Latest update: 24 June 2014

CASES DECIDED JULY – DECEMBER 2012

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

Administrative law – administrative decisions and acts – decision adverse to applicant – relief under Administrative Justice Act [*Chapter 10:28*] – unreasonable decision – degree of unreasonableness required to set aside decision – unreasonableness must show *mala fides* or ulterior motive

Rukuni v *Min of Finance & Anor* HH-340-12 (Patel J) (Judgment delivered 13 September 2012)

The applicant was appointed in 2008 as a commissioner of the Securities Commission of Zimbabwe by the Minister of Finance. In May 2011 the Minister terminated her tenure as commissioner. At the time of her appointment, when asked to declare her assets and business interests, she disclosed that she was a member of the board of a company listed on the Zimbabwe Stock Exchange. One other commissioner was also in the position of holding office in a listed entity. In February 2010 the Commission resolved that there was a potential conflict between the office of commissioner and tenure on the board of a listed entity and told the Minister of its views. The Minister told the two affected commissioners that they should choose between their office as commissioners and their tenure on the boards of listed entities. The applicant refused to comply and said that she would only resign if compensated for the loss of fees for the remaining period of her office on the Commission. The Minister then formed the view that the applicant's office as commissioner was inconsistent with her tenure on the board of the company. He consequently wrote to the Commission directing the applicant and the other commissioner to vacate their office as commissioners. The applicant claimed compensation from the Commission for the remaining term of her office. This claim was declined by the Chairman of the Commission on the ground that the Securities Act [*Chapter 24:25*] did not provide for such compensation.

The applicant argued that the Minister's decision was contrary to s 3(1)(a) of the Administrative Justice Act [*Chapter 10:28*] in that he failed to act lawfully, reasonably and fairly. The Minister argued that he was entitled to so act in terms of s 10(2)(e) of the Securities Act because the prevailing circumstances justified his decision. Moreover, he exercised his discretion reasonably after giving the applicant ample time to elect which post she wished to retain. The Commission took the stance that the purpose of disqualifying dual tenure is to ensure transparency and integrity and that there was a conflict a interest in the applicant's tenure on the Commission as well as the board of the company because of her access to information through these posts and the fiduciary duties that she owed to both. Such a situation would undermine the purpose of the Securities Act and the integrity and independence of the Commission. In reply, the applicant argued that the provision of the Act relied upon by the Minister only applied to a material change of circumstances that occurs during a commissioner's tenure of office, not to her situation as she was appointed to the Commission after full scrutiny and disclosure of her position on the company's board. Paragraph (e), taken in the context of section 10(2) as a whole, had to be construed prospectively. The provision was concerned with changed circumstances, not a pre-existing situation that had been specifically approved by the Minister. There had been no change in the applicant's circumstances, nor had any actual conflict of interest materialised as envisaged in s 16(5), that entitled the Minister to act as he did.

One of the ancillary issues raised in argument at the hearing of this matter pertained to the full-time versus part-time status of commissioners.

Held: (1) there was no distinction in s 9 of the Securities Act between part-time and full-time appointments to the Commission. Every commissioner must devote himself to the work of the Commission and is expressly precluded from engaging in any other occupation, unless permitted to do so by the Minister. In this case, the applicant was so authorised prior to her appointment, with specific reference to the corporate interests and positions that she had declared at that time.

(2) The Minister was perfectly entitled to invoke s 10(2)(e), which could not be interpreted so as to be confined to changed circumstances. It is a perpetual provision with infinite effect. The fact that the Minister had previously approved the applicant's position did not preclude him from forming the opinion at a later stage, provided of course that he did so fairly and on reasonable grounds, that her continued tenure on the company board was inconsistent with her duties as a commissioner. The proper exercise of this discretion would not only accord with the intrinsic objects of the Act, *viz.* integrity and transparency in the regulation of the securities market, but would also be incumbent upon the Minister in the fulfilment of his statutory duties. The exercise of his discretion in that regard could not be set aside as having been unlawful. The remaining question was whether or not this discretion was exercised reasonably and fairly.

(3) In deciding the reasonableness or otherwise of an administrative action, the court is enjoined to consider, *inter alia*, whether the action taken is so unreasonable that no reasonable person would have taken it, whether there is any evidence or other material which provides a reasonable or rational foundation to justify the action

taken, and whether an irrelevant matter has been taken into account or a relevant matter has not been taken into account. The traditional approach under the common law is to require gross irrationality, as opposed to mere unreasonableness, as a ground of review. The degree of unreasonableness must be such that something else can be inferred from it, *viz.* that the administrative authority was actuated by *mala fides* or some ulterior motive or that it failed to apply its mind to the matter. The threshold of reasonableness required by s 3(1)(a) of the Administrative Justice Act has not been modified to any degree beyond the parameters of the common law.
(4) The power to remunerate or compensate a commissioner for his remaining tenure on the Commission was not reasonably necessary or incidental to the Minister's power to appoint commissioners and fix their terms and conditions of office under s 5(1) and 9(4) of the Act. Even if this power were to be necessarily implied, it is a fundamental principle of our law that no State official can expend public moneys or commit himself to any such expenditure unless this is expressly provided for by or under statute.
(5) On the facts, there was nothing unreasonable or unfair in the Minister's decisions or actions. The court could not interfere simply because it might have arrived at a different decision on the same facts, nor may it usurp the Minister's functions and substitute his opinion and discretion with its own. The applicant had not shown that the Minister was actuated by *mala fides* or some ulterior motive or that he failed to apply his mind to the matter. In all the circumstances, the decisions impugned by the applicant were not so unreasonable that no reasonable person in the Minister's position would have made them. As to the alleged unfairness of the Minister's actions, he afforded the applicant ample and adequate opportunity to make representations. He fully considered the representations that the applicant did put forward. The only issue that he did not address was the applicant's claim for compensation. However, the question of compensation was collateral and consequential to the decision as to whether or not the applicant should continue in office. The decision to terminate her tenure stood on its own.

Appeal – costs – security for – "good and sufficient" security – what constitutes – written undertaking to pay security as requested by respondent – such offer constituting good security – duty cast on respondent to specify sum required, failing which sum will be as determined by registrar

MDC & Anor v *Mudzumwe & Ors* S-37-12 (Chidyausiku CJ, in chambers) (Judgment delivered 17 October 2012)

In their notice of appeal, the appellants stated: "In terms of the Rules the appellants undertake to pay the costs of preparing the record of proceedings and the respondents' costs including paying into court such costs as requested by the respondents and determined by the Registrar" and "In terms of the Rules appellant hereby tenders costs for the preparation of the record and any other costs." The issue arose whether these statements constituted "good and sufficient" surety for the costs of the appeal as required by r 46(2) of the Supreme Court Rules 1964 (RGN 380 of 1964).
Held: The word "good", in the context of r 46(2), denotes an appropriate method of availing the money that is required, the quality of the method of provision, such as payment into court, deposit into a trust account, etc. The word "sufficient" simply means an adequate amount or sum of money in the circumstances of the case. Rule 46(2) is about arranging for an amount or sum of money, provided in a satisfactory manner, which is capable of covering the respondents' expenses in the event that the issue is resolved in the respondents' favour, bearing in mind the circumstances of the case, its complexity, and the length of time it will take to be completed. The nature of the undertaking/tender given by the appellants in their notice of appeal was such that the respondents had been invited to request such costs as they saw fit. The respondents ought to have responded to their request and indicated a suitable sum of money to cover their security of costs.
A written undertaking offering payment of an adequate sum of money to cover the respondent's costs is sufficient compliance with r 46(2) is "good" security. What constitutes adequate or "sufficient" money is something at the time the offer is made is privy to the respondent. Where an offer to pay money into court as security for costs is made it, becomes incumbent on the respondent to disclose the amount the respondent requires to cover its costs. In the event of a failure to agree on the *quantum* the registrar determines the *quantum*. It is not open to the respondent to refrain from disclosing the *quantum* until after *dies induciae* in order to facilitate a claim for dismissal for default.

Appeal – hearing – application for hearing on urgent basis – appeal against refusal to grant spoliation order – applicant must show reasonable prospects of success

Swimming Pool & Underwater Repair (Pvt) Ltd & Ors v *Rushwaya & Anor* S-32-12 (Chidyausiku CJ, in chambers) (Judgment delivered 21 August 2012)

An application for a spoliation order in a court of first instance is heard on an urgent basis, because of the need to urgently stop unlawful conduct and self-help and restore the *status quo ante* until the law has taken its course. Where, however, the applicant for a spoliation order has been unsuccessful in the court of first instance and wishes to appeal against that decision, the appeal will not necessarily be heard on an urgent basis. Different considerations apply, in that a court of competent jurisdiction will have determined whether or not there was spoliation. Whether or not the appeal should be heard on an urgent basis should depend on the prospects of success of the appeal. Where there are good prospects of success on appeal, the appeal should be heard on an urgent basis so as to bring to an end the unlawful conduct. However, where the appeal has no prospects of success, the appeal should not jump the queue.

Arbitration – award – setting aside of – grounds – award contrary to public policy – allowing party to be unjustly enriched from an illegal transaction – when may be contrary to public policy

Arbitration – proceedings – notice of – where notice of proceedings must be sent – notice sent to party's place of business sufficient unless parties had agreed to different method of communication

Portnet Hldgs (Pvt) Ltd v *Maliseni* HH-450-12 (Mutema J) (Judgment delivered 3 September 2012)

The applicant employed the respondent. Shortly before the introduction of the multi-currency system, the parties agreed to the termination of the respondent's employment. The agreement included a cash pay out in US dollars. The applicant paid a portion but left well over half outstanding. The respondent caused the dispute to be referred for conciliation. Following a stalemate, the dispute was referred to compulsory arbitration. The arbitrator gave an award in the absence of the applicant ordering it to pay the respondent the balance. The arbitrator found that the applicant was in default.

The applicant sought to have arbitration proceedings set aside on two grounds, viz., that the applicant was not given proper notice of either the appointment of the arbitrator or the arbitral proceedings and that the award was in conflict with the public policy of Zimbabwe. In respect of the first ground, the applicant alleged that notice of the proceedings had not been delivered to its legal practitioners; and in respect of the second, it argued that the agreement by the parties to have the respondent paid her terminal benefits in foreign currency at a time when that was illegal or unlawful in the country was contrary to the public policy of Zimbabwe and that the *in pari delicto* rule should be invoked.

Held: (1) in terms of art 3(1)(a) of the Schedule to the Arbitration Act [*Chapter 7:15*], unless otherwise agreed between the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business. There was no evidence that the parties had agreed that the applicant would be notified of either the appointment of the arbitrator or of the arbitral proceedings via delivery of the notice upon its legal practitioners. The applicant did not dispute that service was effected at its place of business. Accordingly, the first ground fell away.

(2) In seeking to set aside an arbitral award on the grounds that it is contrary to public policy, the applicant had to show that some fundamental principle of the law or morality or justice was violated. Here, apart from this particular agreement, the applicant was trading in foreign currency. It was remunerating its employees – the respondent included – in foreign currency. All these transactions by the applicant were in contravention of the Exchange Control Regulations. The applicant was therefore trading and paying salaries illegally. It now wished to resile from an illegal agreement in which it has discharged the bulk of its obligations on grounds of public policy. The respondent was still entitled to be paid her terminal benefits. The balance of those benefits could not be paid in local currency, which had been rendered moribund. To allow the applicant to benefit from such illegality by way of unjust enrichment would constitute a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded Zimbabwean would be intolerably hurt by the setting aside of the award. It would surely be contrary to public policy not to set it aside. The concept of public policy is not immutable. It must conform to changing times and suit existing circumstances. Even if the *in pari delicto* rule applied, given the applicant's conduct *in casu*, the case called for the relaxation of the rule on grounds of justice and equity.

Aviation – Civil Aviation Authority of Zimbabwe – status of – proceedings against – Authority may sue and be sued in own name – no need to cite Minister of Transport in such proceedings

Maguwu v *Co-Ministers of Home Affairs & Ors* HH-404-12 (Mathonsi J) (Judgment delivered 24 October 2012)

See below, under CRIMINAL PROCEDURE (Search and seizure).

Church – government of – constitution – members required to adhere to constitution – failure to do so – diocese seceding from church without following proper procedures – persons involved thereby voluntarily ceasing to be members of church – church property – persons seceding having no rights in respect of such property

Church – property – diocese seceding from church – persons involved thereby voluntarily ceasing to be members of church – church property – ownership remaining with church – persons seceding having no rights in respect of such property

Church of the Province of Central Africa v *Diocesan Trustees, Diocese of Harare* S-48-12 (Malaba DCJ, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 19 November 2012)

The appellant Church was formed in 1955, out of four dioceses of the Anglican Church. The Church now has as its administrative area the whole of Botswana, Malawi, Zambia and Zimbabwe under the control of an ecclesiastical authority, headed by an archbishop. It is governed by a constitution. Membership of the Church is a declaration of commitment to act at all times and places in accordance with the doctrines and the rules of the Constitution, the contract in terms of which each person binds himself to others as a member and office-bearer in the Church.

The Church is under the general authority of the Archbishop, who sits in the Provincial Synod. He also sits on the Episcopal Synod, which deals with matters of faith and is made up of bishops of the Province only. The Archbishop administers all the functions of the Church through bishops, who are the heads of the several dioceses. A diocesan bishop is a member of and presides over the proceedings of the Diocesan Synod. He also administers property rights owned by the Church through a Board of Trustees which he heads. Under the supervision of the Archbishop, a Diocesan Bishop is "chief in superintendency" in matters ecclesiastical within the diocese. Members of the Diocesan Board of Trustees are appointed by the Diocesan Synod.

As at 4 August 2007, the Diocesan Bishop of Harare was Dr Nolbert Kunonga. He was a member of the board of trustees responsible for holding, managing and using Church property in trust and on behalf of the Province. Under art 18 of the Church's Constitution the Provincial Synod has the full power and authority to determine in what manner and upon what conditions such property shall be used or occupied. Under art 24 no-one is allowed to be admitted to any office in the Province or be entitled to receive any income, emolument or benefit from or out of any property held under the authority of the Provincial Synod unless he has signed a declaration of submission to the canons or rules of the Province relating to such office.

The respondent was made up of Dr Kunonga and those people with whom he constituted the Board of Trustees for the Diocese of Harare before 21 September 2007.

A controversy arose within the Church over the issue of homosexuality and the extent, if any, to which it should be tolerated and the approach that should be taken towards homosexual people. The result of the debates which followed was that on 21 September 2007 Dr Kunonga wrote a letter to the Archbishop, notifying the withdrawal of the Diocese of Harare from the Province with effect from 4 August 2007. It was clear from the letter that the object was the creation of Zimbabwe as a Province. The Church responded by pointing out that such a move was constitutionally and canonically impossible, the proper procedures not having been followed. The see was declared vacant and Dr Kunonga was asked to hand over the Church's property to a vicar general, pending the election of a new bishop.

An extraordinary meeting of the Episcopal Synod of the Church decided that Dr Kunonga and his followers had left the Church and that he had, as a result of his behaviour, resigned as a Bishop of the Province. They revoked his pastoral licence.

Dr Kunonga and his followers responded by forming a new ministry which they called the Anglican Church of the Province of Zimbabwe, with five dioceses each headed by a Bishop consecrated and enthroned by Dr Kunonga. He and his followers did not surrender possession of the property of the Church upon secession.

The parties took the dispute over the Church property to the High Court. The Church sought orders directing the respondents to vacate or surrender possession of its property. The respondents sought orders declaring that they were still members of the Board of Trustees for the Diocese of Harare entitled to the control of Church property in the diocese. The High Court found for Dr Kunonga. The Church appealed.

Held: (1) By definition a church is a voluntary and unincorporated association of individuals, united on the basis of an agreement to be bound in their relation to each other by certain religious tenets and principles of worship, government and discipline. The existence of a constitution is testimony to the fact that those who are members of the church agree to be bound and guided in their behaviour as individuals or office-bearers on ecclesiastical matters by the provisions of the constitution and the canons made under its authority.

(2) The words and actions of the individuals as members and office bearers indicate whether there is conformity with the articles of faith. Just as a person would have exercised the right to freedom of choice in becoming a

member of a church, he has the right to leave it of his own free will. A church has no right to compel a person to remain a member. When looked at in the light of the distinctive principles on homosexuality which the parties adopted in relation to the requirements of faith under the Constitution, the only reasonable inference to be drawn from the contents of his letter is that Dr Kunonga and his followers gave notice of having withdrawn their membership from the Church.

(3) It is not for the court to say whether the principles adhered to by either party on the question of homosexuality are bad or good. The court does not discuss the truth or reasonableness of any of the doctrines of the religious group. Disputes over ownership or possession and control of Church property must be resolved on the basis of the interpretation and application of the law of voluntary associations. That law requires consideration and application of the terms and provisions of the Constitution of the body concerned, as well as the rules made under its authority.

(4) Adherence to the fundamental principles on which the Church is founded must be the factor on which disputes of ownership or possession and control of Church property are determined. Almost all constitutions of churches have as their subject-matters the faith, worship, government and discipline to be observed. The constitution would invariably make provision for matters of faith as expressed in ecclesiastical doctrines and embodied in all the rules governing matters of worship, government and discipline. It cannot be correct to say that whilst the church considers the Word of God to be embodied as the primary command in the doctrines which are incorporated in the constitution by reference, they should not constitute the standard to be considered and applied by the court in determining the rights and obligations of the parties over the property in dispute.

(5) Adherence to the fundamental principles on which a church is founded is the critical factor to be considered in the determination of a dispute over church property. This means that those who have departed from the standards and principles on which the church is founded are more likely to leave it. For the purposes of establishing the fundamental principles of a church it is not only the accepted interpretation of scriptures that counts. An accepted interpretation of or inference from subordinate standards may just as well be an article of faith as any other opinion. There is no tenable distinction for the purpose between one religious principle or opinion and another.

(6) The exclusionary and distinctive principle to the effect that it is unlawful to associate with homosexuals and their supporters or sympathisers was put forward as a fundamental principle by Dr Kunonga and his followers. It was later to be the original principle on which the Church of the Province of Zimbabwe would be founded and became the creed or doctrine in terms of which their religious belief was expressed and on the basis of which they associated in the new church. The issue of associating with homosexuals and supporters or sympathizers of them which they had raised was about personal religion. They had originally agreed to associate with others on the terms and conditions contained in the Constitution. They were now in effect saying that they did not want to be associated with the other members, with whom they disagreed because they were said to tolerate homosexuality. They could only avoid contact by withdrawing themselves from the Church. It is not unusual for people to value separation from a church as a safeguard for doctrines which they hold intensely and as to which they know that the surrounding world is indifferent or hostile. Respect for human dignity is a fundamental principle of faith. It must have been clear to Dr Kunonga and his followers that the position they had taken contradicted the basis of this material particular of the accepted expression of the doctrine of the Church, which requires that every person be treated with respect and dignity. Once they adopted that position, they separated themselves automatically from the Church and ceased to form part of it. They did not recant their position; instead, they went on to form their own church, thereby creating a schism. A person who is responsible for the creation of a schism cannot be heard to say he has not withdrawn membership from the former Church. Even where a bishop, priest or deacon of the Province who is charged under canon 24(1) with the offence of schism is found guilty by the Church Court, the only sentence that can be imposed is excommunication.

