 the applicants instituted a court application in which they challenged the lawfulness of their continued suspension and asked for reinstatement to their duties as councillors. The first respondent filed opposing on 23 April. On 15 June the first respondent invited the three applicants to attend before a board of inquiry, headed by the second respondent, to inquire into the allegations upon which the suspensions were based. On 19 June the applicants filed the present application, in which they sought an interim interdict restraining the respondents from proceeding with the inquiry pending the determination the earlier application.
Held: in terms of s 114(3) and read with (4), the Minister is required to hold a thorough investigation as soon as practicable and, in any event, within 45 days into whether the grounds on which a councillor has been suspended are established as facts. This had not been done *in casu*. The applicants had to right to this investigation. If the interim interdict was not granted and they ultimately succeed in the earlier application, then the order in that case would be a *brutum fulmen*. Regarding the balance of convenience, the respondents would not be prejudiced by the granting of the interim interdict. It took them more than six months to institute the impugned inquiry. A temporary stay of the proceedings of the inquiry will not cause any worse delay than had already been experienced. In the circumstances, the balance of convenience favoured the granting of the interim relief.

Editor's note: see below, under PRACTICE AND PROCEDURE (Interdict – interim interdict) for the principles regarding the grant of an interim interdict.

Maxims – *nemo judex in sua causa*

Nyikadzino v *Tsvangirai* HH-166-12 (Patel J, Kudya J concurring) (Judgment delivered 25 April 2012)

See above, under COURT (Customary law court).

Mines and minerals – mining dispute – resolution of – mining commissioner's court – appeal from such court – appeal lies to High Court – Secretary of Mines – judicial powers – same as those of a mining commissioner – Secretary having no appellate powers

Simbi v *Mazuwa & Ors* HB-54-12 (Ndou J) (Judgment delivered 1 March 2012)

The applicant was a small scale miner who is the registered owner of a mining claim. A boundary dispute arose between him and the first respondent pertaining to a shaft which the first respondent claimed was situated on his mining claim. The dispute was taken to the local mining commissioner who, after taking submissions from both parties and ordering a survey of the claims, ruled in favour of the applicant *viz.* that the disputed shaft was situated on the applicant's claim. Dissatisfied with the mining commissioner's determination, the first respondent noted an appeal to the Secretary of Mines. The latter, after receiving the appeal, wrote a memorandum instructing the parties to stop mining operations pending the determination of the appeal. In executing the said instructions, the first, third and fourth respondents removed from the mining site various

items which belonged to the applicant. They also chased away the applicant's workers; as a result, the applicant was not able to operate. The applicant contended that there was no valid appeal pending before the Secretary of Mines; but that even if there was, the second respondent (the chief mining commissioner) did not have authority to stop mining operations pending the determination of the appeal. The first respondent contended that such appeal to the Secretary was proper because of the provisions of s 341 of the Mines and Minerals Act [*Chapter 21:05*].
Held: s 346 of the Act gives the mining commissioner of the mining district to which he is appointed judicial powers in the resolution of disputes. The mining commissioner's court is a court of first instance, with more or less similar powers to those of a magistrates' court in civil cases. Under s 352, if before or during the hearing of any complaint it appears to the mining commissioner that it will be necessary for a survey to be made of any land or mining location in dispute, he may order either party to cause such survey and a plan thereof to be made. Section 361 provides for an appeal from the mining commissioner's court to the High Court.
Section 341 confers on the Secretary for Mines both administrative and judicial powers. The judicial powers given to the Secretary are limited to those enjoyed by a mining commissioner. The Secretary may assume these powers of a court of first instance. Appellate powers are conferred on the High Court; the Secretary is not empowered to hear appeals from a mining commissioner's Court. There is no provision in the Act for an appeal to the Secretary.
There being no appeal to the High Court, the question of stay of execution of the decision of the mining commissioner pending appeal did not arise at all. In any event, the Act did not give the Secretary the authority to suspend the operation of a judgment of the mining commissioner pending the determination of an appeal.

