Latest update: 20 September 2014

CASES DECIDED JANUARY – JUNE 2013

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

Administration of estates – *curator bonis* – sale by *curator bonis* of property forming part of estate – perishable property – may only be sold when sale authorised by the Master – sale of immoveable property – need for authorisation by High Court or by person appointing *curator bonis* – sale of property by any person to provide for funeral or subsistence of deceased's family – such sale not lawful after administration of estate in hands of the Master

Est Hedley v *Angwa City Invstms Three (Pvt) Ltd & Ors* HH-41-13 (Uchena J) (Judgment delivered 14 February 2013)

In terms of s 22 (2) of the Administration of Estates Act [*Chapter 6:01*], a *curator bonis* can only dispose of perishable property forming part of an estate and then only when specially authorised by the Master. Immovable property is not perishable and cannot be sold by a *curator bonis* in terms of the section. Under s 91 of the Act, a *curator bonis* cannot sell immovable property belonging to or forming part of any estate under his guardianship, unless the High Court or any judge thereof has authorised such sale or unless the person by whom any such *curator bonis* has been appointed (such as the Master) has directed such sale to be made.
Section 41(a) of the Act, as read with the proviso to s 41, authorises any person, without the authority of a competent court or the Master, to take it upon himself to take the deceased's property into his safe custody for its preservation or to sell the deceased's property when it is absolutely necessary for the purpose of providing a suitable funeral for the deceased or for the subsistence of the deceased's family or household or livestock, and limits such person's liability to the deceased's estate or its creditors, in the circumstances there mentioned. "Any person" is a phrase of very wide meaning and can mean any person without exception. However, the section must be read in conjunction with the other provisions of the Act, and it is clear that the intention of the legislature in enacting s 41(a) was to enable "any person", before the appointment of an executor, to take it upon himself to act for the preservation of the deceased's property, or to sell the deceased's property for the purposes of giving the deceased a decent burial or for the sustenance of the deceased's family or livestock. This was intended to provide for situations which arise before an estate can be properly administered under the authority of the courts and the Master. It is inconceivable that the legislature could have envisaged the use of s 41(a) in circumstances where the Master has already been involved in the administration of a deceased estate. Section s 41(a) is not applicable if the person taking it upon himself to dispose the deceased's property does so for fraudulent purposes. The authorization and protection against liability given to persons who take it upon themselves to intervene for the deceased's burial or the deceased's dependents by disposal of the deceased's property does not extend to fraudsters.

Administration of estates – property forming part of estate – sale of before executor appointed – when such sale lawful – sale effected to provide funds for family – need for sale to be absolutely necessary

Muchini v *Adams & Ors* S-47-13 (Ziyambi JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 12 February 2013)

The appellant bought a house from the widow of the owner of the house. At the time he did so, no executor had been appointed. The widow sold the property through a firm of legal practitioners, which received the purchase price but did not pay the proceeds to the widow. She sold the property because the family was in financial difficulties. The appellant argued that the sale was rendered valid by s 41 of the Administration of Estates Act [*Chapter 6:01*], which provides that if "any person takes upon himself to dispose of such estate or any part thereof, except in so far as may be … absolutely necessary for … the subsistence of the family left by the deceased … such person shall thereupon become personally liable to pay to the creditors and legatees of the deceased all debts due by the deceased at the time of his death or which have thereafter become due by his estate, and all legacies left by the deceased in so far as the proceeds and assets of such estate are insufficient for the full payment of such debts and legacies".
Held: the legislature's intention in enacting s 41 was to protect the position of beneficiaries and creditors of a deceased person pending the administration of the estate and that were the court to sanction the disposal of an estate asset in circumstances such as the present, it would bring about the very situation which the legislature sought to prevent, thereby causing prejudice to both the beneficiaries and creditors of the estate. The clear

intention was to prohibit the distribution of a deceased estate by persons other than executors. The authority to dispose of certain assets of a deceased estate before the appointment of an executor is strictly limited to the circumstances set out in s 41. In the present case it would have to be shown that the sale of the property was *absolutely necessary* for the subsistence of the family. The use of the word *absolutely* is significant and is indicative of a higher standard than mere necessity.

Administrative law – administrative decisions and acts – validity of -- acts performed by committee chaired by person having an interest in outcome of deliberations – resulting decision invalid

Sigudu v *Min of Lands & Anor* HH-11-13 (Patel J) (Judgment delivered 22 January 2013)

See below, under LAND (Acquisition – offer letter)

Appeal – Constitutional Court – procedure to be adopted

Practice Direction 2 of 2013 (issued 19 June 2013)

See below, under Court (Constitutional Court.

Appeal – criminal matter – appeal from magistrates court – against sentence – sentence including community service – need for appellant to apply for suspension of operation of community service order – remedies when such application dismissed – do not include application for bail

S v *Mataruse* HH-202-13 (Musakwa J) (Judgment delivered 25 June 2013)

The applicant was sentenced, following her conviction for theft, to a term of imprisonment, portion which was suspended on condition that she undertake community service, part on condition that restitution was made and the rest on conditions relating to future good behaviour. An appeal was noted against conviction and sentence and an application made for the suspension of the community service order pending the determination of the appeal. The magistrate dismissed that application, but ordered that the order for restitution be stayed. The applicant then applied to the High Court for bail.
Held: it was incongruous to seek bail for a person who was not in custody. Bail pending appeal can only be sought by a person who is in custody. A community service order may be a direct community service order (s 350A of the Criminal Procedure and Evidence Act [*Chapter 9:07*]) or community service as an alternative to a fine (s 347) or as a condition for suspending a sentence of imprisonment (s 358). Such an order may be suspended pending appeal in terms of s 63(b)(iii) of the Magistrates Court Act [*Chapter 7*:*10*]. In the event that the court turns down an application for suspension of the order, the aggrieved party may appeal against such a decision or seek a review. The correct procedure had been followed in the magistrates court.

Appeal – criminal matter – application by Attorney-General to appeal against sentence – allegation of inadequacy of sentence passed – principles to be observed by High Court when considering application for leave to appeal – grounds of appeal – what such grounds should allege

A-G v *Gwisai & Ors* HH-20-13 (Hungwe J) (Judgment delivered 16 January 2013)

The right of the Attorney-General to appeal against the inadequacy of a sentence passed in the magistrates court is an unusual one. It does not exist either in South Africa or in England and there have been few cases in this country where such a right was successfully claimed and exercised. There is therefore very little guidance to be found as to the principles to be followed when the Attorney-General invokes this right.
Two grounds of appeal are available to the Attorney-General in a case where he wishes to exercise his right of appeal against sentence. First, he may argue that the sentence is incompetent at law. Second, he may argue that the sentence imposed by the magistrate is inadequate, either in the light of the findings of fact made by the court and the nature of the charge, or because it was based on findings of fact for which there was no evidence or on a view of the facts which could not reasonably entertained. Alternatively, he may raise both grounds of appeal against sentence in appropriate circumstances. Where the incompetence of the sentence is raised, this will be easy to demonstrate. Where, however, the ground of appeal raised is that of the alleged inadequacy of the sentence, then a heavier onus exists on the Attorney-General, not only to demonstrate the inadequacy of the sentence imposed, but also to show that in imposing such a sentence, the court misdirected itself in light of its

findings of fact and the nature of the charge or because it was based on findings of fact for which there was no evidence or because it was based on a view of the facts which could not reasonably entertained.
The correct approach to adopt regarding such an appeal is to decide whether the appellant has any prospect of success, in light of the requirement set out in s 62(1) of the Magistrates Court Act [*Chapter 7:10*]. It should be remembered that sentence is primarily a matter for the trial court, which has had an opportunity of seeing precisely the type of person with whom it is dealing – a very important factor in assessing sentence. An appeal court will be even more reluctant to increase a sentence than to reduce one because of the hardship to the convicted person who may have reconciled himself to his initial punishment. This reluctance becomes greater if the sentence has already been served and an increased sentence would result in a person who had been released being recalled to serve further imprisonment. The right of appeal should, therefore, be used with circumspection.
There are three main situations where it is appropriate: (1) where the magistrate has adopted an entirely erroneous view of the law; (2) where the sentence is so inadequate as not to do justice to the community as a whole; and (3) where, because of special circumstances, such as the prevalence of a particular type of offence, a higher penalty is called for than that being applied.
The grounds of appeal must be brought strictly within s 62(1)(b) of the Act, since they will be considered within the strictures imposed by that section. Without clearly and specifically setting out in which respect the magistrate's findings of fact regarding sentence could be impugned, as required in terms of r 22(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules 1979, the prospects of success on appeal are dim.
When the High Court considers an application for leave to appeal, its decision should not be based on whether an appeal is arguable or not, but on its prospects of success.

Appeal – criminal matter – hearing – procedure at hearing – whether court obliged to hear oral argument – appellant's counsel failing to appear but having lodged written heads of argument – court entitled to decide matter on merits

S v *Murisi* HH-31-13 (Hungwe J, Mavangira J concurring) (Judgment delivered 6 February 2013)

The appellant was a magistrate. He was arraigned on two counts of contravening s 3(1)(a)(ii) of the Prevention of Corruption Act [*Chapter 9:16*]* and, after a contested trial, convicted. He was sentenced to undergo 36 months' imprisonment of which twelve months were suspended on condition of future good behaviour. After lengthy delays caused by problems at the magistrates courts, the appellant's appeal was set down for hearing in the High Court. On the day appointed, counsel for the appellant sought a postponement for a week. This was granted, but on the day of the resumed hearing there was no appearance by the appellant or his counsel. State counsel moved for the dismissal of the appeal. The first issue was whether, in light of non-appearance by the appellant, the court could still proceed to hear argument from the respondent and decide the matter on the merits. On the merits, the appellant's counsel had argued in his heads of argument that for conviction to follow, the appellant ought to have done something which, objectively considered, showed favour or disfavour to another.
Held: (1) An appeal is not a trial. It is not necessary to go over everything at the appeal hearing. Heads of argument are submitted, among other reasons, to shorten oral argument. The court will almost certainly have read these before the hearing, and to avoid wasting time, may ask counsel to deal only with particular points. It may advise counsel that it does not want to hear him at all, because its *prima facie* view is that counsel's argument is correct, and will ask the other side to present his argument in full. Both the appellant and the respondent were represented through counsel when the matter was by mutual consent postponed to a specific date and time at the request of the appellant. There was no explanation for the non-appearance by the appellant on the day of hearing. To simply strike the matter off the roll would be inconsistent with the requirement to treat as urgent appeals in cases where the appellant has received and unsuspended prison sentence. The court having formed a *prima facie* view of the matters raised in the appeal, a determination on the merits would move the matter to the next step and bring it to finality sooner rather than later. In terms of s 38 of the High Court Act [*Chapter 7:06*], unless, upon a reading of the record of the trial proceedings and the heads of argument filed by the parties, the court is of the opinion that an appeal has merit on the basis of one or more of the matters set out in that section, it shall dismiss the appeal. There is no express requirement for oral argument to be presented before the court could exercise its appeal powers.
(2) What constitutes the offence in terms of s 3(1)(a)(ii) is soliciting, accepting or agreeing to accept or attempting to obtain, from any person a gift or consideration for himself or any other person as an inducement or reward, for showing or not showing or for having shown or not shown, favour or disfavour to any person in relation to his principal's affairs or business. This offence is not the same as that under s 4, which deals with offences by public officials.

* The section was repealed when the Criminal Law Code [*Chapter 9:23*] came into effect, but was extant when the appellant was convicted. The corresponding provisions are now in s 170 of the Code. – *Editor.*

Appeal – leave required – leave not granted until after expiry of time for filing of notice of appeal – notice of appeal filed before leave granted – not a valid notice – leave to appeal must be granted first – procedure appellant should follow

Ngazimbi v *Murowa Diamonds (Pvt) Ltd* S-27-13 (Malaba DCJ, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 24 June 2013)

On 21 February 2011 the Labour Court gave a judgment, against which the appellant sought to institute an appeal on 9 March 2011. Rule 5 of the Supreme Court (Miscellaneous Appeals and References) Rules 1975 provides that an appeal against a decision of the Labour Court shall be instituted within 15 days of the decision being given. The notice of appeal must be delivered to all interested parties and filed with the registrar of the Supreme Court within 15 days of the decision appealed against being given. However, leave to appeal to the Supreme Court was granted by the Labour Court, in terms of s 92F(2) of the Labour Act [*Chapter 28:01*], only on 2 June 2011.
Held: The fact that, in terms of r 36 of the Labour Court Rules, leave to appeal may be granted after the expiry of the time within which to note an appeal against the judgment as required by r 5 of the Supreme Court (Miscellaneous Appeals and References) Rules does not mean that a notice of appeal which precedes the granting of leave to appeal has been validly delivered and filed. The purpose of requiring leave before noting an appeal (such leave to be given by the President of the Labour Court or upon refusal, by the judge of the Supreme Court in terms of s 92F(2) of the Act) is to prevent appeals not based on questions of law getting to the Supreme Court. The right to appeal given by s 92F(1) is limited. The exercise of it is made conditional upon leave being granted. By making an application for leave to appeal, the party is seeking the right to lodge the appeal. The law interposes the President of the Labour Court between the wish to appeal and the action to lodge the appeal. The authority, when granted, is prospective rather than retrospective. Until the special leave is granted, the party does not know whether an appeal is open to him; and until leave is granted, there cannot be said to be an appeal pending before the Supreme Court, even though a purported notice of appeal has been filed. As no valid notice of appeal was filed and delivered after the grant of leave to appeal by the Labour Court on 2 June 2011, there was therefore no appeal before the Supreme Court. The appellant should have made an application to a judge of the Supreme Court for an extension of time within which to note an appeal and for condonation of late noting of appeal.

Arbitration – appeal – voluntary submission to arbitration – no appeal possible – limited grounds on which award may be set aside by High Court

Zimbabwe Educational, Scientific, Social & Cultural Workers' Union v *Welfare Educational Institutions Employers' Association* S-11-13 (Malaba DCJ, Ziyambi & Gowora JJA concurring) (Judgment delivered 26 February 2013)

Section 89(1) of the Labour Act [*Chapter 20:28*] gives the Labour Court the power to hear and determine applications and appeals "in terms of this Act or any other enactment". The quoted words limit the powers of the exercise of the functions of hearing and determining to grounds raised in an application and appeal made or noted in the exercise of a right given under the Act or any other enactment. There should therefore be a provision in the Act or other enactment giving the party the right to make the application or note the appeal to the Labour Court before it can exercise any power to hear and determine the matter as an application or appeal. For the court to exercise the right to review a decision of an arbitrator as provided by s 89(1)(d1), there has to be a valid application for review in terms of the Act or other enactment, as provided by s 89(1). Thus, the court has the power to hear and determine an appeal from a compulsory arbitration award because the appeal would have been noted in accordance with the right of appeal given by s 98(10) of the Act. Voluntary arbitration proceedings are not subject to either appeal or review under the Labour Act.
Voluntary arbitration proceedings are governed by the Arbitration Act [*Chapter 7:15*]. Where parties make submissions to arbitration on the terms that they choose their own arbitrator, formulate their own terms of reference to bind the arbitrator and agree that the award will be final and binding on them, the courts will proceed on the basis that the parties have chosen their own procedure and that there should not be any interference with the results. Even in cases of misconduct of proceedings by the arbitrator, the court would be

reluctant to interfere, save in certain limited instances in which an award is against public policy. The Arbitration Act is clear that the only court that has jurisdiction in those limited circumstances is the High Court, not the Labour Court.

Arbitration – arbitrator – jurisdiction – dispute about validity of contract containing arbitration clause – arbitrator entitled to determine validity of arbitration clause

Marange Resources (Pvt) Ltd v *Core Mining & Minerals (Pvt) Ltd & Ors* HH-187-13 (Dube J) (Judgment delivered 30 May 2013)

A dispute between the applicant and the first respondent was referred to arbitration. The applicant sought an order, *inter alia*, staying the arbitration proceedings pending the High Court's ruling on the validity or otherwise of the shareholders' agreement in terms of which the arbitration proceedings were being conducted. The applicant contended that there was no valid shareholders' agreement and that the arbitration clause could not survive on its own. It argued that the arbitrator was not entitled to make an award as to the validity or otherwise of the contract.
Held: in terms of article 16 of the First Schedule to the Arbitration Act [*Chapter 7:15*], the arbitrator has power and competence to determine any challenge raised in respect of his jurisdiction and any objections with respect to the existence or validity of the arbitration agreement. The Act provides for a remedy to resolve such a dispute. Whether the arbitrator had power to deal only with the narrow issue of the validity of the arbitration clause or the validity of the whole contract was the issue that should have been taken up with him. The arbitrator invited the parties to address him on the preliminary issues. The applicant misconstrued this invitation to make submissions on the issue of jurisdiction with the actual arbitration proceedings over the validity of the contract. The issue regarding whether the arbitrator has power to rule on whether there is an agreement has a bearing on the issue of his jurisdiction and should have been taken up with the arbitrator for his determination. The appellant had not exhausted the domestic remedies provided for in the Act. It should have done so before approaching the court.
The arbitrator also had power to order interim measures in terms of article 17(1) and (2)(a). He also had power to grant interdicts in terms of article 17(2)(a). The arbitrator could do exactly what the court was being asked to do. If the arbitrator decided to proceed with the actual arbitration on the merits and came out with an award not favourable to the applicant, the applicant could apply to have the award set aside by the High Court in terms of article 34(1). Any harm that might to ensue was curable.

Arbitration – award – labour case – registration of award with magistrates court or High Court – such registration for purposes of enforcement only – award remains award of Labour Court and under control of Labour Court

Muneka & Ors v *Manica Bus Co* HH-30-13 (Mtshiya J) (Judgment delivered 6 February 2013)

Voluntary awards granted in terms of the Arbitration Act [*Chapter 7:15*] are governed by the provisions of that Act and in like manner awards granted through compulsory arbitration in terms of the Labour Act [*Chapter 28:01*] are governed by the provisions of the Labour Act.
In terms of s 98(14) of the Labour Act, the registration of an arbitration award is for purposes of enforcement only. See s 98(15). The same applies to a decision, determination or order of the Labour Court registered with the High Court in terms of s 92B of the Act. The award or order remains an award or order of the Labour Court and is to be managed and controlled in terms of that Act. Accordingly, the Labour Court can vary or amend such an order even after it has been registered with the High Court. The award is only registered with the High Court because the Labour Court has no enforcement mechanism for its orders. This reasoning would also apply to all arbitral awards obtained through compulsory arbitration in terms of the Labour Act. This is so because s 98(9) of the Act gives the arbitrator the same powers as the Labour Court in determining a labour dispute.
In providing for registration for enforcement purposes, the legislature did not envisage a procedure where the applicant would be denied the registration of a certified award, although the other party would be at liberty to oppose the process of execution or enforcement on any legal or reasonable grounds. As long as the arbitral award has not been suspended or set aside on review or appeal in terms of the Labour Act, there is no basis upon which the High Court may decline registration of the award.

Arbitration – point of law – when may be raised – should form part of party's claim or defence – point of law may only be raised by seeking amendment to claim or defence unless parties agree otherwise – when amendment may be refused

Gold Driven Invstms (Pvt) Ltd v *Tel-One (Pvt) Ltd & Anor* S-9-13 (Malaba DCJ, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 25 February 2013)

The appellant was a company which carried on the business of tobacco contract farming, merchandising and export. The first respondent, a company which provided telecommunication services in Zimbabwe, entered into an agreement with a foreign company for the manufacture and supply of telecommunication equipment. The first respondent had local currency but needed foreign currency to buy the equipment. It entered into two agreements with the appellant, in order to raise foreign currency from the sale of tobacco. In terms of the first agreement, which related to the 2005/6 tobacco growing season, the first respondent was to provide local currency to enable the appellant to buy tobacco from local growers on its behalf. The appellant's obligation was to sell the tobacco in foreign currency and send the money to the foreign company to discharge the first respondent's debt. A second, similar, agreement related to the next tobacco season. In respect of both agreements, the first respondent discharged its obligations to the appellant, but the appellant did not reciprocate. It made a partial payment in respect of the first agreement and no payment at all in respect of the second. The first respondent claimed against the appellant for payment of foreign currency owed in terms of the two agreements. The appellant partially admitted the claim but denied that it owed all that the first respondent was claiming.

