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CASES DECIDED JANUARY – JUNE 2010

Administrative law – review – application for – domestic remedies available under relevant legislation – domestic remedy already being sought – not proper for court to hear matter until domestic remedies exhausted – judicial deference – meaning of

African Consol Resources plc & Ors v *Min of Mines & Ors* HH-57-10 (Uchena J) (Judgment delivered 18 March 2010)

The simultaneous filing of an application before the High Court, and an appeal under the relevant legislation, places the court in competition with the determiner of the domestic remedy. When that happens, this court must defer to domestic proceedings, and allow them to be exhausted before it can hear the dispute between the parties. In terms of s 7 of the Administrative Justice Act [*Chapter 10:28*], the court can decline to hear an application, based on an alleged failure to comply with the provisions of the Act, if it is of the view that the applicant has other legal remedies through which he can obtain the remedy sought before it and it considers that such remedy should first be exhausted. The court can exercise its discretion to hear the matter, but it should not do so in a manner that terminates pending domestic remedies unless there are compelling reasons for it to do so. The intention of the legislature in providing domestic remedies must be respected by the courts, and the officials charged with the authority to determine domestic appeals or reviews must be allowed to do their work before the court intervenes. The court should only intervene in cases where it is obvious that domestic remedies will not do justice in the case before it. This approach is consistent with the principle of judicial deference.

Administrative law – review – proceedings which may be reviewed – proceedings of tribunal appointed to enquire into allegations against Attorney-General – when such proceedings may be reviewed

Gula-Ndebele v *Bhunu NO* HH-14-10 (Makarau JP) (Judgment delivered 27 January 2010)

See below, under CONSTITUTIONAL LAW (Attorney-General – removal from office).

Appeal – dismissal of – failure by appellant to provide security for costs – judge's discretion as to whether to dismiss appeal – matters to consider – need for appellant to seek condonation and extension of time – appellant failing to do so – no basis upon which judge can exercise discretion in appellant's favour

Appeal – dismissal of – failure by appellant to provide security for costs – whether judge obliged to dismiss appeal upon proof that security for costs not provided

Diocesan Trustees, Diocese of Harare v *Church of the Province of Central Africa* S-9-10 (Malaba DCJ, in chambers) (Judgment delivered 3 May 2010)

The applicants obtained from the High Court a rule *nisi* calling upon the respondent church to show cause why an order should not be made declaring K to be the bishop for the diocese of Harare until the church complied with the provisions of its constitution governing termination of the term of office of the incumbent bishop and ordination of a new bishop for a diocese. The church had been planning to consecrate one G as the bishop of Harare. The church noted an appeal against the provisional order, the grounds of appeal being appeal were that the judge *a quo* misdirected himself in refusing to recuse himself from hearing the application and exercising jurisdiction over the respondent whose affairs, it was alleged, were governed by canon and ecclesiastical law. The noting of the appeal had the effect of suspending the operation and execution of the interim order. The respondent took advantage of the appeal procedure to consecrate G as the new bishop of diocese of Harare as originally planned.
The respondent was required by r 46(2) of the Supreme Court Rules to provide security for the applicants' costs of appeal, and failing agreement as to the amount, to have the amount or nature of the security to be determined by the registrar. It was obliged under subr (5) to furnish such security within a month of the noting of the appeal. The respondent failed to provide security and the applicants applied under r 36(1) for the appeal to be dismissed. The respondent prayed for dismissal of the application and for an order directing the registrar to determine the amount or nature of the security to be provided for the applicants' costs of appeal. The applicants argued that r 36(3) obliged the judge to dismiss the appeal upon proof that the respondent failed to furnish security for the applicant's costs of appeal within the period prescribed. The respondent argued that the judge had a discretion,

as the subrule used the word "may", and that the nature of the dispute between the parties would justify the exercise of the discretion in favour of the respondent.
Held: (1) The general rule is that when the word "may" is used in a statute which confers power on a public official to do a thing, the intention is to confer the power only, without a duty to exercise it. The statute must be construed as conferring on the repository of the power a discretion to decide whether or not to do the thing, unless there is something in the subject-matter to which the statute relates which shows that the word "may" is used in an imperative sense to impose a duty on the public official to exercise the power. The "something" referred to may be in the nature of the thing the public official is empowered to do, in the object for which the thing is to be done, in the condition under which it is to be done, in the title of the persons for whose benefit the power is to be exercised. It may couple the power to a duty and make it an obligation on the person in whom the power is reposed to exercise it when called upon to do so.
(2) There was nothing in the subject-matter of r 36(3) to show that, upon proof of the fact that the respondent failed to furnish security for the applicant's costs of appeal, within the prescribed period, the judge must, as a matter of course, dismiss the appeal. The subrule confers power on the judge to dismiss the appeal and add any such order as he thinks fit. He has power to make any such other order as he thinks fit which is not the dismissal of the appeal as sought by the applicant.
(3) In considering whether to exercise the discretion, the court had to remember that at the time the respondent filed the opposing affidavit, it was under an automatic bar imposed on it as a result of the failure to furnish the security for costs of appeal within the prescribed period. Because of the position of no right on the part of the respondent arising from its own non-compliance with the rules, the applicant acquired the right to make the application for dismissal of the appeal. The respondent had to normalize its legal capacity to ensure that what it put forward in the opposing affidavit could properly be considered by the judge in the exercise of discretion in its favour; but there was no application by the respondent for condonation and extension of time. The rule is that whenever a party realizes that he has not complied with a rule of court, which he is under a duty to observe, he should, to protect hi rights, apply for condonation without delay. A litigant who knows that the prescribed period for complying with a rule of court has elapsed and that an application for condonation is necessary is not entitled to hand over the matter to his legal practitioner and then wash his hands of it.
(4) The obligation imposed on a respondent under r 36(1) to give an appellant notice of the intention to apply for dismissal of the appeal by reason of the failure to provide security confers on the appellant the right to receive the notice. It does not, *ipso facto,* confer on the appellant the right to put before the judge information which the judge is then obliged to consider when deciding the question before him. The respondent was aware that security had not been provided but took no steps to apply for condonation. Without an application for condonation, there was no basis on which the discretion vested in the judge could be exercised in favour of the respondent. The making of an application for condonation would properly have placed matters for consideration which were in favour of the respondent and triggered the exercise of discretion to make the order extending the time within which the respondent should comply with the requirements to provide security as the alternative to the order of dismissal of the appeal sought by the applicant. A judicial discretion cannot be exercised in favour of a party which has not placed before the judicial officer an explanation for non-compliance with a mandatory rule of court and asked for indulgence. Indulgence cannot be extended to a party that has not asked for it.
(5) The respondent had blamed the failure on an "oversight", presumably on the part of its legal practitioner, but the judge could not consider absolving the respondent from the consequences of lack of diligence committed by its legal practitioners, when there was no suggestion in its papers that the "oversight" was that of a legal practitioner.
(6) The appeal was a legal stratagem designed to achieve the indirect purpose of securing the suspension of the operation of the interim order, so as to enable the respondent to consecrate a new bishop for the diocese of Harare. When a party abuses the legal process in this way, he should not expect protection from the court.

Appeal – execution – pending appeal – when court may order execution despite noting of appeal – correct procedure to follow – need for special application to be made and for court to give full reasons for ordering execution – including order of execution as part of main judgment – when such a course proper

Zimbabwe Mining Development Corp & Anor v *African Consol Resources plc & Ors* S-1-10 (Chidyausiku CJ, in chambers) (Judgment delivered 25 January 2010)

At common law the noting of an appeal against a judgment suspends the operation of that judgment. At common law the court granting the judgment enjoys inherent jurisdiction to order the execution of that judgment despite the noting of an appeal. Before a court can exercise the discretion to order execution despite the noting of an appeal, the successful party has to make a special application for such relief. For the court to be able to exercise this discretion properly, the special application must set out in some detail the basis for seeking such relief. The respondent is entitled to an opportunity to respond to the application.

There are several factors that a court takes into account in determining whether to grant or refuse the relief of execution despite the noting of an appeal. There was no indication that the judge *a quo* gave consideration to these or any other factors. The reasons for judgment did not indicate what he took into account and what he did not take into account in arriving at the conclusion that there should be execution despite the noting of an appeal. *In casu*, none of the applicants made a special application for leave to execute. They simply applied at some stage in the course of proceedings before judgment to amend the draft order to include an order to that effect.
Held: (1) the application was totally inadequate because the court was not provided with details necessary for the proper exercise of its discretion.
(2) Without reasons, it was impossible to understand the judge's reasoning. Failure to give reasons in an application to execute despite the noting of an appeal is a serious misdirection justifying the setting aside of such a determination.
(3) The right of appeal is fundamental and critical to our justice system. This right it should not be rendered nugatory or abrogated without due process. Due process requires that a case proceeds to finality, namely the giving of a judgment. Once a judgment is given, the losing party who has a right to appeal is entitled, if he so wishes, to note an appeal. The noting of an appeal has the effect of suspending the judgment. It is only then that the successful party can make a special application for leave to execute the judgment despite the noting of an appeal. The losing litigant is entitled to respond to that application. It is only after hearing both parties to the special application for leave to execute that a court can properly exercise its discretion on the matter.
(4) It is only in exceptional circumstances that an order of execution despite the noting of an appeal should be made part of the main judgment. It might be justified in a dispute over the custody of a minor child where it is clear that the noting of an appeal will be used to facilitate the removal of the minor child from the jurisdiction of the court. In the absence of exceptional circumstances, due process must be observed before issuing such an order. The litigant's right to appeal should not be abrogated lightly and without due process.

Banking – bank – distinction from building society – whether building society can be regarded as a bank

Zimbabwe Banking & Allied Workers' Union & Ors v *Beverley Bldg Soc & Ors* S-3-10 (Malaba DCJ, Sandura & Cheda JJA concurring) (Judgment delivered 11 May 2010)

See below, under EMPLOYMENT (Trade union).