Police – discipline – trial of member before a single officer – such member not having right to elect to be tried by a magistrate

Gabarinocheka v *OC Traffic Bulawayo & Ors* HB-15-12 (Ndou J) (Judgment delivered 26 January 2012)

A member of the police force who is not an officer may be tried by a single officer for minor infractions of the Police Act [*Chapter 11:10*] and regulations made thereunder. Such an officer may impose a punishment of imprisonment for up to 14 days and a fine of up to level two. Such infractions are minor disciplinary measures in the police force and are not regarded as criminal offences. A member who is summoned for trial before a single officer does not have the right under s 32 of the Act to elect to be tried by a magistrate. The election provided for in that section only applies to trials before boards of officers and not trials before a single officer.

Practice and procedure – admission – withdrawal of – when party may withdraw admission made

Wamambo v *Chegutu Municipality* HH-234-12 (Mathonsi J) (Judgment delivered 6 June 2012)

A party may not, without the leave of the court, withdraw an admission made (including any admission made at a pre-trial conference), nor may it lead evidence to contradict any admission.

Practice and procedure – application – *ex parte* – nature of order sought – order final in effect – should not be granted on *ex parte* basis – should not be executed before return day

Sub-Saharan Mgmt Consultants (Pvt) Ltd v *Sirituta Invstms (Pvt) Ltd & Ors* HH-249-12 (Chatukuta J) (Judgment delivered 6 June 2012)

See above, under APPEAL (Execution pending appeal).

Practice and procedure – declaratory order – principles – need for a applicant to have a direct and substantial interest in subject matter – interest must relate to existing, future or contingent right – order may not be granted to resolve academic or abstract point

Mpukuta v *Motor Insurance Pool & Ors* HB-25-12 (Ndou J) (Judgment delivered 9 February 2012)

It is not the business of the courts to dispense legal advice or express opinions on abstract points. The courts exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon

abstract questions, or to advise upon differing contentions, however important. It is therefore a pre-requisite to the grant of declaratory relief that the applicant must have some existing, future or contingent right that would be affected by the order of the court. The applicant must be an interested person, in the sense of having a direct and substantial interest in the subject-matter of the suit which could be prejudicially affected by the judgment of the court. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. This is the first stage in the determination by the court. At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14 of the High Court Act [*Chapter 7:06*]. In this regard, some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order. A matter that does not present a live controversy having practical consequences is not justiciable.

Practice and procedure – interdict – interim interdict – requirements for – "right" for which protection is sought – existence of – a matter of substantive law – extent to which right is established a matter of evidence – court's general discretion even if right established

Nyambi & Ors v *Min of Local Govt & Anor* HH-324-12 (Zhou J) (Judgment delivered 25 June 2012)

The requirements for an interim interdict are well settled, being these: (1) that the right which is sought to be protected is clear; or (2) (a) if it is not clear, it is *prima facie* established, though open to some doubt; and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right; (3) that the balance of convenience favours the granting of interim relief; and (4) the absence of any other satisfactory remedy. Where a clear right is proved, then the applicant interdict need not show that he will suffer irreparable harm if the interdict is not granted. The applicant merely has to show that an injury has been committed or that there is a reasonable apprehension that an injury will be committed. The words "clear" and "*prima facie*" in the context of interdicts relate to the degree of proof required to establish the right and should strictly not be used or interpreted to qualify "right" at all. The existence of a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a matter of evidence.
The court has a general and overriding discretion whether to grant or refuse an application for an interim interdict. That discretion exists even if the applicant has established all the requisites for the interim relief. The discretion must be exercised judicially, taking into account the circumstances of the case. Regarding the balance of convenience, the court is enjoined to weigh the prejudice to the applicant if the interim interdict is refused against the prejudice to the respondent if it is granted.