The parties agreed to have the dispute settled by way of arbitration. The issues referred to the arbitrator all related, in essence, to how much was owed by the appellant. The arbitrator heard evidence and stood the matter down for judgment. In its heads of argument the appellant for the first time raised the issue of illegality of the contracts. The first respondent objected to the issue being raised at that stage, on the ground that it was not part of the defence and its introduction would be prejudicial to its case. The first respondent argued that, in the absence of compliance with the procedure for amendment of the statement of defence in terms of art 23(2) of the Model Law (contained in the First Schedule to the Arbitration Act [*Chapter 7:15*]), the question of the illegality of the contracts could not be determined by the arbitrator. The appellant contended that the principles of the law regarding the raising of questions of law authorised the arbitrator to act outside the provisions of art 23(2). The arbitrator held that an objection *in limine* should be taken by a defendant before plea, in order to avoid further pleadings and the holding of a trial, and to afford finality to litigation, thereby avoiding the consequential costs. In the absence of an application by the appellant to amend or supplement its statement of defence and having regard to the excessive delay in raising the illegality defence, it was now inappropriate to permit the appellant to rely on it. He then made his findings on the facts, which findings were substantially in favour of the first respondent.

Having failed in an application for review by the High Court, the appellant appealed to the Supreme Court. It argued that the decision of the arbitrator was against the public policy of Zimbabwe, on the grounds that the principles of law governing the raising of points of law in judicial proceedings provided authority to the arbitrator to forego the need to insist on compliance by the parties with the procedure provided by art 23(2) of the Model Law.

Held: the basic principles found in the authorities are that a question of law can be raised at any stage of the proceedings, provided it does not occasion prejudice to the other party. This is, however, subject to the absence of clear provisions governing procedures in particular proceedings. It is particularly applicable where the procedure in question does not provide a sufficient remedy for raising a point of law. The principles do not, on their own, provide a separate legal basis on which a court can ignore explicit provisions of law designed to deal with the raising of questions of law. In this case, art 23(2) is comprehensive and clearly takes care of the appropriate procedure by which a point of law may be raised in arbitral proceedings. There is no exception to the procedure which would allow the arbitrator to decide the question of the raising of points of law outside art 23(2) on the ground that one of the parties considers the matter to go to the root of the dispute. Here, the illegality of the contracts would have been part of the defence raised by the appellant against the first respondent's claims. Raising it at the belated stage of the proceedings and in the manner the appellant did would, if accepted, mean that the arbitrator allowed an amendment to the defence in a manner contrary to the procedure provided for the purpose by art 23(2). Article 23(2) envisages a situation in which an arbitrator makes a decision to allow or refuse a proposed amendment following submissions by both parties. It was not common cause that the contracts were illegal. The first respondent would have been entitled to resist the proposed amendment of the defence on the basis that the agreements were lawful.

Aviation – air carrier – liability of carrier for delayed consignment of freight – need for plaintiff to make written complaint within 21 days of freight being placed at consignor's disposal – claim for damages – need for summons to be served within two years of date freight ought to have arrived – failure in either respect fatal

Christal Motor Spares (Pvt) Ltd v *South African Airways* HH-135-13 (Mathonsi J) (Judgment delivered 8 May 2013)

The plaintiff sent a consignment of sculptures which were to be displayed at an exhibition in Brazil. The defendant airline was the carrier. It was made clear to the carrier what the dates of the exhibition were and when the consignment needed to get to its destination. The consignment only reached its destination over a month later, too late for the exhibition. The plaintiff brought an action for damages, claiming that it had suffered various itemised losses due to the non-arrival of the consignment.
Nearly two years later, the plaintiff issued summons (which was not served until over four months later). The claim was said to be in terms of the Warsaw Convention, as read with the Carriage by Air Act [*Chapter 13:04*]. The Warsaw Convention provides the sole and exclusive cause of action and remedy for a passenger who claims for loss, injury and damages sustained in the course or arising out of his international carriage by air, or for the consignor of cargo whose cargo is destroyed, lost or delayed. The Convention (as amended by the Hague Protocol of 1955), as well as the Supplementary Guadalajara Convention of 1961) have been domesticated into Zimbabwean law by the Act, s 3 of which provides that the Conventions shall, so far as they relate to the rights and liabilities of carriers, carriers' agents, passengers, consignors, consignees and other persons, and subject to the provisions of the Act, have the force of law in Zimbabwe in relation to any carriage by air to which the Conventions apply, irrespective of the nationality of the aircraft performing the carriage.
The defendant filed a plea in abatement to the plaintiff's summons, on two grounds: (a) that the plaintiff's claim was bad at law by reason of failure to submit a written complaint to the carrier within 21 days from the date on which the freight was placed at its disposal, as provided for in art 26 of the Warsaw Convention and (b) that the claim was prescribed in terms of art 29 of the Convention, as read with s 8 of the Act. Article 29(1) provides that the right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. The plaintiff argued that the claim was one for restitution, rather than damages, so the prescriptive periods provided by the Convention were not applicable.
Held: (1) It was necessary for the plaintiff to make the averment that art 26 was complied with. A claim brought in terms of the Convention must certainly contain an averment that the requirements of the Convention for bringing such a claim, in this case art 26, have been complied with. It is critical to plead the cause of action. No such averment was made.
(2) It was a distinction without a difference to say that the claim was for restitution rather than damages.
(3) Although the summons might have been issued within the two years provided for in the Convention, it was necessary for the summons to be served within that time as well. Under art 29(2), the method of computing the prescriptive period is determined by the law of the court seized of the case. That law, in Zimbabwe, is the Prescription Act [*Chapter 8:11*], s 7(1) of which provides that the running of prescription is only interrupted by the *service* of process.

Aviation – Air Zimbabwe Corporation – successor company to – whether more than one successor company could be formed – other companies subsequently formed in Air Zimbabwe "stable" – not successor companies to Corporation and not enjoying protection of State Liabilities Act [*Chapter 8:14*]

Air Zimbabwe (Pvt) Ltd & Anor v *Nhuta & Ors* HH-129-13 (Mafusire J) (Judgment delivered 2 May 2013)

The applicants brought an application under a certificate of urgency, seeking the release of certain goods, mostly vehicles, that had been attached in execution. They also sought as an interim relief an order that the respondents should pay any storage costs that might have been incurred as a result of the attachment of the assets. Finally, they sought an order that the actions of the respondents be declared illegal for allegedly contravening s 9A of the Finance (No. 2) Act of 2012 (Act 6 of 2012), as read with the State Liabilities Act [*Chapter 8:14*].
The first respondent was a former employee of Air Zimbabwe Holdings (Pvt) Ltd, the second applicant. In October 2010 an award for outstanding wages and benefits had been made in his favour. He had subsequently, in September 2012, registered the award as an order of the High Court. He proceeded to execute and the disputed assets were attached by the Deputy Sheriff.
The basis of the current application was that the assets belonging to either of the applicants or any other company hailing from what they called "… the Air Zimbabwe Stable" had become immune from attachment

and execution by virtue of the Finance (No. 2) Act (which had been promulgated in December 2012) as read with the State Liabilities Act. It was also argued that the applicants both hailed from the "Air Zimbabwe stable"; and that both were successor companies to the Air Zimbabwe Corporation. The applicants accepted that the attached assets did not belong to the first applicant, against which the first respondent had no judgment, but to the second applicant.
The Finance (No. 2) Act had inserted a provision into the Air Zimbabwe Corporation (Repeal) Act (No. 4 of 1998), to the effect that the State Liabilities Act [*Chapter 8:14*] "applies with necessary changes to legal proceedings against the Corporation or any successor company". The applicants argued that *any* company formed by "… the shareholder or board of the National Airline" would automatically enjoy the same immunity provided by that amendment and that the second applicant, like the first, was a successor company to the Corporation and enjoyed the same immunity.
Held: it was not the intention of the legislature to extend such immunity to an indeterminate number of companies some shareholders or board somewhere could think of floating. The amending section did not grant the power to anybody, let alone some shareholder or board of directors somewhere, to create a successor company, let alone several of them, to the defunct Corporation. The words used in the amendment were "… or any successor company". The word "company" was used in the singular. The use of the word "any" before the noun "company" did not transformed the word "company" from the singular to "companies" in the plural. A reading of the whole amendment and the Repeal Act as a whole left no doubt that it was intended to refer to a single successor company. For example, in terms of s 5, the Minister was empowered to transfer the assets and liabilities of the Corporation to the successor company. In terms of the other sections, the successor company inherited the rights and obligations of the Corporation, including contracts of employment in terms of s 8. To hold that there could be any number of successor companies would lead to absurdity. In addition, the power to declare a successor company to the defunct Corporation in terms of the Repeal Act was not given to all and sundry, but to the Minister of Transport only, who was empowered, in terms of s 3 of the Repeal Act, to form "*a* company … which shall be *the successor company* to the Corporation". The proviso to s 3 envisaged that the company that the Minister could nominate or direct as being the successor company could be one already in existence prior to the Act. Thus, if the Minister did not want to form a new company, he had a choice to nominate a pre-existing one. The first applicant was already in existence when the Repeal Act became law and was declared by the Minister in 2000 to be the successor company. The second applicant was incorporated later but was not the successor company to the Corporation.

Company – director – authority – ostensible authority to enter into contract – when person contracting with company entitled to rely on assumption of authority on part of director – person contracting also a director with knowledge of workings of company – not entitled to make such assumption

Company – director – payments to – payments subject to tax – unlawfulness of providing for tax-free payments – payments for loss of office – must be disclosed to members of company and approved in a general meeting – payment not so disclosed or approved unlawful

Mills v *Tanganda Tea Co* HH-12-13 (Patel J) (Judgment delivered 22 January 2013)

The applicant was the former managing director of the respondent and a former director of another company, M Ltd, of which the respondent was a wholly owned subsidiary. He resigned from both positions. A severance package was executed. The agreement was signed by one B, representing the respondent in his capacity as group chief executive of M Ltd and being duly authorised thereto. The applicant averred that the respondent had complied with certain aspects of the agreement, relating to payments in lieu of notice and leave and the transfer of the applicant's motor vehicle and cellphone, but was trying to resile from the principal element pertaining to severance pay. The respondent claimed that B had no authority to execute the agreement with the applicant, in the absence of resolutions from M Ltd and the respondent authorising him to bind the respondent to the agreement. It said that M Ltd was a distinct legal entity quite separate from the respondent company. In any event, the agreement was invalid because of the absence of due authorisation to conclude it and because its principal features would entail non-compliance with certain provisions of the Companies Act [*Chapter 24:03*]. The applicant sought summary judgment.
Held: (1) M Ltd and the respondent were distinct and separate legal entities, each with its own governing board and executive management. The fact that M Ltd owned 100% of the shares in the respondent did not in itself make the actions of B binding on the respondent.
(2) Section 12 of the Companies Act codifies the so-called *Turquand* rule or presumption of regularity in corporate affairs. It provides that any person dealing with a company is entitled to make certain assumptions, and that the company is estopped from denying their truth. In particular, it may properly be assumed that the company's internal regulations have been duly complied with. It may also be assumed that every person described in the company's register or returns as a director, manager or secretary of the company, and every

person whom the company represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary, or by an officer or agent of the kind concerned. However, a person is not entitled to make any such assumptions if he has actual knowledge to the contrary or if he ought reasonably to know the contrary. The section is not intended for the benefit of any insider who ought to have known of any alleged irregularity.
(3) The applicant was clearly not an outsider or mere employee of the respondent, but its managing director. Even if he was, as he claimed, precluded from attending board meetings of M Ltd and the respondent at the relevant time, he could quite easily have obtained the minutes of relevant board meetings so as to ascertain decisions taken concerning his resignation and severance package. In any event, in his position as managing director, he must have known that any decision in that regard would require a board resolution from the respondent authorising B to negotiate and conclude his severance package. The applicant was thus not entitled to take advantage of the presumption of regularity embodied in s 12 of the Act.
(4) Section 176(1) of the Act is designed to curb the mischief of parties determining the tax element of payments to directors on their own without the approval of the taxman. This construction is fortified by s 176(2), which deems the net sum actually provided for as a gross sum subject to taxation. The agreed figure payable to the applicant could not possibly be a net amount after taxation because it included a sum as compensation for restraint of trade.
(5) Section 178 of the Act requires the approval of the company for any payment to a director for loss of office. Full particulars with respect to the proposed payment, including the amount thereof, must be disclosed to members of the company and the proposal must be approved by the company in general meeting. Approval by members is a prerequisite for any severance payment to a director. Accordingly, the severance payment *in casu*, not having been disclosed to the members of the respondent and not having been approved by them at a general meeting, was patently in violation of s 178 and consequently unlawful.
(6) It was clear that the respondent had several *bona fide* defences to the applicant's claim and that the plaintiff's case was not unassailable and unanswerable. Summary judgment would accordingly be refused.

Company – director – liability for company's debts – director acting recklessly, grossly negligently, or fraudulently – limited liability of director no longer available – director may be held personally liable for debts

Ordeco (Pvt) Ltd v *Govere & Anor* HH-179-13 (Chigumba J) (Judgment delivered 5 June 2013)

The limited liability of company directors is afforded to persons who conduct business through the medium of a company. It is not there to protect them against conduct which is reckless or that takes place with fraudulent intent. Once a court has found the conduct of the director to be reckless, grossly negligent, or to be motivated by fraudulent intent, then the principle of limited liability in the conduct of company business ought to be set aside. Proof of fraud is an essential requirement and in order to establish this element it must be proved that the director made a false representation with intent to deceive. The representation to creditors that the company had sufficient funds to make payment to the creditors concerned would constitute such a misrepresentation. A director who was knowingly party to the carrying on of business by the company recklessly and with intention to defraud its creditors should be held personally responsible, without limitation of liability, for the discharge of a judgment debt obtained against the company arising out of that misrepresentation.

Company – judicial management – application – must be by court application – urgent chamber application not competent – when application may be granted – purpose of judicial management – what must be shown before order may be granted

Ellingbarn Trading (Pvt) Ltd v *Assistant Master & Anor* HB-82-13 (Mutema J) (Judgment delivered 25 April 2013)

The second respondent obtained judgment against the applicant following non-repayment of moneys loaned to the applicant. It also obtained judgment against the applicant's co-principal debtors and guarantors in their personal capacities. When the second respondent sought to execute the writ of execution against movable and immovable property, which included a dwelling belonging to one of the co-principal debtors, the applicant and its co-defendants filed an application for the suspension of the sale of the dwelling in terms of the High Court Rules 1971. This application was dismissed by the High Court. Realising that the sale in execution of the immovable property was to go ahead, the applicant, undaunted, applied for provisional judicial management via an urgent chamber application. The applicant also sought a stay of all proceedings against all its directors and/or

guarantors or other persons who had underwritten the applicant's debts. A provisional order was granted but the second respondent opposed confirmation of the order.
At the hearing the second respondent took the point *in limine* that the applicant was automatically barred on account of not having filed its heads of argument within the ten day period after receipt of the second respondent's heads, the period stipulated in r 238(2a), as read with (2b), of the High Court Rules 1971.
Held: (1) the respondent is to file his heads of argument within 10 days of being served with the applicant's heads. If the respondent has been served with the applicant's heads close to the set down date, he shall not have the benefit of the full 10 day period within which to file and serve heads but must do so five clear days before the set down date. No reasons were proffered for filing the applicant's heads out of time and, more importantly, the matter had already been delayed more than necessary. A further delay would not be in the interests of justice.
(2) Sections 299 and 300 of the Companies Act [*Chapter24:03*] make it clear that an application for judicial management must be a court application, not an urgent chamber application. In any event, there was no urgency about the matter.
(3) The order sought by the applicant to exonerate its directors and guarantors from their personal liabilities was incompetent. In its founding affidavit, the applicant never stated the basis upon which liability against its directors and guarantors was founded and why action against them should be stayed, nor did those directors and guarantors file any supporting affidavits.
(4) Judicial management is an extraordinary procedure available to a company in special circumstances and for prescribed purposes. It is only adopted when the court is satisfied that there is a reasonable possibility that, if placed under judicial management, a company which is unable to pay its debts will be able to do so in full, meet its obligations and became a successful concern. It is not an experiment to determine whether a company can extricate itself from financial difficulties. The concept of judicial management is premised on the basis that a company has failed to be viable due to mismanagement which can be corrected by a judicial manager. In the instant case, the applicant did not allege mismanagement in its application; it alleged lack of capital, the liquidity crunch and competition, problems which no judicial manager can arrest.
(5) On the return day of a provisional order for judicial management, the court may, in terms of s 305(1) of the Companies Act, discharge the order or make any order it thinks fit. This can include an order for the winding up of the company. Such an order would be just and equitable in this case.

Company – winding up – grounds for – company unable to pay its debts – meaning of – commercial insolvency – when court may find company to be commercially insolvent – goodwill – may not be treated an asset in determining company's ability to pay debts

Company – winding up – grounds – just and equitable – situations where court may find winding up to be just and equitable

Company – winding up – order for – provisional order granted – importance of return day – effect of failure to confirm, discharge or extend provisional order on return day

Boka Invstms (Pvt)Ltd v *Thirdline Trading (Pvt) Ltd & Ors* HH-104-13 (Patel J) (Judgment delivered 25 April 2013)

Where a provisional order for sequestration of an estate or the winding up of a company has been granted, the return day is critical to its confirmation or discharge. If the provisional order is not confirmed, discharged or extended on the stipulated return day, this would ordinarily entail the conclusion that it has lapsed and is no longer extant.
In terms of s 206 of the Companies Act [*Chapter 24:03*], a company may be wound up if, among other grounds, it is unable to pay its debts. In terms of s 205, a company is deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining this issue, the court shall take into account the contingent and prospective liabilities of the company. The test that is generally applied is that of commercial insolvency. The primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts and is accordingly liable to be wound up.
A company may also be wound up if the court finds that it is just and equitable to do so. In making this determination, it is necessary for the court to take into account all the relevant circumstances, including the

competing interests of all the parties concerned. There are five broad categories that that have been identified for winding up on just and equitable grounds: the disappearance of the company's substratum; the illegality of its objects and fraud committed in connection therewith; a deadlock in the management of the company's affairs; grounds analogous to those for the dissolution of a partnership; and where there is oppression. These are not exhaustive; it is open to the courts to identify other circumstances or devise other categories in the future.
Goodwill cannot be treated as an asset in determining whether a company's liabilities exceed its assets. Goodwill based on prospective revenues may be treated as an asset in valuating a company's business when it is sold or transferred as a going concern, but it is utterly valueless and cannot assist in discharging the company's debts and liabilities as and when they arise.