Church – bishop – resignation of – effect – person ceasing to have any rights or privileges arising from status as a bishop

Jakazi & Anor v *Anglican Church, Province of Central Africa, & Ors* HH-80-10 (Bhunu J) (Judgment delivered 19 May 2010)

The first applicant was the Anglican Bishop of Manicaland. He wrote a letter to the Church of the Province of Central Africa, of which the Diocese of Manicaland was a part, purportedly withdrawing the Diocese from the Province. The Bishops of the Province responded by issuing a statement rejecting the withdrawal of the Diocese of Manicaland but accepting the resignation of the first applicant as an individual. The applicant then attempted to recant and retract his withdrawal. The Bishops rejected his application and appointed a vicar general, pending the election of a new bishop. The applicant sought an order declaring that he remained the Bishop of Manicaland.
Held: resignation is a unilateral voluntary act which takes effect as soon as the resignation has been communicated to the correct person or authority. The first applicant was not dismissed. He resigned voluntarily. Once his resignation letter was received, he automatically ceased to be an employee or member of the church without any further formalities. Having ceased to be an employee or member of the church, he automatically stripped himself of any rights and privileges arising from the contract of employment, membership or his status as a bishop of the church. He had no residual rights to meddle in the affairs of the church by barring the appointment of replacement staff. Any appeal or review which he may launch means that he is appealing or seeking a review of his own conduct. This is wholly untenable and so illogical that it must be incompetent at law.

Companies – legal proceedings – company subject to reconstruction order under Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] – associate company – only administrator entitled to bring action on behalf of such company or any associate company

SMM Hldgs Ltd v *Min of Justice* S-5-10 (Chidyausiku CJ, Malaba DCJ & Sandura JA concurring) (judgment delivered 11 May 2010)

The appellant, a company incorporated in the United Kingdom, was the sole shareholder of SMM Holdings (Pvt) Ltd ("SMMZ"), a company incorporated in Zimbabwe. In September 2004 a reconstruction order was issued in respect of SMMZ by the respondent Minister, initially in terms of temporary legislation; the order was confirmed by the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*].
The appellant brought an application in the High Court challenging the issue of the reconstruction order and seeking to have it set aside. The founding affidavit was signed on behalf of the appellant by one Mawere, the beneficial shareholder of a company which was the beneficial owner of the appellant. The respondent took 3 preliminary points: (1) the appellant was an associate company of SMMZ and therefore was itself a company under reconstruction and so could not launch legal proceedings in its own name. (2) Since Mawere was a specified person in terms of the Prevention of Corruption Act [*Chapter 9:16*], he was prohibited from swearing an affidavit on behalf of the appellant without the leave of his investigator. (3) The application for review was filed out of the time stipulated in r 259 of the High Court Rules for the filing of a review. The High Court upheld these points and dismissed the application without going into the merits. On appeal:
Held: (1) under s 4(3) of the Reconstruction Act, a reconstruction order is deemed to be issued in respect of every associate company of that in respect of which the order was issued. Accordingly, the appellant was also a company under reconstruction. Under s 18(1)(e) of the Act, the power to bring and defend legal proceedings on behalf of a company under reconstruction is vested in the administrator who, to the exclusion of anyone else, has the *locus standi* to bring an action on behalf of a company under reconstruction.
(2) While the Act may well not have extra-territorial operation, it applies to everybody, foreigner or not, who commences action in this jurisdiction.
(3) Mawere stated in his affidavit that he represented the appellant, which made him an agent of the appellant. He was not simply filing that affidavit as a witness in proceedings concerning the appellant. That being the case, he was prohibited in terms of s 10(1)(e) and (f) of the Prevention of Corruption Act from acting on behalf of the appellant without the authority of his investigator.

Companies – pre-incorporation contract – company not yet formed – contract entered into on behalf of such company – ratification of -- requirements of s 47 of Companies Act [*Chapter 24:03*] -- effect of – company entitled to ratify contract if it is a *stipulatio alteri*

Gray & Anor v *Registrar of Deeds* HH-114-10 (Gowora J) (Judgment delivered 30 June 2010)

The first applicant, acting as trustee for the second, purchased an immoveable property for the second applicant. The second applicant was a company to be formed and was incorporated two months after the sale. Early in the following year, the respondent was requested to register the transfer of the property, but refused to do so, on the grounds that s 47 of the Companies Act [*Chapter 24:03*] had not been complied with. This provides that any contract made in writing by a person professing to act as agent or trustee for a company not yet formed shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by the company after it has been registered as if it had been duly formed, incorporated and registered at the time when the contract was made, provided that (a) the memorandum of association contains as one of the objects of the company the adoption or ratification or the acquisition of rights and obligations in respect of such contract; and (b) the contract or a certified copy of it is delivered to the Registrar simultaneously with the delivery of the memorandum. In view of the manner in which the memorandum and articles of association were prepared the applicants would not be able to comply with the requirements of the Act.
The question for decision was whether the second applicant was obliged to comply with the provisions of the Act in order for the transfer of the immovable property to be effected in its name or whether under the common law the applicant could have the property registered in its name despite avoiding the requirements set by statute. The applicants argued that notwithstanding non-compliance with the provisions of s 47, the company was under common law entitled to ratify the contract as it was entered into on behalf of the company by a trustee and that the contract constitutes a *stipulatio alteri*.
Held: at common law the promoters of a company prior to incorporation can individually enter into a contract for the benefit of such company. The contract negotiated by the first applicant was a *stipulatio alteri*. Where a company has not complied with provisions of the Act, the alternative is to invoke the common law. A company

can under the concept of a *stipulatio alteri* ratify the contract, or it may refuse to be bound by it. This was not the situation here as the company was the prime mover for the acceptance and ratification of the contract concluded on its behalf.

Constitutional law – Attorney-General – removal from office – procedure – may only be removed by President acting on recommendation of tribunal – President bound to act on recommendation – notice of removal – how should be given – need for Attorney-General to be notified personally

Gula-Ndebele v *Bhunu NO* HH-14-10 (Makarau JP) (Judgment delivered 27 January 2010)

The applicant was the former Attorney-General. Following allegations of misbehaviour made against him, the respondent and two other persons were appointed by the President in terms of s 110(5) of the Constitution as members of a tribunal to enquire into the allegations. The tribunal, having heard the allegations, recommended to the President that the applicant should be removed from office as Attorney-General. Acting in terms of s 110(3), the President removed the applicant from office. The applicant's removal was publicly announced in the *Gazette* and a week later he received personal notification, by letter, of his removal.

In his application, the applicant did not seek reinstatement, nor did he cite the President as a party. He sought a review of the tribunal's decision, on the grounds that it was grossly unreasonable and utterly perverse in its defiance of logic and reason and no tribunal, properly addressing its mind to the facts before it and to the law, and having regard to the evidence before it, could have arrived at such a decision; that the tribunal was biased against him; and that the tribunal's recommendation to the President arose not only out of bias against him but also as a result of the consideration of improper motives.

The application was opposed on the grounds (a) that it had been filed out of time, having been filed more than 8 weeks after the notice in the *Gazette*; and (b) that the tribunal's recommendation was effectively the decision of the President and in terms of s 31K(2) of the Constitution the court had no power to review the President's decision. The judge raised the non-citation of the President as an issue and requested the parties to address the court on whether or not such was fatal to the applicant's case.

Held: (1) The 8 week period is to be reckoned from the date when the applicant was notified of the fact that the proceedings against him had terminated. No provision of the Constitution requires that the removal of the Attorney-General be notified in the *Gazette*. Publication of the termination of the applicant's appointment could not have been meant to constitute personal notice to him. Personal notification of the termination of his appointment was effected through the letter and the application was thus made in time.

(2) Like the proceedings of any other quasi-judicial body, the proceedings of the tribunal, if tainted by procedural irregularities recognizable at law as vitiating such proceedings, could be set aside before they are concluded and before any recommendation was made. Even after the inquiry was complete but before its recommendation was acted upon, the proceedings and the consequent recommendation of the tribunal could have been set aside on review. In both instances, there would be no need to cite the President in review proceedings to set aside the decision of the tribunal. However, where the recommendation of the tribunal has been implemented as required by the Constitution, then the decision of the tribunal ceases to have any independent status and becomes imbedded in and forms an integral and inseparable part of the action of the President.

(3) In terms of s 110, the Attorney-General can only be removed from office by the President if the President is so advised by the recommendation of the tribunal. The President does not take any decision in the matter but is bound simply to implement the recommendation and advice of the tribunal to that effect. The removal of the Attorney-General from office is thus not a decision that the President can reach *mero motu* or against the recommendation of the tribunal. He cannot act without a recommendation and advice from a tribunal. While the recommendation and advice can exist on its own before implementation, once they are implemented, the two become one. The implementation cannot exist on its own without the recommendation and once the recommendation is lawfully set aside, the implementation fails to have a basis in law and becomes unconstitutional. The non-citation of the President was fatal to the application. It was untenable for the applicant to suggest that he could attack the recommendation of the tribunal only without affecting the act of the President to remove him from office. The act of removing him from office cannot lawfully exist without the requisite recommendation and thus to attack one is necessarily to attack the other. Consequently, to be procedurally correct, the President must be made a party to the proceedings as the court could not make an order adversely affecting the action of the President without affording him the right to be heard.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 21 (freedom of association) – right to join trade union – effect of such right – right of worker to join union for industry

other than that in which worker is engaged – such right not obliging employer to pay union fees to that trade union

Zimbabwe Banking & Allied Workers' Union & Ors v *Beverley Bldg Soc & Ors* S-3-10 (Malaba DCJ, Sandura & Cheda JJA concurring) (Judgment delivered 11 May 2010)

See below, under EMPLOYMENT (Trade union).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 22 – freedom of movement – citizen's right to hold a passport in order to enjoy right to travel freely in and out of the country – minor child – has same right of freedom of movement as adult – issue of passport to child – not a juristic act requiring assistance of guardian

Dongo v *Registrar-General & Anor* S-6-10 (Makarau AJA, Chidyausiku CJ, Ziyambi & Garwe JJA & Gowora AJA concurring) (Judgment delivered 3 June 2010)

The applicant, a woman, was married under the Customary Marriages Act [*Chapter 5:07*]. When one of her minor children required a passport, the applicant approached the offices of the Registrar-General, the first respondent. She was turned away on the basis that she could not assist the minor child to obtain a passport as she was not the natural guardian of the minor child and that only her husband, as the natural guardian of the minor child, could assist the child. He took the view that the obtaining of a passport for a minor child is an act of guardianship and therefore a juristic act and the applicant, not being the minor child's guardian, could not approach his office.

The applicant brought an application to the Supreme Court under s 24(2) of the Constitution, alleging that the Declaration of Rights, particularly s 23(1) (a) and (b), had been violated in relation to her, in that she was being discriminated against on the basis of her gender and her marital status. In argument, the applicant accepted as correct the legal position advanced by the first respondent that in applying for a passport a minor child requires the assistance of his guardian.