Practice and procedure – interpleader proceedings – duty of party objecting to attachment of goods to file opposition, if any – failure to file opposition – effect – party barred – fact that party initiated proceedings by submitting affidavit to deputy sheriff not giving right to appear at hearing

Deputy Sheriff, Harare v *Conview Energy (Pvt) Ltd & Anor* HH-250-12 (Mathonsi J) (Judgment delivered 20 June 2012)

Following a judgment against the judgment debtors, a writ of execution, directing the deputy sheriff to attach and take into execution movable property belonging to the judgment debtors, was issued. The deputy sheriff duly placed under attachment certain items of property, some of which were claimed by the claimant. The claimant filed an affidavit, alleging that he was the owner of the items. The deputy sheriff instituted interpleader proceedings in terms of Order 30 of the High Court Rules 1971. The claimant did not file any notice of opposition and or opposing affidavit, but was represented by counsel at the court hearing. There, while conceding that no opposing papers were filed, counsel argued that the claimant was entitled to be heard as an interested party who had also submitted an affidavit to the applicant claiming the goods.
Held: It happens with alarming frequency that people who find their goods being attached by the deputy sheriff merely submit an affidavit and documents to the deputy sheriff laying a claim to such goods, then sit back and do nothing more. When the deputy sheriff institutes interpleader proceedings, they do not bother to file opposition; they only surface on the day of hearing, oblivious of their failure to oppose the interpleader proceedings. The fact that a claimant has submitted an affidavit to the deputy sheriff claiming the goods placed under attachment without doing anything more does not confer upon such claimant the right to appear in court when no notice of opposition and opposing affidavit have been filed. Where a deputy sheriff has served a court

application initiating interpleader proceedings, that application commands the respondents (the claimant and the judgment creditor) to file their opposition, if any. It also announces to them that, in the event of failure to do so within the time frame given, the matter will be set down for hearing unopposed and an automatic bar comes into effect. *In casu*, due to its failure to file a notice of opposition and opposing affidavit, the claimant was, in terms of r 233(3), automatically barred. Once either the claimant or the judgment creditor fails to file opposition, the matter becomes unopposed for all intents and purposes and should be set down for hearing on the unopposed roll.

Practice and procedure – judgment – default judgment – rescission – grounds – existence of *bona fide* defence – claim to be allowed to pay in instalments – not a defence

V Daya & Co (Pvt) Ltd & Anor v *Savanna Tobacco(Pvt) Ltd* (Mathonsi J) (Judgment delivered 13 June 2012)

The applicants sought rescission of a default judgment obtained against them. After issue of the summons, they had signed an acknowledgment of debt in respect of the full amount claimed by the respondent and undertook to pay the debt at an agreed rate per month. In spite of this undertaking they did not pay the monthly sums agreed; they paid only one amount, which was considerably less than the agreed monthly rate. The grounds for rescission were that they were not in wilful default and had a defence to the claim.
Held: Nowhere in the world can it be a defence to say that a debtor should be allowed to pay in instalments. To say that the applicants negotiated a settlement after receipt of the summons did not even begin to explain the default. It was as unreasonable an explanation as it was dishonest. To say that the applicants should be allowed to pay the debt they acknowledged as owing in monthly instalments did not come anywhere near presenting a *bona fide* defence. It put to question the *bona fides* of the entire application for rescission of judgment. This kind of litigation must be discouraged at all costs and legal practitioners who indulge in such egregious departure from acceptable behaviour risk the sanction of costs *de bonis propriis* being visited upon them.

Practice and procedure – judgment – execution – court order requiring defendant to hand over certain property and authorizing deputy sheriff to seize such property – writ of execution not necessary to allow deputy sheriff to seize property

Medical Invstms Ltd v *Daka NO & Anor* HH-279-12 (Kudya J) (Judgment delivered 29 June 2012)

See above, under COSTS (Taxation – review).