(7) Resignation of a bishop is a question of fact dependent on the evidence of the conduct of the individual. Where the evidence shows that the individual exercised his right to terminate the relationship with the Church, the resignation takes effect immediately the conduct is committed. This is so unless there is a special provision by virtue of which it takes effect upon acceptance by the person who is given the right to receive written notice and decide whether to accept the resignation or not. The law is clear. Resignation is a unilateral act. Its validity does not depend upon acceptance by the person to whom it is directed. Acceptance determines when the resignation takes effect. In the final analysis, it is for the court and not the individual concerned to decide whether his conduct amounts to resignation or not. Once Dr Kunonga left the Church, and *ipso facto* vacated his office of Bishop of the Province, he was beyond the reach of the Church's disciplinary procedures, which would only be applicable to a "Bishop of the Province". Dr Kunonga was no longer a bishop of the Province.

(8) In the absence of express provision in the constitution of a voluntary association, property held in trust must be applied for the benefit of those who adhere to the fundamental principles of the association. Related to this is the principle that a member of a voluntary association who leaves the organization, whilst others remain, must leave the property with those who have not resigned membership. When one leaves a club one does not take its property

with one. It is well established that when one or more people secede from an existing church they have no right to claim church property, even if those who remain members of the congregation are in the minority.
(9) Once Dr Kunonga and his followers left the appellant Church, they disentitled themselves from continuing as members of the Board of Trustees of the Church. They could only hold the positions of trustees for the purposes of delivering services and protecting the property on behalf of the Province which is the owner of the property. When they left the Church, Dr Kunonga and his followers used the property and continued to control it without the approval of or authority from the Provincial Synod. They could no longer have been acting according to the mandatory tenets of the trust. The conditions under which they had held the property had changed. They could not separate the question of control of the property of the Church from the obligation to uphold and adhere to the fundamental principles on which the Church is founded and for the purposes of the maintenance of which it continues to exist. They used the property of the appellant Church to further the interests of their new church. The property could not be applied to purposes which were alien to the purposes of the Trust and for the benefit of persons who had no title to call themselves members and office bearers of the Church. It would be unreasonable to think that the trust with which they would have been expected to act authorized Dr Kunonga and others to use the property for the achievement of the interests of their new church.
(10) From all the circumstances of the dispute between the Church and Dr Kunonga and his adherents, it was clear that they constituted the seceding party. They broke away from the Church, citing irreconcilable differences on the question of tolerance of homosexuality. The principle that the property must fall under the control and use of those who adhere to the fundamental principles of the Church must be enforced. The property in question belonged to the Church. The Church had a right to an order for vindication of its property from possessors who had no right to have it. Dr Kunonga and his followers had no right to continue in possession of the congregational buildings when they had departed from the fundamental principles and standards on which the Church was founded. They left the Church, putting themselves beyond its ecclesiastical jurisdiction.

Company – legal proceedings – action by majority shareholders against minority shareholders – need to obtain company resolution to initiate proceedings

Swimming Pool & Underwater Repair (Pvt) Ltd & Ors v *Rushwaya & Anor* S-32-12 (Chidyausiku CJ, in chambers) (Judgment delivered 21 August 2012)

For a majority shareholder to succeed in an action to evict a minority shareholder, it is necessary to allege and prove that the company resolved to evict the minority shareholder and that the majority shareholder has *locus standi* to initiate legal proceedings to enforce the company's resolution. It is not enough for the majority shareholder to simply say that as the majority shareholder it wants to evict and exclude from the administration of the company the minority shareholder without a company resolution to that effect.

Company – liquidation – assets which may be included in liquidation process – liquidator including assets that had already been alienated – court entitled to interfere with liquidator's decision

Nyoni & Ors v *Bopse Land Developers (Pvt) Ltd & Ors* HB-158-12 (Makonese J) (Judgment delivered 12 July 2012)

The first respondent entered into a contract with the City of Bulawayo (the fourth respondent) under which it purchased land for private development. The first respondent was expected to service the land in question, develop houses, and or sell stands to individuals requiring them. It was also mandated to enter into purchase agreements with prospective buyers. In pursuance of this arrangement that the applicants others purchased land for housing development. However, the first respondent ran into financial problems, and it failed to service or develop the land. The applicants had already commenced construction of their houses when the first respondent went into voluntary liquidation. The liquidator caused the assistant Master of the High Court to set a date for a meeting of creditors to be held. Included in the list of assets to be liquidated were the stands sold to the applicants. Believing that they may be prejudiced if the stands were included in the liquidation process, the applicants filed an urgent chamber application preventing the inclusion of the allocated and sold stands in the liquidation process. The first respondent and the liquidator argued that the order sought was incompetent and that the applicants were not entitled to prevent the assistant Master from performing his duties in terms of in the Companies Act [*Chapter 24:03*].
Held: In terms of s 222(3) of the Companies Act, any person aggrieved by any act or decision of the liquidator may apply to the court for relief. The assets which the liquidator of a company takes over are primarily those to which the company is entitled to at the commencement of the liquidation. The basic proposition in insolvency proceedings is that all of the property of the debtor must be made available to the creditors and accordingly the

liquidator must get into his possession or control all the property and assets to which the company is entitled. The first respondent and the liquidator should not be allowed to realize and liquidate property that was no longer theirs and all the requirements for a final interdict had been shown.

Company – winding up – by the court – petition for winding up – may be made by court application or chamber application

Dawson & Ors v *Nerry Invstms (Pvt) Ltd* HB-250-12 (Kamocha J) (Judgment delivered 6 December 2012)

Under s 199 of the Companies Act [*Chapter 24:03*] a company may be wound up by the court, on any of the grounds set out in s 206. Section 207 provides that an application to the court for the winding up of a company shall be by petition presented by the company or creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories or by all or any of those parties together or separately. The word "court" as used in these provisions means the High Court, as being the court of jurisdiction. It does not relate to the procedure to be used in company winding up proceedings. In s 2 of the Act "court", in relation to any company, means the High Court, and in relation to any offence against the Act, includes a magistrates court having jurisdiction in respect of that offence. In terms of s 15(2) of the Interpretation Act [*Chapter 1:01*], a "petition" to a court means an application to a court or judge. This means that an application for winding up may be by court application or by chamber application.

Company – winding up – by the court – winding up at the petition of the company on grounds set out in s 206 of Companies Act [*Chapter 24:03*] – notice to employees and consultation – requirement to give such notice to and consult employees

Crempton Trading (Pvt) Ltd v *Matekenya* HH-332-12 (Zimba-Dube J) (Judgment delivered 30 August 2012)

The applicant company passed a resolution in favour of the winding up of the company. The company resolved that the company be wound up by the court. A director was authorised to sign all documents necessary to wind up the company and a liquidator was recommended in terms of s 207 of the Companies Act [*Chapter 24:03*]. The reason for the resolution was that running costs of the company were high and there was no business, the applicant was insolvent and there was no prospect of recovery for the applicant; and that the company's liabilities exceeded its assets.

The respondent, the chairman of the works council, submitted that it was mandatory in terms of s 25A(5)(c) of the Labour Act [*Chapter 28:01*] that an employer should consult the works council about proposals relating to plant closures. He averred that the works council was not consulted before the application was filed with the court for a provisional order for winding up. He refuted the allegation that the business had struggled just because of hyperinflation and dollarization; he said that the business was being mismanaged by its directors and that there was sufficient work for the employees to engage in, instead of subcontracting work to another company. He said that the company had good prospects of recovery if properly managed and that the appropriate remedy required was judicial management rather than winding up.

Held: Winding up may either be voluntary or by the court. Voluntary winding up is carried out in terms of ss 242 and 243 of the Companies Act. This application came as an application for winding up by the court. The circumstances under which a company may be wound up by the court are listed under ss 206 and 207. A company undergoing voluntary winding up is required in terms of s 243 to give notice of the winding up in particular to "the company's workers' committee or, where the company has no workers' committee, to the company's employees". There is no similar provision requiring the company to give notice of winding up or consultation where the winding up is by the court. The question was whether 25A of the Labour Act applies to a situation of winding up by the court.

There is some inconsistency in the Companies Act, as the requirement to give notice is only in respect of a voluntary winding up in terms of s 243 and not in respect of winding up by the court under ss 206 and 207. However, s 2A(3) of the Labour Act provides that the Act shall prevail over any other enactment inconsistent with it. Even if the Companies Act did not provide in ss 206 and 207 for such consultation in cases of winding up by the court, the Labour Act prevails over the Companies Act. This means that s 25A imposes the requirement to consult the works council and afford them a reasonable opportunity to make representations and to advance alternative proposals in a winding up by the court. Section 25A is of general application. The intention of the legislature in enacting this provision was clearly to ensure that workers are advised and consulted about proposals relating to partial or total plant closures carried out at the establishment.

Editor's note: would this apply to a company being wound up at the petition of a creditor? In that situation, presumably the company would have no plans about plant closures, such closures being forced on it.

Constitutional law – citizenship – by birth – rights of citizen by birth – whether can be deprived of citizenship – Constitution of Zimbabwe 1980 – s 9 – only citizenship by registration or naturalization may be lost – Citizenship of Zimbabwe Act [*Chapter 4:01*] – s 9(7) – requirement to renounce foreign citizenship, failing which Zimbabwe citizenship is lost – not *ultra vires* s 9 of Constitution

Whitehead v *Registrar-General of Citizenship & Ors* HH-349-12 (Zimba-Dube J) (Judgment delivered 13 September 2012)

The applicant was born in the then Southern Rhodesia. His mother was also born in this country. At the time of the applicant's birth, his father, who was born in South Africa, had become a naturalised citizen. In 2005, the applicant had been declared by the then Minister of Home Affairs to be an undesirable person and prohibited from entering the country. The applicant's case was that he was a citizen by birth. In 2002, he renounced whatever claim he might have had to South African citizenship. He averred that in October 2005 the first respondent confiscated his Zimbabwean passport. In order to avoid being stateless, he applied for and was granted South African citizenship and was subsequently issued with an emergency travel document. He needed to travel on business as he had consultancies in Zambia and South Africa. He did not state exactly when he did this. He argued that he did not do "a voluntary act" when he took up South African citizenship as stipulated in s 9(2) of the Citizenship of Zimbabwe Act [*Chapter 4:01*], as he had no other option. He argued that s 9(2) of the Act was *ultra vires* s 9 of the Constitution of Zimbabwe in so far as those provisions relate to citizenship by birth. The first respondent claimed that, although the applicant was a citizen of Zimbabwe from his birth, he was also a citizen of South Africa and was required to renounce his foreign citizenship by a stipulated date in terms of s 9 of the Citizenship Act. He argued that the applicant lost Zimbabwean citizenship by not complying with the renunciation requirements.

Held: s 9 of the Constitution, in its original form, did not allow for the deprivation of citizenship by birth. However, the amendment in 1983 of the section empowered the legislature to enact legislation governing citizenship in Zimbabwe. It provided that legislation may provide for the acquisition of citizenship of Zimbabwe and the circumstances in which a citizen of Zimbabwe by birth may cease to be a citizen or be deprived of such citizenship. The proviso to the section stipulated that the only instance when cessation or deprivation of citizenship by birth was permissible is where a citizen by birth of Zimbabwe had become a citizen of some other country. In accordance with s 9, Parliament enacted s 9(2) of the Act, which provides that a citizen of Zimbabwe of full age who, by voluntary act other than marriage, acquires the citizenship of a foreign country shall immediately cease to be a citizen of Zimbabwe. Section 9(7) required a citizen of Zimbabwe who was also a citizen of another country to renounce the citizenship by a specified date. The proviso to s 9 of the Constitution permitted Parliament to enact laws depriving a citizen of Zimbabwe by birth of that status, if he became a citizen of another country. This means that a citizen by birth of Zimbabwe could be deprived of citizenship by birth. The mischief that the legislature intended to remedy was a situation where a citizen of Zimbabwe acquired foreign citizenship and still remained a Zimbabwean citizen and thereby held dual citizenship. It covered all classes of citizenship.

Section 9 of the Constitution was again repealed and substituted in 2009. The new provision provided in para (c) for circumstances in which persons qualify for or lose their citizenship by descent and registration. The provision makes no reference to the term "citizenship by birth". The maxim *expressio unius est exclusio alterius* was applicable: the express mention of the power of Parliament to enact laws dealing with the loss and qualification of citizenship by descent or registration warranted one inference, namely, that the power to enact a law dealing with qualification and loss of citizenship by birth was deliberately excluded.

Section 9 of the Act guarantees the right to nationality for as long as the person remains a Zimbabwean citizen and does not acquire any other citizenship. A citizen is given the right to change his nationality, but once that is done the person has dual citizenship, which is contrary to the laws of Zimbabwe. Section 9 of the Constitution has to be read in conjunction with the sections prohibiting dual citizenship. The major thrust of s 9 of the Act is to prohibit dual citizenship. A citizen can only protect his Zimbabwean citizenship if he desists from acquiring foreign citizenship. By acquiring foreign citizenship, a person is deemed to have renounced his Zimbabwean citizenship. There is no express provision under s 9 of the Citizenship Act which deprives a person of his citizenship by birth. The provisions of the Act were not *ultra vires* the provisions of s 9 of the Constitution.

See Piroro *v* Registrar-General of Citizenship & Ors *HH-128-11 (summary in Recent Cases 2011(2)), where the opposite conclusion was reached. With respect, surely a provision of the Constitution does not have to be read in conjunction with an ordinary Act of Parliament; if anything, the situation is the other way round. While s 9 of the Act was* intra vires *the provisions of s 9 of the Constitution before 2009, the amendment in 2009, as pointed out*

in Piroro supra*, effectively rendered s 9 of the Act* ultra vires*, in so far as citizens by birth were concerned – Editor.*

Contract – illegality – *par delictum* rule – departure from – relaxation of rule where party would be unjustly enriched at expense of other

Portnet Hldgs (Pvt) Ltd v *Maliseni* HH-450-12 (Mutema J) (Judgment delivered 3 September 2012)

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

Contract – sale – option – right of first refusal (pre-emption) – creation of right – need for right to be granted – sitting tenant of leased property – no custom or convention whereby such tenant has right of pre-emption

Prize Commercial Hldgs (Pvt) Ltd v *Goldberg & Ors* HH-446-12 (Mathonsi J) (Judgment delivered 5 December 2012)

A right of pre-emption or first refusal differs from an option by giving the holder the right to buy in priority to other prospective buyers if and when the seller decides to sell. The grantor of such a right cannot be compelled to sell the property concerned, but if he does sell, he is obliged to give the grantee the preference of purchasing and consequently he is prevented from selling to a third person without giving the first refusal. A right of pre-emption thus involves a negative contract not to sell the property to a third party without giving the grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies. The right of pre-emption can only be created by contract or agreement between the grantor and the grantee. Where breach of the right is alleged as a cause of action and its existence is denied, the onus is on the plaintiff to show that there was an agreement between the parties in terms of which the defendant undertook to offer to him the property at a price equal to that offered by another.
In the case of a leased property, a right of pre-emption can only be granted by the property owner and by agreement of the parties. There in Zimbabwe no custom, convention or practice under which a person can claim the right of first refusal as a sitting tenant, on a property to be sold.

Contract – set-off – when may be claimed – necessary for both debts to be liquidated or capable of easy proof

ZCFU v *Gambara* HH-395-12 (Mathonsi J) (Judgment delivered 17 October 2012)

Set off, or *compensatio*, comes into effect when two parties are reciprocally indebted to each other, a natural obligation being sufficient. The reciprocal debts must be liquidated, in the sense of being either admitted or capable of easy and speedy proof. Where one or neither of the debts is liquidated or ascertainable, then set off cannot come into play.

Contract – *stipulatio alteri* – formation – requirements – need for contract to show that third party should have option to accept contract – need for third party to accept contract and communicate acceptance to offeror

Hamtex Invstms (Pvt) Ltd v *King* HH-403-12 (Mathonsi J) (Judgment delivered 24 October 2012)

See below, under PROPERTY AND REAL RIGHTS (Vindicatory action).

Costs – contribution towards – divorce action – spouse's entitlement to – principles – need for spouse seeking contribution to have reasonable prospect of success – need to be honest about own financial position

Jones v *Jones* HB-144-12 (Cheda J) (Judgment delivered 12 July 2012)

All costs, unless expressly otherwise enacted, are in the discretion of the judge. However, that discretion must be judicially exercised.
In our law a wife is entitled to demand a contribution of costs from her husband towards a matrimonial action. The success of that demand largely depends on the prospects of success of her claim. The wife must show that she has a reasonable prospect of success, but it is not necessary for her to convince the court that there is a balance of probabilities in her favour. Our legal system is geared towards assisting those who are financially less privileged to access financial assistance in order for them to prosecute their claims or defend such claims. However, the courts should apply a strict means test in order to determine some reasonable prospects of success. In as much as a wife is entitled to be adequately funded by her husband in order to prosecute her claim, factors like her own financial status should be taken into consideration. The fact that the husband may be wealthy would not and cannot entitle the wife to lavish spending or at the worst, destroy her husband's financial nest while hers is being cosily built. The applicant is expected to be honest with the court. Any litigant who chooses to mislead the court by his or her conduct must reap the fruits of such deceit.

Costs – *de bonis propriis* – legal practitioner – defects in application for condonation attributable to flagrant disregard of rules and a casual attitude – costs *de bonis propriis* appropriate

M M Pretorius (Pvt) Ltd & Anor v *Mutyambizi* S-39-12 (Ziyambi JA, in chambers) (Judgment delivered 17 October 2012)

A legal practitioner is not engaged by his client to make omissions and to commit oversights. He is paid for his professional advice and for the use of his skills in the representation of his client. He is not paid to make mistakes. These could be costly to his client. He is professionally, ethically and morally bound to exercise the utmost diligence in handling the affairs of his client.
Where the blame for the numerous defects in an application for condonation of late noting of an appeal was entirely attributable to the applicants' legal practitioner's flagrant disregard of the rules of court and his casual attitude, it would be appropriate to make an order that the practitioner should pay the costs personally.

Costs – legal practitioner and client scale – grant of – losing party a self-actor – action frivolous and vexatious and an abuse of court process – costs on higher scale appropriate

Guard-Alert (Pvt) Ltd v *Mukwekwezeke & Anor* HH-405-12 (Mutema J) (Judgment delivered 25 July 2012)

While normally a litigant should not be penalised with costs, especially when that litigant is a lay person, there may exist instances where a litigant – lay person or not, or self-actor or not – deserves to be mulcted with costs on an attorney-client scale. This could happen where the action is frivolous and vexatious and an abuse of court process, and where the court considers that, as a result, it would be just, by means of such an order, to ensure, more effectively than it can do by means of a judgment for party and party costs, that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.

Court – contempt – failure to obey court orders – duty to obey court order even if apparently wrong

Mpofu v *Tevestrand Invtsms (Pvt) Ltd & Ors* HB-211-12 (Cheda J) (Judgment delivered 23 October 2012)

See below, under COURT (Officer – Deputy Sheriff).