Held: (1) it is correct to say that in all juristic acts a minor child must be assisted by his or her guardian. While most of the debate between the rights of the guardian parent and the custodian parent has arisen in instances where the parents of the minor child have separated or divorced, even during the subsistence of a marriage a minor child still requires the assistance of a guardian to perform all juristic acts.

(2) A Zimbabwean passport is a document that enables holders to travel outside the borders of the country. It is issued to citizens only, to enable them to travel beyond the borders of the country. It also acts as a document of identity identifying the possessor as a Zimbabwean national, but it is not the issuance or denial of the document that confers on or withdraws nationality or citizenship from Zimbabweans. The document simply confirms or affirms that the holder is a Zimbabwean citizen and identifies him or her as such. Holding a passport is simply a recognition by the State that the holder is a citizen and is entitled to enjoy his constitutional right to travel freely in and out of the country. While the possession of a passport is not guaranteed by the Constitution, the right to freedom of movement, which is constitutionally guaranteed, can only be fully enjoyed by citizens who are in possession of a passport. A passport is issued to enable the citizen to enjoy a constitutional right of freedom of movement but does not confer that right itself.

(3) The right to freedom of movement inheres in all human beings and is enshrined in the Constitution. Minor children are guaranteed that right by virtue of being human beings. Any abrogation to that right has to be found in the Constitution and cannot be by an administrative act of the first respondent or by provisions of another statute that is not consistent with the Bill of Rights. To deny a minor child a passport because he has not been assisted by his natural guardian may amount to an unlawful abrogation of the minor child's right to freedom of movement. The issuance of a passport does not confer any new or additional right that the citizen of Zimbabwe did not enjoy before the document was issued. It does not change the holder's legal status after its issuance. Accordingly, the issuance of a passport to a citizen is thus not a juristic act and the exclusive assistance of the minor child's guardian is not a legal requirement. Both parents of a minor child can assist a child to obtain a passport.

Constitutional law – Parliament – Speaker – election of – procedure – requirement for secret ballot – meaning of "secret ballot" – display by small number of members of their voting papers after having cast their votes in secret – not a reason to vitiate election

Moyo & Ors v *Clerk of Parliament & Anor* HH-28-10 (Patel J) (Judgment delivered 9 March 2010)

The applicants were members of Parliament; the first respondent was the Clerk of Parliament and the second was the Speaker. The applicants challenged the validity of the second respondent's election as Speaker on several grounds and sought an order setting aside his election.
Following the swearing-in of members of Parliament, the first respondent announced the procedure for the election of the Speaker. As there was more than one person proposed as Speaker, the election was to be conducted by secret ballot as enjoined by Parliamentary Standing Orders 4 and 6. The evidence showed that although the members of Parliament voted in secret, about 6 members of the Speaker's party openly displayed their ballot papers to their colleagues to show how thy had voted. Several queries were raised by certain Members during the election process but the first respondent refused to take any questions throughout the election. It was not clear whether the queries that were raised were by way of formal objection or mere interjection.
The second respondent challenged the applicants' *locus standi* on the grounds that they did not allege any violation of their own right to vote by secret ballot and that the losing candidate who should have been the principal applicant. He also contended that, in addition to the respondents *in casu*, the applicants should have cited all other members who participated in the election as well as the MDC-T party itself. Finally, he averred that the applicants did not lodge any formal objection or complaint with the first respondent before the election result was announced. It was incumbent upon the applicants to have exhausted relevant Parliamentary processes before approaching the court.
Held: (1) The applicants were clearly entitled as members to participate in the election conducted by the first respondent and they unquestionably had a real and substantial interest in the outcome of that election. That being so, they were also entitled to challenge the legitimacy of the election process to ensure that it was conducted in accordance with the prescribed procedures and that it yielded a legitimate result. Section 3(1)(a) of the Administrative Justice Act [*Chapter 10:28*] requires every administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person to "act lawfully, reasonably and in a fair manner". In terms of s 4(1), any person who is aggrieved by the failure of an administrative authority to comply with s 3 may apply to the High Court for relief. The conduct of the Speaker's election affected the interests and legitimate expectations of the applicants in the outcome of the election. If they claimed to be aggrieved by the first respondent's alleged failure to act lawfully, reasonably and fairly in the conduct of that election, they were eminently entitled to approach the court for appropriate relief.
(2) It was the first respondent, whose conduct was impugned by the applicants, and the second respondent, who was declared the winner of the election, who were the most apposite respondents in the present contestation. It was their specific actions that were challenged and their interests that were directly affected by the declaratory relief being sought. Although not all possibly relevant parties had been cited as respondents, their non-joinder was not fatal to the proceedings, inasmuch as the determination of the issues in dispute would not directly impact upon their rights and interests.
(3) As a general rule, Parliament is at large to regulate its own proceedings without external interference. However, it is well-established that in a constitutional democracy, this general immunity is necessarily and invariably subject to the provisions of the Constitution. This subordination to the primacy of the Constitution is entrenched and clearly recognised in ss 3 and 49 of the Constitution. The election of the Speaker is a process that is not exclusive to Parliamentary privileges and powers, being explicitly regulated by s 39 of the Constitution. It was thus a matter that is justiciable by the courts to ensure due compliance with the Constitution and the Standing Orders. Nevertheless, the court should be loath to interfere with the internal proceedings of Parliament unless it is shown that the applicants had attempted to exhaust relevant Parliamentary processes in the first instance.
(4) Although the conduct of normal Parliamentary business does admit the possibility of formal objections, there is no equivalent procedure prescribed in the Constitution or in the Standing Orders with respect to the election of the Speaker that enables the Clerk of Parliament to deal with formal objections. The Standing Orders do not prescribe any procedure for the raising of formal objections during the election of the Speaker and before the election result is announced. In the absence of any such procedure, there was no internal Parliamentary process that the applicants could be required to exhaust before approaching the court for relief.
(5) The term "secret ballot" means the expression of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed. With regard to the open display of votes by at least 6 of the voting members, the provisions of s 39(2) of the Constitution as read with Standing Order No. 6 are peremptory and must be strictly complied with. Thus, if it is shown that the requirements of a secret ballot have been violated in any election to the position of Speaker, the election result should in principle be declared a nullity, unless it is shown that this

would lead to great injustice or public inconvenience. The gravamen of a secret ballot is that each voter is enabled to cast his vote privately and in secret, without fear of having his voting choice identified or ascertained by others. In this respect, it is incumbent upon the regulating authority to provide the requisite wherewithal for that purpose. The courts should not interfere unless it is shown that the objective conditions put in place for the election precluded the possibility of a secret vote. Beyond this, it is then a matter purely for the individual voter if he chooses to divulge, whether publicly or in private, the specific manner in which he has cast his vote. If he does so of his own volition, without any external coercion or intimidation, and howsoever his conduct might influence other voters, this cannot detract from the secrecy of his vote or vitiate the secrecy of the ballot as a whole. There is nothing to show that any of the members did not cast their votes in secret or that the members who did display their votes did so under any threat or duress. They did so of their own free will and, more significantly, after having cast their votes in secret.

Contract – benefit of third party – company not yet in existence – ratification of contract by company after formation – when permissible

Gray & Anor v *Registrar of Deeds* HH-114-10 (Gowora J) (Judgment delivered 30 June 2010)

See above, under COMPANIES (Pre-incorporation contract).

Contract – illegality – *par delictum rule* – applicability – when rule should be relaxed – unjust enrichment – part payment of contract fee – no evidence to show that services rendered were out of proportion to payment made – loss should lie where it falls

Muguti v *Uboxit Worldwide (Pvt) Ltd & Ors* HH-5-10 (Makarau JP) (Judgment delivered 13 January 2010)

Before the *de facto* abandonment of the local currency and the adoption of foreign currencies, the defendants had contracted with a freight company for that company to carry the defendants' freight to Zambia. The price for doing so was fixed in US dollars, and the defendants paid a little under half of agreed fee. The freight company ceded its right to collect the debt to the plaintiff, which issued summons. The defendants having failed to appear, the plaintiff sought summary judgment. The plaintiff accepted in argument that the original agreement was illegal, since it was in contravention of the exchange control laws. However, he pleaded that the court should relax the rule against illegal contracts and allow him to collect the balance due under the contract, as this would prevent an injustice and would ensure simple justice between man and man.
Held: (1) the law applicable to illegal contracts is quite clear and business people are well advised to take heed of this law before they institute litigation over contracts whose illegality may be questionable. Two rules are of general application. Where the contract has not been performed, the courts will not compel performance by either party to the contract. This rule is absolute and admits of no exceptions. Where the parties are equally in the wrong, the loss will lie where it falls unless, in its discretion, the court is of the view that one party will thereby be enriched at the expense of the other. In such cases, the courts will relax the *in pari delicto potior est conditio possidentis* rule to do simple justice between the parties.
(2) *In casu* the contract was performed in part. The defendants had made some payment towards the services that the freight company rendered them and were not seeking to reap where they had not sown. In the absence of such evidence as to the true value of the services rendered to the defendants, it could not said that the services rendered to the defendants were so out of proportion with the payment made that the court should interfere by relaxing the rule operating against the contract.

Contract – interpretation – clause giving options open to innocent party in event of breach of contract – options separated by "either" and "or" – effect – innocent party not entitled to exercise both options – must elect one or another

Contract – interpretation – use of words "either" and "or" – normally treated as disjunctive unless compelling indication that it is conjunctive

TM Supermarkets (Pvt) Ltd v *Chadcombe Properties (Pvt) Ltd* HH-30-10 (Patel J) (Judgment delivered 9 March 2010)

The appellant was the tenant of a commercial property owned by the respondent. The lease agreement between the parties stipulated the remedies of the lessor in the event of any breach of the agreement by the lessee. Pursuant to any such breach, the lessor was entitled in terms of the relevant clause *either* (a) to forthwith terminate the lease and eject the lessee *or* (b) continue the lease and claim rental or remedy of any other breach *or* (c) in either event, take or enforce *any other action or right* for damages or otherwise arising from the lessee's breach. The appellant breached the lease by not paying rent for several months, but when a letter of demand was issued, it paid the outstanding amounts to the respondent's lawyers within the time limit given in the letter of demand and in accordance with their specific instructions. Nevertheless, the respondent obtained an order from the magistrates court terminating the lease agreement and requiring the appellant to vacate the premises. The court *a quo* found that that the lease agreement entitled the respondent to cancel the lease after the breach complained of had been rectified and to accept rectification and still proceed to cancel the agreement.