Company – winding up – grounds for – "just and equitable" – company formed by husband and wife in order to buy a property – breakdown of marriage occurring and husband retaining sole control of company and property – winding up ordered

Peta v *Buwu & Anor* HH-29-13 (Chitakunye J) (Judgment delivered 7 February 2013)

The applicant and first respondent were married. They formed a company, the second respondent. Each spouse had a 50 percent share in the company. An immovable property was acquired and registered in the company's name. This immovable property was the company's only asset. After several years the marital relationship began experiencing problems which culminated in the applicant (the wife) moving out of the house. Later, the first respondent moved out as well, leaving tenants in occupation. The applicant brought proceedings for the winding up of the company, alleging various breaches of the Companies Act [*Chapter 24:03*], as well as averring that the relationship between the two shareholders was now untenable. The first respondent stated, *inter alia*, that the breakdown in the relationship between him and the applicant could not be a basis for winding up the company, which was a separate legal entity.
Held: on terms of s 206(g) of the Act, a company may be wound up if the court is of opinion that it is just and equitable that the company should be wound up. Where an association which is formed on the basis of a personal relationship which involves mutual confidence (such as exists when a pre-existing partnership is converted into a limited liability company), the company can properly be wound up on the "just and equitable" principle when the personal relationship of confidence and trust which must prevail between partners is eroded and the members cease to act towards one another honestly and reasonably and with friendly co-operation in managing the affairs of the company. Those members who are not responsible for the destruction of that relationship will be entitled to claim that it is just and equitable for the company to be wound up. The only way to protect the applicant's interests and ensure that she benefitted from her investment would be to order that the company be wound up.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(2) – right to fair hearing within a reasonable time – application to lower court to refer matter to Supreme Court – need for applicant to lead evidence to support averment that delay attributable to State – failure to adduce evidence fatal to application

S v *Matatu* S-34-13 (Ziyambi JA, Malaba DCJ and Patel AHA concurring) (Judgment delivered 13 May 2013)

A delay of seven years in prosecuting a criminal charge is presumptively prejudicial and would, generally speaking, trigger an inquiry by the Supreme Court into the constitutionality of the delay.
Before permitting an accused person to raise the question of not having been brought to trial within a reasonable time, the lower court should be satisfied that ample written notice has been given to the State, with a copy filed of record, of the intention to advance the complaint. The prosecution is entitled to be afforded the time and opportunity to investigate the cause of the delay and to be ready to adduce evidence as to the reasons therefor, if it is considered necessary to do so. The magistrate must hear evidence from the applicant and the prosecutor must be given an opportunity to cross examine the applicant and to lead any evidence it considers necessary, after which the magistrate must make a ruling based on the evidence. If there are disputes of fact which needed to be resolved, it is the function of the referring court to resolve such disputes.
Where the applicant has placed no evidence before the court from which it can be concluded that the delay in bringing him to trial is totally attributable to the State, has caused him prejudice and is a violation of his right to a fair trial, the application must fail, the absence of evidence being fatal to the application.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1) – application to Supreme Court alleging infringement of Constitutional rights – who may bring – every person entitled to bring application to ensure public officer complies with duties under the law

Constitutional law – Constitution of Zimbabwe 1980 – elections – when must be held – Parliament being dissolved by effluxion of time – President's duty to fix election date before Parliament dissolved – undesirability of lengthy period without all three arms of State being in existence

Mawarire v *Mugabe NO & Ors* CC-1-13 (Chidyausiku CJ, Ziyambi, Garwe , Gowora & Hlatshwayo JJA, Chiweshe & Guvava AJJA concurring; Malaba DCJ & Patel JA dissenting) (Judgment delivered 31 May 2013)

The applicant brought an application against the President and the other principals in the Global Political Agreement, alleging that his rights under ss 18(1) and 18(1a) of the Constitution had been contravened. He sought an order directing the President forthwith to proclaim an election date for a Presidential election, general election and elections for members of the governing bodies of local authorities in terms of s 58(1) of the Constitution. At the time of the application, the dissolution of Parliament by effluxion of time was imminent, the date for such dissolution being 29 June 2013.

The issues for decision were: (a) whether the applicant had *locus standi* in terms of s 24(1) of the Constitution; (b) when harmonised general elections fell due in terms of the laws of Zimbabwe? and (c) whether the applicant had made out a case for the order sought.

In respect of the first issue, he contended that his right to the protection of the law in terms of s 18(1) of the Constitution had been, was being and was likely to continue being violated, in view of the failure by the President to fix the date for elections when, at law, according to him, the said elections were looming and were now due. He further claimed protection of the law as a person duly entitled to vote, with a vested right to vote in an election at a stipulated time.

The second, third and fourth respondents argued that elections had to be held within 4 months of the dissolution of Parliament.

Held: (1) s 18(1a) of the Constitution (introduced in 2009), which provides that "Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law", conferred a right on any and every Zimbabwean who is affected by a failure to uphold the law to approach the court in terms of s 24(1). The court did not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. It would entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.

(2) Section 58(1) of the Constitution, which provides for the holding of elections, was susceptible of two interpretations: one, that elections must be held within the life of Parliament; the other, that elections may be held up to four months after the dissolution of Parliament. The second interpretation implied that the President must wait until the life of Parliament would have expired in terms of s 63(4) and then issue a proclamation recognising that fact and fixing dates within four months of the event. The expiry of the life of Parliament would have passed silently without notice to all concerned but with a dramatic effect of creating a deformed State without Parliament for up to four months. This would lead to an absurdity and glaring anomalies.

(3) There are two approaches open to a court faced with apparent absurdities in the construction of statutes - the narrow and the wider approach. Under the narrow approach, the court chooses, between the two possible interpretations, the one which does not lead to an absurdity. In this case, it would be the first interpretation. Under the "wider approach" the court has a broad discretion in removing an absurdity being guided ultimately by the intention of the legislature or in constitutional terms by the intention of the framers of the supreme law. Once an ambiguity or absurdity has been established, the proper approach to adopt would be the wider one, where the court calls into aid historical, schematic, teleological and purposive approaches to interpretation.

(4) If the framers of the Constitution wanted Zimbabwe to function without a Parliament for four months, they surely would have said so in clear and explicit terms and they would not have left this to speculation and interpretation. The only interpretation that could be given to this section is one that favours constitutionalism. The current Constitution was based on the fundamental principles of separation of powers between the three arms of State - the executive, the judiciary and the legislature. This principle was entrenched in the Constitution. Nowhere in the Constitution was there an excuse to function without any one of these branches for an extended period of time. Whatever exceptions are dictated by transitional imperatives of the going out and coming in of governments, these are always kept at the minimum possible. In fact, so important are the tripartite pillars of State that even in a time of emergency or war, these three institutions are preserved. To exist too long without a Parliament would be tantamount to shredding the Constitution and inviting a state of lawlessness and disorder.

(5) The proper construction of s 58(1) is that election dates should be fixed and notified (whether pursuant to Presidential dissolution or automatic dissolution of Parliament) in such a way that elections are held within the

life of Parliament or a day/days immediately following its dissolution. The setting of these dates has to take into account the requirements of the Constitution and the Electoral Act, which stipulate a period of at least 44 days between proclamation and actual holding of elections.
(6) The President was already out of time in fixing and proclaiming dates for the elections to be held before the expiry of the life of the current Parliament. The applicant's rights had already been infringed and continued to be violated with each passing day. He was entitled to the declaration of such infringement and an order correcting or rectifying as far as is possible such infringement. The President could not remedy the situation by issuing the proclamation for elections to be held by 29 June 2013, as doing so would inevitably contravene the time lines set out in s 38 of the Electoral Act, which gives prospective Parliamentary candidates 14 days to organise their nominations and 30 days to campaign before the date of the elections. To fix the date of the elections now in anticipation of the dissolution of Parliament on 29 June 2013 would have the effect of violating the fundamental right of aspiring Parliamentary candidates, entitling them to bring similar applications to that of the applicant.
Held (*per* Malaba DCJ, dissenting): section 58(1) was clear. It gives the President the discretionary power to fix a day or days for the holding of the first elections to fall within a period of four months calculated from the date of occurrence of any of the events referred to in ss 63(4) and 63(7) of the former Constitution. The date or dates fixed for the holding of the first elections must follow the date of the happening of the event concerned. There was nothing in s 58(1) which imposed on the President an obligation to fix a day or days of the election to coincide with the date of the end of the natural life of Parliament. If that were the case the date of the election would be known in advance as if it was fixed by legislation. If the framers of the Constitution had intended the date of the elections to fall on the last day of the maximum duration of the life of Parliament, they would have said so. They would have imposed the duty on the President to simply issue the proclamation announcing that date. There would have been no need at all to vest the President with the power to "fix" "such day or days" of the holding of the elections. The principle that there can be a period following automatic dissolution of Parliament when the affairs of a country are run by the executive and judiciary is widely recognized and accepted in several other countries.
Held (*per* Patel JA, dissenting): A plain reading of s 58(1) makes it clear that elections must be held after the dissolution of Parliament on such day or days as the President may fix by proclamation. This applies to both scenarios for the dissolution of Parliament. Where it is dissolved by the President under s 63(7), elections must take place within four months *after the issue of a proclamation dissolving Parliament*. Where Parliament stands dissolved by operation of law in terms of s 63(4), elections must be held within four months *after the dissolution of Parliament*. The wording used is unambiguous and does not admit of any other interpretation, nor does it entail any absurdity. Consequently, there is no need to invoke any teleological or purposive approach in the construction of s 58(1).

Constitutional law – Constitution of Zimbabwe 1980 – application to Supreme Court – application – *locus standi* – Minister challenging right of members to introduce private member's bill into Parliament – bill affecting Minister's powers and responsibilities – Minister having *locus standi*

Constitutional law – Constitution of Zimbabwe 1980 – Parliament – bills – private member's bill – subject matter of bill – limitation on what matters may be dealt with in private member's bill – Inter-Party Agreement incorporated into Constitution as Schedule 8 – effect on right to introduce private member's bill

Chombo v *Parliament of Zimbabwe & Ors* S-5-13 (Garwe JA, Chidyausiku CJ, Ziyambi JA, Gowora JA & Omerjee AJA concurring) (Judgment delivered 20 May 2013)

Members of Parliament sought to introduce a private member's bill into Parliament, the purpose of the Bill being to reduce the powers of the Minister of Local Government over municipal and town councils. The applicant, the Minister in question, took the view that the introduction of such a private member's bill was incompetent, being inconsistent with ss 18, 18(1a) and Article 20.1.2. of the 8th Schedule of the Constitution of Zimbabwe 1980. The respondents questioned the applicant's *locus standi* to bring the application, as well as averring that it was competent in terms of Schedule 4 of the Constitution for a private member's bill to be introduced. They argued that since the applicant had brought this application in his capacity as a Cabinet Minister and member of Parliament, no rights that relate to him personally had been infringed; consequently he had no *locus standi* to bring the application. They also submitted that the relevant Constitutional provisions had not curtailed the rights of members to introduce private bills save "where policies and programmes of the National Executive are concerned". Lastly, they submitted that the applicant, being a Minister and therefore part of the State, could not sue Parliament, which is also another arm of the State.

Held: (1) an applicant approaching the Supreme Court in terms of s 24(1) of the Constitution must show that his individual rights have been infringed or, to put it another way, that there has been a contravention of the Declaration of Rights in relation to himself. He has no right to seek redress on behalf of the general public or anyone else. In this case the applicant, as the Minister of Local Government, is assigned the responsibility of administering various pieces of legislation that govern the activities of local government institutions, in particular the Urban Councils Act [*Chapter 29:15*]. The rationale for the introduction of the Bill was stated in the memorandum to the Bill as the need to reduce the powers of central government over municipal and town councils, which meant suggests that the real intention was to reduce the powers of the applicant as Minister of Local Government over municipal and town councils. The applicant clearly had an interest in this matter as it is his powers as Minister which the Bill intended to proscribe. In a case, such as the present, where it is suggested that the process of introducing the Bill that seeks to reduce such powers is unconstitutional, the applicant would certainly be entitled to the protection of the law and thus entitled to approach the Supreme Court and demand that the respondents act in accordance with the law. It would follow that in an appropriate case a Cabinet Minister can have *locus standi* to sue another arm of the State.
(2) Under Schedule 4 of the Constitution, it is clear that any member of Parliament is at liberty to introduce a bill into Parliament. Where, however, the proposed Bill by a member makes provision for the introduction or increase of any tax or charge on the Consolidated Revenue Fund or other public funds, or where the Bill makes provision for the compounding or remitting of any debt due to the State, or condoning any failure to collect taxes, or the raising of any loan by the State or condoning unauthorised expenditure, Parliament shall not introduce a debate on such a Bill, except on the recommendation of a Vice President, Minister or Deputy Minister. However, this situation changed with the introduction in 2009 of Schedule 8 of the Constitution which incorporated the Interparty Political Agreement between ZANU (PF) and the two MDC formations. Schedule 8 provides that during the subsistence of the Interparty Political Agreement, Article XX of that agreement shall prevail notwithstanding anything to the contrary in the Constitution. The intention must have been to ensure that for the duration of the Inter-Party Political Agreement, what is contained in Article XX of the agreement would override any provisions in the Constitution inconsistent with it. In clause 20.1.2 of Article XX, the Cabinet was specifically given the responsibility (a) to evaluate and adopt all government policies and consequential programmes (b) to allocate the financial resources necessary for the implementation of such policies and programmes and, most importantly (c) to prepare and present to Parliament all such legislation and other instruments as may be necessary to implement such policies and programmes. Whilst the drafting of the Interparty Political Agreement could have been refined and the agreement itself more elegantly worded, particularly when it was decided to incorporate it into the Constitution, it was clear that the use of the word "responsibility" was intended to give the power of formulating government policies and programmes and the necessary legislation only to Cabinet. Accordingly, where such policies and programmes were concerned, the formulation and presentation of Bills were the responsibility of Cabinet and no-one else.
(3) Whilst a private member has no right to introduce a private Bill that deals with government policies and programmes during the subsistence of the Inter-Party Political Agreement, he is still empowered to do so in two situations. The first is where he introduces a Bill that does not deal with such policies or programmes. The second is where the Bill that he seeks to introduce, in addition to the requirement that it must not deal with government policies and programmes, deals with issues of a financial nature that are covered by s 1(4) of Schedule 4 of the Constitution and is supported by a Vice President, Minister or Deputy Minister.
(4) The purpose of the Bill was to reduce the powers of the applicant as Minister of Local Government. That the Bill intended to amend current government policies was not in dispute. Accordingly, the Bill should not have been introduced or debated.

Constitutional law – Constitution of Zimbabwe 1980 – President – executive powers of – when exercise of such powers subject to review by the courts

NCA & Anor v *The President & Anor* HH-58-13 (Chiweshe JP) (Judgment delivered 28 February 2013)

Acting in terms of s 3 of the Referendums Act [*Chapter 20:10*], the President issued a proclamation on 15 February 2013, in terms of which a referendum was to be held on 16 March 2013, to enable the voters of Zimbabwe to determine whether or not to accept a draft new Constitution for Zimbabwe. The applicant organization and its chairman sought an order setting aside the proclamation, on the grounds that the time period was grossly inadequate in light of the importance and complexity of the opinion being sought from voters. In particular, they averred that at the time of setting of the date no official copy of the draft constitution or translated or simplified versions of the same had been published. They further averred that by setting the date of 16 March 2013 the President acted arbitrarily, irrationally, grossly unreasonably and *ultra vires* the Act. By

acting in this way, they argued that he had denied citizens adequate time to study and debate the draft so as to participate in the referendum from an informed position.
The President opposed the application solely on ground that his conduct of the applicant in publishing the Proclamation was not subject to review by the judiciary. He relied on s 31K(1) of the Constitution, which, it was argued, ousts the jurisdiction of the courts in relation to all executive acts of the President where he has acted on his own deliberative judgment and precludes the court from inquiring into the manner in which he exercised his discretion. In deciding to call for a referendum and fixing the day and time for the holding of the referendum, he acted on his own deliberate judgment in terms of the Referendums Act.
Held: The provisions of s 31K were clear and unambiguous. The powers given to the President by s 3 of the Act, being wide, discretionary and unfettered, fall into the category of those powers envisaged under s 31K(1), wherein the President is required or permitted to act on his own deliberate judgment. That being the case, his conduct in setting the date of the referendum and the time within which voters may cast their vote was not subject to review by a court. Only where a prerogative or executive power has been exercised unlawfully or outside the law might the courts be entitled to interfere.

Editor's note (information supplied by *Veritas*): at an appeal against this ruling, heard on 13 March, the Supreme Court held that the proclamation of the referendum date was reviewable by a court, but on the merits of the application ruled that the NCA's evidence did not prove its complaint that the time allowed by the proclamation was inadequate. The Supreme Court's judgment has not yet been made available.

Contract – breach – breach induced by third party – plaintiff having delictual claim against third party

Trojan Nickel Mine v *RBZ* HH-169-13 (Mathonsi J) (Judgment delivered 29 May 2013)

The plaintiff, a public company, sued the defendant for payment of a little over US$1 million, together with interest and costs of suit, being the plaintiff's money appropriated by the defendant from the plaintiff's bank in pursuance of a monetary policy statement issued in terms of s 46 of the Reserve Bank Act [*Chapter 22:15*] and a directive issued to banks in terms of s 35(1) of the Exchange Control Regulations SI 109 of 1996. The defendant, which was established in terms of s 4 of the Act, was charged with, *inter alia*, the regulation of Zimbabwe's monetary system, the supervision of banking institutions and the smooth operation of the payment system, as well as acting as banker and financial advisor to, and fiscal agent of, the State. In the discharge of those duties, the defendant issued a monetary policy statement on 1 October 2007, centralising all foreign currency accounts and directing the lodgement with it of all corporate foreign currency balances held by authorised dealers. One such authorised dealer was the bank where the plaintiff maintained a foreign currency account. The plaintiff's bank complied with this directive. The plaintiff, being unable to access its money, sued the defendant to recover the money. The defendant contested the action, averring that there was no causal nexus between the parties, given that the plaintiff and the defendant did not enjoy any banking relationship and that the plaintiff should have proceeded against its own bank, and not against the defendant.
The plaintiff argued that it had a cause of action against the defendant because the defendant wrongfully procured a breach of the contract between the plaintiff and its own bank, such an action existing in our law for the intentional and wrongful interference with contractual rights. In addition, the plaintiff was entitled to recover from the defendant the procured money on the basis of unjust enrichment, it having been enriched at the expense of the plaintiff.
Held: It is well established that the intentional inducement of a breach of contract is an actionable wrong. After appropriating the plaintiff's money, the defendant did not return that money and had not even begun to give any indication as when, if at all, it will repay the money. It contented itself with hiding behind the non-existence of a contractual relationship between it and the plaintiff. Quite how and why the defendant could come to the conclusion that it could just acquire the money and refuse to repay it to the owner was unfathomable. The right to private property is sacrosanct. The plaintiff should be protected against the arbitrary deprivation of its equity deposited at its bank, which institution was powerless against the defendant's directive and was now unable to perform its contractual obligations, namely paying the money to the plaintiff on demand.
The directive which led to the appropriation of the plaintiff's foreign currency balance at its own bank constituted a wrongful interference with contractual rights. While the defendant was the monetary authority charged with the management of the banking sector and the formulation of banking rules, no authority was cited which entitled the defendant to proscribe the release of deposits to depositors or indeed to interfere with bankers' obligations to pay balances to their clients on demand. In any event, on the basis of unjust enrichment, the defendant could not escape liability.

However, it would be inappropriate, bearing in mind the banking relationship between the parties, to direct that the money be paid directly to the plaintiff. The correct approach would be for the defendant to return the money to the plaintiff's banker.

Contract – breach – damages – assessment – special or extrinsic damages – when such damages are recoverable – need for parties to foresee that breach would result in type of loss claimed for

Tapvice Entprs (Pvt) Ltd v *Sino Zimbabwe Cotton Hldgs (Pvt) Ltd* HH-156-13 (Mafusire J) (Judgment delivered 16 May 2013)

The general principle governing the assessment of compensation for breach of contract is that the wronged party should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. The reinstatement cannot invariably be complete, for it would be inequitable and unfair to make the defaulter liable for special consequences which could not have been in his contemplation when he entered into the contract.
Damages for breach of contract are not calculated in the same way as damages for delict. Delictual damages are intended to compensate the innocent party for what he has lost, whereas damages for breach of contract are intended to compensate the innocent party for what he should have gained had the breach not occurred. The measure of such damages is limited to the general or intrinsic damages that flow naturally and generally from the breach of the contract in question. Special or extrinsic damages are recoverable only if in the special circumstances attending the conclusion of the contract the parties actually or presumptively contemplated that they would probably result from the breach of the contract. In general, it is those damages which the innocent party might suffer from the non-performance of the contract in respect to the particular thing which is the object of it which he is entitled to recover, and not such damages in respect to his other affairs as may have been incidentally occasioned by the breach. Under the "contemplation" principle followed in this country, the innocent party should recover if the contracting parties actually or presumptively foresaw that the breach of contract in question would result in the type of loss being sued for. Whether a particular loss constitutes special or extrinsic damages or was within the contemplation of the parties at the time of making the contract is a question of fact.