Court – contempt – what is – statement ascribing political motivation to court – such statement a clear contempt

Kwaramba v *Bhunu NO* S-46-12 (Chidyausiku CJ, in chambers) (Judgment delivered 1 November 2012)

See below, under COURT (Supreme Court – jurisdiction).

Court – officer – Deputy Sheriff – special relationship with court – must be scrupulous to obey orders of court – failure to obey such orders – should be met by punishment

Mpofu v *Tevestrand Invtsms (Pvt) Ltd & Ors* HB-211-12 (Cheda J) (Judgment delivered 23 October 2012)

Contempt of court is an act or omission calculated to interfere with the due administration of justice. Any person who without just cause or excuse fails to comply with a court order of a competent jurisdiction is in contempt of court and he remains so until he purges the contempt. In our jurisdiction a court order should be obeyed even if the person affected by it is of the view that it is a wrong order or is against him. In simple terms, you first obey the order and complain later. When an allegation of a contempt of court is made, the person so accused should be given an opportunity to explain his conduct. Where the court finds that the person has no reasonable excuse it must either punish or coerce the contemnor.

The Deputy Sheriff is an officer of the court and as such the court places reliance on him for the purposes of furthering the interests of justice. He falls under the umbrella of the Ministry of Justice, which Ministry is charged with the proper administration of justice. It is upon that basis that the court expects utmost good faith on all his services. A person who is an officer of the court like a legal practitioner, or has a special relationship with a court like a liquidator or in a position of a trustee, should be scrupulous to obey the orders of the court. If he fails to do so his special breach will require punishment. The Deputy Sheriff is charged with effecting court orders and is deemed to know what disobedience means. If he himself disobeys a court order, he cannot expect non-informed litigants to obey such orders.

Court – High Court – jurisdiction – inherent jurisdiction – court not given jurisdiction to exercise powers given to another court or official in terms of a statute

Karimatsenga v *Tsvangirai & Ors* HH-369-12 (Guvava J) (Judgment delivered 12 September 2012)

The applicant and the first respondent were lovers. The applicant became pregnant by him. She claimed that thereafter he sent his representatives to the applicant's family and married her in terms of customary law. The applicant proceeded to the first respondent's rural home where she stayed with the latter's mother for two months. When the applicant was 7½ months pregnant she suffered a miscarriage and lost the baby. Subsequently, she learned that the first respondent was going to marry the second respondent in accordance with the Marriage Act [*Chapter 5:11*]. Fearing that if the first respondent were to marry the second respondent in terms of the general law she will cease to be his wife by operation of law, the applicant sought an urgent order to stop the proposed marriage. The first respondent, although admitting a relationship with the applicant, denied having married her in terms of customary law. The respondents raised a number of defences, the first of which was that the court had no jurisdiction to give the order applied for. Their argument was that the legislature had appointed through statute the persons who should deal with an objection to a marriage. The applicant's argument was that the High Court had inherent jurisdiction to deal with all matters.
Held: each court is a creature of statute, and its powers are created and defined by statute. If one court were to claim that it has same inherent power to overrule another court, instead of a power specifically created by statue, in effect it would be claiming the power to nullify the body of statute law which specifically relates to the establishment and powers of each of the civil courts in the country. The High Court cannot invoke its inherent powers to take away powers which have been given to another court or person in an Act of Parliament. Section s 19 of the Marriage Act sets out the procedure to be adopted by a person who wishes to object to a marriage. An objection must be lodged with the person publishing banns of marriage, the magistrate who issues a marriage licence, or the marriage officer who is to solemnise the marriage. Once the applicant became aware of the intended marriage she should have lodged her objection in writing with to the marriage officer who was to solemnise the marriage. As a magistrate had issued a marriage licence, she could also have lodged an objection with the magistrate. It was not for the High Court to usurp the powers of the magistrate and the marriage officer and take over their functions. If the court were to use its inherent powers to take over the functions of the lower courts, that would be tantamount to amending legislation through the back door.

Court – judicial officer – *functus officio* – when court is *functus officio* – court order giving party until stated date to comply with legal obligations – appeal court upholding such order but setting new date – order of lower court still extant – lower court entitled to grant further extension of time

The President v *Bhebhe & Ors* HH-400-12 (Chiweshe JP) (Judgment delivered 17 October 2012)

The three respondents were elected members of Parliament but, following their expulsion from the party they represented, their membership of parliament was terminated at the behest of the party. The speaker of the House of Assembly notified the President (the applicant *in casu*) of the vacancies so created, as required of him in

terms of s 39(1) of the Electoral Act [*Chapter 2:13*]. The applicant did not take the necessary steps to fill the vacancies as required by law. The respondents obtained an order compelling the applicant, within 14 days of the order, to gazette a date for by-elections to fill the vacancies in the three constituencies. The applicant appealed. The Supreme Court dismissed the appeal and ordered that dates for the by-elections be published not later than 30 August 2012. By consent, the date was extended to 1 October 2012. The applicant then brought another application to extend the date to 31 March 2013. The reason given – which was the same as that given previously – was lack of funds to conduct the by-elections. The respondents, despite consenting to the previous extension, argued that the High Court had no jurisdiction to alter the judgment given by a superior court, the Supreme Court.

Held: (1) This matter originated in the High Court and the High Court issued the original order directing the applicant to issue the notice to hold the three by-elections within 14 days from the date of that order. The Supreme Court confirmed that order and directed that the applicant should comply with it within a prescribed period. Although the Supreme Court order altered the judgment of the court *a quo*, it did not do so in any material respect. At most it confirmed substantially the same order of this court, though in different words. The order being confirmed was the order of the High Court. It would be different if the Supreme Court had set aside the High Court order and substituted it with its own. Under those circumstances, the High Court would have no jurisdiction to entertain an application such as the present.

The alteration of the High Court's original order to reflect a new time scale was necessitated by the passage of time. A new time frame was introduced because the original time frame had been overtaken by events, and, having lapsed, could no longer be complied with. That alteration did not substantially change the nature of the original order, which remained extant and the High Court retained jurisdiction. This was not an alteration of the order of the court in circumstances where the court had become *functus officio*; rather, it was an extension of time within which to execute that order. It was a procedural rather than substantive matter in which the court may, on good cause shown, exercise its discretion in favour of the applicant.

(2) The applicant had offered a reasonable explanation for the indulgence he sought and, by approaching the court timeously, had demonstrated his wish to abide by the court's order but for the constraints he alluded to. The application would therefore be granted.

Court – jurisdiction – meaning – when jurisdiction of court determined – principles on which court may exercise jurisdiction – effectiveness – no attachment of defendant or his property – any judgment would be illusory – *ratio jurisdictionis* – cause of action arising outside jurisdiction – need for plaintiff to show how court would have jurisdiction

Katsande v *Grant* HH-380-12 (Zhou J) (Judgment delivered 19 September 2012)

The plaintiff and his wife, who both hailed from Zimbabwe, were married in Zimbabwe but moved to the United Kingdom and took up residence there. While they were there, the defendant became involved in an adulterous relationship with the plaintiff's wife. The plaintiff consulted a legal practitioner in Harare and brought an action in the High Court in Zimbabwe, claiming $2.5 million as damages. The plaintiff was granted leave to serve the summons and declaration upon the defendant outside the jurisdiction of the court. The summons and declaration were served upon the defendant in the United Kingdom by the Messenger-at-Arms. The defendant did not enter appearance to defend and was barred. The issue of the court's jurisdiction was raised. A notice of amendment to the summons, alleging that some of the adulterous acts took place in Zimbabwe, was filed but not served on the defendant.

Held: Jurisdiction means the power vested in a court by law to adjudicate upon, determine and dispose of a matter. The time for determining the jurisdiction of a court to entertain an action is the time of the commencement of the action. An action commences when the summons has been issued and duly served. Three common law principles underpin the exercise by a court of its jurisdictional powers generally. These are (a) the doctrine of effectiveness; (b the doctrine of submission; and (c) the *actor sequitur forum rei* rule.

The doctrine of effectiveness essentially means that jurisdiction depends upon the power of the court to give an effective judgment. *In casu* both the plaintiff and the defendant were *peregrini*. Both parties were resident in the United Kingdom. The plaintiff claimed that he had not abandoned his domicile in Zimbabwe, but domicile is not a ground of jurisdiction in a delictual claim for adultery damages. The court could not give effect to a judgment given in favour of the plaintiff and against the defendant where there had been no attachment of the defendant's person or his property. Such a judgment would be illusory, as it could not be enforced.

Quite apart from the fact that no arrest or attachment had taken place, the plaintiff had not established any *ratio jurisdictionis*. The cause of action arose outside the jurisdiction of the court. The notice of amendment filed on behalf of the plaintiff did not clothe the court with jurisdiction. At the time that the summons was issued and served there was no averment that the cause of action had arisen in this jurisdiction.

The amount claimed in damages by the plaintiff was out of this world and bore no relation to the prevailing awards in this and other jurisdictions. A legal practitioner owes it to his injured client to advise him of reasonable awards of damages, instead of creating misdirected expectation in the minds of the client, who looks up to the practitioner for advice. The cases decided in this country did not support the amount claimed or any reasonable fraction of it.

Court – magistrates court – court of record – meaning of "record" – record indecipherable because of magistrate's poor handwriting – not a record which can be used as basis for reasoning or discussion – judgment – what it should consist of – should be a process of reasoning, showing why conclusions were drawn

S v *Mazangwa* HH-370-12 (Mutema J) (Judgment delivered 13 September 2012)

Section 5(1) of the Magistrates Court Act [*Chapter 7:10*] provides that the magistrates court shall be a court of record. The word record denotes a "collection of data". And the term data can be defined as "factual information used as a basis for reasoning, discussion or calculation". If the record of proceedings is indecipherable because the magistrate's handwriting is so bad, it means that it cannot pass the definition of "record", neither can that unreadable data be called factual information to be used as a basis for reasoning or discussion to enable the trier of fact in a court of law to analyse and arrive at an informed or correct decision.
Judgment writing is a process of reasoning, giving reasons why and how a particular finding was arrived at. A trier of fact is not expected to simply waffle or regurgitate what witnesses said and then out of the blue baldly and boldly conclude that the State managed to prove its case beyond reasonable doubt and convict an accused person. A trier of fact is enjoined to deal with the credibility of the witnesses and justify why the evidence of a particular witness is to be preferred to that of the accused and why that of the accused is being rejected.

Court – Supreme Court – jurisdiction – review powers – when may be exercised – need for an irregularity or misdirection to be alleged – concurrent jurisdiction with High Court – whether Supreme Court can order review of decision of decision of a High Court judge

Kwaramba v *Bhunu NO* S-46-12 (Chidyausiku CJ, in chambers) (Judgment delivered 1 November 2012)

The applicant was one of the team of legal practitioners representing 29 persons who were accused of murdering a police officer. The trial of the accused persons had commenced in the High Court. The applicant, on behalf of the accused persons, made a bail application, which the State opposed. The court, presided over by the respondent, reserved its judgment. The trial continued while awaiting judgment on the bail application. While judgment was pending on the bail application, an article appeared in a newspaper stating the applicant had said that the law was not being applied fairly and that justice was being politicised because the accused belonged to a particular political party. The applicant admitted being asked to comment on the manner in which the wheels of justice were turning in the matter and that he expressed disappointment at the lengthy stay of his clients in remand prison. He said that although the article was to some extent true, it contained several inaccuracies, which inaccuracies probably created the wrong impression in the minds of readers, including the presiding judge. The respondent, disturbed by the article, summoned all the legal practitioners in the matter to his chambers. There he expressed his concern over the contents of the article and asked the legal practitioners to comment. The applicant indicated to the respondent that the article was inaccurate and that there was no intention whatsoever on his part to attack the court or make adverse comments. He tendered his apology to the respondent if the wrong impression had been created. He alleged that the newspaper had misquoted him or misrepresented him. He assumed that the matter had been resolved, but when the respondent gave his decision on the bail application in court, he castigated the applicant for his communication with the newspapers, accusing him of "demonising and attacking the dignity and integrity of this court and the judiciary of this country in general". He described the applicant's remarks as being "ill conceived" and "malicious" and said that the applicant was bent on bringing the due administration of justice into disrepute. He concluded by describing the applicant as "dishonest, slanderous, contemptuous and unethical".
The applicant, aggrieved by the remarks, requested that a judge of the Supreme Court give directions in terms of s 17(h) or s 25(3) of the Supreme Court Act [*Chapter 7:13*] that a review of the matter be instituted.
Held: (1) Before a judge of the Supreme Court issues directions in terms of s 25(3) of the Act, he has to be satisfied of the existence of an irregularity that needs determination or correction which has occurred. Generally speaking, an irregularity occurs when a judicial officer takes into account factors that he should not take into

account or fails to take into account factors he should take into account in the process of the making of a determination the judicial officer is seized with. An irregularity also occurs where the law is misapplied or an incorrect procedure is followed. The court *a quo* was seized with a bail application. No misdirection or irregularity in the determination of the bail application was alleged. The respondent's remarks about the applicant were *obiter*.
(2) Sections 17(h) and 25 of the Act confer concurrent review jurisdiction on the Supreme Court with the High Court over inferior tribunals. What this means is that a Supreme Court judge, in the exercise of jurisdiction conferred by ss 17 and 25 of the Act, has the same review jurisdiction as a High Court judge. A judge cannot order the review of a judgment of another judge of the same jurisdiction. Thus, from a jurisdictional standpoint, the request was not competent.
(3) The applicant did not seem to appreciate what is expected of him as a legal practitioner and an officer of the court. The remarks ascribed to him did not only scandalise the respondent but were also made while the matter was *sub judice*. A time-honoured practice which has crystallised into law prohibits the making of inappropriate statements on matters pending before the courts. The statements ascribed to the applicant grossly transgressed the *sub judice* rule and clearly constituted contempt of court, in that they scandalise the court by ascribing to it political motivation in its judgment. The inescapable inference is that the remarks were made not only to bring the court into contempt in the eyes of the public but also in an attempt to influence the outcome of the bail application and consequently the course of justice. The applicant was lucky that he was not prosecuted for contempt of court. He should have immediately issued a statement disassociating himself from the contents of the article and denying that he ever uttered the words ascribed to him by the newspaper. He should also have urgently sought audience with the judge to assure him that he never said the words ascribed to him. Instead, he only offered a wishy washy explanation upon being asked about the matter.

Criminal law – offences under Criminal Law Code – assault – when constitutes domestic violence – need for person assaulted to be "complainant" as defined in Domestic Violence Act [*Chapter 5:16*]

S v *David* HH-289-12 (Makoni J) (Judgment delivered 18 July 2012)

Where it is proposed to charge a person contravening the Domestic Violence Act [*Chapter 5:16*], it is essential that the person who is the victim of the violence be a "complainant" as defined in the Act. The Act was put in place for the protection and relief of victims of domestic violence, not to protect the victims of any other form of assault. If the assault does not constitute "domestic" violence, a charge of assault under s 89(1) the Criminal Law Code [*Chapter 9:23*] may be brought. The penalties are the same.

Criminal law – offences under Criminal Law Code – bigamy (s 104) – party to unregistered customary law union – union not dissolved in terms of customary law – marriage to another person under civil law constituting bigamy

Tsvangirai & Anor v *Mutevedzi NO & Anor* HH-351-12 (Bhunu J) (Judgment delivered 14 September 2012)

A man who is married to a woman in terms of customary law cannot marry another woman in terms of the civil law without committing bigamy as defined in s 104 of the Criminal Law Code [*Chapter 9:23*]. The mere fact that s 3 of the Customary Marriages Act [*Chapter 5:07*] does not recognise an unregistered customary law marriage as a valid marriage for the purposes of bigamy is irrelevant. If the man wishes to marry the other woman, he must divorce the first one extra-judicially, according to customary law practices and procedures, as the formal courts have no role to play in the dissolution of an unregistered customary law marriage. Upon the lawful dissolution of such a union, the courts can only recognise that the union has come to an end, thereby releasing the couple from the shackles of s 3 of the Act.

See also *Karimatsenga* v *Tsvangirai & Ors* HH-369-12 (judgment of Guvava J, delivered delivered 12 September 2012), summarised under COURT (High Court – jurisdiction) for earlier proceedings in this matter. – *Editor.*

Criminal law – offences under Criminal Law Code – culpable homicide – death caused by negligence – foreseeability – objective test – what must be foreseen – need to foresee risk of death, not merely risk of injury – need for a *nexus* between actions of accused and death of deceased

S v *Tapera & Ors* HH-372-12 (Hungwe J, Mavangira J concurring) (Judgment delivered 26 September 2012)

The appellants, who were all police officers, were convicted of culpable homicide. They had, at night and on an unlit road, intercepted a bus. Acting in concert, they forced the driver to reverse the bus for considerable distance in order to go back to the nearby police station. They were acting on the belief that inside the bus was a suspect whom the complainant in a case of assault would identify at the station. The third appellant was driving a vehicle parallel to the reversing bus with his headlights on full beam facing the direction towards which the bus was reversing. A flashing blue light on top his vehicle was operating. A motor vehicle travelling in the same lane as the reversing bus came upon the scene and rammed into the back of the bus, killing the driver and two other passengers. There were no particulars of negligence set out in the charge sheet but the basis of the charge, as set out in the State outline, was that the appellants created a dangerous situation which they failed to warn approaching motorists about, resulting in the motor vehicle driven by the deceased crashing into the back of the bus.

Held: The test for negligence in culpable homicide is objective. What ought to have been foreseen, whether what was foreseeable ought to have been guarded against, and the measures which ought to have been taken are adjudged by the standards of what the reasonable man would have done in the circumstances. Foreseeability is an essential element to be considered in deciding whether a causal connection exists between the unlawful act or omission and the death of the victim. Foreseeability of risk of bodily injury, as opposed to risk of death, is not sufficient. The test of foreseeability in culpable homicide is, however, an objective one and it is sufficient for legal responsibility to arise that the accused ought to have foreseen some risk of death.

To convict an accused person of culpable homicide, the court must find as fact the existence of a causal link between that person's act or omission and the death of the deceased before liability can attach. Death must have been reasonably foreseeable as a consequence of the accused's conduct: for example; the manner of assault, or of driving in which the accused was engaged vis-à-vis the deceased. The argument that the accused is liable because he was engaged in an unlawful act which somehow resulted in the death of the deceased implicitly imports the rejected doctrine of *versari in re illicita*.

The appellants may have overstepped the call of duty regarding the execution of effecting an arrest. Their pursuit of the suspect was, however, largely in the line of duty. They could hardly have foreseen that, in requiring the driver to promptly get to the police station by reversing the bus, someone else outside the bus could die when there was appropriate signalling by the blue beacon atop third appellant's vehicle. On the evidence, there was no *nexus* between the actions of the appellants and the death of the three deceased. Rather, the evidence pointed to the failure by the deceased driver to keep a proper look out as being the proximate cause of the fatal crash.