Held: the options given to the lessor under the lease agreement were not conjunctive but disjunctive. This was clear from the use of the words "either" and "or". Option (c) was confined to *any other action or right*, including damages, and did not include the right to terminate the lease and evict the lessee. On a proper construction of the clause, the lessor could not straddle both options of formally demanding and accepting the late payment of rent on the one hand and then claiming the right to terminate the lease on the other. In short, the lessor could not purport to exercise both options in respect of the same breach.

Contract – sale – *res litigiosa* – whether *res litigiosa* may be alienated – sale of property to third party – rights of successful litigant against third party – sale to fourth party – sale genuine and *bona fide* – successful litigant having no claim against fourth party

Gardner v *Dampier Development & Ors* HH-72-10 (Makoni J) (Judgment delivered 12 May 2010)

In July 2004, the applicant and the first respondent entered into an agreement of sale in respect of a certain piece of land. A misunderstanding arose regarding payment of the purchase price. This culminated in the applicant suing the first respondent for an order of specific performance. Judgment was entered in favour of the applicant on 4 April 2006. The first respondent appealed against the judgment but later withdrew the appeal. About a month before judgment was given, the first respondent sold the same property to the second and third respondents. It effected on 13 April 2006. The second and third respondents subsequently sold and transferred the property to the fourth respondent on 18 September 2007. The applicant sought an order declaring that the first respondent had lost *dominium* over the property and that the subsequent sales were void. He argued that he retained an absolute right to repossess the property from whoever had title at the time of judgment, if such title was obtained subsequent to joinder of issues. Once the pleadings were closed, the matter became *litis contestatio*. The parties lost dominion over the property, which became *res litigiosa*. As such the property could not be disposed of before the termination of the proceedings. Accordingly, he was entitled to vindicate the property. The first respondent argued that the mere operation of the doctrine of litigiosity does not result in dominion over property being lost. A *res litigiosa* can be alienated. At no time did the applicant become the owner of the property. He did not pay the purchase price and he could not therefore seek to vindicate the property, which was now owned by the fourth respondent.
Held: (1) One of the essential elements of an *actio rei vindicatio* is that a party seeking such relief must establish the right of ownership. The action is not available to those who have not yet obtained ownership. What the applicant acquired through the judgment was a personal right. The doctrine of *res litigiosa* applies in an action *in rem* and not in a personal action. The defendant's real rights as *dominus* in a *res litigiosa* were not lost, but were diminished to that extent to which he could not dispose of the thing to the prejudice of the plaintiff.
(2) The fact that a thing is *res litigiosa* does not preclude or prevent it from being alienated or similarly dealt with, so long as the rights of the non-alienating litigant in the *res* are protected. Where property is sold to a third party, the agreement of sale of the *res litigiosa* between the litigating party and the third party is valid *inter partes*. The purchaser is bound by the judgment in the action and the successful party can recover it from the new possessor by execution and without fresh proceedings. However, this case involved a sale to a fourth party. If the sale to the fourth party was a genuine and not a simulated transaction, and the transfer to the fourth party was *bona fide*, that transfer would be valid.

Editor's note: see also *Supa Plant Invstms (Pvt) Ltd* v *Chidavaenzi* HH-92-09, a judgment of Makarau JP, delivered 9 September 2009, and reported in *Case Summaries 2009 (2)*, under PROPERTY AND REAL RIGHTS (*Res litigiosa*).

Contract – sale – sale of immoveable property – double sale – sale to one person, then to another – principles

Contract – specific performance – when may be granted – agreement tainted with illegality – specific performance should not be granted – grant of specific performance resulting in injustice – grant would give applicant valuable asset for virtually nothing

Mutetwa v *Dixon & Ors* HH-67-10 (Makarau JP) (Judgment delivered 14 April 2010)

The applicant bought a house from the first respondent, who was about to emigrate from Zimbabwe. The purchase price was expressed in local currency and the agreement of sale specified that the price was to be paid in full within 5 days, failing which the agreement would be considered null and void. The parties, immediately after executing the agreement, agreed verbally that the purchase price of the property be converted to a sum expressed in US dollars and that payment be made into an overseas bank account. The applicant paid a quarter of the sum agreed on, then defaulted. When pressed for payment of the balance of the purchase price in foreign currency, the applicant tendered local currency, which was spurned by the first respondent. The first respondent's estate agent wrote to the applicant cancelling the agreement of sale. The applicant took no steps to enforce the sale. In due course, the property was sold jointly to two other purchasers. Before transfer was made, the applicant obtained an order restraining the first respondent from doing so. In the meantime, the second purchasers took occupation of the property. The applicant filed an application, seeking an order compelling the first respondent to pass transfer of the property to him against payment of the sum of expressed in local currency and evicting the first respondent and all those occupying through him from the property. The second and third respondents (executors of the estates of the joint purchasers) opposed the application. They claimed that the full purchase price had been paid and that the applicant was in breach of the contract between himself and the first respondent.

Held: (1) this was a double-sale situation. Where A sells a piece of land to B and then to C, and where transfer has been passed to neither, B, in the absence of special circumstances affecting the balance of equities, can interdict A from passing transfer to C and obtain specific performance on the contract, and in that event, C's only remedy is an action for damages against A.

(2) The next issue was whether the applicant was entitled to specific performance on the written contract of sale. If he was, his right to the property should prevail unless there are special circumstances in the matter that favour the second purchasers. Specific performance is a discretionary remedy. Specific performance of the second agreement of sale could not be granted because (a) the applicant had not sought specific performance of this arrangement; and (b) it was tainted with illegality, being in breach of the exchange control laws. As for the first agreement, the actions of the parties showed that it was a sham; they did not intend to be bound by it at all. In any case, the applicant had breached the first agreement by not making payment within 5 days.

(3) Specific performance would also be refused because it would result in injustice. The local currency had now gone into disuse and was valueless. The order sought would grant transfer of a valuable asset against the payment of a valueless currency.

Contract – variation – when permitted – quasi-mutual assent – one party giving out a certain position and other party accepting – first party bound

Munyani v *Liminary Invstms & Anor* HH-38-10 (Makarau JP) (Judgment delivered 24 February 2010)

The applicant sold a house to the first respondent. Part of the purchase price was paid at the time the agreement was concluded and it was agreed that the balance would be paid by a third party within 3 months. It was provision of the agreement of sale that transfer would be effected on payment of the purchase price in full. In spite of this provision, the applicant, of her own volition, allowed the first respondent to take possession of the property before the purchase price was paid in full. Part of the balance was paid but before the remainder was paid the third party died. The applicant sought the eviction of the first respondent.

Held: the applicant would be bound by her act. She was so bound not because she waived any rights to retain possession of the property pending transfer (as contended by the first respondent), but because she agreed to a variation of the term of the agreement regulating occupation, to her prejudice. Where, by word or deed, one party to a contract gives out to the other a certain position and that position is accepted, both parties are bound. This is referred to the quasi-mutual assent doctrine, which is an intrinsic part of objectively establishing consensus *ad idem* between the parties to a contract. The application of this doctrine meant that the applicant was bound by the variation in the terms of the agreement.

The law does not restrict the parties' power to vary their own contract. They are at liberty to change their minds as many times as it suits them, as long as, each time that they do so, they are acting in concert and their minds meet. The law will only restrict their power to vary their own contract where they have, in the contract,

restricted their own power to do so by inserting a non-variation clause. Typically, a non variation clause provides that no subsequent agreement between the parties shall be valid and binding as between the parties unless it is reduced to writing and signed by both parties. There was no such clause in this case. It did not matter that the applicant viewed her conduct in parting with possession prior to the agreed date as an indulgence on her part. That mental reservation was not communicated to the first respondent. What was communicated to the first respondent, and accepted by it, was that occupation would no longer await transfer.

Costs – taxation – fees charged by legal practitioner – reliance on Law Society's tariff – not permissible to use current tariff to calculate fees earned before such tariff came into operation

In re *Est Matimura* HH-12-10 (Bere J) (Judgment delivered 18 January 2010)

The executor for a deceased estate was a legal practitioner. The administration of the estate had taken place over several years, due to the involved nature of the estate. When the executor presented his bill of costs to the taxing officer, he relied on the Law Society's tariff of fees which came into effect on 1 April 2009 and was expressed in US dollars. His bill included the work he had done during the currency of previous Law Society tariffs, which were then expressed in Zimbabwe currency. By the time his bill was presented, the Zimbabwe dollar which, though officially still in existence, in practice had disappeared from circulation. The taxing master rejected the bill for fees incurred before 1 April 2009 on the grounds that the tariff for each particular year should be that on which the fees for that year were based.
Held: the taxing officer is not merely there to rubber stamp any bill for taxation presented to him. A cursory reading of order 38 of the High Court Rules shows that he has a lot of discretion thrust upon him and he is therefore not always expected to be in agreement with any bill presented to him. In determining whether the fees charged are reasonable, the officer has to *inter alia* refer to the relevant tariff, which was precisely what he did in this matter. He was within his rights to demand that work done before 1 April 2009 be charged in accordance with the relevant and applicable Law Society tariff for the year in question. It was certainly not competent for the executor to seek to rely on the latest tariff in his computation of fees due to him for any work done before it came into effect. The issues of the current value of the Zimbabwe dollar required the intervention of the legislature, not that of the courts. The legislature must come up with an acceptable method of giving value to the Zimbabwe dollars that have literally been locked out of circulation. This has affected almost every citizen or enterprise in the country; the executor's predicament was not peculiar to him.

Costs – wasted costs – payment of – when may be ordered – principles – other party being put to expense – wasted costs must be awarded

Church of Province of Central Africa v *Jakazi & Ors (2)* HH-73-10 (Makarau JP) (Judgment delivered 28 April 2010)

The general rule is that any party to the suit is entitled to withdraw any of its pleadings, provided this does not cause any injustice to the other party. A defendant may thus withdraw an exception and substitute it with a special plea or a different exception, provided the withdrawal does not cause any injustice to the plaintiff and which in justice cannot be cured by an order of costs. The issue is not whether or not the same dispute is still before the court. It is whether the plaintiff has been put to some expense. The award of costs in its favour is restricted to the consideration of the withdrawn pleading and has little if anything to do with the outcome of the hearing on the pleading.