Contract – enforceability – *paratie executie* clause – requirements – liability of debtor must be agreed between parties or established through court process – not open to creditor unilaterally to determine level of debt and then enforce clause

Mandala v *Glens Removals & Storage (Zimbabwe) (Pvt) Ltd* HH-78-13 (Bere J) (Judgment delivered 14 February 2013)

The plaintiff lodged her household goods with the defendant for storage at agreed monthly charges. When she did so, she personally gave her contact address, which was an address in London. This was the only document which was signed by the plaintiff. The goods were to attract a monthly storage charge and payment was to be made in advance. It was a specific term of the agreement between the plaintiff and the defendant that should the storage charges remain unpaid for three consecutive months, the defendant reserved the right to sell part or all the goods by public auction without notice in order to defray the accrued charges.
Following the alleged default by the plaintiff in the payment of storage charges the bulk of her property was sold through public auction. Some of the property, which could not possibly have been sold (like the plaintiff's marriage and educational certificates), could not be accounted for. The same happened with other household goods which did not appear on the list of items sold by public auction. These were simply not traceable. After the defendant had taken what it believed was due to it, there was some residue due to the plaintiff, but it was not until the plaintiff had gone to the defendant to enquire about her goods that she was advised of both the sale and the residue.
The central issue at the trial was whether or not the defendant breached the contract between the plaintiff and the defendant; alternatively, whether or not the defendant acted wrongfully and unlawfully in the circumstances.
The evidence showed that the correspondence meant for the attention of the plaintiff were sent to the wrong addresses, so it had to be accepted that she was never advised of the arrear payments and that the defendants unilaterally decided to sell her property to allegedly defray the accrued charges which she was not aware of.
The main thrust of the defendant's position was that the contract entered into by the plaintiff and the defendant allowed the latter to act in the manner it did. The defendant argued that the contract was one of *paratie executie*

and was enforceable. The plaintiff argued that the clause the relied upon by the defendant in disposing of the plaintiff's property was a *pactum commissarium* and unenforceable.
Held: *paratie executie*, in appropriate circumstances, remains part of our law subject to the qualification that the creditor is precluded from acting in a manner that prejudices the debtor in his rights. In all the cases where reliance is placed on a *paratie executie* clause, both the defendant and the plaintiff were in agreement as regards the liability of the latter. Liability is never an issue in those cases. Before the defendant sought to dispose of the plaintiff's property in the manner it did, her liability ought to have been established first through a court process. Here there was no agreement as regards what was due to the defendant, hence the inapplicability of the principle. The defendant unilaterally decided what was owed. Allowing the defendant to embark on unilateral action would give the defendant freedom to act as both the prosecutor and a judge in a matter it has vested interest in and this would not accord well with public policy. Consumers or those in the plaintiff's position would be most vulnerable to such conduct as exhibited by the defendant.
Even after unilaterally selling the plaintiff's property, the defendant did not bother to contact the plaintiff at her chosen address to give her the residue from the sale of her property after taking what it considered was due to it.
The clause relied upon by the defendant in selling the plaintiff's property without the knowledge, consent and or approval of the plaintiff was a *pactum commissorium*, which our law prohibits.

Contract – validity – contract contrary to public policy or inimical to interests of community – contract in terms of which supplier of water charged fixed rate even if no water actually consumed – whether such a contract lawful

ZINWA v *Kadoma Municipality* HB-13-13 (Ndou J) (Judgment delivered 31 January 2013)

The applicant and the respondent municipality entered into an agreement in terms of which the applicant supplied water to the municipality. It was a term of the agreement that billing was per allocation, as opposed to consumption. The municipality failed to pay the agreed rate, but a compromise sum was agreed on. The applicant sought summary judgment. The respondent pleaded, in essence, that billing per allocation was repugnant to public policy and it should only pay for consumed water.
Held: summary judgment should not be granted when any real difficulty as to a matter of law arises. A contract or term may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to social or economic expedience, or is plainly improper and unconscionable, or is unduly harsh or oppressive. The respondent was a local authority, contracting on behalf of its rate payers and residents, who actually paid for the water in issue. The respondent was not a profit making organization but a public entity. Various questions arose: was it inimical to the interests of the community to ask the respondent's residents and rate payers to pay even if no water was received? Was the agreement between the parties not contrary to the law or morality? Was such an agreement unconscionable? Was it not unduly harsh or oppressive? There were there are clearly arguable questions of law raised by the respondent and also in light of legislation governing fairness of consumer contracts in our jurisdiction, making summary judgment incompetent.

Court – Constitutional Court – applications and appeals to – procedure to be adopted

Practice Direction 2 of 2013 (issued 19 June 2013)

The procedure for bring applications (whether urgent or in the ordinary course) and appeals to the Constitutional Court is set out in the Practice Direction issued by the Chief Justice.

Court – judicial officer – conduct and ethics – communication with prosecutor and defence counsel – direct communication improper

S v *Ndlovu* HH-149-13 (Uchena J) (Judgment delivered 28 March 2013)

See below, under CRIMINAL PROCEDURE (Trial – record)

Court – High Court – jurisdiction – management of execution of court orders – court entitled to manage orders so as to avoid absurd or irrational outcomes

The President v *Bhehbe & Ors & related cases* HH-110-13 (Chiweshe JP) (Judgment delivered 8 April 2013)

See below, under ELECTION (By-election).

Criminal law – offences under Criminal Law Code – bribery (s 170) – elements – no need for State to show that accused's actions objectively showed favour or disfavour to another

S v *Murisi* HH-31-13 (Hungwe J, Mavangira J concurring) (Judgment delivered 6 February 2013)

See above, under APPEAL (Criminal matter – hearing).

Criminal law – offences under Criminal Law Code – unlawful entry into premises followed by theft – such constituting unlawful entry committed in aggravating circumstances and higher penalty permissible – how should be charged – necessary to allege and prove aggravating circumstances before higher penalty may be imposed

S v *Zhakata* HH-13-13 (Patel J) (Judgment delivered 25 January 2013)

Section 131(1) of the Criminal Law Code [*Chapter 9:27*] enacts the crime of unlawful entry, the essential elements of which are intentional entry without permission or authority. This statutory offence repeals and replaces the common law crime of burglary or housebreaking with intent to steal, but with certain additional features. By virtue of para (a) of subs (1), as read with paras (a) to (e) of subs (2), the offence is aggravated by any of the circumstances set out in subs (2). Section 131(1)(a) does not create a combined offence of unlawful entry and theft. What it does is to aggravate the offence of unlawful entry, by prescribing a more severe penalty therefor, in the event of any one or more of the circumstances enumerated in subs (2) being established. These circumstances include the commission of another crime.

It is necessary for the State to prove or otherwise establish the relevant aggravating factor if it is to sustain a charge under s 131(1)(a). If it fails to do so, that factor cannot be taken into account for the purposes of assessing and imposing the more severe sentence stipulated by that provision (or for ordering restitution). Once this is accepted, it is unavoidable that the aggravating factor or circumstance be specifically pleaded and spelt out in any charge under s 131(1)(a). It cannot simply be left to be dealt with at some later stage in the proceedings. In the event that the State fails to prove or otherwise establish the aggravating circumstance stated in the charge, this will not be fatal to the conviction of the accused on the primary charge. It would still be possible to properly convict him of unlawful entry *simpliciter* under s 131(1)(b).

It is axiomatic that a criminal indictment must clearly set out all the particulars of the charge so that the accused fully grasps the basis of the charge so as to enable him to prepare his defence. If the charge does not allude to the alleged aggravating circumstance, the accused would be prejudiced in the preparation and presentation of his defence. For instance, the crime of robbery under s 126 of the Code attracts a considerably more severe punishment if the crime is committed in aggravating circumstances, such as possession of a firearm or dangerous weapon or the infliction of serious bodily injury. In any such case, the State must both charge the particular aggravating factor alleged and prove it in order to invoke the more severe penalty prescribed. The same principle must apply to all crimes that provide for increased sentences when those crimes are committed in aggravating circumstances.

Note: this decision conflicts with that in *S* v *Chirinda & Ors* HH-87-09, reported in 2009 (2) ZLR 82, which held that aggravating circumstances may be taken into account, even if not specified in the charge, if they are mentioned in the outline of the State case, in any agreed statement of facts, or in the prosecutor's address in aggravation.

Criminal law – offences under Criminal Law Code – unlawful entry into premises and theft from those premises – correct way to charge such offence – not competent to charge unlawful entry and theft as separate offences

S v *Maripfonde & Anor* HB-81-13 (Mutema J) (Judgment delivered 25 April 2013)

Sections 113 and 131 of the Criminal Law Code [*Chapter 9:23*] create two separate, stand alone, offences of theft and unlawful entry into premises, respectively. Neither of these two crimes can be read with the other, as used to be done in the old offence called housebreaking with intent to steal and theft. That offence has now been

codified into two stand alone offences. It is accordingly procedurally both wrong and incompetent to charge one as read with the other. Where a person unlawfully enters premises and steals property therefrom, the aspect of theft remains encompassed in s 131 and should not be ascribed separately to s 113. The clear meaning of s 131 is that where the accused unlawfully enters into premises and steals property therefrom and the premises were a dwelling house, or if the accused knew that there were people in the premises, or if the accused carried a weapon or used violence against anyone in effecting the entry, there is absolutely no procedural legal justification to charge the accused with two separate offences of unlawful entry into premises and theft. The proper charge is simply one of unlawful entry into premises in aggravating circumstances in contravention of s 131(1)(a) as read with subsection (2)(a), (b), (c) or (d) of the Code in respect of each count.

Criminal procedure – charge – exception to – grounds on which exception may be made – charge calculated to prejudice or embarrass accused in his defence – allegation that accused involved in litigation on same matter, decision on which was awaited – not a ground for quashing indictment – prejudice or embarrassment must relate to accused's ability to formulate a defence

S v *African Consol Resources Ltd* HH-145-13 (Musakwa J) (Judgment delivered 10 May 2013)

The accused, a mineral exploration company, was charged with fraud, alternatively various offences under the Precious Stones Trade Act [*Chapter 21:06*]. It was alleged that sometime in April 2006 the accused sought to obtain diamond mining claims in the Marange area in favour of the non-existent companies, which were only incorporated after they had obtained certificates of registration of mining claims from the Ministry of Mines. After securing mining licences through these alleged misrepresentations of the legal status of the companies, the company was alleged to have failed to keep records of diamonds recovered from the mining claims. Following several enquiries from the Ministry of Mines concerning its activities at the mining location, the company claimed that no mining was taking place. To the contrary, the State alleged, mining activities were taking place and the company was also purchasing diamonds from illegal miners. Upon cancellation of the mining permits, the company maintained that no mining activity ever took place. However, upon a search being conducted the company was found in possession of diamonds that had been mined and purchased without being accounted for.
The accused excepted to the indictment in terms of s 178 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], contending that the indictment was likely to prejudice and embarrass it because the company was involved in civil litigation on the same subject matter. In 2009 the company had obtained a declaratory order from the High Court to the effect that the claims it held were valid, but a year later the same judge rescinded his order on the grounds that the company had misled the court as to the status of the subsidiary companies in whose names the licences were obtained. An appeal was noted against this ruling, but at the date of the current trial had yet to be determined. The accused argued that, if the appeal against the rescission judgment were to be upheld, it would be entitled to raise the defence of claim of right, the claim companies being the valid holders of the claims. If the appeal failed, it would be entitled to raise the defence of lack of *mens rea*, in that at all times it had the *bona fide* belief that the claim companies had been validly incorporated at the time of registration of the claims, and that title to the claims was valid at the time of possession of the diamonds.
The State argued that a motion to quash an indictment can only be made where the charge preferred is imprecise and ambiguous, hence where it embarrasses or prejudices an accused person in the formulation of a defence.
Held: It was clear from the application made on behalf of the accused that the issue was not about formal defects in the indictment. There was also no question about the indictment not disclosing any offences. The issue was about the accused contending that it could not properly plead to the charges because it awaited the Supreme Court's determination of its appeal relating to the same subject matter. Under s 178 of the Criminal Procedure and Evidence Act, an exception can be raised when a charge discloses no offence or when there are imperfections in the way the charge is drafted.
The crucial question was whether a criminal prosecution could be instituted from the same facts giving rise to a civil suit and whether it was impermissible to have a parallel process where the conduct of an accused person gives rise to both criminal prosecution and civil litigation.
There was no question of the charges lacking clarity by way of omission of some essential averments, nor of the accused being charged with a non-existent offence. The accused seemed to raise a claim of right and lack of intention. That meant that it was able to plead to the indictment. Prejudice or embarrassment must relate to the accused's inability to formulate a defence on account of imperfections in the charge and accompanying facts. If the indictment and facts are well understood, there can be no prejudice or embarrassment.
That out of the same set of facts civil litigation and criminal prosecution had arisen could not be a ground for excepting to an indictment, any more than it could if out of the same conduct a criminal charge, disciplinary/misconduct proceedings and a delictual suit arose. An accused could not claim to be unable to defend himself because a decision was awaited in the other matters.

The accused's remedy might have been to seek a stay of proceedings pending the outcome of the appeal.

Criminal procedure – plea – guilty – explanation of charge and essential elements – questioning by magistrate in terms of s 271(2)(b) of Criminal Procedure and Evidence Act [*Chapter 9:07*] – accused admitting facts but denying requisite *mens rea* – court's duty to alter plea to one of not guilty and to proceed to trial

S v *Sakatare* HH-105-13 (Bhunu J) (Judgment delivered 6 March 2013)

Before an accused person can be found guilty on his own plea of guilty the court must satisfy itself that his plea of guilty is an unequivocal admission of his guilt. The purpose of canvassing the essential elements of the offence is for the court to satisfy itself that the accused is tendering a genuine plea of guilty from an informed position of his liability at law. Where the accused person pleads guilty but goes on to deny an essential element of the offence charged, the court is duty bound to alter the plea to one of not guilty and proceed to trial in the normal way. It is not the duty of the presiding magistrate to browbeat the accused into submission in order to convict the accused on his own plea of guilty.
The accused, a youth of 17, was charged with having consensual sexual intercourse with a juvenile girl in contravention of s 70(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He pleaded guilty, but in answer to questions from the magistrate, denied being aware that the girl was aged under 16 years.
Held: an act does not constitute guilt unless done with a guilty frame of mind. Here, it was not enough for the accused to admit that he had sexual intercourse with a minor child below the age of consent. He had also to admit the mental aspect of the offence, namely, that he intentionally had sexual intercourse with the minor child well knowing that she was below the age of 16 years. Once he had stated that he did not appreciate that the complainant was below the age of 16 years at the material time, he was proffering a valid defence to the charge. At that juncture, the trial magistrate was obliged to alter the plea to one of not guilty, instead of embarking on a lengthy cross-examination of the accused, apparently calculated to extort a confession from him so as to avoid the rigours of a fully fledged trial.

Criminal procedure – plea – guilty – explanation of charge and essential elements – questioning by magistrate in terms of s 271(2)(b) of Criminal Procedure and Evidence Act [*Chapter 9:07*] – manner in which questions should be asked – need to ensure that accused not admitting things he does not understand – need to ensure accused is admitting or denying relevant facts

S v *Matsetu* HH-84-13 (Uchena J, Bere J concurring) (Judgment delivered 4 March 2013)

The accused pleaded guilty to a charge of culpable homicide arising out of traffic accident which occurred at night. The magistrate then proceeded in terms of 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to question the accused to canvass the essential elements of the offence. In answer to one question, the accused said he did not mean to cause the accident. The magistrate then proceeded to ask the accused a series of further questions, relating to the speed at which he was driving, the distance at which he was from the deceased when he first saw the deceased, the state of the lights on the accused's vehicle, and so on.
The scrutinising regional magistrate was of the view that the accused was raising a triable issue and the plea should have been changed to one of not guilty. The trial magistrate explained that his approach had been to ascertain the facts from the accused, and then decide if negligence could be inferred from them. This approach necessarily entailed asking the accused several questions. He would not ask the accused person directly to admit negligence.
Held: Judicial officers, when proceeding in terms of s 271(2)(b), are free to ask the accused whatever questions they deem fit to ascertain the accused's guilt or innocence. There is no exhaustive list of questions, nor any limit to the ways in which the questions should be put. It is therefore permissible to ask indirect questions and infer from them the accused's guilt or innocence. An indirect question usually brings out the truth as it does not warn the accused of the effect his answer may have. It overcomes the problem of an accused person's appreciation of legal concepts. It brings out real justice as it seeks facts without clothing the question in legal jargon. This approach is preferable because legal concepts are not easy to master. In the case of unrepresented accused persons, the explanations of the charge and its elements should not be expected to fully inform them of the offence to the extent of expecting them to correctly and from an informed position answer direct questions based on legal concepts. Judicial officers should therefore always be careful, when canvassing essential elements, to avoid being satisfied by an accused's admission or denial of facts couched in legal jargon. They should ensure, through careful probing, that the accused is admitting or denying such facts. If an accused person is asked

whether he admits that he was negligent, and he answers "yes", that answer does not mean that he was indeed negligent. The magistrate who fully appreciates what negligence means must ask questions which will enable him to establish whether or not the accused was negligent.
A judicial officer is expected to know the law applicable to the offence charged. That will enable him to avoid being distracted by answers not relevant to the issues before him. In fact, s 271(2)(b) requires a judicial officer to have such knowledge as it requires him to explain the charge and its essential elements to the accused and to be satisfied, by the facts he gathers during the canvassing of essential elements, of the accused's guilt. Here, the offence charged was culpable homicide. The magistrate therefore correctly carried on with the canvassing of essential elements, because the accused's answer was not a valid defence to the offence charged.

Criminal procedure – sentence – fine – may not be imposed as a condition of suspension of a term of imprisonment – term of imprisonment should be stipulated as being in default of payment of fine

S v *Nkomo & Ors* HB-99-13 (Kamocha J) (Judgment delivered 27 June 2013)

It is not competent to suspend a sentence of imprisonment (or a portion thereof) on condition that the convicted person pays a fine. The correct way to formulate the sentence is to impose a fine, in default of payment the relevant period of imprisonment.

Criminal procedure – trial – record – lost record – reconstruction of – reconstruction procedure should be initiated by clerk of court – how record can be reconstructed using available evidence from other sources

S v *Ndlovu* HH-149-13 (Uchena J) (Judgment delivered 28 March 2013)

The accused was a legal practitioner. One of his colleagues had represented a foreign national who was on bail on a criminal charge. One of the bail conditions was that this person should surrender his passport to the clerk of court. The accused's colleague asked for an order that the foreign national's passport should be returned to him so that certain immigration matters could be attended to, and undertook not to give the passport to the foreign national. After the court ruled that the passport could be returned, the accused signed for the passport, undertaking that he would only use it to sort out immigration formalities, and return it to the clerk of court. The foreign national did not return to court and left the country. The accused and his colleague were charged with defeating the course of justice and alternatively giving false information to the court. The accused was convicted but given bail pending appeal. The record was subsequently lost, and the matter was referred by the trial magistrate to the chief magistrate, who sent to matter to the High Court for review, with a request that the proceedings be set aside. The reviewing judges, having heard the parties to the matter, issued an order requiring the clerk of the trial court, with immediate effect, to cause the reconstruction of the record of proceedings. A declaration was received from the trial magistrate, the trial prosecutor and the accused's counsel to the effect that reconstruction of the record of proceedings was impossible.
Held: (1) Judges review proceedings to determine the result and not to rubber stamp decisions from administrative officers. The chief magistrate's request would be ignored and the court would determine the matter as it deemed fit.
(2) The procedure for reconstruction of a record is that the clerk of the court must by affidavit indicate that the record is irretrievably lost and should obtain from the presiding magistrate, witnesses and others present at the trial affidavits as to the contents of the record and 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. The procedure is not initiated by the officials who made the above mentioned declaration and reconstruction does not only depend on their inputs. The reviewing judge should be informed by the clerk of court about the result of the reconstruction, not by the declarants. The clerk of court should have obtained affidavits from them, the witnesses and others present at the trial. Their inputs should not have been sent directly to the reviewing judge but to the clerk of court, who could, if the result of his consultation with all he had to consult was in agreement with the view of the declarants, have deposed an affidavit to that effect addressed to the Registrar for onward transmission to the reviewing judges.
(3) The trial magistrate should not have communicated directly with the prosecutor and defence counsel; he should have done so through the clerk of court. Such a direct communication was contrary to judicial ethics.
(4) The evidence as to how the accused applied for the release of the passport, and signed for it, failed to return it and the absconding of his client should be in the court's records. The immigration department should have evidence on whether there was anything the accused needed to sort out at their offices using the accused's

client's passport, whether he attended at their offices for that purpose, and whether the client left the country using that passport. The simplicity of the evidence which should have been led at the trial whose record of proceedings has been lost has a strong bearing on the case with which such proceedings can be reconstructed. The institutional nature of the source of such evidence defeated the declarants' declaration that exhibits have been irretrievably lost. That, and the trial magistrate's use of an incorrect procedure to reconstruct the record, left no doubt that the record could be reconstructed. However, because the trial magistrate and his co-declarants had so compromised themselves that a reconstructed record in which they were participants could not be of any value at any legal proceedings, the court reluctantly had to accept the declarants' averment that the record could no longer be reconstructed.