Criminal law – offences under Criminal Law Code – murder (s 47) – intent to kill – realisation of risk or possibility of death ensuing from conduct – what must be shown

S v *Mhako* S-315-12 (Musakwa J) (Judgment delivered 20 July 2012)

The accused was charged with the murder of his seven year old daughter. He had severely beaten her with a bamboo stick for a misdemeanour and she had fallen down and injured herself when she managed to run away from him. She died a week later.

Held: (1) although moderate corporal punishment of a child by its parent is permitted by the Constitution, there was no doubt that the accused had exceeded the bounds of moderate corporal punishment. The question was whether he exceeded such bounds with intent to kill or did so negligently.

(2) The common law concept of "constructive intent" has been replaced by the term "realisation of risk or possibility" in the Criminal Law Code [*Chapter 9:23*]. There are two components. The first is a component of awareness, that is, whether or not the accused realised that there was a risk or possibility, other than a remote risk or possibility, that (i) his conduct might give rise to the relevant consequence; or (ii) the relevant fact or circumstance existed when he engaged in the conduct. The second is a component of recklessness, that is, whether, despite realising that risk or possibility referred, the accused continued to engage in that conduct. If the component of awareness is proved, the component of recklessness is inferred from the fact that (a) the relevant consequence actually ensued from the conduct of the accused; or (b) the relevant fact or circumstance actually existed when the accused engaged in the conduct. According to his confession and to the evidence of an eye witness, the accused must have realised that there was a real risk or possibility that his conduct might cause death but nonetheless continued in such conduct despite that risk or possibility.

Criminal law – statutory offences – offences under Road Traffic (Rules of the Road) Regulations – policy of referring certain offences to court instead of taking deposit fines – lawfulness of such policy

S v *Babbage* HB-157-12 (Cheda J, Kamocha J concurring) (Judgment delivered 2 August 2012)

See below, under CRIMINAL PROCEDURE (SENTENCE) (Statutory offences – offences under Road Traffic (Rules of the Road) Regulations)

Criminal procedure – charge – prosecutor's duty to prefer appropriate charge – charging accused with culpable homicide when murder was clearly the appropriate charge – a dereliction of duty on part of prosecutor

S v *Muromo & Anor* HH-286-12 (Mathonsi J) (Judgment delivered 11 July 2012)

The accused were charged with and convicted of culpable homicide in the magistrates court and sentenced to terms of imprisonment. The trial took place over 10 years after the killings took place. The killings were politically motivated and the beatings which lead to the deaths of the victims were committed right under the noses of police officers. One of the victims actually ran from his assailants to hide behind a police officer. This did not deter the assailants from dragging him from there and severely assaulting him inflicting fatal injuries. When the assailants were working on their second victim, a hapless young woman whose braids they had pulled off her head and they were assaulting her with logs even on her private parts, police officers arrived. The assailants were even urinating in her month. This did not stop the savagery as they went further to dump her lifeless body at her homestead.
Held: (1) It was amazing that, armed with these facts, the prosecution decided to prefer lesser charges of culpable homicide when it should have charged the accused persons with murder. Although the prosecutor is *dominus litis*, he has a responsibility, delegated to him by the Attorney-General, to discharge a public function of prosecuting offenders. In doing so, the prosecutor must ensure that the correct charges are preferred against offenders. He fails in his duty if, for some unknown reason, he trivialises the offences by opting for lesser charges where serious ones should be levelled against the offender.
(2) The magistrate, as the trier of facts with the objective of doing justice between man and man, should not have allowed the prosecutor to abuse his prosecutorial mandate in this way. A magistrate has a responsibility to ensure that suitable charges are preferred against accused persons who appear before him. He must prevent the prosecutor from proceeding on a lesser charge where justice clearly requires that a more serious charge be preferred. Here, the magistrate should have realised that the facts pointed to a charge of murder and that prosecution on charges of culpable homicide was a sheer dereliction of duty on the part of the prosecution. He should have stopped the trial in terms of s 54 of the Magistrates Court Act [*Chapter 7:10*] and referred the matter to the Attorney-General.
(3) The result was that the offences committed were trivialised and the outcome offended all sense of justice.

Criminal procedure – plea – not guilty – requirement to request accused to make statement outlining defence – accused already having given explanation resulting in alteration of plea from guilty to not guilty – requirement not thereby dispensed with

S v *Isaac* HH-424-12 (Uchena J) (Judgment delivered 2 November 2012)

The accused pleaded guilty to a charge of theft, but after the facts had been put to the accused and he was asked whether he had anything to add, he gave a lengthy explanation inconsistent with guilt. The magistrate thereupon altered the ;plea to one of not guilty and proceeded to trial without asking the accused to outline the defence case. At the conclusion of the trial the accused was convicted. The magistrate, in answer to a query from the scrutinising regional magistrate, said that, in view of the detailed response which the accused had already given, it was not necessary to ask him to outline the defence case.
Held: in terms of s 188 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], whether the accused person pleads not guilty or his plea is altered to one of not guilty, the prosecutor *shall* make a statement outlining the nature of his case and the material facts on which he relies; and the accused *shall* be requested by the magistrate to make a statement outlining the nature of his defence and the material facts on which he relies. The fact that the convicted person had given a detailed explanation did not entitle the magistrate to dispense with this mandatory procedure, which in a trial of an unrepresented accused imposes on a magistrate the duty to explain to him the provisions of s 189(2), which authorises a court to draw adverse inferences if an accused person fails to mention any relevant fact he would have been expected to mention in his defence outline. The failure to request the accused to make a statement was an irregularity necessitating a trial *de novo*.

Criminal procedure – record – status of – need for full record to be made during trial – unreliability of subsequent and belated explanation from magistrate in answer to query from scrutinising regional magistrate or reviewing judge

S v *Mazambani* HH-449-12 (Uchena J) (Judgment delivered 28 November 2012)

The magistrates court is a court of record. A trial court is therefore duty bound to keep an accurate record of the proceedings and of the scrutiny cover. The record of proceedings must be considered by the scrutinizing regional magistrate and reviewing judge, as it appears, and not as the trial magistrate interprets it on inquiry being made. Members of the public who have access to the record of proceedings will understand the proceedings as per the record. It is therefore important that judicial officers presiding over courts of record keep an accurate record of the proceedings. A court record should tell the whole story of what happened during the trial. It cannot be supplemented by an explanation from the trial magistrate on details which should be in it. The rationale for the rules prohibiting review and appellate tribunals from having recourse to matters extraneous to the actual record is clear, as is the prohibition against the correction and reconstruction of records except in accordance with defined rules and in only exceptional cases. It is inconceivable that a magistrate who hears several cases per day can recall what happened in a particular case months later on being questioned by a scrutinizing regional magistrate. A scrutinizing regional magistrate or reviewing judge cannot rely on such a belated and unprocedural reconstruction or correction of the record.

It is the duty of judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available 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. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done.

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.

The failure to ask the accused whether he wishes to give evidence is an irregularity necessitating the setting aside of a conviction, though in proper cases an appeal court may remit the matter for the correct questions to be put. The failure to explain to an accused who has misunderstood his right to give evidence or the other courses open to him, and what his rights really are, is also an irregularity justifying an appeal court in setting aside the conviction. The fact that the accused has been informed of these matters should be recorded; it is a fatal irregularity not to record this fact.

Criminal procedure – record – incomplete – duties of magistrate and clerk of court when record not complete

Criminal procedure – review – submission of records for review – duties of magistrate and clerk of court to ensure that records are submitted in orderly fashion and properly secured

S v *Chizhanje* HH-8-13 (Uchena J) (Judgment delivered 28 December 2012)

Reviews are based on the documents in the review cover and the record of proceedings. Where the record or part of it goes missing and it becomes impossible to review the proceedings, the convicted person's conviction and sentence must be set aside. That however must only occur if the record of proceedings (if it was mechanically recorded) cannot be transcribed, or, if it was handwritten, cannot be reconstructed. Where a record or part of it is lost, that is not the end of the matter. The following should be done:

(1) The clerk of court, who is the custodian of court records, must be administratively required to search for the record or missing part of the record.

(2) If it cannot be found after a diligent search, the clerk must either cause the mechanical record to be transcribed or the missing record of proceedings to be reconstructed. If a document generated by the State is missing, a copy can be obtained from the prosecutor.

(3) If the mechanically recorded proceedings are transcribed and the transcribed record is certified by the transcriber and signed by the magistrate, it can be forwarded for review.

(4) If the record is to be reconstructed, since the trial court is *functus officio*, the clerk of the court must by affidavit indicate that the record is irretrievably lost and should obtain affidavits from the presiding magistrate, witnesses and others present at the trial as to the contents of the record. Thereafter he must give both parties an

opportunity to peruse this, so they may give their version as well. This reconstructed record from the best available secondary evidence must be sent for review.
While a magistrate becomes *functus officio* on sentencing the convicted person, he retains an administrative duty to ensure that the record is sent for scrutiny or review. That is why he has to sign the scrutiny or review cover. The *functus officio* principle only applies to his judicial role. It does not extend to his administrative duties.
Many records are now being forwarded for review in a disorderly manner, with papers loosely placed in a review cover and in any order. It is the duty of the clerk and the trial magistrate to ensure that the documents and record of proceedings are properly arranged and securely stapled or bound together. If documents are simply loosely placed in the review cover, they can easily slip out. A magistrate should not sign a review cover with loose papers in it. He should instruct the clerk of court to staple or bind them together before signing the review cover.

Criminal procedure – search and seizure – when may be carried out – need to suspect that articles concerned are connected to commission of an offence – what may effect seizure – agents of state security organisation – required to act in terms of law

Maguwu v *Co-Ministers of Home Affairs & Ors* HH-404-12 (Mathonsi J) (Judgment delivered 24 October 2012)

The applicant, a human rights activist, had certain items of his property seized by unnamed officials at Harare International Airport as he tried to board a flight en route to a human rights conference in Ireland. After being issued with his boarding passes he went through all the immigration formalities and it was then that he was approached by 2 persons who did not identify themselves but who were agents of the Central Intelligence Organization (CIO). They conducted a body search of his person and also searched his luggage. Various items of his property were seized from him. The agents refused to advise him of what offence that he was suspected of having committed. They seized his property without issuing him with any warrant of seizure or even an inventory listing the property they had confiscated from him. He brought an urgent application ordering the return of his property and a provisional order was granted. The confirmation of that provisional order was contested although the first and fourth respondents did not file any opposition.
The third respondent, the Minister of Transport, argued that he was wrongly cited, because, although the fourth respondent (the Civil Aviation Authority of Zimbabwe) was a parastatal under his ministerial portfolio, it was a legal *persona* constituted in terms of an Act of Parliament which could sue and be sued in its own right.
The fifth respondent admitted taking some valueless papers but denied seizing the applicant's computer, camera and money. He also said that the role of the department of state for national security was to detect, assess and neutralise security threats against the country. He stated that, owing to the fact that subversive elements operate covertly, the CIO had to operate covertly in order to discharge its responsibility. He made reference to the Official Secrets Act [*Chapter 11:09*] generally and to s 296 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] as legal instruments protecting classified information. He claimed that his department had received intelligence information that the applicant was travelling to attend sic) a human rights workshop for the purposes of subverting the government of Zimbabwe. For that reason he was searched and documents seized.
Held: (1) In terms of s 4 of the Civil Aviation Act [*Chapter 13:16*], the Civil Aviation Authority was a body corporate capable of suing and being sued in its own name and, subject to the Act, of performing all acts that bodies corporate may by law perform. To the extent that the Minister had been cited merely as the Minister responsible for the Authority, there had been a misjoinder. He should not have been cited for the acts of commission or omission of the Authority.
(2) The applicant was a citizen of Zimbabwe who is entitled to the protection of the law. He enjoyed certain rights, including the right to property and free movement, as enshrined in the C of Zimbabwe. If the property of an individual is to be seized, such seizure must be under the authority of the law. While the rights of an individual to possession and enjoyment of his property can be derogated from, that can only be done in accordance with the law. The fifth respondent could no cite law under which the state agents acted; in fact, counsel for the fifth respondent admitted that the state agents did not operate under any law. It had not been shown how the state agents were able to reasonably suspect that any of the articles in the possession of the applicant could be the subject of the seizure in terms of s 49 of the Criminal Procedure & Evidence Act or any other law for that matter. The fifth respondent contented himself with hedging behind vague allegations of subverting the Government of Zimbabwe. How this subversion could be deduced from the articles the applicant was carrying had not been demonstrated.
(3) The manner in which the search was conducted by agents who did not identify themselves, was not only arbitrary but highhanded. If an individual is to be lawfully deprived of his property, he must be informed of the reasons for doing so and the law under which such deprivation is being effected. While state security is

paramount, what is done in pursuit of state security must be justifiable in a democratic society and must conform to the rule of law.

Criminal procedure – stay of proceedings – stay sought on ground of breach of tight to trial within a reasonable time – magistrate not entitled to grant stay – should refer matter to Supreme Court

S v *Chuma & Anor* HB-192-12 (Makonese J) (Judgment delivered 20 September 2012)

The accused had been granted bail in January 2005 following their arrest on drugs charges. The appeared regularly at remand hearings until September 2007, when the record appeared to disappear. No further proceedings took place until April 2010, when the accused appeared before a magistrate after they had been apprehended by the police and brought to court for an application for a cancellation of the warrant of arrest. The warrant of arrest was cancelled but the magistrate who had partly heard the matter had since left the bench. For reasons that were not very clear from the record the matter dragged on slowly until May 2012, when the accused person's defence counsel launched an application in the magistrate court for a "permanent stay of proceedings." On at least three occasions between 2006 and February 2012 the accused's legal practitioners had sought the postponement of the matter on the grounds that they were involved in other commitments elsewhere. In June 2012 the magistrate purported to grant a permanent stay of proceedings.
Held: the magistrate's order was incompetent. The accused persons' application was premised on an alleged breach of the provisions of s 18(2) of the Constitution. In terms of s 24(2) the court may, on its own accord, refer a constitutional issue to the Supreme Court. When a party to the proceedings applies for referral, the court must refer the issues to the Supreme Court unless it finds that that application for referral is frivolous and vexatious. The magistrate should have referred the application for a permanent stay of proceedings against the accused to the Supreme Court in terms of s 24(2). He erred when he granted the order for a permanent stay of proceedings because he had no jurisdiction to do so.

See S *v* Kusangaya *1998 (2) ZLR 10 (H), where Devittie and Mungwira JJ, on appeal, held that arising out of the High Court's inherent review jurisdiction, the High Court has jurisdiction to order a permanent stay of criminal proceedings. Using these powers, the High Court can grant an appropriate remedy where the constitutional right of a person to a fair trial within a reasonable period of time has been violated. The constitutional provision providing for reference to the Supreme Court of constitutional questions merely establishes a procedural mechanism whereby constitutional issues may be raised by the lower courts for decision by the Supreme Court. This provision does not affect the inherent review jurisdiction of the High Court. The learned judges also held that although a magistrate has no inherent jurisdiction to grant a permanent stay of criminal proceedings, there are ways (which they elaborated on) in which a magistrate can provide an effective remedy where there has been undue delay in bringing an accused for trial or in concluding the trial. – Editor.*

Criminal procedure – trial – conduct of – cross-examination of prosecution witness – defence counsel not in court for examination in chief – whether allowed to conduct cross-examination

Mashavideze v *A-G & Anor* HB-177-12 (Kamocha J) (Judgment delivered 2 August 2012)

The applicant was appearing in the regional court on a charge of rape, to which he had pleaded not guilty. At the trial, his chosen legal practitioner, M, did not initially appear. Instead, another lawyer from the same firm, K, appeared in court. He introduced himself to the court as defence counsel for the applicant and advised the court that he was doing so in his representative capacity for M who was to join the proceedings at a later stage. K said he was to record the complainant's evidence in chief and begin cross examination and that M was going to join the proceedings and continue with cross examination of the complainant. After K had finished cross-examining the complainant he handed over to M, who had by then joined the proceedings, to also cross-examine the complainant. The prosecutor informed the court that he had no objection to this procedure, but the magistrate not only did not allow M to continue, he ordered M to leave the court. The applicant sought an order for trial *de novo* before another magistrate.
Held: the prosecutor's concession was completely erroneous and misleading. The procedure that M, with the support of the prosecutor, was attempting to adopt was not only wrong but was also absurd. He wanted to take over cross-examination of a witness whose testimony was given in his absence. The trial magistrate was entirely correct in refusing to allow him to do so. A legal practitioner may not walk into a court room where proceedings are in progress and purport to join in or take over cross-examination of a witness whose evidence in chief was

given during his absence. He does not known what the witness said. This is common sense. What M attempted to do was grossly improper.

The learned judge cited no authority for this ruling. With respect, there seems to be no law preventing a legal practitioner doing what the lawyer wished to do in this case, though there are clearly practical difficulties and the legal practitioner might well being doing his client a disservice. But it is not unheard of for a lawyer, for one legitimate reason or another, to take over a matter from another lawyer before the trial is completed. – Editor.

Criminal procedure – trial – inspection *in loco* – purpose of – inspection necessary outside borders of Zimbabwe – court not thereby conducting trial outside borders

S v *Kurotwi & Anor* HH-285-12 (Bhunu J) (Judgment delivered 6 July 2012)

The accused were charged with defrauding the Zimbabwe Government of a large sum of money, it being alleged that they perpetrated a series of fraudulent misrepresentations culminating in the signing of an inappropriate shareholder agreement to the loss and prejudice of the Government. Part of the *modus operandi* involved the crafting and presentation of a due diligence report based on a visit to South Africa. It was alleged by the State (and denied by the accused) that the due diligence exercise purportedly conducted in South Africa was a sham and fictitious, calculated to misled the Government into concluding a shareholder agreement. In a bid to discharge the onus on it, the State applied for an inspection *in loco* to be conducted in South Africa. The application was opposed on various grounds: it was argued that it was unnecessary, unduly expensive and time wasting for the court to travel to South Africa when evidence could easily be led from witnesses to establish what the State was seeking to prove. The defence also argued that holding an inspection *in loco* in South Africa amounted to holding a trial in a foreign land, the court's jurisdiction being limited to the territorial boundaries of Zimbabwe.
Held: an inspection *in loco* is no more than the observation of evidence at the place where that evidence may be found. Such observation of the evidence does not convert into a trial of the issues before the court. The purpose of an inspection *in loco* is for the court to observe and experience real evidence that cannot be brought to court as an exhibit. By applying for the court to go for an inspection *in loco*, the State was merely inviting the court to go and view or look at the place in South Africa where certain events are said to have taken place. The State was not inviting the court to go and conduct a trial in South Africa.

Criminal procedure – trial – stopping of – lesser charge brought when facts showed that more serious charge appropriate – duty of magistrate to stop trial and refer matter to Attorney-General

S v *Muromo & Anor* HH-286-12 (Mathonsi J) (Judgment delivered 11 July 2012)

See above, under CRIMINAL PROCEDURE (Charge).