Court – children's court – jurisdiction -- application to for guardianship of child – when court has jurisdiction to hear such application

Ex p *Ndoro* HH-119-10 (Uchena J) (Judgment delivered 17 June 2010)

See below, under FAMILY LAW (Child – guardianship – application).

Court – contempt of – disobeying court order – belief that court order improperly obtained – correct course of action – duty to obey order and seek redress afterwards

Court – contempt of – what is – what person alleging contempt must show – onus falling on respondent to show disobedience not wilful and *mala fide*

John Strong (Pvt) Ltd & Anor v *Wachenuka (1)* HH-44-10 (Chatukuta J) (Judgment delivered 3 March 2010)

The applicants were owners of a farm which had been acquired by the State. A letter of offer had been issued to the respondent by the Minister responsible for lands. The respondent went to the farm and locked the tobacco grading shed, the irrigation pump station and borehole, thereby denying the applicants access to the infrastructure. By consent, a court order was issued directing the respondent to remove the locks and desist from interfering with the applicants' peaceful and undisturbed occupation of the farm. He complied with the order for 4 months, then he denied the applicants access to barns on the farm and interfered with the curing of the applicants' tobacco. A spoliation order was obtained, and complied with for another 4 months, whereafter the respondent again denied the applicant access to the barns and sheds and to water. A further court order was issued, by consent, requiring the respondent, *inter alia*, to restore to the applicants and their employees full possession, use and access to the tobacco barns, grading sheds, workshop, office and irrigation pump station and all farming implements owned by applicants and to allow the applicants to grade their tobacco and remove it for sale. In defiance of this order, the respondent forcibly evicted the applicant's manager from the farm office, and again locked the gates, thereby denying the applicants possession of, access to and use of workshop, barns and sheds. The applicants approached the Deputy Sheriff for assistance to enforce the order, but the respondent denied the Deputy Sheriff access to the plot. The applicant sought an order committing the respondent for contempt of court.
Held: (1) It was evident that the respondent was under the impression that, because he had an offer letter, he owned all the buildings on the farm and the applicants did not have any claim irrespective of the orders that have been issued by the court. Despite having consented to the latest court order, he still did not believe that he must comply with it, because it was improperly obtained. A person who believes that an order is invalid must generally comply with that order. He may seek to have the order set aside by way of review or appeal, but he cannot treat the order as though it does not exist.
(2) Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. Before holding the respondent to have been in contempt of court, it is necessary for the court to be satisfied both that the order was not complied with and that the non-compliance was wilful on the respondent's part. Once the applicant has established that the respondent has failed to comply with the order, the onus shifts to the respondent to establish that he was not wilful and *mala fide.*
(3) The respondent's conduct not only demonstrated that he wilfully disobeyed a court order but that he also acted *mala fide*. The applicants had to approach the court four times in order to assert their rights against the respondent. In two of the cases, orders were granted with the respondent's consent, yet he still proceeded to defy the orders. This demonstrated his utter disdain of a court order. Court orders must be respected and obeyed. It was the court's responsibility to ensure that its orders are ordered. This was one of those instances where the court must ensure compliance with its order by ordering the committal of the respondent. Any lesser penalty would not adequately reflect the court's displeasure at the respondent's conduct.

Court – contempt – disobedience to order of court – arrest for – may only be ordered after finding by court that person has flouted court order – not competent to authorize police to effect arrest without such a finding

John Strong (Pvt) Ltd & Anor v *Wachenuka & Anor (2)* HH-118-10 (Gowora J) (judgment delivered 23 June 2010)

The applicants were the owner and lessee of a farm which had been expropriated by the State. The first defendant had been given a letter of offer in respect of part of the farm and began to interfere with the applicants' operations on the farm. The applicants sought a spoliation order. In addition, they sought an order that, should the first respondent breach the spoliation order, the police be authorized to arrest him.
Held: the spoliation order would be granted, but the order for the arrest of the first respondent in the event that he was in breach of the spoliation order could not be granted. Firstly, the first respondent was not before the court and had made no submissions on that subject. Secondly, the court could not order the police to arrest a person for an alleged breach of a court order before finding that such person was in fact in breach of the court order. What the applicants were seeking was an order protecting them from an anticipated breach of the

spoliation order. This was not the correct manner to approach a court for an order of contempt of court. Before an arrest can be ordered by the court on allegations of a party being in breach of a court order, it is necessary for the respondent to be arraigned before the court for a finding that he had deliberately flouted a court order served on him personally. This is done by the institution of proceedings for contempt of court proceedings against such party. Time and time again legal practitioners insert in their draft orders a paragraph for the arrest of a party in the event of breach of paragraphs in the order. This is irregular and contrary to any person's right to be heard before an order is granted against such person. Legal practitioners should therefore desist from drafting orders in this fashion.

Court – judicial officer – *functus officio* – when becomes *functus officio* – court making *prima facie* determination on assessment of urgency without hearing parties – court not precluded from hearing argument from parties subsequently

Church of the Province of Central Africa v *Diocesan Trustees, Diocese of Harare* HH-105-10 (Mavangira J) (Judgment delivered 31 May 2010)

The applicant brought an urgent chamber application. On consideration of the papers, the judge ruled that the matter was not urgent. The applicant then sought an opportunity of arguing the question of urgency before the judge. At the hearing, the respondent argued that the judge was *functus officio* and could not hear the matter as it had already made a final determination that the matter was not urgent and the determination had been communicated to the parties. The applicant argued that the determination was only a procedural directory as to how the matter should proceed and was not an order of court. Even if it was to be taken as an order of court it was an interlocutory order which related to a procedural matter and the court could thus not be *functus officio.*
Held: The endorsement that the matter was not urgent was made on a consideration of the papers without hearing any oral arguments by the parties. It was the court's *prima facie* view of the matter as regards the issue of urgency. The parties were not heard by the court on the merits of the issue of urgency. The court could not be *functus officio* in such circumstances. Had the parties been heard orally and a determination made thereafter, such determination would be consequent upon full ventilation by the parties on the pertinent issue and the court would then become *functus officio.*

Court – judicial officer – recusal – application for – grounds – bias – appearance of bias – application must be based on reasonable litigant's apprehension of bias and apprehension itself must be reasonable – refusal to grant postponement – not in itself an indication of bias – previous knowledge of case – magistrate having convicted an accomplice who was to be called as witness in subsequent trial – reasonable to fear that he would not dispassionately assess accomplice's evidence

Matapo & Ors v *Bhila NO & Anor* HH-84-10 (Uchena J) (Judgment delivered 14 May 2010)

The applicants had been arraigned before the first respondent, a regional magistrate, for trial on charges of escaping from prison. The trial did not start at the planned time. When it resumed, counsel for four of the applicants was not present. The magistrate nevertheless, in spite of the applicants' protests and a request for postponement, ordered the applicants to give their defence outlines. Counsel returned when the first applicant was giving his defence outline. He asked the magistrate to recuse himself on the grounds that because he had presided in the cases of two men who were participants in the applicants' alleged attempted escape from prison. They had pleaded guilty and been sentenced to terms of imprisonment. It was argued that the applicants reasonably believed that the magistrate's knowledge of their case gained from his presiding over the other case would make it impossible for him to impartially assess their evidence, in view of the fact that the two men would testify for the State in the applicants' trial. The magistrate refused to recuse himself, and an urgent application was made to the High Court seeking a stay of the proceedings before the magistrate pending review by the High Court. It was argued that the dismissal of the applicant's applications for postponement when their counsel failed to appear in time at 11.30 a.m., and his requiring them to immediately give their defence outlines, reflected an extraordinary eagerness of the magistrate and the Attorney-General to fast track the trial and that this raised a reasonable apprehension of bias in the applicants. It was also argued that, as the magistrate had presided over the applicants' accomplices' trial, this creates a reasonable appearance of bias as the magistrate was most likely to believe the accomplices when they testified that an attempt to escape from prison occurred, than to believe the applicants if they were to say it did not.

Held: (1) Generally the High Court does not encourage the bringing of uncompleted proceedings for review. There are, however, circumstances which may justify the reviewing of such proceedings. This means that the court will not lightly stay proceedings pending review. An application of this nature can only succeed if the application for review has prospects of success. It would be prejudicial to the accused, and a waste of time and resources, for the trial court, to carry on with a trial which is likely to be declared a nullity.
(2) Judicial officers generally recuse themselves on their own motion or on application by a party, on realizing the presence of facts disqualifying them from presiding over a case. If the judicial officer does not recuse himself in such circumstances, a party who applies for the judicial officer's recusal and his application is turned down is most likely to succeed if he applies for the stay of the proceedings pending review. The present case was not one where the reason for recusal is easily identified. It fell into the class of cases where the reasons for recusal are not actual bias, but an appearance of bias, which is the applicants' perception of how the magistrate was conducting their case, based on how he handled preliminary applications in their case, his exposure to information about their case and his refusal to recuse himself.
(3) An application for recusal must be based on a reasonable litigant's apprehension of bias and the apprehension must itself be reasonable. Mere apprehensiveness on the part of a litigant that a judge will be biased – even a strongly and honestly felt anxiety – is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law. A judicial officer is expected to manage his court in the interests of justice and the efficient administration of justice. The circumstances in which the applications for postponement were dismissed must therefore be carefully considered. A judicial officer, can in a proper case, insist that a scheduled trial must begin. That would not, in the absence of other apparent motives, be an indication to a reasonable litigant of bias. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. The need for efficient court management by judicial officers must, however, give way to the delivery of quality justice, which must be seen to be done. In short, a judicial officer must be firm and fair, allowing genuine applications for postponement, and turning down those made for dilatory purposes. Here, the magistrate was merely exercising firm control of the proceedings in circumstances where he was justified in suspecting delaying tactics on the part of the applicants and their legal practitioner.
(4) The fact that a judicial officer previously made a decision about substantially the same dispute between the same parties and that he must therefore be biased, when he presides over the same parties' dispute for the determination of a further issue arising from the one already decided, is answered by the principle of *res judicata,* putting that judicial officer in the same position as any other judicial officer. In such a case there would be no reason for the judicial officer to recuse himself, because once a matter is *res judicata* it cannot be decided again on the same issue. Here, however, two disputes were not between the same parties. The applicants' apprehension of bias could not be defeated by the principle of *res judicata*. In this case the issue of there having been an attempt to escape from prison was not *res judicata* between the applicants and the State. It had never been decided between them. Justice will not be seen to be done when a magistrate who has convicted an accomplice has to determine whether that an accomplice is telling the truth when he comes before him as a witness to tell the same story but now for the purpose of securing the unconvicted accomplices' conviction. Even though the magistrate was a trained judicial officer, and there was a presumption of judicial impartiality in his favour, that could not convince the applicants, to believe that he will dispassionately assess the evidence of witnesses he previously believed and convicted having accepted that they correctly confessed their part in the crime the applicants were facing. The applicants' apprehension was reasonable, and the proceedings before the magistrate would be stayed.