Criminal procedure (sentence) – forfeiture – of article used in commission of offence – motor vehicle used in kidnapping – accused sentenced to lengthy term of imprisonment for kidnapping – forfeiture in addition to imprisonment inequitable

S v *Nongerai & Ors* HB-43-13 (Cheda J) (Judgment delivered 28 February 2013)
The three accused were convicted of assault and kidnapping. They had assaulted the complainant with an assortment of weapons, demanding money which they alleged was owed to them by her mother. She suffered injuries in the process and was medically attended to. She was then forced into a car which belonged to one of the accused and driven to another town. Throughout this period, they continued assaulting her.
They were sentenced to five years' imprisonment and the car was ordered to be forfeited. The magistrate considered the car to be the means by which the offence was committed.
Held: The order of forfeiture is purely discretionary, which discretion, of course should be judicially exercised. In that determination the courts should be guided by the following factors:

- the nature of the article;
- its role in the commission of the offence
- whether there is a possibility of the article being used again in the commission of similar offences;
- the effect of the forfeiture on the accused person;
- whether, in view of the value of the article, its forfeiture will give rise to the imposition of a penalty disproportionate to the gravity of the offence;
- where the article is of considerable value, like a motor vehicle, whether it has been used previously to commit a similar offence.

The motor vehicle was indeed used in the commission of the offence and it was a necessary connection between it and the offence. However, that factor must be taken together with other factors, such as the effect of the forfeiture on the owner of the motor vehicle. The vehicle was of considerable value, especially when regard was given to the fact that the accused was already serving a five year term of imprisonment. In the circumstances, forfeiture was inequitable.

Criminal procedure (sentence) – forfeiture – of vehicle used for conveyance of article by means of which offence committed – when forfeiture should be ordered – value of vehicle in relation to value of other article – relevance of

S v *Chikandiwa & Ors* HH-57-13 (Mathonsi J) (Judgment delivered 27 February 2013)
The accused were all convicted under s 78(1)(a) of the Forest Act [*Chapter19:05*] after they were apprehended at road blocks with vehicles filled with firewood they had taken from various farms. In addition to the suspended prison sentences to which they were sentenced, the magistrate ordered the forfeiture of the firewood and the vehicles. Although the Forest Act does not provide for forfeiture, the magistrate relied on s 62(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as justifying the forfeiture order.
Held: the penalties for contravening s 78(1)(a) of the Forest Act are set out in the Act. They do not include the forfeiture of the instruments used in the commission of the offence, be it the machete used to cut the firewood or the means of conveyance by which the firewood was carried. It was a misdirection for the magistrate to rely on s 62(1) of the Criminal Procedure and Evidence Act.
In any event, care must always be taken, in deciding whether to order forfeiture or not, to ensure that such order does not result in the imposition of a penalty which is disproportionate to the gravity of the offence committed. Factors to consider include:

- the nature of the article;
- its role in the commission of the offence
- whether there is a possibility of the article being used again in the commission of similar offences;
- the effect of the forfeiture on the accused person;

- whether, in view of the value of the article, its forfeiture will give rise to the imposition of a penalty disproportionate to the gravity of the offence;
- where the article is of considerable value, like a motor vehicle, whether it has been used previously to commit a similar offence.

Firewood is generally of negligible value. This, measured against the considerable value of motor vehicles, meant that the unsolicited order for forfeiture was not only inequitable but clearly led to the imposition of a disproportionate penalty not matched by the gravity of the offence.

Editor's note: s 62(1) of the Criminal Procedure and Evidence Act provides that –

"A court convicting any person of *any* offence may, without notice to any other person, declare forfeited to the State –

(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
(b) if the conviction is in respect of an offence specified in the Second Schedule, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or, in the case of a conviction relating to the theft of any goods, for the conveyance or removal of the stolen property …" (emphasis supplied).

The use of the words "any offence" would indicate that it is not necessary for a particular enactment specifically to provide for forfeiture in the event of conviction. The offences listed in the Second Schedule are:

1. Any offence under any enactment relating to the unlawful possession, conveyance or supply of habit-forming drugs or harmful liquids.
2. Any offence under any enactment relating to the unlawful possession of, or dealing in, precious metals or precious stones.
3. Theft, either at common law or as defined by any enactment.
4. Breaking and entering any premises with intent to commit an offence, either at common law or in contravention of any enactment.

It would seem, therefore, that the forfeiture of the firewood could be and was lawfully ordered under s 62(1) but the forfeiture of the vehicles could not, contravening the Forest Act not being a Second Schedule offence..

Criminal procedure (sentence) – general principles – factors to consider – deterrence – need for deterrence should not lead to punishment disparate to offender's deserts

Criminal procedure (sentence) – general principles – factors to consider – plea of guilty – weight to be given to – should not be disregarded

Criminal procedure (sentence) – general principles – statutory offences – penalty provided by legislation – fine or imprisonment or both provided for – when custodial sentence may be considered

S v *Makumbe* HH-39-13 (Mavangira J, Hungwe J concurring) (Judgment delivered 13 February 2013)

The appellant was convicted on his own plea on a charge of negligent driving. He was driving a pickup and failed to stop at an intersection although the traffic lights were red against him. His failure to stop resulted in a collision with another motor vehicle which was travelling through the intersection. The magistrate sentenced him to 9 months' imprisonment, of which 3 were suspended. In addition, he was prohibited from driving class 2 motor vehicles for a period of 6 months. The relevant provision in the Road Traffic Act [*Chapter 13:11*] provides for a maximum sentence, where the vehicle concerned is not a commuter omnibus or a heavy vehicle, of a fine not exceeding level 7 or imprisonment for period not exceeding 6 months or both such fine and such imprisonment. In her reasons for sentence, the magistrate said that she attached little weight to the appellant's plea of guilty, saying that it was not a sign of contrition and that the appellant had no other option but to so plead "because the negligence was so gross and glaring."

Held: (1) as the appellant was convicted of a statutory offence, the trial court ought to have been guided in its assessment of an appropriate sentence by the penalty provisions of the Act. The sentence imposed by the trial court did not fall within the range of sentences stipulated by the relevant provision of the Act. Even if imprisonment might have been found to be appropriate, he ought not to have been sentenced to a period of imprisonment exceeding 6 months. Where a penalty provision provides for either a fine or imprisonment or both, the court ought to be satisfied that a fine will not meet the justice of the case before it considers the custodial option as well as the length thereof.

(2) A plea of guilty must be recognised for what it is – a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. The magistrate unduly minimised the value of or the weight to be attached to the appellant's plea of guilty. This led to a miscarriage of justice.
(3) It is important for courts to guard against such excessive devotion to deterrence that it obscures other relevant considerations, and so leads to a punishment which is disparate to the offender's deserts. Here, the magistrate gave excessive devotion to the need for the court to "register its displeasure by imposing stiffer penalties", and in the process proceeded to not only impose an unduly harsh sentence but also went one that was incompetent.
(4) Regarding the prohibition from driving, as the appellant was driving a class 4 motor vehicle, it was a misdirection for the trial court to prohibit him from driving class 2 motor vehicles. The prohibition, if appropriate, should have related to the class of vehicle that the appellant was driving at the time of the accident.
(5) A fine was a permissible penalty and was appropriate in the circumstances of this case.

Criminal procedure (sentence) – general principles – juvenile offenders – probation offer's report and recommendations – should not be disregarded without good reason – involvement of accused's family in rehabilitation – need for court to court to consider such involvement and offers of assistance

S v *M (a juvenile)* HB-19-13 (Ndou J, Cheda AJ concurring) (Judgment delivered 7 February 2013)

The appellant, a juvenile, had been convicted of two counts of rape of girls aged 6 and 4 years, respectively. A probation officer had placed before the court *a quo* a detailed report on the appellant's family relationships, education, background, personality, traits, circumstances surrounding the commission of the offence, attitude towards the offence, the victim, motivational analysis, prognosis, treatment plan and had made recommendations on how best to deal with appellant. The probation officer had recommended that the charges be withdrawn before plea and that the appellant be placed under supervision of a probation officer. The appellant's uncle undertook to take over the guardianship and upkeep of the appellant, having learnt of the appellant's predicament. He further undertook to, at his own expense, secure a professional psychologist or counsellor to ensure the reformation and rehabilitation of the appellant. The magistrate disregarded the recommendations of the probation officer and the efforts by the appellant's uncle to assist with his reformation and rehabilitation. Instead, the trial magistrate sentenced him to be placed at a state reformatory in Harare for a period of three years. The appellant was then lodged in a conventional prison in which he mixed with adult convicts pending transfer to Harare.
Held: it was a misdirection to disregard the probation officer's report regarding the management of the appellant without good and sufficient reasons for doing so. Again, for no good reason, the court *a quo* spurned the uncle's efforts. The courts have emphasized the importance of not only the probation officer's opinion in formulating a scheme of management for a juvenile offender, but also the involvement of the juvenile's family and education authorities in efforts to rehabilitate the offender. The sentence would be replaced with one of corporal punishment and the appellant would be placed under supervision of a probation officer.

Criminal procedure (sentence) – offences under Criminal Law Code – sexual intercourse with a young person (s 70(1)(a)) – principles – factors to be considered

S v *Tshuma* HB-70-13 (Mutema J) (Judgment delivered 21 March 2013)

The rationale behind punishing carnal knowledge of girls under 16 years is the protection of immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility of mental or physical injury.
A wide range of differing circumstances can attend this crime. The factors that should be considered include, *inter alia*, the age, appearance and character of the complainant, the age of the accused and the circumstances of the offence. The complainant's age is relevant because, the younger she is, the more seriously will the court regard the exploitation of her youth, while the closer she is to 16 the less justified will be any presumption of her incapacity to make an informed decision about sexual intercourse. Her appearance is important because the moral blameworthiness of the man will be less if he wrongly believes, from her appearance, that she is older than she actually is. Similarly, the girl's character – whether she be a virgin or promiscuous, a flirt or demure – must have a like bearing on whether the accused was knowingly preying on the innocent or merely risking lying with an underage but worldly-wise girl. In no case, though, can the girl's sexual experience be a defence. The accused's age is important because of the relevance to his moral blameworthiness of his own experience or lack

of it and of any disparity in the ages of the parties. Apart from the accused's age, it is also important to determine whether the accused was in a position of responsibility in relation to the girl. A careful investigation of these and other relevant factors by the trial court is essential.
The offence is mitigated where, for instance, (a) the complainant is of loose morals; or (b) she enticed the accused to have intercourse; or (c) the accused and complainant were genuinely in love; or (d) she was nearly 16 years old; or (e) the accused is a simple and unsophisticated person from a community in which this law is not well known; or (f) he is a youth; or (g) he *bona fide* believed the complainant to be of age. On the other hand, the offence is aggravated where (a) the accused is much older and more mature than the complainant; or (b) she is just above the legal age of consent; or (c) the accused has relevant previous convictions.

Delict – *actio injuriarum* – malicious prosecution – when committed – "malice" – meaning – genuine belief in plaintiff's guilt based on reasonable grounds – defendant not liable

Econet Wireless (Pvt) Ltd & Ors v *Sanangura* S-52-13 (Malaba DCJ, Ziyambi JA & Patel AJA concurring) (Judgment delivered 13 May 2013)

The delict of malicious prosecution or proceedings is committed when one person maliciously and without reasonable and probable cause brings legal proceedings against another.
Every citizen has a right to use legal proceedings legitimately for the purpose of upholding and protecting his rights, but does not have the right to abuse the legal process for the purpose, not of upholding and furthering his rights, but instead solely for the purpose of causing harm to another because he has malice towards that person. The term "malice" does not here mean spite or ill-will or a spirit of vengeance; it has a wider connotation. It includes any motive different from that which is proper for the institution of criminal proceedings, which is to bring an offender to justice and thereby aid in the enforcement of the law. In order for one to succeed in an action for malicious prosecution, one must prove four requirements, namely: that the prosecution was instigated by the defendant; it was concluded in his favour; there was no reasonable and probable cause for the prosecution; and that the prosecution was actuated by malice. Placing of information and facts before the police does not in itself amount to instigating prosecution. It would amount to instigation if besides giving information the defendant proceeds to lay a charge or overbears on the police to institute proceedings which they would not otherwise commence or institute. The defendant must have been actively instrumental in setting the law in motion. Simply giving a candid account, however incriminating, to the police is not the equivalent of launching a prosecution: the critical decision to prosecute not being his, the stone set rolling is a stone of suspicion only. But if besides giving information, he proceeds to lay a charge, this amounts to an active instigation of proceedings which he cannot shrug off by saying that they were in the last resort initiated at the discretion of the public authority.
A defendant will not be liable if he held a genuine belief in the plaintiff's guilt founded on reasonable grounds. In effect, where reasonable and probable cause for the arrest or prosecution exists, the conduct of the defendant in instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one, since it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.
There can be said to be "reasonable and probable cause for a prosecution" if there exists an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

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

Delict – defamation – damages – need for amount claimed to take into account damages awarded in this and other jurisdictions – duty of lawyers not to claim excessive and unrealistic amounts

Delict – defamation – plaintiff – reference to – plaintiff not identified by name – test – need to show that defamatory aspects of publication referred to plaintiff

Mohadi v *The Standard & Ors* HH-16-13 (Zhou J) (Judgment delivered 17 January 2013)

The plaintiff, one of the co-Ministers of Home Affairs, claimed damages for defamation following the publication of an article in a newspaper. The article referred to the large scale theft of copper wiring alongside the main Gweru-Harare road and the lack of action by the police, and went on to say: "Recently the co-Minister of Home Affairs responsible for the Police had his 30-tonne truck impounded with 30 tonnes of stolen copper wire on board … a close relative has been running a gang stripping wire from power lines for several years. The police at Beitbridge are well aware of this and have done nothing ..." The article did not name the plaintiff. The defendants excepted to the claim, on the grounds that the words complained of contained no reference to the plaintiff and, further, that the declaration made no proper allegations of what facts would enable the ordinary reader to identify the plaintiff as the person referred to. The plaintiff claimed damages in the sum of US$35 million.

Held: (1) in order to succeed in a claim for defamation damages, a person must establish that the material complained of referred to or concerned him. The test for determining whether in any publication the reference is to the plaintiff is an objective one: whether the ordinary, reasonable man hearing the speech would have understood the words complained of to apply to the plaintiff. There are two stages in the inquiry into the question whether the material complained of refers to or concerns the plaintiff. The first is whether the statements complained of are reasonably capable of referring to the plaintiff, either in their ordinary meaning or by reason of some special circumstances. This is a question of law which can be determined on exception. Evidence is not admissible in that enquiry. The second leg of the inquiry is whether a reasonable person would regard the words complained of as referring to the plaintiff. Only the first stage needed to be considered *in casu*. (2) Where the plaintiff is not identified or referred to by name or description, such as his office or occupation, he must state the facts upon which he relies as showing that the statements complained of referred to or concerned him. While it was possible to identify the plaintiff as the co-Minister of Home Affairs being referred to (the other co-Minister being female), it was clear that the defamatory aspects of the article which the plaintiff sought to rely upon did not refer to or concern the plaintiff as co-Minister of Home Affairs. They concerned a relative of his, as well as the police who were being accused of inaction. The article did not say or imply that the plaintiff was responsible for vandalising the electrical system. The allegation that the police impounded a motor vehicle owned by the plaintiff carrying thirty tonnes of copper wire did not in any way mean that the plaintiff was involved in the stealing of the copper wire. Although, the article stated that a close relative of the plaintiff had been leading a gang of persons responsible for stealing copper wire from the railway company, there was no suggestion that the plaintiff is responsible for the conduct of his relative. The article did not state or suggest in any way that the plaintiff ran a criminal gang that had been stealing copper wire. That allegation related to a relative of the plaintiff. There was no suggestion that the plaintiff influenced the police not to arrest the persons who stole the copper cables. The exception would accordingly be upheld.

Delict – interference with contractual rights – inducing breach of contract – an actionable wrong

Trojan Nickel Mine v *RBZ* HH-169-13 (Mathonsi J) (Judgment delivered 29 May 2013)

See above, under CONTRACT (Breach – breach induced by third party).

Elections – by-elections – requirement to hold by-elections – general election imminent – holding of by-elections impractical – application to be excused from holding by-elections granted

The President v *Bhehbe & Ors & related cases* HH-110-13 (Chiweshe JP) (Judgment delivered 8 April 2013)

The three respondents in the first of these three related matters were elected as members of Parliament in 2008. In 2009 they fell out of favour with their party and were expelled. The party ensured that their membership of Parliament was terminated, with effect from 22 July 2009. In August 2009 the Speaker of the House notified the President of the vacancies, as required of him in terms of s 39(1) of the Electoral Act [*Chapter 2:13*]. For over 18 months, the President did not take the necessary steps to fill the vacancies as required by law. The respondents then sought an order compelling the President to gazette a date for elections to fill the vacancies in the three constituencies. An order was granted on 13 October 2011 directing the President to gazette a date for elections within 14 days. The President appealed against this order; in July 2012 the Supreme Court dismissed the appeal and ordered that by-elections be held no later than 30 August 2012. This date was extended by consent to 1 October 2012. After a further application by the President to the High Court, the election date was extended to 31 March 2013. The reason given for the application – which was the same as that given previously

– was lack of funds to conduct the by-elections. In the current proceedings, the President sought to be excused altogether from the performance of that order.
The reasons given for the application were that on 15 March a referendum had been held to adopt a new Constitution. A Constitutional Amendment Bill had since been gazetted, which would be debated in Parliament. Once the Bill was passed into law, the provisions of the new Constitution relating to elections would be brought into effect. The present Parliament would be dissolved automatically on 29 June, by which time harmonised elections would have been held. It did not make economic or practical sense to conduct a parallel process leading to the holding of by-elections about the time it is anticipated to hold harmonised elections.
The respondents argued that relief sought was beyond the court's jurisdiction as the court has no power "to suborn, condone or in the very least countenance" disobedience of its order. The court had become *functus officio*. Whereas in the past the applicant had sought extensions within which to abide by the order, what was presently sought was relief which the court could not entertain. They insisted that they had vested rights to participate in the by-elections, regardless of the fact that general elections may be imminent. Besides, they said, there was no guarantee that general elections would be held by 29 June 2013 and the applicant had not told the court what would happen if general elections are not held by that date. The court order to hold by-elections must be obeyed.
Held: (1) there could be no doubt whatsoever that the life of the present Parliament would end on 29 June 2013. On that date Parliament would stand dissolved by effluxion of time. Although it was permissible to extend the life of Parliament beyond that date on the grounds provided under s 63(5) and (6) of the Constitution (which allow for that extension only if the country is at war or under a declared state of public emergency), such a situation did not presently obtain in the country.
(2) The various time lines of possible dates for the general election showed that the respondents could, at most, hold their seats for 25 days at most. Another consideration was that these were not the only outstanding by-elections: there were 16 vacancies in the House of Assembly, 12 in the Senate and 164 in council wards.
(3) Accordingly, compliance with the existing order was no longer reasonable or practical. The court had inherent jurisdiction to manage the execution of its own orders, ensuring whenever necessary that the execution of the same does not lead to absurd or irrational outcomes. The application would therefore be granted.

Editor's note: the two judgments of the High Court referred to above are *Bhebhe & Ors* v *Chrmn, ZEC & Ors* 2011 (2) ZLR 274 (H); and *The President* v *Bhebhe & Ors* HH-400-12. The general election was, in the event, held on 31 July 2013, which meant that the electors in the three constituencies concerned had had no representatives in Parliament for over 4 years.

Employment – arbitration – award by arbitrator – registration of award with magistrates court or High Court – such registration for purposes of enforcement only – award for other purposes remains under control of Labour Court

Muneka & Ors v *Manica Bus Co* HH-30-13 (Mtshiya J) (Judgment delivered 6 February 2013)

See above, under ARBITRATION (Award – labour case).