Practice and procedure – judgment – rescission – grounds for – error – by court – court being induced by non-disclosures and misrepresentation to make an order – such order made in error and susceptible to rescission

Kaiser Eng (Pvt) Ltd v *Makeh Entprs (Pvt) Ltd* HB-6-12 (Ndou J) (Judgment delivered 19 January 2012)

The court has both a statutory and a common law power to reverse a default judgment that has been granted in error or under circumstances that indicate some irregularity. An error on the part of the court, where the judgment would not have granted had the court been fully of certain facts, would be grounds for rescission. Where a default judgment was induced by certain non-disclosures and misrepresentations made by the respondent in its papers, the judgment was granted in error and should be rescinded.

Practice and procedure – order – types of order which may be granted – order *ad factum praestandum* and order *ad pecuniam solvendam* – distinction between

Evans & Anor v *Surte & Ors* S-4-12 (Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 13 February 2012)

See above, under COURT (Contempt).

Practice and procedure – particulars – application for – what particulars litigant is entitled to – purpose of particulars

Zimbabwe Online (Pvt) Ltd v *Telecontract (Pvt) Ltd* HH-206-12 (Mutema J) (Judgment delivered 9 February 2012)

The function of particulars, required to enable a party to plead to his opponent's pleading, is to provide a more precise, albeit fuller, statement of the issues which will arise on the trial. The supply of such particulars will of necessity, limit the generality of the allegations in the pleadings and will prevent the party so supplied from being taken by surprise at the trial. Where another party's claim or defence is not sufficiently clear, a party may request further particulars of the claim which will enable him to plead. Particulars are intended to define the issues and prevent a party from being taken by surprise at the trial. Only those particulars which are strictly necessary will be supplied and not where disclosure of evidence is sought, or where the request is fishing expedition or to gain time or to assemble material for cross-examination or where particulars relate to a statement of law. There is a tendency on the part of practitioners to abuse the further particulars procedure by making unnecessary and unduly lengthy requests for information before pleading, thereby clouding the real issues between the parties. The particulars to which a litigant is entitled are particulars of matters in respect of which the onus is on the opponent.

Practice and procedure – parties – "clean hands" – requirement to come to court with – applicability – application to set aside arbitral award – applicant not having complied with award – no requirement to comply with award before approaching court for relief under Arbitration Act [*Chapter 7:15*]

Pioneer Tpt (Pvt) Ltd v *Delta Corp Ltd & Anor* HH-18-12 (Gowora J) (Date of judgment 1 January 2012)

See above, under ARBITRATION (Award – setting aside of).

Practice and procedure – parties – *locus standi* – workers committee – not a legal *persona* – not entitled to represent workers in litigation

C T Bolts (Pvt) Ltd v *Workers Committee* S-16-12 (Garwe JA, Omerjee & Gowora AJJA concurring) (Judgment delivered 27 Match 2012)

See above, under EMPLOYMENT (Workers committee).

Practice and procedure – parties – President – action against – whether leave of court required – no restriction provided President cited in official capacity and not by name

Tsvangirai NO v *Mugabe NO & Ors* HH-273-12 (Chiweshe JP) (Judgment delivered 27 June 2012)

The Prime Minister brought an action against the President, in his official capacity, to challenge the legality of the appointment of various Provincial Governors (who were the other respondents) as being *ultra vires*. The respondents took a point *in limine* that in terms of r 18 of the High Court Rules 1971 the leave of the court was required to bring an action against the President.

Held: Rule 18 is intended to afford the President and judges protection against frivolous actions that may be brought against them. This application *per se* was neither frivolous nor vexatious; it was of national significance. It must be heard on the merits notwithstanding the provisions of r 18, a course permissible under r 4C, which allows the court to direct, authorise or condone a departure from any provision of the rules, where it is satisfied that the departure is required in the interest of justice. In any event, s 4 of the State Liabilities Act [*Chapter 8:14*] provides an absolute right to bring proceedings against the President in his official capacity provided he is cited by his official capacity and not by name. That is the sole restriction. Had the legislature intended that the institution of any such action or process be preceded by the grant of leave from the High Court or Supreme Court, it surely would have said so. Certainly there is no justification for reading such a requirement into the section. Nothing in r 18 of the High Court Rules could be understood to override either s 4 of the State Liabilities Act, or any other provision of the Constitution, which exhibits a contrary intention.