Criminal law – defences – provocation – when may be a defence – when may reduce murder to culpable homicide – need to show that accused lost his self control *and* that a reasonable person would also have done so

S v *Mafusire* HH-130-10 (Musakwa J) (Judgment delivered 18 June 2010)

By virtue of s 238 of the Criminal Law Code [*Chapter 9:23*], provocation is not a complete defence. In respect of any crime other than murder, provocation is not a defence but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime. In murder cases there is a two-stage approach. The first stage is to decide whether the accused had the intention to kill when he reacted to the provocation. If he did not have intention to kill, he will not be convicted of murder but only of culpable homicide. If he had an intention to kill, then the court will proceed to the second stage, which is to decide whether the accused himself lost his self-control and killed intentionally in circumstances where even the reasonable person, faced with this extent of

provocation, would also have lost self-control. If the accused did lose his self-control and the reasonable person would have done likewise, the accused will have a partial defence and will be found guilty of culpable homicide and not murder. In South Africa, on the other hand, if the accused killed intentionally, he will be found guilty of murder and the provocation will only act in mitigation of sentence. It is not enough to show merely that in the circumstances a reasonable man would have lost his self-control. There would have to be some evidence (leaving aside the question of onus) that the accused himself lost his self-control. What is meant by loss of self-control, and how that may differ from a lack of intention, is another matter. A loss of self-control is not absolute but is a matter of degree: there are many intermediate stages between icy detachment and going berserk.

Criminal law – inchoate offences – being an accessory to a crime – elements – not necessary that accused know precisely what crime has been committed

S v *Choruma & Anor* HH-103-10 (Uchena J) (Judgment delivered 18 June 2010)

The elements of the crime of being an accessory to a crime are:

- knowledge that the actual perpetrator has committed a crime, or the realization that there is a real risk or possibility that the actual perpetrator has committed a crime, and
- rendering the actual perpetrator or his accomplice assistance which enables him to conceal the crime or to evade justice, and
- the assistance must be rendered after the crime has been committed.

In an appropriate case the accused can be convicted as an accessory after the fact, of the crime which had been committed at the time he rendered assistance, even if at the time of rendering assistance he did not know what crime had been committed. He must, however, believe that a crime has been committed, and with that knowledge render assistance to conceal it, or help the actual perpetrator to evade justice. Giving false information to a police officer or other person in authority concerning the circumstances of a crime renders the giver of false information an accessory to the crime.

Criminal law – inchoate offences – conspiracy – what is – withdrawal from conspiracy – what is required to end conspirator's liability for commission of substantive crime

S v *Stanley* HH-97-10 (Mavangira J, Omerjee J concurring) (Judgment delivered 6 June 2010)

"Conspiracy" may be defined as the act of conspiring; combination for unlawful purpose, plot. A conspirator is one engaged in a conspiracy. In general a conspirator is liable for the crime perpetrated by his co-conspirators. But where he has effectively withdrawn from the conspiracy, he does not remain liable for the commission of any subsequent criminal acts. The terms "withdrawal" and "dissociation", which are often used in this context of the law, refer to a voluntary action by a conspirator which is legally effective to terminate his relationship to the conspiracy. The reason for allowing such a defence is to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object and, by encouraging his withdrawal, to weaken the group which he has entered. The actual role of the conspirator will determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner, something further than a communication to the co-conspirators of the intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required.

Criminal procedure – Attorney-General – removal from office -- procedure

Gula-Ndebele v *Bhunu NO* HH-14-10 (Makarau JP) (Judgment delivered 27 January 2010)

See above, under CONSTITUTIONAL LAW (Attorney-General – removal from office).

Criminal procedure – compensation – order for compensation to complainant following conviction – not suspended by noting of appeal – amount of order – not limited by magistrate's civil monetary jurisdiction

CFX Bank Ltd v *RTO Engineering (Pvt) Ltd & Anor* HH-8-10 (Karwi J) (Judgment delivered 20 January 2010)

An order for compensation following conviction for a criminal offence may be made in terms of s 363 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. If the accused person notes an appeal, the requirement to pay compensation is not thereby suspended. This is shown by the provisions of s 370 of the Act. This provides that a court which makes or order of compensation may require the injured party to give security for repayment of the compensation, in case the award is reversed on appeal or review. This clearly suggests that payment of compensation is immediate and is not suspended by an appeal or review. If an order of restitution was suspended by noting an appeal, the legislature would not have provided for security to be given by the injured party. The need to provide security by the injured party presupposes that compensation would have been paid soon after the sentence is passed.
Under s 367 of the Act, the amount of an order for compensation is not limited by the civil monetary jurisdiction of the magistrate making the order.

Criminal procedure – evidence – conspiracy – proof of – conspiracy need not be proved before evidence in connection with conspiracy may be led

S v *Bennett (2)* HH-33-10 (Bhunu J) (Judgment delivered 5 February 2010)

During the course of the accused's trial, the prosecution sought to introduce evidence of e-mails allegedly downloaded from a computer said to have belonged to the State's main witness. The e-mails were said to tend to implicate the accused. The defence objected to the production of the e-mails without previous proof of a conspiracy. In order to show that the e-mails were not genuine, the defence sought to introduce an admittedly false e-mail which purported to emanate from the Attorney-General, who was leading the prosecution. The argument was that a fake e-mail could be made anywhere in the world and therefore the exhibit was a fake e-mail which could have been made anywhere in the world.
Held: (1) In cases involving allegations of conspiracy, a foundation must be laid by proof – sufficient evidence in the opinion of the court – to establish *prima facie* the fact of conspiracy. It does not matter whether the evidence in connection with the conspiracy is admitted before a conspiracy is proved, provided that a conspiracy is eventually proved. If it were found at the conclusion of the case for the prosecution that a common purpose had not been established, then the evidence would have to be rejected and could not be regarded as evidence against the accused.
(2) The mere fact that a fake e-mail can be created anywhere in the world does not necessarily mean that the exhibit is fake. Conversely, the mere fact that genuine e-mails can be created anywhere in the world is no proof that the exhibit is genuine. Once the defence has alleged that the e-mails are fake documents the state bears the burden of proving their authenticity beyond reasonable doubt.

Criminal procedure – review – review of criminal case coming to attention of High Court – case being brought to attention of High Court by complainant dissatisfied with acquittal – court's powers on review – may not alter verdict

S v *Prandini* HH-94-10 (Kudya J) (Judgment delivered 2 June 2010)

An unhappy complainant may seek a review of an acquittal notwithstanding that the Attorney-General may appeal against the acquittal in terms of s 61 of the Magistrates Court Act [*Chapter 7:10*] or s 38A of the High Court Act [*Chapter 7:06*]. In terms of s 29(4) of the High Court Act, the review powers conferred by s 29(1) and 29(2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review. Such proceedings may be initiated by a complainant who asks the court to declare that an acquittal was not in accordance with real and substantial justice. On review of an acquittal the High Court has two options. The first is to confirm the proceedings if they meet the procedural and substantive legal requirements. The second is to decline to confirm the proceedings if they fall short of the requisite standards of justice. However, s 29 does not authorize the High Court to convict an accused person on review where the trial magistrate intended to acquit.

Criminal procedure – review – uncompleted proceedings – when court may entertain application for review

Matapo & Ors v *Bhila NO & Anor* HH-84-10 (Uchena J) (Judgment delivered 14 May 2010)

See above, under COURT (Judicial officer – recusal).

Criminal procedure – seizure of article – without warrant – requirements – need to show effect of delay in obtaining warrant – seizure with warrant – warrant must be issued before seizure – warrant issued after seizure having no retrospective effect

Chinjayani v *Min of Home Affairs & Ors* HH-76-10 (Uchena J) (Judgment delivered 5 May 2010)

The seizure of an article without a warrant in terms of s 51(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:*07] must satisfy the two requirements of subparas (i) and (ii). The officer effecting the seizure must on reasonable grounds believe that a warrant would be issued to him in terms of s 50(1()(a) if he applied for one; and that the delay in obtaining a warrant would prevent the seizure. Even if the officer has reasonable grounds for believing that a warrant would be issued, he must also, if the seizure is to be lawful, explain the effect of the delay in seizing the article while awaiting the issuance of a warrant of seizure. If the issue of the effect of delay is unexplained, the seizure cannot stand.
If the seizure is to take place by virtue of a warrant, the warrant must, in terms of s 50(1) of the Act, be issued before the article is seized. The police officer must in those circumstances ascertain from the warrant the extent of the authority it gives him. A warrant does not have retrospective effect; the issue of a warrant after the article has been seized cannot legitimize the seizure.

Note: see also *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Madzingo NO & Ors* 2003 (2) ZLR 225 (H). – *Editor*

Criminal procedure – witness – hostile – impeachment of – when witness may be declared hostile – basis of impeachment not restricted to previous inconsistent statements – court may also examine witness's attitude towards State

S v *Bennett (1)* HH-15-10 (Bhunu J) (Judgment delivered 25 January 2010)

The State sought to have its principal witness declared hostile in order that it could cross-examine him. The witness had previously made a statement to the police, which had implicated the accused in the present trial. The witness had challenged the admissibility of the statement, on the grounds *inter alia* that he had not been correctly warned and cautioned. The prosecution in that trial did not attempt to introduce the statement in evidence. The witness was subsequently convicted and sentenced to a term of imprisonment, which he served.
When notified that he would be subpoenaed to give evidence against the accused, the witness made it clear that he absolved the accused of any wrong doing. Nonetheless, the prosecution called him and his evidence was favourable to the accused and against the State case.
Held: (1) the witness's statement to the police was inadmissible against him and *a fortiori* inadmissible against the accused. In any event, being an alleged confession by the witness, it was, in terms of s 259 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], inadmissible against any other person. It could not be used for the purpose of impeaching the witness.
(2) The basis for impeachment is not restricted to previous inconsistent statements. There are various ways of proving hostility and proof of previous inconsistent statement is only one of them. The basis of impeachment proceedings is adversity or hostility on the party of a witness against a party calling him. A witness can only be considered adverse, or hostile, if he is shown to bear a hostile *animus* towards the party calling him and so does not give his evidence fairly and with the desire to tell the truth. Hostility may be inferred through various considerations, which include his demeanour in the witness stand. *In casu*, the witness considered that he had been unjustly prosecuted, convicted and served a prison term at the instance of the State and he still viewed the State as an adversary. He would therefore be declared hostile and the State would be entitled to cross-examine him.