Employment – contract – termination – retrenchment – approval by Minister of proposed retrenchment – such approval not constituting termination of employment – employment only terminated when employer decides to proceed with retrenchment – employer entitled to revoke intention to retrench – employees obliged to return to work

Freda Rebecca GM Hldgs Ltd v *Nhliziyo & Ors* S-16-13 (Ziyambi JA, Gowora JA & Omerjee AJA concurring) (Judgment delivered 3 June 2013)

Due to financial difficulties, the appellant company decided to retrench the respondents so as to reduce its operational costs and notified the respondents of its intention to do so. Negotiations then took place in terms of the procedures laid down by the Labour Act [*Chapter 28:01*], culminating in the approval, in terms of s 12C of the Act, of the retrenchment by the Minister of Labour. The retrenchment was approved subject to the payment of a specified retrenchment package. The company then notified the respondents that, due to the high costs of the retrenchment package, the retrenchment process would be deferred until further notice. The respondents were ordered to return to work. The appellant also notified the Ministry of Labour that it had decided to defer the retrenchment process. The respondents turned up at work for two days, but declined to work thereafter, asserting that their contracts had been terminated by reason of their retrenchment. They did not heed a further reminder to return to work, so the appellant brought proceedings against them in terms of the code of conduct

for willful disobedience to a lawful order, and the respondents were summarily dismissed. They then brought proceedings against the appellant for an order declaring their dismissals to be invalid and for the payment of a retrenchment package. The Labour Court found in their favour. On appeal:
Held: (1) A contract of employment is concluded by an employer and employee and can only be terminated by one or other of them. The Minister, not being a party to the employment agreement, could not terminate it. A *proposed* retrenchment can either be refused by the Minister or approved subject to terms and conditions which the Minister deems fit to impose. Thereafter the Minister must cause his decision in the matter to be conveyed to the employer and the other parties mentioned in s 12C(9) of the Act. The Minister's directive is not constitutive of the retrenchment nor does it terminate the contracts of employment of the proposed retrenchees. It merely sets the conditions upon which the employer, if still so minded, can proceed to retrench. The contract is terminated by the employer when it proceeds with the retrenchment. Where, as here, the employer decides not to retrench, the employment contracts remain in force.
(2) Where the retrenchment package set by the Minister would have the effect of worsening the financially precarious situation of the employer, the very purpose of the retrenchment would be defeated. Since any retrenchment exercise would be for the benefit of the employer, the employer could revoke its intention to retrench and invite the employees back to work. The immediate objective of retrenchment is the saving of the company and of the jobs of the remaining employees. Clearly, therefore, the ability of the company to pay the retrenchment package is the ultimate criterion. If the company cannot pay what it is ordered to pay, it must go into liquidation, which is what any retrenchment exercise is designed to avoid.
(3) Accordingly, until the appellant notified the respondents of the termination of their employment by virtue of the fact that the proposed retrenchment was going to be effected by the appellant, the respondents remained in the employ of the appellant, who was entitled to recall them back to work. Their failure to respond positively to the command by the appellant to return to work constituted misconduct on their part. They were accordingly properly charged with misconduct and dismissed by the appellant.

Employment – disciplinary proceedings – charge – sabotage – meaning – can include withdrawal of labour, resulting in interruption of services necessary to operations of employer

Speciss College v *Chiriseri & Ors* S-2-13 (Ziyambi JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 12 February 2013)

The appellant was an educational institution, and the respondents were tutors employed by the appellant. A withdrawal of labour was called for by the respondents' union as a means of forcing the appellant to negotiate salaries. The strike was called off but the respondents nevertheless withdrew their labour at the beginning of the new school term. As a result, new students wishing to register for classes were turned away, tuition fees were not collected and those who did attend classes received no tuition. Misconduct proceedings were conducted in respect of most of the participants in the collective job action. The respondents, who had played a leading role in inciting other employees to participate in the collective job action, as well as another employee, were charged with "sabotage" under the employment code of conduct and, having been found guilty, were dismissed from employment. The code defined "sabotage" as "any wilful act by an employee to interfere with the normal operations of the employer's business by damaging any plant, machinery, equipment, raw materials or products or by interrupting any supplies of power, fuel, materials or services necessary to the operations".
They successfully appealed to the Local Joint Committee which set aside their dismissals on the basis that sabotage was not proved. The appellant appealed without success to the National Employment Council and to the Labour Court. The Labour Court held that although by the withdrawal of their labour the respondents had made it "difficult and perhaps impossible for the business of teaching to be conducted", their actions did not amount to sabotage within the meaning of the code. It held that where the code referred to an interruption of services, it meant the interruption of services to third parties and not the services of the employee himself.
Held: (1) That the respondents had the right to withdraw their labour was beyond question. That right must, however, be exercised within the parameters set out in the Labour Act [*Chapter 28:01*]. No notice was given to the appellant of the impending strike or no attempt had been made to conciliate the dispute as required by s 104(2)(b). The collective job action was therefore unlawful.
(2) Sabotage is a deliberate action aimed at weakening another entity through subversion, obstruction, disruption, or destruction. In a workplace setting, sabotage is the conscious withdrawal of efficiency, generally directed at causing some change in workplace conditions. Apart from the wilful and malicious destruction of an employer's property, sabotage also means with an employer's normal operations, especially during a labour dispute. Sabotage can therefore mean the withdrawal of labour with the intention of forcing the employer to comply with the employees' demands. The unlawful withdrawal of their services by the respondents constituted sabotage. They interfered with the normal operations of the appellant to the extent that those services were not

available to the appellant, to its loss, during the period of the strike. Their conduct amounted to an interruption of services necessary to the operations of the appellant, who was dependent on those services for its functioning. The respondents were, therefore, properly found guilty of the misconduct of sabotage and dismissed by the appellant.

Employment – Labour Court – appeal from to Supreme Court – need for leave to be granted – leave not granted until after expiry of time for filing of notice of appeal – notice of appeal filed before leave granted – not a valid notice – leave to appeal must be granted first – procedure appellant should follow

Ngazimbi v *Murowa Diamonds (Pvt) Ltd* S-27-13 (Malaba DCJ, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 24 June 2013)

See above, under APPEAL (Leave required).

Employment – Labour Court – appeal to – against arbitral award – no appeal or review possible in case of voluntary arbitration – appeal only possible in case of compulsory arbitration

Zimbabwe Educational, Scientific, Social & Cultural Workers' Union v *Welfare Educational Institutions Employers' Association* S-11-13 (Malaba DCJ, Ziyambi & Gowora JJA concurring) (Judgment delivered 26 February 2013)

See above, under ARBITRATION (Appeal – voluntary submission to arbitration).

Estoppel – criminal proceedings – application to – limited application of concept in criminal proceedings – need to show previous determination on same issue – concessions made by State in bail application – State not estopped from supporting conviction on appeal

Evidence – sexual case – corroboration – not essential – corroboration – what evidence may be taken as corroborative – not necessary that corroborating evidence itself must point towards accused's guilt

S v *Madeyi* HH-34-13 (Hungwe J, Mavangira J concurring) (Judgment delivered 16 January 2013)

The appellant had been convicted of the rape of a young girl and sentenced to a long term of imprisonment. He had been released on bail pending appeal, following misgivings about the safety of the conviction expressed by State counsel.
On appeal, one of the issues raised on behalf of the appellant was that since the respondent made submissions which amounted to concessions indicative of lack of support for the appellant's conviction, the respondent was bound by that concession and as such the matter the matter should be dealt with in terms of s 35 of the High Court Act [*Chapter 7:06*]. The appellant also made submissions on the evidence itself and whether it was satisfactorily corroborated.
Held: (1) doctrine of issue estoppel, which has been embraced by the Supreme Court as part of the law of Zimbabwe, prevents a party to civil proceedings, except in certain circumstances, from raising a contention of fact or of legal consequences of facts, where he raised the contention as an essential element of his case in previous civil proceedings between the same parties or their predecessors in title, and the contention was found by the court, in a final judgment in those proceedings, to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion, and could not, by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him. There are two forms of the doctrine of *res judicata*: cause of action estoppel and issue estoppel. Both operate where the court has adjudicated the cause of action between two or more parties and one of them seeks to re-litigate on the same facts. Where the cause of action is the same, cause of action estoppel operates to prevent any litigation of any matter that was raised or should have been raised in the prior proceeding. Where the cause of action in the two proceedings is different, issue estoppel operates to prevent any litigation of any issue determined in the prior proceedings.
In criminal proceedings, the principles of *res judicata* are given effect through the pleas of *autrefois acquit* and *autrefois convict.* Where those pleas are not available, issue estoppel arises where the accused has been finally acquitted of a criminal offence arising out of certain conduct, is charged with a different offence, and for some reason the facts surrounding the earlier charge become relevant. Issue estoppel prevents the State from calling

into question issues determined in the accused's favour in an earlier proceeding. However, that common law position has been severely curtailed by statutory limitations placed on that right by such provisions as ss 290 and 324 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].
Assuming that the principles apply in criminal cases, it would be necessary to show that the same issue had been decided. This was not the case here: the determination was not on the same issue for which the appeal was lodged but on a different issue, that is, whether the appellant was a suitable candidate for bail. Whatever submissions the respondent made in the bail application, the issues before that forum were far removed from issues squarely placed before the appeal court. No determination of the appellant's guilt or innocence was ever made by the court in the bail application hearing.
(2) It is permissible for a court to convict, in a sexual case, even if there is no corroboration of the complainant, but only where the merits of the complainant and the demerits of the accused are without question. On the other hand, corroboration will not secure a conviction unless the court is in any event satisfied that the complainant is credible. In the case of young children, the degree of corroboration or other factors required to reduce the danger of relying on the child's evidence will vary with the age of the child and other circumstances of the case. The evidence of a single witness must be approached with caution and its merits weighed against any factors that militate against its credibility. A common sense approach must be adopted. Where the evidence of a single witness is corroborated in any way that tends to indicate that the whole story was not concocted, the caution may be overcome, as it may be by any other feature that increases the confidence of the court in the reliability of the single witness. Corroboration is not, however, essential.
(3) As to what evidence may be regarded as corroborative, corroboration may be by facts and circumstances proved by evidence other than that of a single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied. Evidence may therefore be corroborative even if, taken on its own, it does not point conclusively towards a suspect's guilt. Corroboration is about the number of witnesses available to prove facts. It is not about number of facts available to prove guilt.

Family law – child – birth – registration – child born out of wedlock – person believing himself to be the father acknowledging paternity – subsequently discovering he was not the father – not permissible to have entry in birth register cancelled – Registrar-General entitled to correct entry – name under which birth registered – purported father not entitled to order preventing his surname being used by the child

Mubaiwa v *Mubaiwa & Anor* HH-170-13 (Chitakunye J) (Judgment delivered 6 June 2013)

The applicant sought an order that the second respondent (the Registrar-General) delete from the register of births the birth entry of the first respondent, on the grounds that he was falsely shown as the first respondent's birth father, although a DNA test result which clearly showed that he was not the father. He purported to bring this application in terms of s 27(4) of the Births and Deaths Registration Act [*Chapter 5:02*]. He also sought an order that the respondents be interdicted from registering the first respondent's birth entry with his (the applicant's surname).
The evidence showed that the applicant and the first respondent's mother had been intimate before the first respondent was born and that the applicant, at the time of the first respondent's birth, believed he was the father. The birth was registered about five years later, a birth certificate being necessary to enrol the child at school. Because the child was born out of wedlock, it was necessary, if the father's name was to be shown in the register, for both parents to appear and for the father to acknowledge paternity.
Held: (1) s 27(4) of the Act was not a basis for ordering that the entry be deleted; the section specifically referred to steps a court may take at the conclusion of a *criminal* matter. The section could not be used as the basis for a civil claim and the claim was thus fatally defective.
(2) It was incumbent upon the applicant to satisfy the court that false information was given before the court could order the cancellation of the entry itself. On the basis of the maxim *omnia praesumuntur rite esse acta*, it had to be presumed that when the certificate was issued, and in the absence of a marriage certificate, both parents appeared before the Registrar and the applicant identified himself as the father. They could have been mistaken as to the real position but nonetheless they appeared. When he gave the information, the applicant believed that he was the father of the first respondent. This was not a deliberate effort to give false information but was a clear error of fact or substance. The error in the register could be rectified by the Registrar-General in terms of s 8 of the Act.
(3) To obtain an order preventing the applicant's surname appearing in the entry, he would have to show that he had a clear right to the exclusive use of the name. This had not been shown; the use of the same surname by the

first respondent did not mean that he was holding himself out to be the applicant's son. There were many people, unrelated to the applicant, with that surname.

Family law – child – guardianship – application for award of guardianship to relative of orphaned minors – application to remove child to another country – what court must consider

In re *Moyo* HB-16-13 (Cheda J) (Judgment delivered 7 February 2013)

An applicant who seeks to be awarded guardianship of a minor child and for approval to remove the child to another country must not only prove her relationship with the minor and some consent from other relatives, but must submit, among other requirements, depending on the circumstances: (1) sufficient proof of her right of stay in the foreign country; (2) proof of financial support or regular income; (3) proof of suitable accommodation; and (4) in case of a child of school-going age proof of adequate arrangements for the child.
The list is not exhaustive. In all this, the court will always bear in mind the need for the safety and comfort of the children in the host country.

Family law – husband and wife – divorce – postponement of proceedings to attempt reconciliation – when postponement may be granted – need for both parties to desire to attempt reconciliation

Magaya v *Magaya* HH-67-13 (Uchena J) (Judgment delivered 7 March 2013)

In an action for divorce, if it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counselling, treatment or reflection, the court may, in terms of s 5(3) of the Matrimonial Causes Act [*Chapter 5:13*], postpone the proceedings to enable the parties to attempt a reconciliation. The use of the words "reasonable possibility" limits such postponements to cases where there is a real chance of parties reconciling. The provision cannot be used in cases where one of the spouses is refusing to accept the reality of the state of his or her marriage to a spouse who is resolutely seeking a decree of divorce. There must be a real or reasonable chance that the marriage can be saved.
Love cannot blossom if it is not reciprocated. Reconciliation can only be possible if both parties are willing to engage each other to sort out their marital problems. The courts cannot sustain a marriage without the co-operation of both spouses. Irretrievable breakdown of marriage can therefore take place even when one of the spouses still loves the other.

Family law – husband and wife – divorce – jurisdiction – domicile – parties aliens resident in Zimbabwe and married in Zimbabwe – no evidence that husband domiciled in Zimbabwe – additional jurisdiction provided by s 3(1) of Matrimonial Causes Act [*Chapter 5:13*] – not applicable where husband is applicant or plaintiff – provision only applies to wife

Zhung v *Miao* HH-148-13 (Guvava J) (Judgment delivered 4 April 2014)

The applicant and respondent were Chinese nationals resident in Zimbabwe since 2003. In late 2003 they married in Harare in terms of the Marriage Act [*Chapter 5:11*]. In 2010, the respondent deserted the marital home. The applicant, not knowing where she was, sought an order for substituted service. When the court raised the issue of whether it had jurisdiction, the applicant did not aver that he was domiciled in Zimbabwe, but that the court had jurisdiction in terns of s 3(1)(b) of the Matrimonial Causes Act [*Chapter 5:13*], in that the marriage was celebrated in Zimbabwe and the wife had resided in Zimbabwe for a period of at least 2 years immediately before the date of commencement of the action and was still so residing, notwithstanding that the husband had never been domiciled in Zimbabwe.
Held: the court's jurisdiction in divorce matters is based upon the domicile of the husband at the time the action is instituted. This meant that for the applicant to institute divorce proceedings in this court he must be domiciled in Zimbabwe. The issue of jurisdiction may be raised by the court *mero motu.* Where a husband in divorce proceedings is not domiciled in Zimbabwe the court has additional jurisdiction in terms of s 3 of the Matrimonial Causes Act, but this provision covers instances where the applicant is the wife and she wishes to sue her husband, who is not domiciled in Zimbabwe, for a divorce. The applicant *in casu*, being the husband, was not covered by the section. This is because the legislature was concerned about wives who would have been prejudiced because their husbands may no longer be domiciled in Zimbabwe. The mischief that the legislature sought to deal with was clearly those circumstances where a wife wanted a divorce and the husband had

changed his domicile or deserted her. The husband on the other hand is free to change his domicile should he so wish in order for the court to acquire jurisdiction. To acquire domicile of choice the applicant must establish that he is resident in the country concerned; that he has the intention of residing there permanently and that the choice has been made freely. The applicant in this case had not relied on the basis of domicile as he had chosen not to change his domicile.

Insurance – policy – renewal – renewal endorsement incorporating provisions of original policy – policy thus subject to same terms and conditions as original – original policy requiring payment of premium before insurer obliged to indemnify insured – insurer signing endorsement after occurrence of accident but before payment of premium – insurer not liable

Insurance – policy – claim – when claim must be made – notification given promptly of accident but claim submitted after 50 days – need for claim to be expeditiously lodged within reasonable period

Forestry Commission v *Cell Ins Co (Pvt) Ltd & Anor* HH-116-13 (Patel J) (Judgment delivered 25 April 2013)

The plaintiff was insured with the first defendant, through a policy brokered through the second defendant. The policy ran until the end of December 2008. The plaintiff wrote to the second defendant on 24 December 2008 requesting an extension of the original policy of insurance. By letter dated 6 January 2009, the second defendant confirmed the extension of the policy. An accident involving one of the plaintiff's motor vehicles occurred on 14 January 2009. The plaintiff telephoned the second defendant the next day to give notice of the accident. The plaintiff then followed up with a written notification on 16 January 2009, stating that the claim documents would be submitted in due course. Thereafter, on 30 January 2009, the first defendant signed an endorsement renewing the policy as from 1 January 2009 to 28 February 2009. At that stage, both defendants were fully aware of the accident *in casu* and of the pending claim. On 6 February 2009, the plaintiff paid the premium of US$4250 for the renewal period. Subsequently, on 4 March 2009, the plaintiff submitted the requisite claim documents. Eventually, on 19 March 2009, the second defendant wrote to the plaintiff repudiating the claim. Three issues arose: (a) whether there was a contract of insurance between the parties at the time when the plaintiff suffered its loss; (b) whether payment of the premium for the period of insurance was a condition precedent for insurance cover; and (c) whether the plaintiff's claim was submitted within a reasonable time.

The plaintiff argued that the condition requiring the payment of the premium had already been met under the original policy and did not apply to the renewed policy after it was extended. This was because an insurance contract requires no special form and comes into existence as soon as the parties have agreed on its terms, without any policy having been issued or any premium having been paid. It also argued that the first defendant agreed to extend the policy with full knowledge that the accident had occurred during the period of insurance, and was therefore estopped from relying on facts entitling it to repudiate, *i.e.* non-payment of the premium.

Held: (1) the original policy of insurance had been extended by the second defendant. The renewal of the policy was confirmed by the first defendant after the accident but before the stipulated premium was paid. Thus, there was a contract of insurance between the parties in place at the time when the plaintiff suffered its loss. What is in dispute is whether the obligations of the first defendant under that contract were subject to the prior payment of premium by the plaintiff.

(2) Neither the issue of a policy nor the payment of a premium is essential to the conclusion of the contract, unless the parties have expressly or impliedly agreed to the contrary. *In casu*, the endorsement which operated to renew the insurance policy explicitly incorporated and formed part of the original policy and was thus governed by the provisions of that policy: the policy as renewed was subject to the same terms and conditions as applied to the original policy. In terms of the preamble to that policy, the insured must have actually paid the premium for the period of insurance in order to be indemnified for any loss or damage that occurs during that period. The payment of premium was clearly a condition precedent to the provision of insurance cover. An insurance contract subject to a condition precedent cannot be enforced before the fulfilment of the condition. After that condition is fulfilled, the contract operates prospectively. What existed between the parties as at the date of the accident was not a contract of insurance, but a contract to insure subject to the payment of premium by the plaintiff as a condition precedent to the first defendant's obligation to indemnify. This obligation only materialised once the premium had been paid and then only in relation to any accident, loss or damage that occurred thereafter.

(3) The policy itself only dealt with notification of an accident and not the submission of claim documents, but this did not mean that once notice of the accident had been duly given, the insurer was liable to satisfy any subsequent claim made within 12 months. The purpose of immediate written notification is to enable the insurer to investigate the matter quickly in order to obviate the perpetration of any fraud or forgery. In this context, the claim itself should be expeditiously lodged within a reasonable period. In the circumstances, the delay in

submitting the claim documents was unreasonably inordinate. The plaintiff's claim was not submitted within a reasonable time.