Practice and procedure – pleadings – declaration – defective – defendant nevertheless pleading to claim and proceeding to pre-trial conference and trial – not open to defendant at trial to claim declaration was defective

Ndlovu v *Debshan (Pvt) Ltd & Anor* HH-362-12 (Mutema J) (Judgment delivered 14 June 2012)

See above, under DELICT (Aquilian action).

Practice and procedure – pleadings – plea in bar or abatement – purpose of – allows defendant to achieve prompt resolution of factual issue which founds a legal argument which disposes of claim

Cabat Trade & Finance (Pty) Ltd & Anor v *MDC* HB-201-11 (Kamocha J) (Judgment delivered 5 January 2012)

Under r 137(1) of the High Court Rules 1971, as an alternative to pleading to merits, a party may take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case. The plea in bar is not predicated on a denial of any facts set out in the declaration as that would involve going into the merits of the case made by the plaintiffs in their declaration. The plea proceeds on the basis that the allegations in the plaintiff's declaration are correct but that the matter should nevertheless be disposed of for one reason or another that does not appear *ex facie* the pleadings. The purpose of a special plea is to permit the defendant to achieve a prompt resolution of a factual issue which founds a legal argument which disposes of the plaintiff's claim. An example would be where the defendant claims that a contract is void for illegality. Ideally a plea of illegality should be raised before the trial and not *in limine.*

Practice and procedure – set down – notice of – matrimonial matter – need for notice of set down to be given personally in all situations – notice in accordance with Form 30 – no need to serve such notice on defendant where summons in accordance with Form 30A

Mathe v *Mathe* HB-17-12 (Ndou J) (Judgment delivered 26 January 2012)

In terms of r 272 of the High Court Rules 1971, in an action for divorce or nullity of marriage, where the defendant has failed to enter appearance, the plaintiff who wishes to obtain judgment must, if the declaration has not been served with the summons, file and deliver his declaration and either simultaneously or subsequently a notice in accordance with Form No. 30. This notice calls upon the defendant, if he wishes to defend, to plead, answer or except or make claim in reconvention within 12 days of the date of delivery of the notice and informs him that in default judgment will be sought against him. If the declaration was served with the summons, the plaintiff must file and deliver the notice to the defendant after the expiry of the *dies induciae*. After that the plaintiff may set the case down for trial but must serve personal notice of set down upon the defendant. The court may not proceed to trial unless it is satisfied that the personal notice of the defendant has been drawn to the fact that the matter has been set down for trial or that for good and sufficient reason the giving of personal notice is impracticable.
However, under r 269A, the summons commencing an action mentioned may, at the option of the plaintiff, be issued in Form No. 30A, to which a copy of the plaintiff's declaration is annexed. In that event, r 272 does not apply and there is no need to serve a Form 30 notice. Nonetheless, personal service of the notice of set down must be given. This salutary rule of practice is motivated by the irreparable harm that may result in a final decree of divorce. Divorce results in a final change of status of the parties.

Practice and procedure – *res judicata* – dismissal of claim due to failure to appear at pre-trial conference – not a judgment on merits – defaulting party entitled to issue fresh process, provided order for costs met

Practice and procedure – summons – issue – whether plaintiff allowed to issue fresh summons after claim dismissed for failure to appear to pre-trial conference

Belinsky v *Chipere* HH-74-12 (Hungwe J) (Judgment delivered 22 February 2012)