Criminal procedure (sentence) – general principles – juvenile offenders – general approach to sentence – need for courts to get information and support from social welfare department – such support not available – court should look for information from other sources

S v *Mavasa* HH-13-10 (Makarau JP) (Judgment delivered 20 January 2010)

The accused pleaded guilty and was convicted of rape. He was 16 years old at the time of the crime and the complainant, his younger sister, was aged 12. He had inserted his penis into the complainant's vagina; she removed it when she pushed the accused away. There was legal penetration even though such penetration could not be medically detected when the complainant was examined some three days later. The magistrate sentenced him to 12 years' imprisonment, of which 3 years were suspended. The trial magistrate took a long time before sentencing the accused as he was waiting for a probation officer's report. The report never came and, in the end, the trial magistrate had to proceed to assess sentence without the report. The reason for the lack of a report was a shortage of staff in the Social Welfare Department. The issue on review was the challenge that faces the courts in handling matters of juvenile offenders in the absence of the requisite support structures to inform them on how to manage such offenders.
Held: (1) under s 351 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a discretion is given to the court convicting a juvenile on the options available for the management of the young person. It is clear from the section that there must be close liaison between the courts convicting the juvenile and the Social Welfare Department about training institutions or reform schools where convicted offenders may be referred to. Such liaison appears to have died down with the passage of time, leaving trial magistrates with no options but to sentence juvenile offenders to imprisonment as occurred here. There was an urgent need for this liaison to be resuscitated if the management of juvenile offenders is to be done in accordance with the law and for the rehabilitation of young offenders.
(2) Our laws and procedures have for long recognized that it is wrong to sentence juvenile offenders as if one is dealing with an adult offender. The thrust of the criminal justice delivery system in sentencing adults is to punish them for their wrongdoing, whilst in dealing with juveniles, the thrust is to reform them. A court should thus be exceedingly slow to expose a convicted juvenile to the same rigours of punishment which it will impose on an adult, as the purposes served by the sentences are different. Even in the absence of probation officers and probation officers' reports, a trial court handling the matter of a juvenile should be innovative and seek information from the school, family or community of the juvenile before coming up with a management scheme or sentence.
(3) The need to protect the complainants in sexual offences need not strip the youthful offender of his status as such and the consequent need on his part to be protected by the courts from his immaturity. The court should always strike a balance between the two competing rights. None is greater than the other.
(4) The sentence would be altered to one which would ensure the accused's immediate release.

Criminal procedure (sentence) – general principles – youthful offenders – desirability of avoiding long prison sentences – seriousness of particular offence – level of sentence should reflect seriousness of offence – maximum sentences should be reserved for most serious examples of offence

S v *Hunda & Anor* HH-124-10 (Uchena J) (Judgment delivered 16 June 2010)

The two accused pleaded guilty to and were convicted of contravening ss 113 and 131 of the Criminal Law Code [*Chapter 9:23*] (theft and unlawful entry into premises, respectively) and were sentenced to 15 years' imprisonment, of which 6 years were conditionally suspended. They had entered the complainant's house and stolen various items. Finding the complainant's car keys in the pocket of a jacket, they stole the car too. Most of the property was recovered. At the time the accused were convicted and sentenced, they were aged 17 and 18 years respectively. The record was sent for automatic review some two and a half years after the accused were sentenced.
Held: the sentences were inappropriate. The theft of the car was opportunistic; they had not gone with the object of stealing the car. Their pleas of guilty should have been given serious consideration. The rigours of imprisonment on young offenders should have had the effect of reducing the sentence to be imposed and the total effective sentence. Youthfulness and the attendant lack of serious consideration of the consequences of their actions should also have been considered. The 17 year old accused could have been sentenced to corporal punishment, plus a wholly suspended prison term. He was now above the age of 18, and must be treated as an adult, in the sense that corporal punishment is no longer applicable. The offence was a serious one. He must now be sentenced to a term of imprisonment, as he could no longer be subjected to corporal punishment. Other forms of punishment, like community service or a fine, would trivialize the serious offences he committed.

It is counter productive to send 17 to 18 year olds to prison for 15 years. The accused were still in their formative years. They needed more guidance than punishment. As they overstepped the line, making a non-custodial sentence inappropriate, they should be imprisoned but for a period which will let them taste the sting of imprisonment to scare them off a life of crime. The sting should not be for too long, so that they will come out adjusted to it. The sentence must seek to cause them to avoid it in future. If they are imprisoned for a period which would bring them out as hardened criminals, society and the offenders will both lose the benefit of a rehabilitative prison sentence. Society would be the greater loser as it will, at the end of such a sentence, receive into it a schooled and hardened criminal no longer scared of the prospects of being send back to prison.
A judicial officer must avoid imposing sentences around the maximum level of the range for cases which are far from being the worst examples of the particular crime. He must carefully consider the appropriate sentence for each case, bearing in mind that the least sentence is for the least serious example, and the maximum sentence is reserved for the worst example of that crime. This case was far from being the worst example. It was merely above the lower level, but below the middle level. An effective sentence of three years would be appropriate.

Criminal procedure (sentence) – statutory offences – negligent driving – prohibition from driving – classes of vehicle to which such prohibition extends – when court may order that prohibition shall not extend to class of vehicle other than that driven at time of offence

S v *Sabau* HH-110-10 (Patel J) (Judgment delivered 3 June 2010)

The accused was convicted of negligent driving arising out of an accident he caused when driving a commuter bus, a class 2 vehicle. The magistrate sentenced him to a fine. The accused was in addition prohibited from driving motor vehicles in classes 1 and 2 for a period of 2 years. His driver's licence in respect of class 2 was also cancelled. The magistrate's rationale for this course was that the prohibition was extended to class 1 motor vehicles because, if not so prohibited, the accused could have proceeded to obtain a class 1 driver's licence, which would enable him to drive vehicles in all of the other classes, including class 2, thereby defeating the object of the prohibition in respect of that class. As regards classes 4 and 5, he did not extend the prohibition to those classes because the accused was convicted of an offence involving a class 2 vehicle and there was no need to prohibit him from driving motor vehicles in classes 4 and 5.
Held: s 52(4) of the Road Traffic Act [*Chapter 13:11*] provides for prohibition from driving upon conviction for negligent driving. In the case of an offence involving the driving of a commuter omnibus or a heavy vehicle, the court *shall* prohibit the person from driving for a period of not less than two years, but may decline to impose the mandatory prohibition if it considers that there are special circumstances which justify it so declining. Such special circumstances must be endorsed on the record of the case when passing sentence. Section 65 stipulates general provisions relating to prohibition. Section 65(1) provides that a prohibition from driving shall extend to all classes of motor vehicle. However, section 65(3) gives the court a discretion, if it thinks fit, to order that the prohibition shall not extend to such class of motor vehicle, other than the class to which the motor vehicle driven by the accused at the time of the commission of the offence belongs. In terms of s 65(5), where the accused is prohibited from driving for a period of twelve months or more or for consecutive periods which together amount to twelve months, the court *shall* cancel his driver's licence in respect of all classes of motor vehicle to which such prohibition extends. What the magistrate should have done was to impose the prohibition, in general, and then indicate the classes of motor vehicle to which the prohibition would not extend, in particular. Before so doing, he should have considered whether or not there were any special circumstances surrounding the commission of the offence which justified such non-extension and endorsed such special circumstances on the record, as prescribed in section 52(4). As regards cancellation of the accused's driver's licence, s 65(5) requires that such cancellation be imposed in respect of all classes of motor vehicle to which the prohibition from driving extends. In other words, the coverage of cancellation must be co-extensive with the classes of motor vehicle to which the prohibition extends.

Damages – assessment – damages resulting from personal injuries – loss of amenities – meaning of – factors to be considered – loss of earnings – factors to consider – plaintiff not rendered completely helpless – duty to use remaining faculties and to mitigate his loss by engaging in meaningful activity

Gwiriri v *Starafrica Corp (Pvt) Ltd* HH-20-10 (Chitakunye J) (Judgment delivered 3 March 2010)

The plaintiff claimed damages for pain and suffering, loss of amenities and loss of future earnings after he had effectively lost the use of his right hand during an accident at work. The accident was caused by the negligence of his employer.

Held: (1) The concept of the loss of amenities of life has been tersely but aptly defined as a diminution in the full pleasure of living. The amenities of life may further be described as those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Factors that may influence the amount to be awarded include the age and sex of the injured person, as well as the disfigurement and its influence on the plaintiff's personal and professional life: for instance how many of the activities he was able to do or participate in is he still able to or has he been incapacitated and what did those activities mean in his life?
(2) The assessment of an appropriate award for loss of earnings is not as easy as just multiplying figures based on the plaintiff's previous earnings. There are several contingencies that must be taken into account. As a starting point it is important, wherever possible, to deal with the matter on an arithmetical, actuarial basis as opposed to a "gut feeling" basis. While the court will generally have a regard to arithmetical calculation and to actuarial evidence of probabilities to assist it in its assessment, ultimately it must decide whether the results of such calculations and evidence accord with what is a fair and just award in each particular case. It is a fact of life that it is not in every case that one reaches retirement age. The probabilities or possibilities of early retirement or retirement due to ill health from natural causes, retrenchment and discharge by employer on other grounds have to be considered.
(3) *In casu* the plaintiff was not rendered useless by the disability. What has been rendered of not much use is the right hand. His other limbs, his mental faculties and other abilities were unaffected by the injury. He should be in a position to learn how to effectively use the one remaining hand and embark on another career, which he did not seem to have done. Damages of the nature sought could not sustain him. He was not useless or hopeless. He had to mitigate his loss by engaging in meaningful activities. Due to the fact that he would be using one arm, there would be limits to the nature and extent of the employment or activities he can engage in. It is that deficiency or limitation that must be compensated by an award for loss of earnings.