Criminal procedure – trial – when commences – trial commencing with arraignment – arraignment – what constitutes

S v *Chigogo* S-38-12 (Ziyambi JA, Malaba DCJ & Gowora JA concurring) (Judgment delivered 20 November 2012)

The term "trial" can be regarded as including "arraignment" and the trial of an accused person commences when he is arraigned. The calling upon an accused person to appear, the informing him of the crime charged against him, the demanding of him whether he be guilty or not guilty, and the entering of his plea, comprise the arraignment of the accused. His plea having been entered, he is said to stand arraigned.
However, a convening order for a court martial cannot be classed as an arraignment. It is no more than an internal document meant for the guidance of those involved in setting up, and conducting a prosecution before, a court martial.

Criminal procedure (sentence) – general principles – juvenile – probation officer's report – importance of – need to call officer to explain and clarify recommendations made

S v *L S (a juvenile)* HB-165-12 (Ndou J) (Judgment delivered 19 July 2012)

The accused was convicted of rape. He was aged 16 years at the time of the offence and he already had a previous conviction for aggravated indecent assault for which he was sentenced to corporal punishment. During the trial a probation officer's report was produced. The recommendation of the probation officer was that the accused be referred to psychiatric examination. The prosecutor advised the magistrate that he did not agree with the probation officer's recommendation, and the magistrate sentenced the accused to 12 years' imprisonment, of which 3 years were suspended on conditions of good future behaviour.
Held: The greatest regard should always be paid to the report of a probation officer. These officers are experts in their own field. The probation officer's report in this matter was based on careful investigation of the accused's home background, family relationship, personality traits, education and other social factors. The least the magistrate could have done was to call the probation officer to testify and clarify on the recommendation in light of the factors she had discovered during the trial. The probation officer would have been cross-examined on the report with some thoroughness. While a court is never compelled to accept any expert evidence at its face value, where that evidence is honestly given and supported by sound reasons, which are not contradicted in evidence, a court should not lightly disregard that opinion. Oral evidence of probation officers should not be easily dispensed with for the sake of convenience. The sentence would be set aside and the matter remitted to the trial court for the evidence of the probation officer to be heard and sentence passed afresh.

Criminal procedure (sentence) – general principles – probation officer's report and recommendations – court departing from such recommendations – court's duty to give reasons for such departure

S v *Babbage* HB-157-12 (Cheda J, Kamocha J concurring) (Judgment delivered 2 August 2012)

See below, under CRIMINAL PROCEDURE (SENTENCE) (Statutory offences – offences under Road Traffic (Rules of the Road) Regulations)

Criminal procedure (sentence) – statutory offences – offences under Road Traffic (Rules of the Road) Regulations – deposit fines – fine which may be demanded by police

S v *Babbage* HB-157-12 (Cheda J, Kamocha J concurring) (Judgment delivered 2 August 2012)

A police officer stopped and arrested the appellant for using a mobile phone whilst driving, in contravention of s 16B(1) of the Road Traffic (Rules of the Road) Regulations 1974 (RGN 308 of 1974, as amended by SI 299 of 2002). The appellant was issued a "ticket" notifying him to appear in court. He duly appeared and pleaded guilty. In spite of a recommendation from a probation officer recommending community service, the magistrate sentenced the appellant to 14 days' imprisonment.
On appeal:
Held: (1) where a court is of the view that a person should be sentenced to imprisonment for a non-serious offence, it should seriously consider a non-custodial sentence. Failure to consider community service for a minor offence constitutes a serious misdirection on the part the judicial officer, which would call for interference by an appeal court. Where a trial court has reason to differ from the recommendations of a probation officer, it should proffer reasons for departing from those recommendations.
(2) although the statutory instrument under which the appellant was convicted provides no penalty for a contravention of any provision thereof, the penalty for a contravention of any regulation is provided by s 81(5)(i) of the Road Traffic Act [*Chapter 13:11*], the penalty being a fine of level 5 ($200) or imprisonment for a period of six months or both such fine and such imprisonment.
(3) the police were empowered and authorised to impose a fine not exceeding $200.
(4) the Regulations did not authorise the police to refer persons contravening s 16B(1) of the Regulations to court for trial. Any practice that had been adopted to refer such cases to court was outside the powers conferred on the police and prosecuting authorities by statute or common law and was therefore, ultra vires and unlawful.
(5) Where a motorist is caught using a mobile or cellular phone, he should be issued with a ticket to pay a fine as stipulated in level 5; the ticket should give the motorist a reasonable time within which to pay the fine unless the offender elects to pay the fine on the spot; and the police are, however, empowered to use their powers as they deem fit, depending on the motorist e.g. if he is a foreigner or if he has no acceptable identification which will make it difficult for him to be traced in the event of a default in paying the fine.

(6) a police officer cannot and should not insist on a spot fine on the basis that he is not in possession of a ticket book. A ticket book is a necessary administrative tool for executing his duties. A police officer's failure to carry relevant stationery can not be used to curb and/or infringe people's rights.
Sentence reduced to US$20 fine, alternatively 5 days' imprisonment.

Editor's note*: invitations to pay deposit fines are lawful only under s 141 of the Criminal Procedure and Evidence Act* [Chapter 9:07], *which provides that where a peace officer, on reasonable grounds, believes that a magistrates court, on convicting such accused of that offence, will impose a fine not exceeding level three (currently $20), the peace officer may issue which is commonly referred to as a "ticket". This ticket acts as a summons to appear in court on a specified date, but gives the person the option to pay a deposit fine before an earlier specified date. The procedure for payment of a deposit fine is set out in s 356 of the Act, which also refers to a maximum deposit fine of level 3. It would seem, therefore, that a "ticket" may not be issued where a fine of over $20 is warranted; the accused must go to court.*
The Rules of the Road Regulations do not provide for a specific penalty in respect of any particular provision. Section 38 makes it an offence to contravene or fail to comply with any of the provisions of the regulations with which it is the motorist's duty to comply. The Act itself does not say, either expressly or implicitly, that it is an offence to contravene any provisions of any regulations made under the Act, nor does it state that the penalties set out in s 81(5) apply if regulations, like those under consideration, do not prescribe penalties. Nonetheless, on the basis of the decision of Squires J in S *v* Madziwa *1982 (1) ZLR 25 (H), it is probably permissible to apply the penalties set out in s 81(5) of the Act. It would, of course, have been better if the Regulations had specifically provided penalties, whether the same penalties as in s 81(5) or lesser ones.*

Customary law – marriage – unregistered customary law union – status of – party to such union proposing to marry another person under civil law – such marriage constituting bigamy in terms of criminal law

Tsvangirai & Anor v *Mutevedzi NO & Anor* HH-351-12 (Bhunu J) (Judgment delivered 14 September 2012)

See above, under CRIMINAL LAW (Offences under Criminal Law Code – bigamy).

Customary law – traditional leaders – appointment of – customary succession – unfettered discretion residing in President with regard to appointment of chiefs – President not obliged to follow customary principles of succession – headmen and village heads – nomination by chief – chief only required to nominate "suitable" person – no requirement to follow customary principles of succession – appointment by Minister or Secretary – Minister or Secretary obliged to appoint person nominated by chief unless there are good reasons to the contrary

Chadoka v *Chombo NO & Ors* HH-287-12 (Mutema J) (Judgment delivered 11 July 2012)

Historically, the African history of customary tree of succession, whether it be of a chief or headman, has always been oral tradition. Due to incessant feuding, coupled with the concomitant difficulty – often an insurmountable hurdle – of proving it, most dynasties/families have of late seen the light and decided to keep updated written customary trees of succession. Given that the Mashona people have a complicated system of collateral customary succession and that their family trees are mostly by way of oral tradition, hence difficult to prove, they would be well advised to always compile written family trees of succession to avoid the pitfalls associated with oral history that is passed from one generation to the next. With the dynamism of present day society, the oral traditions of yore with respect to customary principles of succession have since been obscured and blurred by current trends of doing things. Also, those who aspire to become traditional leaders are well advised to acquaint themselves with the relevant provisions of the Traditional Leaders Act [*Chapter 29*:*17*].
In the appointment of a chief, the President has an unfettered discretion and is required to only give due consideration to the prevailing customary principles of succession, if any, applicable to the community concerned. In the appointment of a headman and village head, the chief has an unfettered discretion as to whom he should nominate for appointment as a headman or village head, so long as that, person is suitable. "Suitable" means "suited to or for, well fitted for the purpose." The chief is not required to follow any principles of succession in selecting a headman. He is merely required to select a suitable person. The fact that there might be a more suitable person eligible for the position does not mean that the candidate he has selected is not suitable. The chief is not even required to hold meetings in the area to ascertain the views or wishes of the community. Once a person is nominated by the chief the Minister is required to appoint that person as headman unless, in his

opinion, there are good reasons to the contrary. The same principles apply *mutatis mutandis* to the nomination of a village head and that person's appointment by the Secretary.

Damages – delictual – personal injury – assessment – general damages arising out of personal injury – matters to be assessed – pain and suffering, shock, disfigurement and loss of amenities of life – what these items include

Mugadzaweta v *Co-Ministers of Home Affairs & Ors* HH-439-12 (Zhou J) (Judgment delivered 20 November 2012)

The task of assessing damages for personal injury is one of the most perplexing a court has to discharge. Pain and suffering covers all pain, physical and mental suffering and discomfort occasioned by bodily injury, emotional shock, or the medical treatment to be given to the injured person. The pain which is relevant is that actually suffered by the plaintiff and not what would be experienced by a reasonable person. The fact that the plaintiff is more or less sensitive than the *diligens paterfamilias* is of no relevance in the assessment of the pain suffered.

Shock, particularly emotional shock, is closely associated with pain and suffering, albeit it may sometimes account for other forms of loss such as insomnia, anxiety neuroses, hysteria, depression or other mental or physical conditions which the law recognises as non-patrimonial loss. Emotional shock may be described as a sudden, painful emotion or fright resulting from the realisation or perception of an unwelcome or disturbing event which involves an unpleasant mental condition such as fear, anxiety or grief.

Disfigurement, which is also referred to as deformity, refers to any defacing or mutilation of the plaintiff's body or any part thereof. It includes scars, loss of limb, a limp caused by an injury to the leg(s), and distortions of the body. The loss involves the aesthetic value of the body or a part thereof and not its functional performance. The extent of the loss under this head depends upon a number of factors, which include the plaintiff's sex, age, the visibility of the disfigurement, its influence on the plaintiff's life, and the plaintiff's appearance before the injuries. Whether the disfigurement is temporary or permanent is also a factor to be considered.

Loss of amenities of life is experienced when a person loses the ability and/or will to take part in certain activities in life and fails to enjoy life as he used to do prior to the injuries being sustained. This damage is not confined to the loss already sustained but also includes loss which will probably be suffered in future. Loss of amenities has also been described as "a diminution in the full pleasure of living", a loss of those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit and stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self-sufficiency, happiness and dignity are undoubtedly highly dependent.

Delict – *actio injuriarum* – malicious prosecution – malice – how malice may be shown – damages for malicious prosecution – what may be claimed – plaintiff may claim for injury to personality and for pecuniary loss suffered

Sanangura v *Econet Wireless (Pvt) Ltd & Ors* HH-398-12 (Kudya J) (Judgment delivered 17 October 2012)

A plaintiff has the absolute choice to elect who to proceed against in a suit of malicious prosecution. He is not obliged to join the police or the Attorney-General. The question for determination is whether the plaintiff has established the elements of the delict of malicious prosecution. The onus is on the plaintiff to prove malice on a balance of probabilities. Malice in delict has a wide meaning. It covers spite and ill will, often referred to as express malice or *dolus directus;* indirect and improper motive, often referred to as implied malice or *dolus indirectus,* and statements that the defendant did not know to be true, reckless whether the statements were true or false (*dolus eventualis*).

The successful plaintiff in an action for malicious prosecution is entitled to damages both for injury to personality and for pecuniary loss suffered. The former damages are awarded as a *solatium* under the *actio iniuriarum*, while the latter constitute compensation under the *actio legis Aquilia*. A plaintiff who claims loss of earnings and other financial losses must produce evidence which is within his power. If he does not, the court has no other option than to absolve the defendant from the instance.

Claims for pain and suffering and *contumelia* fall under general damages. They arise from injury to the personality of a plaintiff. They are often referred to as infringements or impairments to the reputation and dignity of a plaintiff. They cover the pain arising from both physical and psychological injury to his personality.

Delict – negligence – foreseeability – causation – need to show not only that defendant's conduct factually caused loss but also that loss was reasonably foreseeable at time of act

Ruvinga v *ZEDTC (2)* HH-389-12 (Zhou J) (Judgment delivered 10 October 2012)

The plaintiff, a farmer, paid the respondent to have electricity connected to his farm. The installation included a transformer. Some years later, the defendant, without the knowledge and consent of the plaintiff, connected other farms to the plaintiff's point of supply. That increased the load beyond the capacity of the transformer and caused a fall in the voltage and damage to the electric motors on the plaintiff's farm. As a consequence of the damage to the electric motors the plaintiff could not irrigate his crops. He claimed damages under three heads: for the value of the lost crops; for the reasonable cost of replacing the damaged electric motors; and for mental anguish, anxiety and depression.
Held: For the defendant to be held liable to pay the damages claimed under the third head it had to be shown that its conduct not only factually caused the loss, in the sense of the loss having ensued as a consequence of the conduct complained of, but also that the loss suffered was sufficiently connected to the defendant's conduct to justify making it liable for such loss. The latter stage is what is referred to as legal causation; and the test for determining legal causation is that of reasonable foreseeability. A wrongdoer is held liable only for the reasonably foreseeable consequences of his conduct. The moment of causing damage is the relevant one in determining reasonable foreseeability. One test is this: was the consequence, as well as the causal progression between the act and the consequence, at the time of the act foreseeable with such a degree of probability that the consequence can, in the light of the circumstances, reasonably be imputed to the alleged wrongdoer? Based on this test, the anguish, anxiety and depression suffered by the plaintiff was so remotely connected to the conduct of the defendant that the defendant could not be held liable for it. Such loss could not be reasonably foreseeable as a consequence of the connection by the defendant of other farmers to the point of supply of electricity to which the plaintiff's farm was connected.

Delict – negligence – public officials – failure to assist woman made pregnant as result of unlawful intercourse – no duty imposed on such officials by relevant legislation – no actionable negligence shown

Mapingure v *Min of Home Affairs & Ors* HH-452-12 (Bere J) (Judgment delivered 12 December 2012)

See below, under STATUTES (Termination of Pregnancy Act [*Chapter 15:10*]).

Employment – contract – terms – variation – when employer may vary terms of contract – when employer incurs liability to pay for duties not specified in contract of employment

Maranatha Ferrochrome v *Nyemba* S-28-12 (Gawre JA, Ziyambi JA & OMerjee AJA concurring) (Judgment delivered 8 August 2012)

An employer may require an employee to carry out tasks which may be different but are closely related to the employee's duties without incurring any obligation to pay for those duties. An employee is under an obligation to obey the lawful orders given by the employer. As long as those tasks are not too remote in nature from the employee's normal duties, are carried out during normal working hours and, in the absence of a suggestion that the employee had to engage in overtime to perform those duties, the employer would not be liable to pay for those duties. The employer has the right to unilaterally vary the terms of employment, such as the duties being done by the worker, the location of work or department or to facilitate disciplinary investigations, provided such variation is not substantially different from the contract job description or does not result in substantial downgrading of the status and dignity of the employee or is in breach of a legitimate expectation of the employee or is not unlawful discrimination. Conversely, an employee can lawfully refuse to carry out an order where there has been substantial variation of the employment contract and in particular where the order is not closely related to the duties of the employee.

Estate agent – authority – acceptance of payment on behalf of seller – when estate agent so authorised – authority may be actual or implied – amendment of agreement of sale – estate agent having no authority to amend agreement unless instructed by both parties

Voteti Trading (Pvt) Ltd v *Hancock & Anor* HH-330-12 (Patel J) (Judgment delivered 6 September 2012)

As a general rule, in the absence of agreement, an estate agent with authority to sell has no residual or concomitant authority to accept payment of the purchase price on behalf of the seller. Nevertheless, there will be instances when the estate agent is in fact authorised to receive payment and to receive it in a particular form. It is necessary to consider the general principles of contract to determine whether an agent has authority to perform a particular act. Thus, actual authority may be conferred on an agent expressly, impliedly or tacitly. Implied authority may be evidenced by a single act or by a course of dealing. On a similar but somewhat different footing, apparent or ostensible authority to receive payment can be inferred if the seller, by words or conduct, holds out his agent as having such authority. Again, the principal may be estopped from denying that he has conferred a particular authority on the agent where a third party dealing with the agent is prejudiced by having acted on the principal's representations.
In a contract of sale, the time and mode of payment stipulated therein are usually of the essence and must be exactly complied with, failing which the seller is entitled to cancel the contract. Furthermore, an estate agent does not have the power or authority to amend an agreement concluded by the prospective seller and purchaser unless instructed to do so by the parties.

Family law – child – guardianship – attributes of – transfer of guardianship – transfer from parents to a third party – when may be granted – need for full enquiry – need to show transfer in best interests of child – need to show why parents should be deprived of guardianship – need to establish suitability of third party to be guardian

Kutsanzira v *The Master* HH-309-12 (Guvava J) (Judgment delivered 27 July 2012)

The applicant, the mother of a minor child, sought to have guardianship of the child transferred to the child's aunt. The applicant was unemployed and her husband, the child's father, was serving a prison term. She did not have the financial resources to look after the child. The child's aunt had been providing financial support for the child for a long time and if she were to be awarded guardianship of the child she would be able to take advantage of her employment benefits, such as medical and education allowances, to maintain minor child.
Held: (1) Parents are the *legitimi tutores* of their children, which makes them guardians by operation of law. Parental power consists of duties and rights which parents have in respect to their minor children. Children are from birth subject to the guardianship of their father or parent. The father or parent of a child is the natural guardian of his legitimate children until they attain the age of majority. Parents acquire parental power over a legitimate child at the time of its birth. The natural guardianship of parents is identical with parental power. This power cannot be waived or abandoned in favour of someone else as this is considered to be contrary to public policy. The reason why public policy is against transfer or delegation of parental power in favour of another is basically to protect the child from abuse, which could occur should the parental power fall into the wrong hands. Transfer of guardianship thus is only allowed in very limited circumstances and, normally, only after a full enquiry has been conducted so as to safeguard the interests of the minor child concerned.
(2) There are basically three situations recognized by the law whereby guardianship or parental power may be lawfully transferred. These are (a) adoption; (b) *legitimatio per subsequens matrimonium,* where children whose parents marry after their birth become legitimated as a result of the subsequent marriage of their parents; and (c) *venia aetatis*, the grant by a sovereign or the courts of the status of majority to a minor. Guardianship cannot merely be transferred from one person to another if it does not fall under any of these categories. The willingness of the parents to give away their guardianship does not appear to have any significance in the ultimate decision by the court of whether or not to grant the guardianship of the minor child to another. None of these situations applied here.
(3) The Guardianship of Minors Act [*Chapter 5:08*], whilst imposing on the father the duty to consult with the mother on questions on guardianship of their minor child and setting out the powers of this court relating to custody and guardianship of a minor where the parents are no longer living together, has not altered the common law position, especially relating to transfer of guardianship. The Act provides primarily for the situation where a minor has no natural guardian or tutor testamentary and sets out a procedure to allow a third party to be appointed as guardian. This procedure (outlined in s 9 of the Act) specifically requires that an inquiry be conducted to determine the suitability of the person who seeks to be appointed as guardian. In making the appointment of guardianship, the court must consider the minor child's best interests. This applies whether the

child's parents are alive or dead. The courts may divest a parent of guardianship where it is established that to retain guardianship in the parent would pose a danger to the child.
(4) The inquiry into guardianship, like that of custody, cannot be one sided. It is not only an inquiry into the advantages that will accrue to the child if guardianship is granted to the applicant but also an inquiry into why the respondent must be deprived of his guardianship. Thus, an inquiry seeking to divest one parent of guardianship in favour of another or of a third party must involve not only an inquiry into why and how the respondent parent must be divested of guardianship but also why the applicant is deemed suitable to be able to discharge those legal obligations that are imposed on natural guardians by law. An inquiry into guardianship is an inquiry into the suitability of a person to discharge the legal obligations imposed by law on the guardian of a minor child. It is not an inquiry into issues like where the child will live or how and where it will be educated, as those inquiries relate to issues of custody. *In casu*, no basis had been laid out for the parents to be relieved of their obligations. Although the father was in prison, the mother was available. Poverty does not appear to be a reason to consider in order to divest a mother of guardianship. More importantly, no investigation had been conducted as to the suitability or otherwise of the aunt to be the guardian of the minor child and for the court to satisfy itself that it was in the child's best interest for the aunt to be appointed as guardian. These days, when there is rampant abuse of children by relatives and child trafficking, it can only be in the best interest of any child that a proper inquiry is conducted in terms of the Childrens Act [*Chapter 5:06*].