The excipient had been sued by the respondent for damages arising out of a motor vehicle accident. A pre-trial conference had been set down, but the respondent failed to appear. The excipient applied for and obtained an order dismissing the respondent's claim with costs. Then respondent then issued fresh process and the matter was set down for trial. The excipient took exception to the fresh process issued by the respondent, arguing that the respondent ought to have applied for rescission of the default judgment in terms of either r 63 or r 449 of the High Court Rules 1971. Without having obtained rescission of that judgment, the respondent's claim stood dismissed with costs and the respondent was barred from instituting fresh action.
The respondent argued that r 63 was permissive and gave the party against whom default judgment was entered two options: (a) to seek rescission of that default judgment, and, after obtaining it, proceed on the same papers; or (b) to abandon those papers and issue fresh ones. As long as the order for costs had been complied with, it was open to the respondent to commence a fresh action, since the dismissal of the action at the pre-trial conference stage was akin to absolution from the instance.
Held: the excipient's argument should fail for two reasons. First, the excipient had expressly abandoned the special plea of *res judicata*. If this was meant to be just a preliminary objection, then he ought to have sought the dismissal of the respondent's case as he did, but in addition a stay of proceedings until the respondent had paid the costs in terms of the order for dismissal of the original claim. Second, rules 58, 59, 59A, 60, 61 & 62 grant the power to the court to enter judgment or make such order as it may think fit depending on the circumstances without hearing evidence. a judgment obtained in this manner amounts to a default judgment. The respondent failed to appear in person or through counsel at the pre-trial conference, and generally, in such a situation, an order for dismissal of his claim is entered. Such an order is at law not a judgment for the other party. The respondent was entitled to issue a fresh summons.

Practice and procedure – set down – consent of parties to set down date fixed by Registrar – consent not required – alteration of set down date – action required by party desiring alteration

Makeh Entprs (Pvt) Ltd v *ZB Financial Hldgs* HB-126-12 (Ndou J) (Judgment delivered 31 May 2012)

The consent of the parties to the set down of a civil action is not a requirement imposed by r 215 of the High Court Rules. Once the Registrar allocates a date, it is incumbent upon a party seeking alteration of the set down to apply to the registrar in terms of r 215(3) or to a judge or the court in terms of r 217. The set down date remains good even where a party had not consented to it. There is no legal requirement for the Registrar to seek that the parties file or lodge consent to the set down, although it has been the practice of the Registrar to seek such written consent of the parties to the set down date. Where a plaintiff's legal representative is aware of this practice, it would be tantamount to allowing the plaintiff to snatch at a judgment resulting in compromising the ends of justice if the plaintiff were allowed to take advantage of the failure of the defendant to appear. The conduct of the defendant could be dealt with by an award of costs.

Practice and procedure – trial – re-opening of trial for leading of further evidence – when further evidence may be led

Zaranyika v *Zvoma & Anor* HH-222-10 (Hungwe J) (Judgment delivered 23 May 2012)

After the parties have led their evidence, but before judgment is handed down the court has a discretion as to whether to allow a party to re-open its case and lead further evidence. The grounds on which the court may take this course are: (a) that the evidence tendered could not have been obtained with reasonable diligence for use at the trial; (b) the evidence must be such as is presumably to be believed or apparently credible; (c) that the evidence would, as far as can be foreseen, form a determining factor on the result; and (d) conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party.

Property and real rights – spoliation – order – requirement for grant of – delay in seeking order – whether fatal

Free Methodist Church of Zimbabwe v *Dube & Ors* HH-315-11 (Patel J) (Judgment delivered 10 January 2012)

The doctrine of spoliation is encapsulated in the maxim *spoliatus ante omnia restituendus est*, that is, he who is despoiled must be restituted before all else. It is a fundamental and well established principle of our law that no one is permitted to forcibly or wrongfully dispossess another of his movable or immovable property without his

consent. Whenever this occurs, the courts will summarily restore the *status quo ante*. The claimant need only prove that he was in peaceful and undisturbed possession of the property and that he has been unlawfully deprived of such possession. In spoliation proceedings the fact that the spoliator owns or has beneficial rights in the property despoiled is wholly irrelevant. Delay *per se* does not preclude the grant of a *mandament van spolie*. The court has a discretion to decline the remedy where, on account of the delay in seeking it, no relief of any practical value can be granted at the time of the hearing. An additional aspect to be considered is whether the claimant's failure to apply for relief immediately constitutes such acquiescence in what has been done by the spoliator as to deprive the claimant of the right to seek restoration of the *status quo ante*.