Insurance – premium – non-payment – effect – insurer entitled to repudiate liability – no requirement for insurer to demand payment of premium to place insured *in mora*

Mabvuramiti v *Altfin Ins Co* HH-63-13 (Mafusire J) (Judgment delivered 26 February 2013)

An insured is entitled to an indemnity if the risk he insured against has occurred, but the indemnity is predicated on the premium having been paid. An insurance company is entitled to repudiate liability if the premium is not paid. *Interpellatio* or demand on the insured to pay his instalments is not necessary to place him *in mora ex persona*. If a party to a contract has committed a major breach of the contract, the aggrieved party does not always have to go to the law. The aggrieved party is entitled to disregard the contract, wait for the defaulting party to sue and set up the default as a defence. In an insurance contract, the failure to pay a premium goes to the root and is the very foundation of the contract.

Interpretation of statutes – absurdity – interpretation to avoid absurdity – approaches court may take

Mawarire v *Mugabe NO & Ors* CC-1-13 (Chidyausiku CJ, Ziyambi, Garwe , Gowora & Hlatshwayo JJA, Chiweshe & Guvava AJJA concurring; Malaba DCJ & Patel JA dissenting) (Judgment delivered 31 May 2013)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1)).

Land – acquisition – offer letter – status of such letter – no statutory basis for issue of offer letters – rights given to person receiving such letter – withdrawal of offer letter – when offer letter may be withdrawn

Sigudu v *Min of Lands & Anor* HH-11-13 (Patel J) (Judgment delivered 22 January 2013)

The applicant had been allocated a farm by means of an "offer letter" from the first respondent, the responsible Minister, in 2002. She took occupation of the farm, prepared the land, moulded bricks for farm buildings and purchased equipment in anticipation of commencing farming activities. In 2005 the Provincial Lands Committee held a meeting chaired by the second respondent. The meeting decided to consolidate the applicant's farm with the farm allocated to the second respondent and further resolved that the applicant should vacate her farm. The Minister asserted that the applicant's offer letter was automatically withdrawn because she had failed to comply with the conditions attaching to the offer of land. He provided no evidence of this assertion and it was accepted by the court that she had complied. The remaining issues for resolution were (a) the legality of the consolidation process; (b) whether the Minister was entitled or empowered to withdraw the offer letter; (c) whether the applicant's offer letter was duly withdrawn or cancelled; and (d) whether the applicant's right to occupy still subsisted and whether it was accordingly recognisable and enforceable.
Held: (1) the second respondent should never have chaired the meeting. The basic tenet of our common law is that *nemo debet esse judex in propria sua causa*. This time-honoured precept is codified in s 27(1)(b) of the High Court Act [*Chapter 7:06*] and in s 3(1)(a) as read with s 5 of the Administrative Justice Act [*Chapter 10:28*]). This is so for the obvious reason that the proceedings of a public body or committee should be free from the possibility of bias and the attendant risk of its incumbents serving their own personal interests. The decision to consolidate the applicant's farm with the second respondent's farm was vitiated by a fundamental irregularity. It was tainted *ab initio* and must therefore be declared a nullity.
(2) The standard offer letter in use under the land reform programme states that the offer is made in terms of the Agricultural Land Settlement Act [*Chapter 20:01*], but cites no specific provision of the Act. It is evident from ss 7 to 11 of the Act that the settlement of land under the Act is to be effected through the issuance of leases following investigations and reports by the Agricultural Land Settlement Board. The Act clearly does not contemplate the allocation of land for settlement through offer letters, either on their own or as precursors to formal leases; but nor does it entitle the Minister or any other authority to cancel offer letters or to terminate rights conferred thereunder. The only statutory reference to offer letters is to be found in the Gazetted Lands (Consequential Provisions Act) [*Chapter 20:28*]. Section 3(1) of the Act stipulates that no person may hold, use or occupy Gazetted land without lawful authority, which term means an offer letter or permit or land settlement lease. The holder of a valid offer letter is endowed with the requisite lawful authority to hold, use and occupy

Gazetted land and is shielded from being prosecuted, convicted and evicted under s 3. Beyond this, the Act does not provide for the actual allocation or settlement of Gazetted land, whether by offer letter, permit or lease, nor does it provide for the cancellation or withdrawal of any such offer letter, permit or lease. There is thus no proper statutory basis for the creation or termination of rights granted by offer letters in general. Their basis is essentially administrative and their existence or otherwise is consequently subject to purely administrative rules and discretion – which must, of course, be exercised lawfully, reasonably and fairly, but which are unavoidably open to the possibility of abuse and malpractice, as occurred here.
(3) The general rule is that there can be no power without the requisite authority, but administrative practices evolved through directives, circulars and the like, though without specific statutory authority, are permissible – even desirable – as long as they do not conflict in any way with the empowering legislation under which the public authority acts nor infringe legally protected rights and interests.
(4) In terms of the conditions attaching to the applicant's offer letter, the offer could be cancelled or withdrawn for breach of any of the conditions set out in the letter. The offer was never formally terminated. The applicant was not given any notice of any alleged breach of the conditions of offer. Nor was there any formal notice or communication of the offer having been withdrawn. That the offer was automatically withdrawn could not be accepted. The power to withdraw or cancel an offer of land must be exercised lawfully and procedurally, and this necessitates the giving of due notice to the holder of the offer letter. The applicant's right to occupy the farm had not lapsed or been lawfully terminated and therefore was duly recognisable and fully enforceable.

Land – ownership – registration of ownership – effect – registration constituting constructive notice to the whole world of change of ownership – rights of transferee to enforce rights as owner of property

Efrolou (Pvt) Ltd v *Muringani (1)* HH-112-13 (Mafusire J) Judgment delivered 10 April 2013)

See below, under PRACTICE AND PROCEDURE (Pleadings – amendment).

Landlord and tenant – lease – cancellation – notice of – how to be given – lease agreement entitling landlord to cancel lease "forthwith" in event of late payment of rent – landlord issuing summons when rent paid late – summons constituting notice of cancellation

Bravo (Pvt) Ltd v *Wordhouse Multimedia Svc (Pvt) Ltd & Anor* HH-246-13 (Dube J) (Judgment delivered 4 February 2013)

The first defendant leased a property from the plaintiff. It was a term of the agreement that the rent should be paid in advance. The lease provided that in the event of failure to pay the rent by the 7th day of the month, the landlord was entitled to cancel the lease "forthwith". The lease agreement was silent on the mode of cancellation and notification of cancellation of the lease agreement. For the month in question, the defendant paid the rent on the 27th and the next day the landlord issued summons, seeking an order for cancellation of the lease agreement, ejectment of the defendant, arrear rentals and other sums which it claimed were outstanding. The defendant claimed that it had not breached the lease agreement and that the plaintiff had not given notice of cancellation.
Held: (1) Where a tenant makes a late payment of rent the landlord must elect within a reasonable time and at the latest before the rental for the next month becomes due, to cancel the lease agreement. The plaintiff had shown proved that the defendant failed to pay rentals for the relevant month within the required period. The rent was tendered out of time and the fact that it was subsequently paid did not deprive the plaintiff of his right to cancel the agreement. Failure to comply with the requirement to pay rent timeously in terms of the lease agreement was a material breach justifying cancellation of the lease agreement. The plaintiff had proved that it was entitled to cancel the lease agreement based on breach of contract.
(2) Where a contract does not make provision for the procedure for cancellation of a contract, the common law applies: notice of cancellation must be clear and unequivocal. Cancellation takes place upon delivery of the notice of cancellation. Where there has been no communication of cancellation, cancellation takes place from the date of the service of the summons or notice of motion, a summons claiming damages being an implied notice of cancellation.

Landlord and tenant – lease – relocation – relocation a new lease – express relocation – terms of – whether terms of expired lease are part of new contract a matter of interpretation

Washmate Motors Centre (Pvt) Ltd v *City of Harare* HH-32-13 (Mathonsi J) (Judgment delivered 6 February 2013)

The respondent leased out a property to the applicant for the purpose of selling cars and any other purpose incidental to that purpose. Although the written lease agreement expired on 30 September 2012, the respondent allowed the applicant to remain in occupation and to sell cars and continued to accept rentals, including the rental for the month of January 2013. A letter was written to the applicant on 1 October, allowing the applicant to remain on the property for a further three months, ending on 31 December 2012. The respondent also generated a list of approved car sales outlets in Harare as at 1 December 2012, showing that the applicant was such an approved car sales dealer.

On 9 January 2013, the respondent served the applicant with a notice requiring it, within 48 hours, to vacate the stand, remove all its property and demolish any structures built on the stand.

The applicant sought an interdict to prevent the respondent from summarily evicting it. The issue was whether the applicant had a *prima facie* right to the relief claimed, even though open to some doubt. The other requirements for the issue of an interim interdict were satisfied. The applicant asserted that it was entitled to remain in occupation of the premises because, although the lease agreement terminated by effluxion of time on 30 September 2012, it was relocated after that by the conduct of the parties.

Held: An agreement for a fixed period of time terminates by effluxion of time at the end of the fixed period and no notice is necessary. In the case of a lease agreement, if nothing is said by the parties and the tenant continues to pay rent, then a tacit relocation may be presumed. A landlord who does not wish this to occur may protect himself by giving the tenant notice at any time before the end of the fixed period. The tenant not being entitled to demand reasonable notice because the only object of the notice is to reaffirm the duration of the lease and make it clear that the landlord does not consent to the tenant's continued occupation.

A relocation after a lease has expired is a new contract which may be express or tacit. If the re-letting is express, the question which of the terms of the expired lease form part of the new contract is a question of interpretation. Where the relocation is tacit, there is a presumption that the property is re-let at the same rent and that those provisions that are incident to the relation of landlord and tenant are renewed. But provisions that are collateral, independent of and not incident to that relationship are not presumed to be incorporated in the new letting.

Here, the respondent expressly, in its letter of 1 October 2012, relocated the lease agreement to 31 December 2012. The respondent was merely allowing the applicant to remain in occupation for purposes of winding up its business. In addition, the conduct of the applicant was also consistent with a party which was aware of the day of reckoning. Although the lease had expired on 30 September 2012, the applicant did not do anything visible to renew the lease, nor did it try to challenge a notice given to all car sales operators by the respondent, which notice was published in the press in December 2012. The applicant was aware not only that the lease had terminated but that even the express relocation up to 31 December 2012 was not going to be considered for renewal at all. Accordingly the applicant was left with no right whatsoever to protect at law.

Landlord and tenant – tenant – statutory tenant – rent payable – amount of rent not agreed – tenant obliged to pay an objectively reasonable rent, based on rental value on open market

Altem Entprs (Pvt) Ltd v *John Sisk & Son (Pvt) Ltd* S-4-13 (Garwe JA, Ziyambi & Makarau JJA concurring) (Judgment delivered 12 February 2013)

A tenant has no right to occupy property save in return for payment of rent. Where there is no agreement on the amount of rental payable, the lessee is liable to pay the lessor a reasonable amount for the use and occupation of the property, the rental value of the property in the open market being the criterion for the assessment of this amount. This would also apply to a lessee who remains in occupation after the termination of a lease whilst negotiations for a new lease are in progress. Normally, where there is no agreement on the rental, the lessee must continue to pay the last agreed rental, but that would only apply in a normal economic environment. It would not be applicable in a situation such as occurred in Zimbabwe in 2008 and 2009, where there were two revaluations of the local currency and finally the introduction of foreign currency, which resulted in the local currency becoming moribund.

A tenant who seeks protection of his statutory tenancy must endeavour to pay fair rent. Such fair rent must be objectively and not subjectively assessed. The tenant cannot relieve himself of his obligation to pay fair rent by tendering some arbitrary and paltry sum entirely incommensurate with the rentable market value of the leased premises.

Decision of Patel J in *John Sisk & Co (Zimbabwe) (Pvt) Ltd* v *Altem Entprs (Pvt) Ltd & Anor* 2011 (1) ZLR 433 (H) upheld.

Legal practitioner – conduct and ethics – duties – failure to adhere to time limits laid down in rules of court – extent to which litigant can be absolved

Musemburi & Anor v *Tshuma* S-39-13 (Malaba DCJ, in chambers) (Judgment delivered 5 June 2013)

Generally, there is reluctance by the courts to visit the sins of the legal practitioner on an applicant for condonation for failure to comply with the requirements of the rules of court. However, there is a limit to the extent to which a litigant should escape the results of his legal practitioner's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules. Consideration *ad misericordiam* should not be allowed to become an invitation for laxity. The legal practitioner, after all, is the agent whom the litigant has chosen for himself, and there is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship.

Legal practitioner – conduct and ethics – duty to client – need to render proper advice – must avoid creating false expectations by claiming excessive and unrealistic amounts as damages

Mohadi v *The Standard & Ors* HH-16-13 (Zhou J) (Judgment delivered 17 January 2013)

It is not uncommon now for large sums of money which bear no relation to the awards being made in this jurisdiction or other jurisdictions to be claimed as damages for defamation. The legal profession should be reminded that lawyers owe it to their clients to render proper legal advice on quantum of damages claimed, and should avoid creating false expectations in the minds of their clients regarding the amounts which they can claim.

Legal practitioner – conduct and ethics – duty – to court – duty to assist court to arrive at real and substantial justice

Legal practitioner – conduct and ethics – duty – to exercise professional competence and diligence – failure to do so – when client should be penalised for such failure

Nyamangunda v *Mashonaland Turf Club* HH-125-13 (Mangota J) (Judgment delivered 25 April 2013)

See below, under PRACTICE AND PROCEDURE (Rules – compliance with).

Legal practitioner – conduct and ethics – prosecutor – duty to act impartially and fairly – prosecutor related to accused or complainant – duty to disclose such relationship at outset – need for court then to ascertain attitude of parties to prosecutor's participation in trial

S v *Mpofu* HH-95-13 (Hungwe J) (Judgment delivered 10 April 2013)

A prosecutor must dedicate himself to the achievement of justice. He must pursue that aim impartially. He must conduct the case against the accused with due regard to the traditional precepts of candour and fairness. Like Caesar's wife, the prosecutor must be above any trace of suspicion. As a minister of truth he has the special duty to see that the truth emerges in court.
Where a prosecutor is related to any of the parties in a case, he should acknowledge the relationship at the commencement of the proceedings. The court can then elicit the attitude of the parties on whether they have any objections to the prosecutor's involvement. If the relationship is not declared, it would be very difficult, if not impossible, for the prosecutor to be impartial and fair, as is expected of him.

Practice and procedure – absolution from the instance – principles – application at close of plaintiff's case – onus – application made after close of defence case – lesser onus on applicant – when application might be granted even if defence leads no evidence

Efrolou (Pvt) Ltd v *Muringani (2)* HH-122-13 (Mafusire J) (Judgment delivered 24 April 2013)

The plaintiff sued the defendant for eviction from a property which the plaintiff had bought from the defendant's late husband in a sale in execution. Her defence was that the plaintiff was not the lawful owner of the property; that the plaintiff had obtained the title to the property fraudulently; that as the lawful beneficiary to the estate of her late husband she had the right, title and interest in the property; that she had issued her own summons against the plaintiff and its directors to have the property transferred back to her late husband's estate and that she was entitled to occupation of the property until the dispute was resolved.
It was agreed at the pre-trial conference that the duty to begin at the trial was on the defendant, whose evidence was duly led. At the close of the defendant's evidence, the plaintiff applied for absolution on the grounds that there was not a shred of evidence relating to any fraudulent dealings or illegal conduct by anyone associated with the sale and transfer of the property to the plaintiff. The sale and transfer had been open, public and plainly above board. It was argued that, if the plaintiff was absolved from the instance, there would be no longer any issue for determination in the plaintiff's case because the plaintiff's case for eviction was predicted on the fact of its ownership of the property and that the only issue standing in the way was the defendant's defence of fraud, a defence which had no substance.
Held: (1) It is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the close of the plaintiff's case but to grant it if the defendant then promptly closes his case and renews the application without calling any evidence at all. There is no inconsistency in two such diametrically opposed orders, though the evidence before the court in each application is identical. The reason why there is no inconsistency is because the test to be applied when application is made before the defendant closes his case is "what *might* a reasonable court do?"; whereas the test to be applied when the application is made after the defendant has closed its case is "what *ought* a reasonable court do?" The onus is higher where the application is made at the close of the plaintiff's case than where it is made after all the evidence has been led.
(2) If there is doubt as to what a reasonable court "might" do, a judicial officer should always lean on the side of allowing the case to proceed. A defendant who closes his case without giving evidence risks having an inference being drawn against him from his failure to give evidence contradicting that of the plaintiff.
(3) In the present case, the risk that the plaintiff took in applying for absolution from the instance at the close of the defendant's case and without closing its own case was well taken. Even if the court were to apply the more stringent test of what "*ought*" a reasonable court do as opposed to what *"might"* a reasonable court do, and even bearing in mind that the practice in our courts is to lean more in favour of hearing all the evidence before deciding on questions of fact, the plaintiff was entitled to be absolved from the instance. This was because the plaintiff's cause of action against the defendant was predicated purely on its ownership of the property. An owner of a property is entitled to the full enjoyment of the property unless by agreement or operation of the law there has been a diminution of that right. The registration of a real right in the deeds office protects the holder and the public alike. Once a real right has been registered it becomes enforceable against the world at large. Accordingly, unless there was established a superior right to deprive it of its right to the full enjoyment of the property, the plaintiff was entitled to recover possession of the property.

Practice and procedure – affidavit – further affidavit in response to answering affidavit – when may be filed – court's discretion – no need for such application to be made in writing – may be made orally at hearing

Mawere v *Matahwa NO & Ors* HH-206-13 (Mawadze J) (Judgment delivered 20 June 2013)

The applicant, in applying for rescission of judgment, averred in her founding affidavit that the cause of her not complying with the rules of court was the laxity of her erstwhile legal practitioners in failing to file heads of argument timeously. A replying affidavit was filed and the matter set down for hearing. At the hearing, an application was made for a further affidavit to be filed on behalf of the applicant, her current counsel being of the view that an affidavit from the former legal practitioners was necessary. The application was opposed by the respondent, on the grounds that the application should be have been made in writing.
Held: (1) Where an allegation is made which amounts to charging a legal practitioner of dereliction of duty and a violation of the rules, the applicant should afford the legal practitioner involved an opportunity to condemn himself, if that be the case, from his own mouth. He should be asked to swear an affidavit as to the facts for which he is blamed. Failure to do so on the part of the applicant, particularly after his attention has been drawn to need to do so, must inevitably lead the court to draw the inference that the applicant is not being truthful. In this case, the respondent did not put the matter in issue. While it was prudent to place the legal practitioner's affidavit on record timeously, the door should not be completely shut and deny the applicant such an opportunity, albeit at the time of hearing.
(2) Rule 235 provides for such leave to file further affidavits being granted by either the court or the judge. This means that where such leave is granted by a judge, it is granted by a judge sitting otherwise than in open court.

See r 3. That fact that such leave may be granted by "the court" means that in proper circumstances an application for such leave can be made in court orally and not necessarily in writing. Rule 235 does not indicate that a party seeking such leave from the court or a judge should do so only in writing, nor does r 226, relied on by the respondent, preclude oral applications being made during the hearing.
(3) The applicant had given an explanation which was not disputed and excluded *mala fides*. Her counsel had given a satisfactory explanation why the supporting affidavit was not filed earlier. No prejudice would be occasioned to the first respondent if leave were granted to allow the filing of the affidavit.

Practice and procedure – condonation – application – condonation an indulgence granted at discretion of court – need for applicant to be candid and honest – criteria to be observed by court in exercise of its discretion

Friendship v *Cargo Carriers Ltd & Anor* S-1-13 (Ziyambi JA, in chambers) (Judgment delivered 10 January 2013)

Condonation of failure to apply timeously for rescission of judgment is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court or judge that there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court. Certain criteria have been laid down for consideration by a court or judge in order to assist in the exercise of that discretion. Among these are: the extent of the delay and the reasonableness of the explanation therefor; the prospects of success on appeal; the interest of the court in the finality of judgments; and the prejudice to the party who is unable to execute his judgment. The list is not exhaustive. An appellate court will not interfere with the exercise of its discretionary power by a lower court unless it is shown that the lower court committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision.