Family law – husband and wife – divorce – domicile – loss of – when domicile lost – Immigration Act [*Chapter 4:02*] – application of in determining whether domicile lost

Whitby v *Whitby* HH-423-12 (Uchena J) (Judgment delivered 15 November 2013)

The plaintiff brought an action in the High Court for divorce. She and the defendant were married in Zimbabwe in 2007. They had both left Zimbabwe in 2002 and were living in the United Kingdom. They only came back to marry in Zimbabwe as the plaintiff's parents were still living in Zimbabwe and wanted to attend the wedding. The defendant was born in Zimbabwe but emigrated in 2002 and had been permanently resident in England ever since. He had acquired Portuguese citizenship. When the parties came to Zimbabwe on holiday in 2011 they entered as visitors and obtained visas. The defendant pleaded in bar that the court had no jurisdiction to determine the case as he was not domiciled in Zimbabwe.
Held: (1) in law one can only have one domicile at a time. A person loses his domicile of origin when he acquires a domicile of choice. The issue of domicile is factual and can be determined by the facts of each case. Domicile is not the same as residence. As distinct from residence, domicile does not only involve a physical element. There is also a mental element consisting of an intention to settle in a certain country. Domicile is the place which is or which the law considers to be the permanent home of a person. Two principles flow from this: every person must have a domicile and no person can have more than one domicile at a particular time, although a person may be homeless or have more than one residence.
(2) Where the facts on which the issue of domicile is to be determined involve immigration or emigration, one has to consider the provisions of the Immigration Act [*Chapter 4:02*] to determine whether such immigration has established a domicile of choice, or whether such emigration has caused the loss of a domicile of origin. In such circumstances, the Act is of critical importance in determining whether or not one is domiciled in Zimbabwe. The facts of the defendant's departure from Zimbabwe fell within the provisions of s 3(4)(a)(i) and (ii) of the Act. He voluntarily left Zimbabwe in 2002 and had since that time been residing in England, where he intended to reside permanently. He departed with an intention of making his home outside Zimbabwe. In terms of s 3(4)(a)(ii) a person loses his domicile in Zimbabwe if he is absent from Zimbabwe for a continuous period of five years for purposes other than those referred to in s 3(5). The defendant had been absent from Zimbabwe for more than five years, for purposes other than those referred to in s 3(5). The defendant had lost his domicile in Zimbabwe and the court had no jurisdiction.

Family law – husband and wife – marriage – objection to by third party – how should be made

Karimatsenga v *Tsvangirai & Ors* HH-369-12 (Guvava J) (Judgment delivered 12 September 2012)

See above, under COURT (High Court – jurisdiction).

Insurance – motor – insurer's liability – policy issued in terms of Part IV of Road Traffic Act [*Chapter 13:11*] – insurer liable only to extent of sum insured – no limitation as to form of damages which may be claimed

Johanne v *Clarion Ins Co & Ors* HH-429-12 (Mathonsi J) (Judgment delivered 14 November 2012)

The second defendant, the owner of a commuter omnibus and the employer of the third defendant, took out a third party motor insurance for his vehicle in terms of Part IV of the Road Traffic Act [*Chapter 13:11*]. The insurer was the first defendant, and the insured sum was USD800. While the vehicle was insured, the vehicle, which was being driven by the third defendant, knocked down the plaintiff's minor daughter. The child sustained injuries which required requiring treatment for which the plaintiff now claimed special damages in the sum of US$4 492 and general damages in the sum of US$9000. The plaintiff had already obtained default judgment in those amounts against the second defendant. A special case was brought, the issue being whether the first defendant was contractually or statutorily obliged to pay the plaintiff the damages claimed and, if not, the extent of the first defendant's statutory liability.

The plaintiff argued that, on a proper construction of s 23(2) as read with s 23(3) of the Road Traffic Act [*Chapter 13:11*], the liability of the insurer in a statutory policy is unlimited where the person claiming does not fall under the category of people being carried, or entering or alighting from the vehicle. The plaintiff's daughter having been "outside" the vehicle when she was injured, the claim was not subject to the limits set out in subs (3) and the plaintiff was therefore entitled to recover more than the amount of the insurance cover given by the first defendant.

The first defendant argued that s 23(3) should be read in conjunction with s 25 of the Act. Insurers are entitled to limit their liability in the insurance cover and, where the third party's claim exceeds the insured amount, the injured party must claim the excess from the insured. The first defendant was liable to the plaintiff only if the second defendant was liable, but only to the extent of the sum insured.

Held: Care must be taken, in interpreting the provisions of the Act which form the basis of this dispute, not to lose sight of the legislative intent. In enacting Part IV of the Act, the lawgiver wanted to provide victims of accidents involving a motor vehicle driven on a road in Zimbabwe, whether they are on board or pedestrians as *in casu*, a remedy to sue the insurer directly for recourse. The lawgiver then made it compulsory for such insurance to be issued before a motor vehicle can be driven on a road. An injured person is therefore entitled to sue the insurer for "any liability", whether in the form of special damages or general damages. The use of the word "any" in s 25 simply means that the nature of the liability claimable in respect of a statutory policy is unlimited. To say that "any" means that the extent of the liability vis-à-vis the quantum is unlimited is to stretch the word to elasticity limit. The plaintiff had proceeded against the insurer in terms of s 25(1) of the Act because it is that section which accords an injured person the right to proceed directly against the insurer. It would be incorrect to say that the plaintiff's claim was in terms of s 23, because that section does not create an entitlement to sue. Under s 25, the amount claimed from an insurer under a statutory policy can be any amount "not exceeding the amount covered by the statutory policy". In terms of s 25(1)(b), any excess should be recovered from the insured. The liability of the first defendant was therefore limited to the amount covered, US$800.

Landlord and tenant – lease – premises leased – when premises are "commercial premises" and subject to Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) – person leasing harbour for its own commercial purposes and concluding mooring agreements with owners of boars used for commercial purposes – such mooring agreements constituting leases of commercial premises

Kingdom Calls (Pvt) Ltd v *Sunseeker (Pvt) Ltd* HH-301-12 (Hungwe J) (Judgment delivered 18 July 2012)

The applicant operated a harbour at Lake Kariba. It leased the harbour from another company. The applicant concluded a harbour mooring agreement with the respondent in terms of which the respondent was permitted to moor its houseboat and tender boat. The agreement could be cancelled on one month's written notice. A dispute over a proposed rent increase arose between the parties. The respondent wanted to take the matter to the rent board in terms of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983). In terms of s 3(1) of the Regulations, commercial premises are "any premises or part thereof occupied under a lease for the purposes of carrying on therein industry, business, trade or occupation, and includes any ground, parking space, garage, outbuilding, workers' quarters and other improvement therewith."

The applicant sought an order declaring that the premises were not "commercial premises" in terms of Regulations 1983 and that the agreement could be lawfully terminated. It argued that the respondent was not a lessee since the harbour could not be regarded as being commercial premises and the premises were not occupied by the respondent under a lease. Further, the respondent did not carry out any business at the harbour but simply moored its boats there when not in use.

The respondent pointed out that it, and the owners of the other 150 boats moored at the harbour, hired out its houseboat to various clients and made use of the facilities, including fuelling facilities, which had been established by the applicant.
Held: it was common caused that the harbour was leased by the owner to the applicant for business or commercial purposes. This fact could not be ignored. It was a question of fact and degree as to whether particular premises are "commercial premises". This could only be resolved by making a common sense judgment about the facts of each case and not by adopting any absolute rule. The whole arrangement had to be seen for what it was. Whether one called it a management contract, or a mooring agreement, the bottom line was that the one party made payment to the other for the occupation of space equivalent to parking, in advance on a monthly basis. Owners of boats were given spaces in which to park their boats. Payment was made in advance on a monthly basis to the applicant. Such payments could not be anything but rentals. This was a maritime equivalent of lessor-lessee arrangement and fell under the Regulations.

Legal practitioner – conduct and ethics – duty to client – duty to advise client of reasonable awards of damages – should not claim inflated damages

Katsande v *Grant* HH-380-12 (Zhou J) (Judgment delivered 19 September 2012)

See above, under COURT (Jurisdiction).

Legal practitioner – conduct and ethics – duty to client – duty to exercise utmost diligence in handling affairs of client – omissions and oversights due to practitioner's disregard of rules and casual attitude – costs *de bonis propriis* appropriate

M M Pretorius (Pvt) Ltd & Anor v *Mutyambizi* S-39-12 (Ziyambi JA, in chambers) (Judgment delivered 17 October 2012)

See above, under COSTS (*De bonis propriis*).

Legal practitioner – conduct and ethics – statements on matter which is *sub judice* – when statements may be made – statement ascribing political motives to the court – gross transgression of prohibition against making comments on pending matter – practitioner misrepresented by press – courses to follow

Kwaramba v *Bhunu NO* S-46-12 (Chidyausiku CJ, in chambers) (Judgment delivered 1 November 2012)

See above, under COURT (Supreme Court – jurisdiction).

Legal practitioner – conduct and ethics – trial – examination of witnesses – cross-examination of witness whose testimony was given when practitioner not in court – whether allowed to conduct cross-examination

Mashavideze v *A-G & Anor* HB-177-12 (Kamocha J) (Judgment delivered 2 August 2012)

See above, under CRIMINAL PROCEDURE (Trial – conduct of – cross-examination of prosecution witness).

Legal practitioner – practice – requirement for three years' practical training before being entitled to practise on own account – person proposing to practise as an advocate – not exempt from requirement for appropriate training – need for regulatory framework for such training

Sibanda & Anor v *Ochieng & Ors* HH-382-12 (Mtshiya J) (Judgment delivered 3 October 2012)

The applicants, along with a third newly registered legal practitioner, joined the advocates' chambers in Harare as pupils. They were told that they would be under the supervision of the senior member of chambers, and that their respective pupil masters had to sign off any work when it was returned to the instructing legal practitioners. Both the applicants were issued with practicing certificates by the fifteenth respondent (the Law Society)

describing each of them as "Advocate." The certificates were endorsed with a condition that the applicants could not operate trust accounts.
A few months after they joined chambers, the applicants were advised by the secretary of the advocates' chambers association of new, detailed, rules regulating their pupillage. They refused to sign the letter of acknowledgement and, in a lengthy memorandum, challenged the legal basis of the new rules. They said that the rules were an attempt to equate their pupillage with the training at the "side bar", but argued that the only limitation placed upon them upon admission as advocates was that they should not operate a trust account, which advocates do not do anyway.
The secretary responded to the applicants' memorandum in a way that confirmed the termination of the applicants' relationship with the association, which took effect on the date when the applicants refused or failed to sign for the new regulatory framework. The Bar Association informed the applicants that, contrary to what the applicants asserted in their memorandum, they were not members of the Association, not yet being entitled to practise on their own account as 36 months had not elapsed since their registration. The Association said that a practitioner who has not completed the prescribed 36 month period has no greater right to practice as an advocate than he has to open a firm of attorneys.
When asked to intervene and to provide a mediator, the Law Society replied that it regarded the dispute as essentially a labour matter. It said that the Advocates' Chambers was like a private club, which is governed in terms of its own constitution. One joins the Chambers through invitation. In joining the Chambers one is deemed to have accepted the rules of the Chamber as prescribed in the constitution, memoranda, custom and practices. The Law Society expected the Chambers to have a comprehensive training regime in place. It would be remiss of a set of chambers to take on pupils without putting in place a pupillage training programme. Because the applicants' membership of chambers had ended, their right to hold a practising certificate had fallen away.
The applicants (who were not joined by the third pupil) brought proceedings against the 12 qualified advocates in chambers, as well as the chambers, the Bar Association and the Law Society, for an order that they be restored to their tenancy at chambers, and that the new rules be declared null and void.
The 12 advocates objected to being joined in their personal capacities, as they said they could not implement the order sought.
Held: (1) The applicants knew where authority lay and which entities to deal with. When he joined chambers, the first applicant knew who the chambers association was and that is why he directed his application to it. That association was the entity that admitted both applicants into pupillage. The applicants' memorandum was addressed to the entities that the applicants knew could render the relief they now sought. They knew who was terminating or restructuring their pupillage. The only entities that could attend to the relief the applicants were seeking were the chambers association, the Bar Association and the Law Society. The individual advocates should not have been joined.
(2) Following the fusion of the profession in 1981, all those practicing law in Zimbabwe became known as legal practitioners. That title included advocates. Legal practice in Zimbabwe is regulated by the Legal Practitioners Act [*Chapter 27:07*] and the subsidiary legislation thereto, including the Legal Practitioners (General) Regulations 1999 (SI 137 of 1999). The training referred to in the regulations applies to all newly registered legal practitioners in Zimbabwe, including intending advocates, unless lawfully exempted. The applicants were fully aware of that, but hardly made any direct reference to the regulations. They conveniently avoid direct reference to the law but at the same time indicate that their rights in this matter were protected by the Act – the Act that tells them how to practice law lawfully in Zimbabwe.
To grant the order sought by the applicants would enable them to practice on their own. This would contravene the law which governs all legal practitioners in Zimbabwe. Section 4(1) of the Regulations makes it illegal for a legal practitioner to practice on his own account before the expiration of a period of not les than 36 months from the date of his registration during which he must have been employed as a legal assistant by another legal practitioner. The Law Society respondent has no authority to accord any exemptions to anyone outside the law. The only way for a legal practitioner to be able to practice on their own account is to first of all under go the required practical training as required by law. That training covers all facets of legal practice and is not restricted to trust accounts only.
(3) The training of those who appear in the various courts of our country is crucial and hence the deliberate provision for practical training provided for in the law. Highly qualified legal practitioners will always be an asset so the judiciary and indeed to the entire nation. Newly admitted persons lack the knowledge, experience and professionalism to be effective advocates. They are frequently a downfall to their clients and a hindrance to the administration of justice, yet with time and experience they could become paragons of the profession. That experience cannot conscientiously be obtained by immediate entry to practice at the highest level of the profession. It would therefore be retrogressive and unpardonable for the court to join the queue of those who might want to down grade the practical training of legal practitioners in this country. It would also be a sad day if the court were, because of the call for sympathy, to allow the violation of the country's laws, especially by

those who have the mandate to interpret those laws. There was therefore a need to immediately put an end to an illegality.
(4) The public relies on entities such as the professional associations and the Law Society to ensure that the country produces the best trained legal practitioners. The practical training of newly registered legal practitioners is of national importance, so it is imperative that the parties, with the involvement of the Law Society, should strive to find a way of accommodating each other under a regulatory framework that does not violate or offend the law. The answer is not to abandon the programme but to move forward legally.

Legal practitioner – prosecutor – *dominus litis* – limits to – lesser charge brought when facts showed that more serious charge appropriate – court's power and duty to ensure that trial proceeds on appropriate charge

Legal practitioner – prosecutor – duty – to ensure that correct charges are brought against offenders – bringing lesser charge when serious one appropriate – failure of duty on part of prosecutor

S v *Muromo & Anor* HH-286-12 (Mathonsi J) (Judgment delivered 11 July 2012)

See above, under CRIMINAL PROCEDURE (Charge).

Military law – cantonment area – declaration of by Minister of Defence – Minister's power to acquire any land and declare land to be a cantonment area

Misi v *Zimbabwe National Army* HH-379-12 (Mathonsi J) (Judgment delivered 25 September 2012)

The applicant bought a piece of land near Kadoma. Some years later, he found the army on his land, erecting a fence to incorporate part of his land as a cantonment area. He sought an interdict to prevent the army from including any of his land within the cantonment area. The respondent showed that the Minister of Defence had declared the area which included the portion of the applicant's land to be a cantonment area. A statutory instrument had been published in terms of s 89 of the Defence Act [*Chapter 11:02*]. The section allows the Minister to declare any area or place to be a cantonment area. Communal land is excluded from this provision.
Held: In terms of s 96(1) of the Act, where "any land" other than communal land is required for defence purposes such land can be acquired by the Minister for that purpose. Where such land is required for a cantonment, the Minister is empowered by s 89 to declare such land a cantonment. The Minister gave notice through a statutory instrument that the area being fenced by the army was a cantonment area. That statutory instrument had not been invalidated and the applicant was not challenging its validity. The requirements of a permanent interdict that one should have a clear right, which right is being infringed, or where there is a well-grounded apprehension of such an infringement, had not been met because a clear right could not exist where there was a statutory instrument declaring the land a cantonment.

(1) It is not clear why the applicant cited the Army, rather than the responsible Minister, as respondent, though nothing appears to have been made of this.
(2) If land is acquired in terms of s 96(1) of the Defence Act, the procedures set out in the Land Acquisition Act [Chapter 20:10] *must be followed, and compensation must be paid. It is not clear from the judgment whether the applicant's land had in fact been so acquired. It is also not clear whether an area can be declared to be a cantonment area without having first been acquired. – Editor.*

Military law – court martial – arraignment – what constitutes – convening order for court martial not part of arraignment

S v *Chigogo* S-38-12 (Ziyambi JA, Malaba DCJ & Gowora JA concurring) (Judgment delivered 20 November 2012)

See under, under CRIMINAL PROCEDURE (Trial – when commences).

Practice and procedure – admission – binding nature of – court not entitled to ignore admission unless it is withdrawn – no need for plaintiff to prove admitted fact – absolution not competent if plaintiff fails to prove such fact – when court may go behind admission – possible where admission contrary to facts

Mining Industry Pension Fund v *DAB Marketing (Pvt) Ltd* S-25-12 (Makarau JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 8 August 2012)

The respondent leased premises from the appellant, in which it conducted its various operations, including the manufacture of foodstuffs and pharmaceuticals. Over the years in which the respondent was in occupation of the premises, leaks occurred in the roof and various aspects of the respondent's operations had to be curtailed or terminated. Because the respondent considered that the appellant was responsible for the upkeep and repair of the building and its roof, rentals were not paid. The appellant claimed an order for the cancellation of the lease, plus arrear rentals and holding over damages.