Revenue and public finance – Commissioner-General of Zimbabwe Revenue Authority – duties and powers – duty to assess and collect taxes – not entitled to set conditions for fulfilment of statutory obligations – where capital gains tax due on sale of property, such tax should be collected – Commissioner-General not entitled to refuse to assess such tax on grounds that no tax paid in respect of previous transfer of same property

Sabeta v *Comr-Gen, ZRA* HH-79-12 (Mathonsi J) (Judgment delivered 22 February 2012)

The applicant concluded a sale agreement with a company which owned a stand in a Harare suburb. She paid the full purchase price to the seller through mortgage finance from a building society. The seller did not co-operate in the process of transfer of the property to the applicant, resulting in the applicant obtaining a court order compelling the seller to perform its obligations in terms of the agreement of the parties and the law and, in the event of the seller failing to do so, authorising the Deputy Sheriff to carry out the necessary acts to effect transfer. In the event, the task fell on the Deputy Sheriff. One of the acts that needed to be done to enable transfer of the property to the applicant was payment of capital gains tax assessed by the respondent in this case in terms of the Capital Gains Tax Act [*Chapter 23:01*], but the respondent, the Commissioner-General of the Revenue Authority, refused to do so on the grounds that no capital gains tax had been paid when the property was transferred to the current seller and that tax should be paid first.
Held: The Zimbabwe Revenue Authority (ZRA, which the respondent headed, was established in terms of s 3 of the Revenue Authority Act [*Chapter 23:11*] and its functions and authority are set out in s 4 as read with the 2nd Schedule thereof. Its main function is to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues. As a creature of statute the ZRA is required to act in terms of the enabling statute. The relevant statutes enjoin it to assess and collect the tax that is due. On the face of it, it cannot set conditions for the performance of its statutory obligations. If the respondent had proof that a previous owner avoided paying capital gains tax, he had the right in terms of the Capital Gains Tax Act to pursue the defaulter and recover that tax. He had both criminal and civil remedies at his disposal. The respondent should, in the meantime, assess and collect capital gains tax from the current seller.

Road traffic – vehicle licensing – requirement for vehicle to be currently licensed – failure to hold current licence an offence under s 22 of Vehicle Registration and Licensing Act [*Chapter 13:14*] – late payment penalty under s 36 for failure to pay renewal fee in time – such penalty payable to Road Authority but only after one month following expiry of previous licence – s 36 not relieving motorist of liability to pay fine under s 22 if vehicle not licensed

Hanzi v *Zimbabwe National Road Administration & Ors* (Mutema J) (Judgment delivered 20 June 2012)

The applicant was stopped by the police for driving a vehicle without a current licence, in contravention of s 22 of the Vehicle Registration and Licensing Act [*Chapter 13:14*]. The licence had expired at the end of the previous month, May 2012. She had not been able to renew the licence in time because of the lengthy queues that had resulted when the authorities introduced a new licensing system. She further told the police that they could not legally make her pay a fine because s 36 of the Act provided a grace period of a month within which to regularise her situation and as such she had until the end of June to renew her licence without being fined. The head of the National Road Authority had made a media announcement that, because of the long queues, the Authority had decided to extend the deadline in terms of which motorists could license their vehicles the end of June, although a few days later that announcement was rescinded. The applicant argued that the provisions of s 36 of the Act are peremptory and the correct interpretation of s 36 is that one can only be penalised for non-compliance after the last day of the month following that in which the previous licence expired.
Held: ss 22 and 36 of the Act are completely separate and unrelated. The unequivocal meaning of s 36 of the Act is that: (a) a person who owns a motor vehicle is required to pay the appropriate renewal fee upon the expiry