Practice and procedure – exception – set-down – no indication that exception is opposed – matter may be treated as unopposed – not necessary to set down for hearing as opposed matter

Khan v *Muchenje & Anor* HH-126-13 (Makoni J) (Judgment delivered 27 February 2013)

In respect of an exception, a litigant is obliged to indicate to the court and to the other party whether or not he opposes the exception, although there is no rule of court which specifically provides for that. Where there is no indication that the exception is opposed, there would be no error in treating the matter as unopposed. It is only where an exception is opposed that it is necessary to set it down for hearing in terms of r 223(2) of the High Court Rules.

Practice and procedure – execution – sale – dwelling house – house owned by company but occupied by director and family – company entitled to apply under r 348A(5a) for sale to be postponed – not necessary that execution debtor be a natural person for relief under rule to be available

Granary Invstms (Pvt) Ltd v *Pianim* HH-180-13 (Chigumba J) (Judgment delivered 5 June 2013)

The applicant company owned a house in which a director and her family lived. The house was advertised for sale following judgment obtained several years earlier taken against the company. The applicant sought a stay of execution of the judgment, pending determination of an application for rescission of the judgment. The director also averred that the notice of attachment served by the deputy sheriff was defective, not being in the prescribed form. The respondent argued that that the property in question did not qualify to be a dwelling for purposes of r 348A(5a) of the High Court Rules because it was registered in the name of a company, which is incapable of "dwelling" anywhere. The director challenged the averment that a dwelling house must be owned by an individual as opposed to a company.
Held: it was not necessary that the execution debtor be an actual person with a family, as opposed to a company. The definition of "dwelling house" in r 348A did not stipulate that the building ought to be registered in the name of a natural person as opposed to a juristic person, a company. The question was simply whether the building was a dwelling which is capable of housing a single family.
There was no reason why the fact that the property in question was owned by a company should preclude or disqualify the company from consideration for relief in terms of r 348A(5a). The rule was designed to prevent undue hardship to a judgment debtor who was in occupation of the property in question, resulting from a sale in

execution. The loss of a property of considerable value, in the circumstances of this case, would constitute undue hardship to the applicant, and to its director and shareholder, who was in occupation.

In terms of r 348A(5a), the execution debtor may, within ten days of the service of a notice of execution, apply for the postponement of suspension of the sale. However, the notice must be a valid one; an invalid notice is no notice.

Practice and procedure – pleadings – amendment – when pleadings may be amended – principles – approach followed by courts

Efrolou (Pvt) Ltd v *Muringani (1)* HH-112-13 (Mafusire J) (Judgment delivered 10 April 2013)

The plaintiff company brought an action for the eviction of the defendant from a house which it had bought from the defendant's late husband in 1996, following a sale in execution. The house had been transferred to the plaintiff and the transfer registered in the Deeds Office. Summons was issued in March 2010. Before entering a plea, the defendant brought an action against the plaintiff, among others, to set aside the sale in execution on the basis that the transfer was unlawful, that the deceased had not been aware of the sale, and that the sale had been effected in circumstances amounting to fraud. In its plea to this counter-claim, entered in May 2010, the plaintiff repeated its assertion that the sale had duly taken place and that the deceased was aware of the sale.
A pre-trial conference took place in February 2011, and in November 2012 the plaintiff filed a document to amend its plea to include the plea of prescription. It alleged that the defendant's claim had become prescribed, the sale in execution having taken place in 1996 and transfer effected as far back as 1999.
When the consolidated matters came for trial, the defendant's counsel accepted that a party can amend its pleadings at any time before judgment if this does not cause prejudice to the other party. However, he submitted that neither the defendant nor the deceased had been aware of the sale of the property; that the sale had been "fictitious", the transfer documents "fictitious" and the resultant transfer fraudulent. If the defendant's summons for the reversal of the transfer had been served on the plaintiff within the three years of her becoming aware of the transfer then the running of prescription would have been interrupted.
Held: (1) The general rule is that an amendment of a pleading in an action will always be allowed unless the application is *mala fide* or the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order of costs. The court has a wide discretion to grant or refuse an amendment. The discretion has to be exercised judiciously. The approach of our courts is to allow amendments quite liberally, although this liberal approach is affected where, among other things, there is no prospect of the point raised in the amendment succeeding. Here, the point raised in the notice of amendment was not *mala fide*. If it succeeded, it would virtually decide the case, for if the defendant's claim was prescribed, then she could not persist with seeking a reversal of the transfer.
(2) The fact that the special plea of prescription was not raised when the plaintiff first pleaded to the counter-claim did not mean that it could not be raised at this stage.
(3) In terms of s 15 of the Prescription Act [*Chapter 8:11*], a debt generally (other than specific debts listed in the section) becomes prescribed after the lapse of a period of three years. The term "debt" is defined in s 2 to include anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. In this case the defendant's claim for a reversal of the transfer that was registered in 1999 was plainly a debt, to which the applicable period of prescription was three years.
(4) The defendant became aware of the transfer of the property from the deceased's name to the plaintiff's in 1999, when the transfer was registered. Apart from the fact that the property was sold by public auction following a court judgment, in terms of which, among other things, the sale in execution would have been advertised to the public, the transfer was registered by the registrar of deeds, a public official, through the deeds office, a public office. Registration of title in the deeds office is a transfer of real rights in a property from one person to another. The transferee becomes the owner of those rights in the property and can now enforce his rights against the whole world. The registration of transfer is constructive notice to the whole world of the change of ownership, provided only that the transfer has been obtained in good faith. Conversely, every member of the public is – subject to certain exceptions – entitled to rely on the deeds register being correct.
(5) The fact that the defendant did not sue in her individual capacity, but as the executrix of her husband's estate meant that it did not really matter when she herself became aware of the change of title. It was the knowledge of the deceased that mattered. On the facts, he had such knowledge, as he did not challenge the sale in execution, only the price.
(6) The plea of prescription would therefore succeed.

Practice and procedure – point of law – when may be raised – may be raised at any time if prejudice not occasioned to other party – explicit provisions of law regarding raising of point of law – such provisions overriding general principles

Gold Driven Invstms (Pvt) Ltd v *Tel-One (Pvt) Ltd & Anor* S-9-13 (Malaba DCJ, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 25 February 2013)

See above, under ARBITRATION (Point of law – when may be raised)

Practice and procedure – pre-trial conference – purpose of – failure by party to attend – legal practitioner appearing only to ask for postponement – party not considered to be represented – courses open to court

ZETDC v *Ruvinga* S-20-13 (Ziyambi JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 3 June 2013)

The purpose of a pre-trial conference is to attempt to reach a settlement between the parties and, where this is not possible, to identify issues for trial with a view to curtailing the proceedings. For this reason, the presence of both the parties and their legal practitioners are required thereat. Where a legal practitioner attends a pre-trial conference set by a judge without his client he must have his client's instructions to take decisions on its behalf. The pre-trial conference is not a formality. It is an essential part of the proceedings and the judge will have put aside other work and studied the pleadings, in order to prepare for the conference. It is therefore disrespectful in the extreme to wait until the time scheduled for the conference to advise the court that the parties are unable to attend. Where a legal practitioner who appears on behalf of a party has no knowledge of the party's case, is not prepared to argue it and is there only to seek a postponement, it cannot be said that the party is represented at the pre-trial conference. In an appropriate case, the defaulting party's pleadings could be struck out.

Practice and procedure – rules – compliance with – failure by legal practitioner to comply with rules due to incompetence – extent to which client should be penalised for such failure

Nyamangunda v *Mashonaland Turf Club* HH-125-13 (Mangota J) (Judgment delivered 25 April 2013)

A party which engages the services of a legal practitioner generally reposes its trust and confidence in its legal practitioners to perform, on its behalf, all necessary work which must be performed as and when such work is due. The party does not, for instance, know that there are time lines within which certain actions must be carried out in litigation; that there are rules which guide and govern the operations of the court particularly such matters as the issuance, servicing and/or filing of court process; or that failure to comply with the rules of court can be fatal to its case.

Those who are trained in the law, legal practitioners, do know or, at the very least, are presumed to have knowledge of all of the abovementioned and, indeed, many more matters which relate to litigation. The question which begs an answer is this: should a party which engages a legal practitioner who makes serious technical blunders in the course of prosecuting the case of, or defending, his client be penalised for the obvious mistakes of its legal practitioner(s)? Put differently, that question is: should the sins which a party's legal practitioners commit be visited upon the party itself? The answer to that question depends on the circumstances of each case. Generally, the answer is in the affirmative. That is so in situations where a party's case is hopelessly devoid of merit. Where, however, a party's case seems, on the face of it, to command some merit, the interests of justice would best be served if the court makes a conscious distinction between the sins of a party's legal practitioners, which sins arise out of the practitioners' cavalier approach to the work of their client, and the substance of the party's case as a whole. The duty of the court is not to always allow parties to hinge their cases on technicalities. Its sworn duty is to dispense real and substantial justice.

This is not to suggest that the rules of court should be taken lightly or ignored by litigants. Those rules are so important that a party whose case is before the court must always make every effort to comply with them for its own benefit. The court put the rules in place as a way of ensuring that its work operates in a smooth and clearly defined manner. The rules assist the parties to move their respective cases forward leading to a speedy resolution of disputes. It follows that non-observance of, or non-compliance with, the rules of court by a party does, as a general rule, lead to that party's case falling. That is particularly so where a party's case, viewed holistically, is, on the face of it, hanging on nothing. Where, however, a party's case, taken as a whole, appears to be substantially strong, an injustice would have been visited upon the party which has, out of the inadvertence

of its legal practitioners, failed to observe, or to comply with, this or that rule of court if the court were to allow the case to fall on the basis of those procedural failures.
Litigation is not like a game of chess. It is not a game where one party makes a conscious and deliberate decision to ambush the other and, as it were, catch it unawares. The duty of counsel, as an officer of the court, is to protect the interests of its own client and to assist the court to arrive at real and substantial justice in any matter which is before the court.

Practice and procedure – summary judgment – application – opposition to – failure to file notice of opposition – not fatal if opposing affidavit filed – plaintiff's course of action

Khan v *Muchenje & Anor* HH-126-13 (Makoni J) (Judgment delivered 27 February 2013)

In summary judgment proceedings, it would not be a fatal irregularity for the defendant not to file a notice of opposition if he filed an opposing affidavit timeously. That would constitute substantial compliance with r 233(1). The plaintiff's course of action is then either to inform the court (or the judge) of the relevant irregularity and give reasons as to why the court's discretion should be exercised in favour of the plaintiff, or, preferably, to make an application on notice, to strike out, co-joined with a prayer for default judgment.

Practice and procedure – summary judgment – application for – supporting affidavit – applicant a corporate body – company employee deposing to affidavit – whether resolution authorising deponent to represent company must be produced

African Banking Corp of Zimbabwe (Ltd) v *PWC Motors (Pvt) Ltd & Ors* HH-123-13 (Mathonsi J) (Judgment delivered 8 May 2013)

In an application for summary judgment brought by a company against the respondents, the applicant's head of credit stated that the facts, set out in the supporting affidavit to which he attested, were within his personal knowledge and that he was duly authorised to depose to the affidavit on behalf of the applicant. The respondents took issue with the applicant's failure to attach a resolution showing that the head of credit was authorised to represent the applicant and consequently did not have *locus standi* to bring the action.
Held: in terms of r 64(2) of the High Court Rules 1971, an application for summary judgment must be supported by "an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that, in his belief, there is no *bona fide* defence to the action". While there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution, that form of proof is not necessary in every case as each case must be considered on its own merits. All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorised person. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary. Where no such contrary evidence is produced, the omission of a company resolution cannot be fatal to the application.

Practice and procedure – summary judgment – principles – when summary judgment may be granted – what respondent must show to avoid grant of summary judgment

African Banking Corp of Zimbabwe (Ltd) v *Paul Edwards Shipping (Pvt) Ltd & Ors* HH-168-13 (Zhou J) (Judgment delivered 28 May 2013)

Summary judgment is an extraordinary and drastic remedy which is allowed where a plaintiff has an unanswerable case and ought not be put to the expense and delay of a trial. An affidavit filed by or on behalf of an applicant in summary judgment proceedings must verify the cause of action as set out in the summons and aver a belief that the appearance to defend entered by the respondent is not *bona fide* but was entered for the purpose of delaying the proceedings. On the other hand, for a respondent to successfully oppose summary judgment he must show a good *prima facie* defence to the applicant's claim. The respondent must allege facts which, if proved at the trial, would entitle him to succeed. The defence tendered by the respondent must be valid at law and must not be inherently unconvincing.

Practice and procedure – urgent application – certificate of urgency – need for legal practitioner honestly and conscientiously to apply his mind to facts – must genuinely believe matter to be urgent – such belief must be consistent with facts

Chidawu & Ors v *Shah & Ors* S-12-13 (Gowora JA, Malaba DCJ & Omerjee AJA concurring) (Judgment delivered 18 March 2013)

A certificate of urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In turn, the judge is required to consider the papers forthwith and has the discretion to hear the matter if he forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application the judge is guided by the statements in the certificate by the legal practitioner as to its urgency. In this exercise the judge is therefore entitled to read the certificate and construe it in a manner consistent with the papers filed of record by the applicant.
In certifying the matter as urgent, the legal practitioner is required to apply his own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He is not supposed to take verbatim what his client says regarding perceived urgency and put it in the certificate of urgency. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus, where a lawyer could not reasonably entertain the belief he professes in the urgency of the matter, he runs the risk of a judge concluding that he acted wrongfully, if not dishonestly, in giving his certificate of urgency. The belief that a matter is urgent must be a matter of substance rather than form. The genuineness of the belief postulated in the certificate must be tested by reference to all the surrounding circumstances and facts to which the legal practitioner is expected to have regard.

Prescription – extinctive – debt – what is – declaratory order – not a debt and not liable to prescription

Ndlovu v *Ndlovu & Anor* HB-18-13 (Ndou J) (Judgment delivered 7 February 2013)

The applicant sought a declaratory order, to the effect that the purported sale of his house to the first defendant was unlawful and void and for an order restoring him to possession of the house. The application was made well over three years after the first defendant had taken possession of the house. The only issue was whether the claim had prescribed in terms of the Prescription Act [*Chapter 8:11*].
Held: it is only a "debt", as defined in the Act, that can prescribe. A claim arising from a "debt" must be "by reason of obligation" on the part of the debtor arising from statute, contract, delict or otherwise. A declaratory order is a remedy to secure the public interest of certainty or correct legal position. Such a remedy cannot prescribe. The applicant's claim was based on the alleged nullity of sale transaction and did not arise from a "debt" as defined in the Act. Accordingly, prescription did not apply.

Prescription – extinctive – "debt" – what is – includes claim for reversal of transfer after registration effected in Deeds Office

Efrolou (Pvt) Ltd v *Muringani (1)* HH-112-13 (Mafusire J) Judgment delivered 10 April 2013)

See above, under PRACTICE AND PROCEDURE (Pleadings – amendment).

Property and real rights – ownership – vindication – owner's right to vindicate property – what owner must show – defences open to defendant – contractual right to possess – no contractual right existing – defendant relying on alleged precedent – such not giving rise to contractual right or legitimate expectation

Hwange Colliery Co v *Savanhu* HH-395-13 (Dube J) (Judgment delivered 20 June 2013)

The defendant had been the non-executive chairman of the plaintiff company for some years. While holding that office, he had been allocated a motor vehicle belonging to the plaintiff. Upon his removal as chairperson, the

defendant did not return the motor vehicle and refused to return the vehicle to the plaintiff in spite of demands. In an action claiming the return of the car, a witness for the plaintiff said that there was no policy or resolution which entitled former board chairpersons and members to retain vehicles issued to them. The defendant's stance was that he was entitled to the vehicle because his predecessors had been allowed to purchase their vehicles after leaving the company. He was willing to pay for the vehicle.
Held: The *actio rei vindicatio* is a common law remedy which is based on the principle that an owner of property cannot be deprived of his property without his consent and is entitled to recover it from any person who possesses it without his consent. An owner has the right to exclusive possession of his property and no other person may withhold that right from the owner unless he is vested with an enforceable right against the owner. A litigant seeking to rely on the claim of *rei vindicatio* must prove the following: that he is the owner of the property in question; that at the time of commencement of the action, the defendant was in possession of the property; and that the defendant's possession was without the plaintiff's consent or concurrence. Once ownership has been proved, the onus is on the defendant to prove a right of retention. The defences open to the defendant would be: (a) that he had acquired the property by prescription; (b) that a third party was the owner; (c) that the property was alienated or destroyed; or (d) that the defendant had a superior contractual right to possess. The defendant's position was that he was entitled to possess and purchase the vehicle because other former chairpersons were allowed to purchase their issues and he expected that he would be offered to purchase his vehicle in accordance with that practice. However, the benefits of non-executive directors were determined by a resolution of the board, not by a contract, and there was no resolution in the defendant's favour, nor had any offer been made to him. The fact that other directors were allowed to purchase their vehicles did not confer any rights on him to purchase the vehicle he had been allocated. The hope and expectation of an offer did not justify possession of the vehicle. His expectation that the vehicle would be sold to him was not legitimate. He accordingly had no claim of right in respect of the car and it should be returned to the plaintiff.

Statutes – Air Zimbabwe Corporation (Repeal) Act (Act 4 of 1998) – successor company to Corporation – whether more than one successor company could be formed – other companies subsequently formed in Air Zimbabwe "stable" – not successor companies to Corporation and not enjoying protection of State Liabilities Act [*Chapter 8:14*]

Air Zimbabwe (Pvt) Ltd & Anor v *Nhuta & Ors* HH-129-13 (Mafusire J) (Judgment delivered 2 May 2013)

See above, under AVIATION (Air Zimbabwe Corporation).

Will – interpretation – intention of testator – will appointing wife as heiress – parties divorcing and testator remarrying – no new will executed – no intention that first wife should become heir

Will – validity – marriage subsequent to execution of will – will not made in contemplation of marriage – will void upon marriage

Sumbureru v *Chinamora & Ors* HH-59-13 (Guvava J) (Judgment delivered 21 February 2013)

The applicant married the deceased under customary law in 1977. The marriage was registered in terms of the African Marriages Act [*Chapter 238* of 1974]. Also in 1977 the deceased executed a will appointing the applicant as the heiress and executrix of his estate. The will was never amended, varied or revoked until his death in 1997.
In 1978, the applicant and the deceased were married in terms of the Marriage Act [*Chapter 37* of 1974]. The marriage lasted until 1986, when the applicant and the deceased divorced. In terms of their consent paper the deceased made a financial settlement on the applicant. The deceased thereafter married the first respondent in terms of customary law and they lived as husband and wife until he died in 1997. The deceased did not write another will.
The applicant sought an order declaring the will executed in 1977 to be valid, as well as consequent relief.
Held: (1) It was necessary to determine the intention of the deceased when he made the will in order to ascertain its validity. To do so, it was necessary to look at the wording of the will. A reading of the will left no doubt that when the deceased made the will his intention was to benefit his wife. At the time the will was executed, customary law did not allow a wife to inherit from her husband. The deceased was clearly intent upon circumventing that aspect of customary law and wanted to be certain that in the event of his death his property would not fall into the hands of his male relatives to the exclusion of his wife. However, at the time of his death in 1997, the deceased and the applicant had been divorced for more than ten years. Upon divorce the applicant

had been awarded a significant settlement. It could not have been the deceased's intention that the applicant would again inherit his estate upon his death since he did not revoke his will. The mischief that he had sought to circumvent in his will no longer applied to the applicant, as she was no longer his wife. Once she ceased to be his wife the will became invalid, as it was no longer capable of enforcement.
(2) In any event, the deceased's will became void upon his marriage to the applicant in terms of the general law in 1978. Section 2 of the Deceased Estates Succession Act [*Chapter 302* of 1974], which applied to this will, provided that a will, other than a joint will of an intended husband and wife who thereafter married each other, executed by any person prior to marriage shall become null and void on marriage unless such person endorses on such a will that it is desired that the same shall remain in full force and effect. No such endorsement having been made, the will became void.

Words and phrases – "sabotage"

Speciss College v *Chiriseri & Ors* S-2-13 (Ziyambi JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 12 February 2013)

See above, under EMPLOYMENT (Disciplinary proceedings – charge – sabotage).