The respondent, in its plea, admitted that it was indebted to the appellant on the grounds alleged and in the amount claimed, but it pleaded that it was excused from paying the amount of the appellant's claim because the appellant was indebted to it for damages which it claimed in the counter-claim filed with its plea. It prayed for judgment on the main claim to be stayed until there was judgment on the counter-claim. In the counter-claim, the respondent alleged that the appellant was required to maintain the external structure, including the roof of the premises, and that, in breach of its obligations, the appellant failed to repair the roof of the premises, forcing the respondent to shut down its operations. The respondent claimed that, as a result of having to shut down its operations, it lost profit in a sum stated in the counter claim.

On the basis of the evidence before it, the trial court found that the appellant had breached the terms of the lease agreement by failing to keep the gutters in a good state of repair. Having established liability, the court found that the respondent had failed to show the nature of the loss that it suffered and which flowed from the established breach and on that basis absolved the appellant from the instance on the counterclaim.

On the main claim, the court also absolved the respondent from the instance. Its reasoning was that the respondent was entitled to an abatement of rentals for the period during which the premises could not be used for the manufacture of pharmaceuticals. It found that the respondent was entitled to pay reduced rentals during the period it had limited use of the premises and was further not obliged to pay any rentals for the period after it ceased production all together. On this basis, it held that the amount of rent due to the appellant was unknown and thus absolution should be granted.

Held: (1) A formal admission made in pleadings cannot be ignored by the court before which it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted. Thus where liability in full is admitted, as happened here, no evidence is permissible to prove or disprove the defendant's admitted liability. In terms of s 36 of the Civil Evidence Act [*Chapter 8:01*], it was not necessary for the appellant to prove the extent of the respondent's liability, as this had been admitted. The formal admission by the respondent was by law conclusive of the issue of liability and the amount and no onus lay on the appellant to establish the amount. Absolution was therefore not competent. There may be instances where a court may go behind an admission and give a finding of fact at variance with an admission made on the pleadings, but this would only be where it is clear, after a full investigation, that the admission is contrary to the facts and where injustice would result from an adherence to the admission. This was not such a case.

(2) With regard to the counter-claim, loss of profit following breach of contract is an assessable loss to be proved by evidence and should not be confused with loss of future earning capacity, which calls for compensation for diminished earning capacity and is assessed as general damages. Damages for lost profit must be proved and cannot be presumed. They must be capable of some arithmetical calculation and cannot be assessed from nothing. The evidence led tended to show general loss, not lost profit, and the court was right in ordering absolution from the counter-claim.

Practice and procedure – admission – withdrawal of – when permissible – what must be shown by party seeking to withdraw admission

Practice and procedure – affidavit – further affidavit – party seeking to file further affidavit, having already filed answering affidavit – what party seeking to file such affidavit must show

Industry Pension Fund v *United Refineries Ltd & Ors* HH-313-12 (Zimba-Dube J) (Judgment delivered 31 July 2012)

The ordinary rule with regard to affidavits is that three sets of affidavits are allowed in pleadings, namely, supporting affidavits, answering affidavits and replying affidavits. The court may in its discretion permit the filing of further affidavits in terms of r 235 of the High Court Rules 1971. It is only in exceptional circumstances or if the court considers such a course advisable that a fourth set of affidavits may be received. The purpose of allowing a further or supplementary affidavit is to enable a litigant to file additional information that he becomes

aware of after the filing of the three affidavits as required in terms of the Rules. There must be an application for leave to file such affidavit. The party applying for the leave must provide a satisfactory explanation for the failure to put the information or facts before the court at an earlier stage and for the late filing of the affidavit. The explanation must be one that negatives bad faith or culpable failure to act timeously. The court must also be satisfied that no prejudice will be caused to the opposing party which cannot be remedied by an appropriate order as to costs. If there is an explanation which negatives *mala fides* or culpable remissness as the cause of the facts or information not being put before the court at an earlier stage, the court should incline towards allowing the affidavits to be filed.

Where a party makes an admission in its pleadings, the admission is binding and it is unnecessary for the other party to prove such admission. A party wishing to resile from such an admission may amend or withdraw such pleadings in terms of r 189, which permits a withdrawal of an admission. Where a party seeks to withdraw an admission he is required to apply to the court for such a withdrawal. He must give a reasonable explanation of the circumstances under which the admissions were made and the reasons for the withdrawal. The court in its discretion may allow such amendment or withdrawal on such terms as it deems fit. If the court is of the view that to allow the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him, it will refuse the application. The court will have to be satisfied that the amendment sought is a *bona fide* one. The question must always be posed: "Is the applicant acting *mala fide* in seeking to withdraw his admission?"

Practice and procedure – affidavit – answering affidavit – further affidavit following answering affidavit – when may be filed – court's discretion – need for court to have all facts before it – court entitled to admit further affidavit

Anueyiangu v *Chief Immigration Officer & Ors* S-15-13 (Garwe JA, Chidyausiku CJ, Ziyambi JA, Gowora JA & Omerjee AJA concurring) (Judgment delivered 5 July 2012)

The appellant had been detained by immigration officials, who suspected that he was a prohibited immigrant. In the High Court he challenged the legality of his arrest and sought an order for his immediate release from detention. He averred that he was in Zimbabwe on the basis of an investor permit and he submitted that no reasonable suspicion for his arrest and detention had been shown and consequently an order for his immediate release was justified. In his opposing papers, the first respondent opposed the application on the basis, firstly, that although the appellant had previously been issued with an investor permit, this had expired and had not been renewed, and secondly, that the appellant had been staying in the country on the basis of a provisional restriction notice which had also since expired. Since the appellant had no valid residence permit allowing him to stay in the country he was therefore out of status. The first respondent further averred that it had also been discovered that the appellant had previously been deported twice from Zimbabwe, in June 2005 and June 2009, and was therefore a prohibited immigrant. In his answering papers, the appellant accepted that his investor permit had indeed expired and that he only renewed it shortly after his arrest. He also admitted that the provisional restriction notice allowing him to stay in the country had expired but stated that efforts to extend it were frustrated by the respondents. He denied having been deported either in 2005 or 2009.

In his heads of argument, the first respondent sought the leave of the court to file a supplementary affidavit in order to deal with some of the averments made by the appellant in the answering affidavit. The first respondent also filed with the court the supplementary affidavit in question and in his notice of filing indicated that the affidavit was in response to new issues raised which required clarification by him. In the main, the first respondent sought to produce a record in the immigration deportation book to confirm that the appellant had been deported in 2005 and that when he came back into the country he was allowed entry in error, as it was not appreciated then that he was a prohibited person. The judge admitted the supplementary affidavit and on the basis of the information therein accepted that the appellant, having been deported from Zimbabwe in 2005, had become a prohibited person. The court also found that the appellant had not been in possession of any legal document such as would allow him to remain in the country. Consequently, the court found that the arrest of the appellant and his subsequent detention had been lawful.

On appeal, the appellant argued that the judge erred in admitting the supplementary affidavit. He submitted that the first respondent did not, as required by the High Court Rules, seek the leave of the court first before filing the supplementary affidavit. He simply attached the supplementary affidavit to his heads of argument and then referred to the contents thereof in order to answer legal argument raised by the appellant in his heads of argument.

Held: It is correct that in terms of r 235 of the High Court Rules, once an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge. The court had a discretion to admit the supplementary affidavit and did so. The fact that there was no strict compliance with r 235 was really not that

important, because in terms of r 4C a court or judge is allowed to condone any departure from any provision of the Rules. There was no suggestion that the court acted upon a wrong principle or that it misdirected itself. No basis was shown to justify interference by the appeal court with the exercise of discretion by the court *a quo.*
The court *a quo* was clearly alive to the need to balance the competing interests of justice on the one hand and the appellant on the other. The court was of the view that it was important that all the facts be placed before it so that it could make an informed decision. Despite the suggestion made by the first respondent that the appellant was at liberty to also apply for leave to file a further supplementary affidavit, the appellant did not request to do so, although he clearly could have done so. Had the appellant made such a request and the request been turned down, then the appellant would have been on firmer ground in attacking the manner in which the court *a quo* exercised its discretion.

Practice and procedure – application – urgent – urgent application for spoliation – application dismissed – appeal against such dismissal – whether should be heard on urgent basis – depends of prospects of success

Swimming Pool & Underwater Repair (Pvt) Ltd & Ors v *Rushwaya & Anor* S-32-12 (Chidyausiku CJ, in chambers) (Judgment delivered 21 August 2012)

See above, under APPEAL (Hearing – application for hearing on urgent basis).

Practice and procedure – application – urgent – when a matter may be treated as urgent – principles

Mutarisi v *United Family Intl Church & Anor* HH-445-12 (Zhou J) (Judgment delivered 22 November 2012)

A chamber application is urgent where it cannot wait to be resolved through a court application. The urgency may arise where, if the matter is not determined urgently, there is a risk of irreparable harm to an applicant or there is a risk of perverse conduct on the part of the respondent or its agents which would defeat or render hollow any order which may subsequently be obtained by the applicant in connection with the dispute. The court must be satisfied that if the matter is not heard urgently substantial injustice would result to the applicant.

Practice and procedure – declaratory order – application for – distinction from application for review – application for order having all characteristics of application for review – order sought being appropriate to review proceedings – application should be treated as one for review

Masuku v *Delta Beverages* HB-172-12 (Cheda J) (Judgment delivered 2 August 2012)

The applicant brought an application against her former employer, which was cited as "Delta Beverages". She sought a declaratory order to the effect that the freezing of her salary and her later dismissal were null and void and that she should be reinstated in her position. She alleged that she had not been afforded a hearing in terms of the company's code of conduct or in terms of the principles of natural justice.
The company raised three objections *in limine*: (a) that the applicant had cited a non-existent entity, the company's correct name being "Delta Beverages (Pvt) Ltd)"; (b) that the High Court had no jurisdiction, as the application was in reality one for review; and (c) that the matter was prescribed.
Held: (1) Generally, proceedings against a non-existent entity are void *ab initio* and thus a nullity. However, where there is an entity which through some error or omission is not cited accurately, but where the entity is pointed out with sufficient accuracy, the summons would not be defective. Here, the respondent was a well known blue chip company whose fleet of cars are all over the nation's roads. Its commercial advertisements needed no introduction. The applicant may have technically erred in her description, but described the respondent with sufficient clarity, to the extent of eliminating any mistake, either legal or factual, about the respondent's identity.
(2) There is a clear distinction between an application for a declaratory order and an application for review. Although the application was presented as one for a declaratory order, its contents were those of an application for review. In such an application, the applicant seeks a review arising out of the irregularity of the procedure adopted by a tribunal or board. This what the applicant was seeking. The draft order was clearly not a declaratory order, but relief obtainable on review. As the application was in fact one for review, the correct forum for its determination was the Labour Court, as provided for under s 89(6) of the Labour Act [*Chapter 28:01*].

(3) In any event, the claim was prescribed, as the debt arose over three years before the respondent was summonsed.

Practice and procedure – heads of argument – purpose of – what they should contain – evidence annexed to or contained in heads of argument – not properly before the court and will be disregarded

Nehowa v *Barep Invstms (Pvt) Ltd* HH-357-12 (Makoni J) (Judgment delivered 5 September 2012)

In motion proceedings, the parties proceed by way of filing affidavits *viz* the founding affidavit, the opposing affidavit and the answering affidavit. These are the foundation papers in which the parties lay the basis upon which they seek to rely. In terms of r 235 of the High Court Rules 1971, after the answering affidavit has been filed, no further affidavits may be filed without leave. Thereafter, if a party is to be represented by a legal practitioner, it files heads of argument in terms of r 238. The heads of argument must clearly outline the submissions the practitioner intends to rely on and setting out the authorities, if any, which he intends to cite. Heads of argument constitute persuasive argument, making reference to issues and evidence already placed before the court by the parties at the founding stage.

The courts are increasingly coming across heads of argument which fall short of the definition prescribed in the rules of court. This issue should be well established and trite, but the courts are increasingly being confronted with heads of argument where annexures, which should have been part of the pleadings, are attached to the heads. In some instances new issues in the form of facts, as distinct from points of law, are raised in heads of argument.

Any process filed in violation of the rules will not take the parties' case any further. It constitutes deceit on the part of any party seeking to introduce further pleadings or evidence through the back door. A legal practitioner who pursues such a course of action prejudices his client, both by failing to present evidence before the court at the appropriate stage and by failing to effectively use the opportunity to present to the court heads of argument which will assist the client in its cause. Annexures attached to heads of argument and containing evidence will be disregarded as they are improperly before the court.

Practice and procedure – interdict – interim interdict – draft order – need to base draft on case pleaded

Practice and procedure – interdict – interim interdict – requirements – what right must be established – when necessary to show that irreparable harm will occur if interdict not granted – court's general power to reject application for interdict

Mutarisi v *United Family Intl Church & Anor* HH-445-12 (Zhou J) (Judgment delivered 22 November 2012)

The requirements for an interim or temporary interdict are:

(a) That the right which is the subject matter of the main action and which applicant seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
(b) That, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
(c) The balance of convenience favours the granting of interim relief; and
(d) That the applicant has no other satisfactory remedy.

Where a clear right is established an applicant for an interim 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 alleged. Whether or not an applicant has a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a question of evidence.

The court has a general discretion to grant or reject a request for an interdict even in circumstances where the applicant has established the requirements for interim relief discussed above. The discretion must, of course, be exercised judicially, having regard to all the facts and circumstances of the case.

While a draft order is only a draft and does not bind the court, it must be based on the case pleaded. It is not a mere formality for applicants to file draft orders in application proceedings. The draft order must properly assist the court as to the relief being sought by an applicant.

Practice and procedure – joinder of parties – misjoinder – person joined as a party not having made decision being challenged and not being able to implement order sought – joinder not proper

Sibanda & Anor v *Ochieng & Ors* HH-382-12 (Mtshiya J) (Judgment delivered 3 October 2012)

See above, under LEGAL PRACTITIONER (Practice).

Practice and procedure – judgment – default judgment – when party in wilful default

Practice and procedure – postponement – what party desiring postponement must show

Practice and procedure – process – founding affidavit – who may sign – party's legal practitioner – when may sign such affidavit – cautions to be observed

Practice and procedure – set-down – setting matter down as unopposed – new legal issue being raised – not a reason for not setting matter down on unopposed roll

ZEDTC v *Ruvinga (1)* HH-307-12 (Bere J) (Judgment delivered 18 July 2012)

The applicant had been sued by the respondent for losses arising out of erratic power supplies. The matter was in due course set down for a pre-trial conference. Before the conference, however, the judge gave a directive that the parties convene on their own for a round table discussion, and, with the concurrence of the two legal practitioners, had the matter postponed for a second pre-trial hearing a few days after that. Not only was the applicant not represented at the round table discussion, it was not represented at the postponed pre-trial conference, nor had it sought a further postponement. The given reason, which was not made entirely clear in the affidavit deposed to by the applicant's legal practitioner, was that the applicant needed the services of an expert witness who was apparently unavailable. At the pre-trial conference, the judge struck out the applicant's defence and plea and referred the matter to the unopposed roll for proof of damages by the respondent.
The applicant sought rescission of judgment in order to pave way for the reinstatement of its plea. The respondent raised, *in limine*, the issue of whether the applicant's legal practitioner was competent to depose to the founding affidavit in the application. It also raised the issue of whether the applicant was in wilful default.
Held: (1) Within the context of this case it was indeed competent for the applicant's legal practitioner to swear to the founding affidavit. He was no stranger to the applicant's case, as he was its legal practitioner. However, one should always be aware of the attendant risks involved in the case of a situation where the founding affidavit departs materially from the pleadings filed of record. If that happens, then the competence of the legal practitioner in filing a supporting affidavit inevitably calls for scrutiny.
(2) In order to succeed in having an order made in default of appearance set aside the applicant must show good and sufficient cause. The explanation tendered by the applicant must negative any wilful default on the part of the applicant. In the context of default judgment, "wilful" connotes deliberateness, in the sense that the applicant must have had full knowledge of the set down date and of the risks attendant upon default, and freely took the decision to refrain from appearing, whatever the motivation of that decision may have been. There is nothing like an automatic postponement when a matter is set down before a judge. A party desiring a postponement must advance cogent reasons for a postponement and seek the court's indulgence in that regard. Only when the court agrees with the submissions of a party seeking postponement would the court accede to such an application. It was certainly not enough for the applicant's legal practitioner to decide not to attend court on a date that he had agreed to and to delegate his junior to handle the desired postponement.
(3) The fact that the issues raised in this matter were *res novae* did not mean that the court should condone counsel's dilatory manner of handling the case. The court that would be seized with the matter on the unopposed roll would not be precluded from canvassing the issues in order to come up with a sound decision either for or against the respondent. All these issues about the respondent's claim being *res novae* fall squarely within the province of the court that would be seized with the assessment of damages and they would be adequately addressed at that forum.

Practice and procedure – parties – citation of – inaccuracy in identification of party cited – party nevertheless pointed out with sufficient accuracy to enable it to be correctly identified – process valid

Masuku v *Delta Beverages* HB-172-12 (Cheda J) (Judgment delivered 2 August 2012)

See above, under PRACTICE AND PROCEDURE (Declaratory order).

Practice and procedure – parties – joinder – action against Civil Aviation Authority of Zimbabwe – no need to cite Minister of Transport

Maguwu v *Co-Ministers of Home Affairs & Ors* HH-404-12 (Mathonsi J) (Judgment delivered 24 October 2012)

See above, under CRIMINAL PROCEDURE (Search and seizure).

Practice and procedure – *res judicata* – application for condonation of late noting of appeal and for extension of time – application heard by one judge and granted – applicant then failing to comply with rules regarding noting of appeal – appeal accordingly a nullity – further application made – such application dismissed – dismissal not nullifying earlier order – no further application possible

Dombodzvuku v *CMED (Pvt) Ltd* S-31-12 (Omerjee AJA) (Judgment delivered 12 July 2012)

The applicant had purported to note an appeal against a judgment of the Labour Court. He was out of time so applied to the Supreme Court for condonation of the late noting of the appeal and for extension of time. The application was granted by a Supreme Court judge in chambers, it being ordered that the applicant should file his notice of appeal and grounds of appeal within five days of the granting of the application. He noted an appeal and the matter was set down for hearing. At the hearing, the respondent pointed out that the applicant had failed to comply with the requirement that the notice be served on the Registrar of the Labour Court. The matter was struck off on those grounds. Two days later, having regularised matters, the applicant again applied to the Supreme Court for condonation and extension of time. The case was set down as an unopposed matter. A different judge, in chambers, eventually dismissed the application on the grounds that there were no prospects of success.