of the previous licence; (b) where the owner fails to renew the licence he shall be required to pay, over and above the appropriate fee, at the time of such renewal, a prescribed penalty for the late payment; (c) the prescribed penalty for the late renewal of the licence shall not be charged if the renewal is done on or before the last day of the month following that in which the previous licence expired; and (d) the penalty for late payment shall only be charged after the last day of the month following that (month) in which the previous licence expired. The penalty is payable to the Road Fund and is enforced and collected by the National Road Authority.
On the other hand, s 22(1) and (3) creates a mandatory requirement for every owner of a registered vehicle to have at all times a valid licence for his vehicle. The section creates a criminal offence for failure to have a valid vehicle licence and provides for the appropriate fine. This statutory offence is clearly subject to enforcement by the law enforcement agents. There is absolutely no window for any grace period at all for non-compliance with the requirements of the section.

Succession – spouse – who is – second wife married in terms of putative marriage – second wife unaware of existence of earlier marriage – such wife's entitlement to share of estate

Bhebhe v *Est Bhebhe & Ors* HB-136-12 (Ndou J) (Judgment delivered 14 June 2012)

See above, under ADMINISTRATION OF ESTATES .

Succession – intestate – heirs *ab intestato* – child born out of wedlock – child acknowledged by father – no right of succession

Fitzgerald v *Chong & Ors* HB-135-12 (Cheda AJ) (Judgment delivered 7 June 2012)

See above, under FAMILY LAW (Child – child born out of wedlock).

Water – ownership – vested in President – management of water resources – duty of Zimbabwe National Water Authority – abstraction of water from Lake Kariba – water taken from territorial waters of Zimbabwe – person abstracting water liable to pay for water abstracted

Zinwa v *Kariba Municipality* HB-124-12 (Makonese J) (Judgment delivered 31 May 2012)

In terms of an agreement between the plaintiff and the defendant council, the plaintiff would abstract raw water from Lake Kariba and the plaintiff would receive payment for the abstraction of water from the Lake. Pursuant to the agreement the defendant made two payments towards "the purchase of the water", but then refused to pay any more, arguing that there was no legal basis for the payments to the plaintiff. The defendant contended that it acquired its water from the Zambezi River Authority, which was the owner of Kariba Dam. It further contended that it owned all the equipment for the procurement of the water from lake and accordingly there was no basis for raising charges against the defendant.
Held: it was clear from the provisions of the Zambezi River Authority Act [*Chapter 20:23*] that the Authority was an entity or vehicle through which the governments of Zambia and Zimbabwe administered their common interests over the Zambezi River and its waters. Before to the establishment of the Authority, the Zambezi River and Kariba Dam complex were administered by the Central African Power Corporation under the provisions of the Federation of Rhodesia and Nyasaland (Dissolution) order in Council, 1963 (United Kingdom). The Authority, as an inter-state body or organ, regulates and administers matters of common interest between the two contracting states. The Authority does not regulate and has no jurisdiction to deal with internal water issues of each respective State. The abstraction of water from the lake is an issue left to each state's domestic laws.
In terms of s 3 of the Water Act [*Chapter 20:24*], all water is vested in the President of Zimbabwe. The President, through Parliament, appointed the plaintiff to manage the water resources of Zimbabwe, that is, all the water within the borders of Zimbabwe, under the Zimbabwe National Water Authority Act [*Chapter 20:25*]. The Zambezi River Authority is not vested with any ownership rights over the water which is within the territorial borders of Zimbabwe. If, as the evidence showed, the defendant abstracted water within the territorial jurisdiction and geographical boundaries of Zimbabwe, then such water is vested in the President and the defendant was liable to pay for it.

Words and phrases – "send" – requirement to "send" notice of meeting to various levels of an organization – what duty is imposed on person required to send notice

Mudzumwe & Ors v *MDC & Anor* HH-232-12 (Patel J) (Judgment delivered 12 June 2012)

See above, under ASSOCIATION (Voluntary association).