Several months later, the applicant made yet another application for condonation and extension of time. The applicant said that he needed clarity as to whether there were prospects of success, since there were two "conflicting" decisions of the court on this aspect. He argued that the second judge submitted that the second judge had erred and misdirected himself by dismissing the second application for condonation and extension of time, when the first judge had earlier acceded to a similar application on the same issue, that is, whether or not there were any prospects of success on appeal.

Held: The effect of the judgment of the second judge was not to nullify the earlier order, because that earlier order was no longer operational. The first judge had ordered the applicant to file a notice and grounds of appeal within five days of the date of the order. The applicant failed to comply with that order. The notice of appeal that was filed by the applicant was not only invalid but was a nullity. That is the reason why the appeal was struck off the roll. As a result of such failure to comply by the applicant, there was no appeal before the court.

Fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. The only way this matter could be brought back to court was through a fresh application for condonation and extension of time. This is what the applicant did. That application was placed before the second judge and was dismissed. This was a case where the principle of *res judicata* applied. The matter could not be heard again.

Property and real rights – spoliation – order – refusal to grant – appeal against – when should be heard on an urgent basis

Swimming Pool & Underwater Repair (Pvt) Ltd & Ors v *Rushwaya & Anor* S-32-12 (Chidyausiku CJ, in chambers) (Judgment delivered 21 August 2012)

See above, under APPEAL (Hearing – application for hearing on urgent basis).

Property and real rights – spoliation order – when may be granted – quasi-possession arising out of management agreement – breach by one party – real nature of complaint by applicant – specific performance more appropriate remedy

Redan Petroleum (Pvt) Ltd v *Bioline Petroleum (Pvt) Ltd & Ors* HH-463-12 (Mutema J) (Judgment delivered 14 December 2012)

The first respondent, a fuel company, owed the applicant a large sum of money. The parties concluded a compromise agreement in an endeavour to restructure the debt. The salient terms of the agreement were that the applicant would assume the management of the retail forecourt of a service station which was being leased by the first respondent; the applicant would pay the first respondent a percentage of the sales of fuel; it would be responsible for the salaries and wages of the forecourt staff; and the balance of dealer margins, after paying all trading expenses and the first respondent's overdraft facilities, would go towards settling the debt owed to the applicant by the first respondent. This was done with the consent of the first respondent's landlord. The applicant took over the running of the service station and invested in re-branding it and procured staff uniforms. About 9 months later, the applicant received a letter from the first respondent's co-director, the second respondent, purporting to terminate the agreement. Shortly after that, the second respondent de-branded the service station by repainting it and removing the applicant's colours and logo and instructing forecourt employees not to wear the applicant's uniform any more. The third respondent took over the running of the finances of the service station, contrary to the terms of the compromise agreement. The respondents denied the applicant permission to make fuel deliveries at the service station, saying that no more of the applicant's products were to be sold from the service station. The applicant sought an urgent spoliation order.
Held: Although the respondents' conduct seemed to be imbued with some semblance of spoliation, an order of spoliation was not the proper remedy for the wrong alleged by the applicant. The applicant's real complaint was that it alleges that the respondents are in breach of the alleged management agreement. It should have sued for specific performance of the alleged contract, together with interlocutory relief in the form of an interdict, if it believed such relief was available.
While the concept of possession is widely defined to include quasi-possession or juridical possession (*possessio juris*) one must be careful not to overstate the availability of spoliation proceedings in regard to quasi-possession. If the protection given by the *mandament van spolie* were to be held to extend to the exercise of rights in the widest sense, then rights such as the right to performance of a contractual obligation would have to be included, which would be to extend the remedy beyond its legitimate field of application and usefulness. To grant spoliation, with the respondents contending that it was the applicant who had breached the management agreement, would in effect amount to granting an order for specific performance of a contractual obligation in circumstances where the respondents were precluded from adducing evidence to prove a breach by the applicant of the management agreement.

Property and real rights – vindicatory action – requirements – what owner must show – defences to claim – what possessor must show to defeat claim – owner not pursuing claim for some years – whether can be taken to have waived his rights in respect of property

Hamtex Invstms (Pvt) Ltd v *King* HH-403-12 (Mathonsi J) (Judgment delivered 24 October 2012)

The respondent occupied a flat in a block of flats in Harare. He originally occupied the flat by virtue of his employment with the then owner of the block. He had to retire prematurely due to ill-health, and one of the benefits he received from his employer was to be entitled to occupy the flat for the rest of his life. Several years later, the applicant company bought the block. After some more years, the applicant sought the eviction of the respondent from the property on the basis that it had permitted him to remain in occupation "at the request of its predecessor in title" in the expectation that a servitude would be registered. This had not been done as the respondent was uncooperative. In addition, the respondent had not been paying rates, water and electricity charges, which the applicant had been forced to pay on the respondent's behalf. The applicant further alleged that the respondent was not actually in occupation but had moved to a house in another part of Harare. It alleged that another person was now occupying the flat. The respondent, in addition to opposing the application, filed a counter application, seeking an order declaring that he was entitled to occupy the property and compelling the applicant to register a lifetime usufruct in his favour and directing it to pay all outstanding owner's charges. He denied having relocated and said that the person seen at the flat was his carer, he being a quadriplegic.
It was argued on his behalf that he was entitled to remain in occupation, by virtue of a usufruct or servitude of *habitatio*, a *stipulatio alteri* and a waiver by the applicant of any rights to remove him.
Held: (1) on the evidence, the respondent had indeed moved out of the flat and was now resident elsewhere and that he had indeed installed a third party at the property.
(2) The *rei vindicatio* is an action that is founded in property law, aimed at protecting ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to possess his property that, at law, he is entitled to recover it from wherever found and from whomsoever is holding it, without alleging anything further than that he is the owner and that the defendant is in possession of the property. It is an action *in rem*, enforceable against the world at large. The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and the

defendant is holding the *res* – the onus being on the defendant to allege and establish any right to continue to hold against the owner. There are two defences to such an action, each aimed at destroying each of the two essential elements of the action. The first one seeks either to destroy the claim of ownership completely (by denying that the plaintiff is the owner of the property in question) or to diminish his rights in the property (by admitting his ownership but by alleging that the plaintiff has parted, under, some recognized law, with the right to exclusive possession of the property). The second defence is to deny possession of the property at the time the action is brought or the claim is instituted.
(3) When the applicant took transfer of the block, the parties took quite some time negotiating the terms of a servitude they intended to register. The applicant's legal practitioners drew up a deed in terms of the proposal made by the applicant. Nothing came of that activity and a servitude was never registered. The result was that an agreement between the parties did not exist. The respondent had himself to blame because it was his obstinacy and refusal to have the servitude which left him with nothing to enforce. If a servitude existed before transfer of the property to the applicant and the servitude was inherited by the applicant upon registration, then there would have been no need to seek registration.
(4) A person who is not a party to an agreement is not liable and is unable to claim on it as he enjoys no privity of contract. A contract for the benefit of a third party or a *stipulatio alteri* is an extension of the doctrine of privity of contract. For such to exist, there are certain requirements which must be met. The intention that the third party should have this option must appear from the contract. When the third party adopts the contract as his own he is not only entitled to its benefits but bound by its obligations. To adopt the contract he party must accept the option or offer contained in the contract and communicate his acceptance to the promissor. The validity of his acceptance will be tested in the same way as the acceptance of any other offer. The offer must still be open for acceptance. The facts alleged by the respondent did not even begin to satisfy the requirements of such a contract.
(5) As to the allegation of waiver, there are no equities in the application of the *rei vindicatio*. Once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it, the court may not accept pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor.

Revenue and public finance – income tax – deductions – allowable deductions – costs associated with export of goods – export market development expenditure entitling taxpayer to a double deduction – distinction from normal costs incurred for purposes of trade

Sheena Flowers (Pvt) Ltd & Ors v *Comr-Gen, ZRA* HH-427-12 (Hlatshwayo J) (Judgment delivered 12 October 2012)

The appellants were companies whose main business was horticulture, focused on the growing of flowers and exporting cut flower stems to external markets. Many expenses are incurred in the process of exportation of the flowers, including special packaging, air-freight, port fees and agents' commissions. It was a trade practice to employ marketing agents, who use their expertise to decide the best market destination for the flowers, organise the most appropriate method of transportation of such flowers and advise on selling arrangements. Such agents were employed on an informal basis, without any long term agreement between the grower and agent, who is simply notified once any shipment has been dispatched. The rates of commission varied from agent to agent. The responsibility of the agent was focused on the disposal of the shipment to prospective buyers, who in turn used the services of the agents to identify sellers and advise on their requirements on a regular basis. The flowers remained the property of the grower.
The respondent objected to any deduction based on special packaging, air freight and port expenses associated with the export of flowers, and deduction of commission and marketing charges paid to agents. The issue was whether these costs were acceptable charges for the purposes of s 15(2)(gg) of the Income Tax Act [*Chapter 23:06*], which allows the taxpayer the benefit of a double deduction in respect of the amount of any "export market development expenditure" incurred by the taxpayer in the year of assessment. Such expenditure is defined as being expenditure, not being expenditure of a capital nature, that is proved to the satisfaction of the Commissioner to have been incurred wholly or exclusively for the purpose of seeking opportunities for the export of goods from Zimbabwe or of creating or increasing the demand for such exports, and includes such expenditure as market research, advertising, participating in trade fairs, and bringing prospective buyers to Zimbabwe.
The appellants argued that the payment of agents and air-freight charges associated with export of flowers created and increased the demand for such exports and that the intention of the legislature in enacting the section was to provide an incentive to exporters who in fact are providing foreign currency to the state. The respondent maintained that the intention of the legislature was to encourage the development of new export

markets in addition to those export markets which already exists, or to create or increase the demand for such exports, again in addition that which already exists. The costs incurred by the appellants in exporting the flowers to the foreign markets did not fall within the definition of "export market development expenditure", but were simply costs incurred for the purposes of trade and therefore allowable in terms of s 15(2)(a), under which the deductions allowed are "expenditure and losses to the extent to which they are incurred for the purposes of trade or in the production of income except to the extent to which they are expenditure or losses of a capital nature".

Held: (1) Not every item of expenditure incurred in the export of goods qualifies for the double deduction. The basic distinction is between expenditure falling under s 15(2)(gg) and that which can be subsumed under s 15(2)(a). It is conceivable that a given item of expenditure might be partially for export development (s 15(2)(gg)) and partly for the purposes of trade or the production of income (s 15(2)(a)). Such expenditure would not qualify for the export development double deduction as it would not have been incurred "wholly or exclusively" for the purpose of seeking opportunities for the export of goods from Zimbabwe, or of creating or increasing the demand for such exports. Generally speaking, expenses incurred for the purpose of obtaining an order or a contract in a foreign country would qualify for the double deduction. Such expenses would usually be connected or concerned with opportunity or creating or increase in demand for export of goods. On the other hand, expenses incurred for the purpose of fulfilling an order or contract so obtained or entered into would not qualify unless any item connected with the fulfilment of the contract could be proved to have been incurred for the purpose mentioned in the definition.

(2) The packaging and airfreight expenses were not wholly and exclusively incurred for the purposes spelt out in s 15(2)(gg), but for the purpose of fulfilling already existing orders and thus would not qualify for the double deduction. The agents' commission and marketing charges, however, were expenditures incurred wholly for the procurement of orders for the goods exported and thus qualified for the double deduction.

Road traffic – insurance – third party insurance under Part IV of Road Traffic Act [*Chapter 13:11*] – liability of insurer – insurer liable only to extent of sum insured – no limitation as to form of damages which may be claimed

Johanne v *Clarion Ins Co & Ors* HH-429-12 (Mathonsi J) (Judgment delivered 14 November 2012)

See above, under INSURANCE (Motor).

Statutes – regulations – validity – regulations purportedly enacted by relevant Ministry – enabling Act providing for enactment by Minister – regulations invalid *in toto*

Statutes – regulations – validity – when *ultra vires* – regulation going further than enabling provision in Act

Transport Operators' Assn of Zimbabwe v *Minister of Transport & Anor* HH-455-12 (Bere J) (Judgment delivered 14 November 2012)

The applicant sought a declaratur to the effect that the Road Traffic (Construction and Equipment Use) Regulations 2010 (SI 154 of 2010) and the amendments thereto were invalid, null and void, alternatively, that s 10(2) of the Regulations was *ultra vires* the Road Traffic Act [*Chapter 13:11*] and therefore null and void. That section purported to prohibit the use of left hand drive heavy vehicles in Zimbabwe after a future date. The applicant's argument was that the Regulations were enacted in completed violation of s 81 of the Act, in that, according to the preamble to the Regulations, they were enacted by the second respondent (the Ministry of Transport) when in fact the Act requires that they be made by the first respondent (the Minister).

Held: (1) the Minister's power to enact regulations is derived from s 81(2) of the Act, which allows him to make regulations in respect of matters specified in the Third Schedule. Paragraph 6 of that Schedule allows for the prohibition of the use on roads of any left hand drive motor vehicle, "*unless such motor vehicle is provided with an apparatus to enable the driver thereof efficiently to signal his intention to change direction or stop*". The wholesale prohibition of heavy left-hand drive vehicles in the manner provided by s 10(2) of the Regulations was clearly never intended by the legislature.

(2) Section 81(2) requires that regulations be enacted or made by the Minister. This power cannot be delegated. Although the respondents alleged that there had been an error, no evidence was adduced in support of that explanation. The preamble is part of any enactment and cannot be treated as insignificant. Given the clear and unambiguous language in s 81 of the Act, the legislature's intention was to repose the discretion to make appropriate regulations in the Minister and no one else. It was only the Minister who could have exercised that

power and this would accord with public policy which requires, among other things, that the Minister should apply his mind to the desired regulations and that he be held accountable. The effect of such improper enactment was to render the regulations invalid, as they were *ultra vires* the enabling Act.

Statutes – Termination of Pregnancy Act [*Chapter 15:10*] – when a pregnancy resulting from unlawful intercourse may be lawfully terminated – procedure to be followed by woman concerned – need for affidavit to be made by her before a magistrate, who may then issue certificate authorising termination – no such affidavit made – issue of certificate not lawful

Mapingure v *Min of Home Affairs & Ors* HH-452-12 (Bere J) (Judgment delivered 12 December 2012)

The applicant was raped by robbers who attacked her residence. She reported the rape to the local police immediately afterwards and requested the attending detail to arrange for her to immediately see a doctor to get sought medical intervention to prevent pregnancy and any possible transmission of sexually transmissible infections. The police were dilatory about getting her to a doctor, keeping her waiting the whole day. When she saw a doctor, he told her that he could only terminate any pregnancy in the presence of the police and that a report was also required. She was also told by the doctor concerned that the desired termination had to be done within 72 hours of the unlawful intercourse. The doctor then invited the applicant to come back to the hospital the following day with a police officer. The plaintiff went to the police the next day and was attended to by the investigating officer. The investigating officer advised the applicant that a particular police officer, who was not present at the station at the time, was the only officer who could take her to the doctor. In the absence of a "report" the doctor would not help on that day, nor on the next, the particular police officer still being "unavailable". Only on the third day was the officer present but by the time the applicant went to the doctor with the officer, the doctor said it was too late, more than 72 hours having passed.

The police officer then referred the applicant to a public prosecutor where again the applicant made it clear she wanted the pregnancy terminated. The applicant was told by the public prosecutor to wait until the rape trial was over.

That the applicant was pregnant was confirmed about a month after the rape.

About three months after the rape, the applicant, again on the advice of the officer mandated to deal with rape cases, went back to the prosecutors' office where the applicant saw one of the prosecutors, who again advised her that she needed to get a pregnancy termination order. A magistrate whom she then approached advised that he could not help because the trial had not taken place. It was not until the applicant was nearly 7 months pregnant that an order was given, but the matron assigned to carry out the termination felt that it was no longer safe to do so and declined to terminate the pregnancy. A full term child was later born.

The applicant brought an action against the Ministers of Home Affairs, Health and Justice for damages for physical and mental pain, anguish and stress suffered and for maintenance for the child until the child turned 18. The basis of the claim was that the employees of the three Ministries concerned were negligent in their failure to prevent the pregnancy or to expedite its termination. The particulars of negligence were itemised.

Held: (1) The termination of pregnancy in this country is governed or regulated by the Termination of Pregnancy Act [*Chapter 15:10*]. Under s 4(c), a pregnancy may be terminated where there is reasonable possibility that the foetus is conceived as a result of unlawful intercourse. Under s 5, a pregnancy may only be terminated on the grounds referred to in s 4(c) by a medical practitioner after a certificate has been issued by a magistrate of a court in the jurisdiction of which the pregnancy is terminated to the effect that, in the case of alleged rape or incest, the woman concerned has alleged in an affidavit submitted to the magistrate or in a statement made under oath to the magistrate that the pregnancy could be the result of that rape or incest. Liability of the cited defendants must naturally fall within the four corners of the Act. There must be a specific finding made by the court that the defendants, or one or more of them, acted in a manner that was not consistent with the Act.

(2) The Act itself does not make any specific reference to the role which police officers play in the chain of events that lead to the termination of pregnancy. However, the Act requires that "the woman concerned has to allege in an affidavit", which must be presented to a magistrate, that her pregnancy could be a result of rape. No such affidavit was made. The police officers were of no assistance to the applicant in giving her the correct advice. That there was some negligence in the conduct of police in their interaction with the applicant was quite evident. However, this is the kind of negligence is sometimes referred to as "negligence in the air". The police officers' mandate in a rape case is to ensure the culprit is brought to book in criminal proceedings. Their mandate does not extend to ensuring the successful termination of an unwanted pregnancy. The Act does not say so and its clear language must not be stretched to cover situations which even the legislature could not have contemplated.

(3) The role of a medical practitioner in the termination of the undesired pregnancy is quite simple and straightforward and is governed by s 5(4) of the Act. That section requires the medical practitioner to terminate the pregnancy once a magistrate has issued the appropriate certificate to authorise such termination. Without the certificate it would have been unlawful to proceed. When the certificate was finally issued, termination would have been unsafe. No negligence could be imputed to the medical personnel involved.
(4) A public prosecutor's mandate is to prosecute the alleged offender. He has nothing to do with the termination of the pregnancy, nor is he obliged to give legal advice to a person in the position of the applicant. The mere fact that officials from the Ministry of Justice may have mistakenly or wrongly advised the applicant on the process of termination of her pregnancy did not give her ground to act against them because they were not her legal representatives.
(5) The applicant's situation was understandable. She was ignorant of the procedures involved. However, just as ignorance of the law is no excuse, neither can one find refuge in such ignorance to attach liability to someone else. If the applicant was not aware of the process or procedure for terminating her pregnancy she was at liberty to seek proper legal advice in time

Stock exchange – Securities Commission – appointment and removal of commissioners by Minister of Finance – grounds for removal of commissioner – occupation inconsistent with office of commissioner – commissioner a director in company listed on stock exchange – Minister entitled to remove commissioner even if had been aware at time of appointment of commissioner's directorship – need for Minister to act fairly and on reasonable grounds

Rukuni v *Min of Finance & Anor* HH-340-12 (Patel J) (Judgment delivered 13 September 2012)

See above, under ADMINISTRATIVE LAW (Adminsitrative decisions and acts).