Damages – assessment of – delictual – *actio injuriarum* – adultery – damages claimable for *contumelia* and for loss of *consortium* – need to specify how much claim under each head – loss of *consortium* – need to examine all circumstances – plaintiff aware of adultery and condoned it – no action for divorce – high damages not appropriate

Jhamba v *Mugwisi* HB-1-10 (Cheda J) (Judgment delivered 11 February 2010)

Damages for adultery are claimable on two entirely separate and distinct grounds: firstly, on the ground of the injury or *contumelia* inflicted upon the plaintiff; and, secondly, on the ground of the loss of comfort, society and services of the other spouse (*consortium*). It is wrong for a plaintiff to lump her claims in one, mixing both *contumelia* (injury) and loss of *consortium.* Loss of *consortium* is the main element in the estimation of damages for adultery. The quantum should reflect all the circumstances surrounding the occurrence of the adultery, including the plaintiff's own conduct in the matter.
Where the defendant had been having an illicit relationship with the plaintiff's husband for over 20 years, resulting in four offspring, the plaintiff could not say she was not aware of his sexual escapades. She chose to ignore the situation and thereby condoned the adultery. She did not sue for divorce. Consequently, damages for loss of *consortium* could not be high.

Employment – contract – termination – benefits flowing from contract – employee's right to continue with such benefits – right to benefits ceasing with termination of contract

Zimbabwe Broadcasting Hldgs v *Gono* HH-162-09 (Gowora J) (Judgment delivered 13 January 2010)

The applicant was the respondent's employer. In March 2008, following conciliation through an arbitrator, the dismissal of the respondent from amongst the ranks of the applicant's employees was confirmed. As a result the parties' formal relationship came to an end. At the time, the respondent was in possession of a vehicle belonging to the applicant. The applicant had requested that the respondent, some time before these events, to use her own vehicle for the business of the applicant. In turn, the applicant undertook to have the vehicle serviced and repaired at its own cost. The vehicle required certain repairs and as a result the respondent was given use of the applicant's vehicle on the understanding that it would be returned once hers had been properly repaired. When the relationship was terminated, the respondent's vehicle was still undergoing repair. Some time

thereafter the applicant sent the respondent's vehicle to her with a request that its own be returned. The respondent refused and the applicant launched a vindicatory action for the return of the vehicle.
Held: once an employee has been suspended or dismissed from employment, any benefits extended to such employee from that relationship cease. The respondent's use of the applicant's vehicle was by virtue of her employment with the applicant and her right to retain possession terminated with her dismissal from employment. She had therefore to establish a defence to the claim for the return of the applicant's vehicle. She contended that the applicant was obliged to repair, service and register, in her name, the vehicle she had purchased from the former and which was still in its name. She did not produce a written contract and sought to rely on an alleged oral agreement which the applicant disclaimed. Whatever obligations the applicant assumed under that agreement, those obligations were not tied to the respondent's use of her officially allocated vehicle as a member of staff of the applicant. The obligation by the applicant to service and repair the respondent's vehicle arose from the use by the respondent of her vehicle on the applicant's business and this usage had occurred before she was suspended from duty.

Employment – contract – termination – dismissal – unfair dismissal – employee on fixed term contract – failure to renew contract – what employee must show to establish unfair dismissal

UZ-UCSF Collaborative Research Programme in Women's Health v *Shamuyarira* S-10-10 (Ziyambi JA, Sandura & Garwe JJA concurring) (Judgment delivered 16 February 2010)

An employee engaged on a fixed term contract can claim for wrongful dismissal in the event of the contract not being renewed if he shows that (a) he had a legitimate expectation to be re-engaged *and* (b) another person was engaged in his stead, that is, to do his work. Where the employee has signed a letter of renewal in which he agreed that the renewal would not give rise to a legitimate expectation to be re-employed, he cannot possibly have entertained a legitimate expectation to be re-engaged. Proof that others were engaged in different capacities is insufficient to show that another person was engaged in his stead.

Employment – contract – termination – resignation – a unilateral voluntary act – when resignation takes effect

Jakazi & Anor v *Anglican Church, Province of Central Africa, & Ors* HH-80-10 (Bhunu J) (Judgment delivered 19 May 2010)

See above, under CHURCH (Bishop – resignation).

Employment – Labour Court – jurisdiction – application for declaratory order – Labour Court having no jurisdiction to make such order

UZ-UCSF Collaborative Research Programme in Women's Health v *Shamuyarira* S-10-10 (Ziyambi JA, Sandura & Garwe JJA concurring) (Judgment delivered 16 February 2010)

Before an application can be entertained by the Labour Court, the court must be satisfied that such an application is an application "in terms of [the Labour] Act or any other enactment". This necessarily means that the Act or other enactment must specifically provide for an application, to the Labour Court, of the type that the applicant seeks to bring. There is no provision in the Act (nor in any other enactment) authorizing the Labour Court to issue a declaratory order to the effect that the applicant was unlawfully dismissed. Any such application should be dismissed for want of jurisdiction.

Employment – Labour Court – jurisdiction – dispute between former employer and employee – dispute not arising from contract of employment – Labour Court having no jurisdiction

Medical Invstms Ltd v *Pedzisayi* HH-26-10 (Makarau JP) (Judgment delivered 2 February 2010)

The respondent, who had been employed by the applicant for some 6 years, resigned from her job. During her employment she had been allocated a motor vehicle, which she retained possession of when she left the job. She argued that in terms of the scheme under which she was allocated a vehicle, she was entitled to purchase the car.

The applicant sought the return of the car. The application was opposed on the grounds that the matter was essentially a labour dispute in respect of which the High Court did not have jurisdiction.

Held: the Labour Court has jurisdiction in all matters where the cause of action and the remedy for that cause of action are all provided for in the Labour Act [*Chapter 28:01*]. Where the cause of action and the remedy are at common law, the jurisdiction of the High Court is not ousted. The applicant and the respondent were no longer employer and employee respectively. The dispute between the parties centred on the possession of the applicant's motor vehicle to which the respondent was claiming a right. While the respondent's claim of right to the motor car arose from her terminated contract of employment with the applicant, this did not mean that there was a labour dispute between the parties that could find a remedy or resolution in terms of the Act. The resolution of the dispute between the parties was not entwined with the resolution of the contract of employment. Where the validity of the suspension of the employee or the termination of employment is still pending, the *rei vindicatio* cannot properly lie at the instance of the employer. However, where the status of the former employee is without dispute, the *rei vindicatio* can lie at the instance of the employer in appropriate cases and the matter thereby falls outside the purview of the Labour Court, as it is not a matter that can be heard or determined in terms of the Labour Act or any other related enactment.

Employment – Labour Court – jurisdiction – dispute between former employer and employee – unresolved dispute about lawfulness of termination of contract of employment – employee holding employer's property – employer seeking return of property – High Court having no jurisdiction to determine issue

DHL Intl (Pvt) Ltd v *Madzikanda* HH-51-10 (Makarau JP) (Judgment delivered 17 March 2010)

Generally, the Labour Court has no jurisdiction to entertain claims that are brought at common law. It can only determine applications and appeals among others that are brought in terms of the Labour Act. Where, however, a dispute can either found a cause of action at common law and or in terms of the Act, a case of apparent concurrent jurisdiction between the High Court and the Labour Court appears to arise, but the apparent conflict can be easily resolved by paying regard to the overall intention of the legislature in creating the Labour Court. In such a case, the Labour Court's jurisdiction, being special, must prevail. It would make a mockery of the clear intention of the legislature to create a special court is the jurisdiction of such a court could be defeated by the mere framing of disputes into common law cause of action where the Act has made specific provisions for the same. If the dispute is provided for in the Act, the Labour Court has exclusive jurisdiction even if the dispute is also resolvable at common law.

There appears to be a general misconception amongst employers that one can easily avoid the jurisdiction of the Labour Court by seeking to recover property in the possession of an employee without first exhaustively dealing with the termination of the employment of that employee. The Labour Court has exclusive jurisdiction in matters relating to suspensions form employment and termination of employment. The possession of the employer's property by an employee in terms of the contract of employment is so interdependently linked to the contract that one cannot decide on one without deciding on the other. In the result, because the Labour Court has exclusive jurisdiction over the one, it follows that it also has exclusive jurisdiction over the other. The conditions of service of an employee are simply the terms upon which that employee is employed and to try and separate the contract from its terms is legally untenable and, in any event, highly undesirable.

Vindication is a remedy that is available to an owner against the world at large. By reason of his rights of ownership, an owner is competent at law to demand possession of his property from anyone who cannot invoke a right against him to keep the property. To succeed in such an action, one must allege and prove that one is the owner of the property in question and that the defendant is in possession of it. The right of the owner to possess his property is not absolute, however, and may be subject to some other right that the possessor may have against the owner. Thus, where the defendant held the plaintiff's property in terms of a contract of employment, and the lawfulness of the termination of the contract of employment is in dispute, the defendant would have successfully discharged the onus on him to prove the right to possess the property against the plaintiff, pending the determination of the dispute.

Employment – trade union – trade union registered for particular sector – whether employees entitled to join another trade union – whether employer obliged to deduct union dues for union not registered for that sector

Zimbabwe Banking & Allied Workers' Union & Ors v *Beverley Bldg Soc & Ors* S-3-10 (Malaba DCJ, Sandura & Cheda JJA concurring) (Judgment delivered 11 May 2010)

The first appellant, a trade union, was registered in February 1991 to cover banking institutions. In March 1999 it entered into a collective bargaining agreement with the Banking Employers Association under the auspices of the relevant employment council. The collective agreement provided for the use of a "check-off" scheme whereby employers in the industry, with the consent of their employees who are members of the first appellant, deduct union dues from the employees' remuneration and pay them to the first appellant. Section 1 of the collective agreement provided that it is binding on "all employers and employees in the undertaking who are members of the employers' organisation or the trade union respectively". The second respondent, another trade union, was registered to represent the interests of members employed in the commercial sector. In 1993 it entered into a collective bargaining agreement for the commercial sector. The agreement also contained a provision for the use of a "check-off" scheme. The first respondent, a building society, belonged to the commercial sector and was a member of the employers' association for that industry. In 2004, the second appellant, the workers' committee for the building society, informed the building society that most of the society's employees had withdrawn from the commercial trade union and joined the banking trade union. It demanded that the society should use the check-off system to pay to the banking union the dues deducted from the employees. The building society rejected the demand on the ground that, as it belonged to the commercial sector, it was under no obligation to deduct money from its employees' remuneration and pay it to a trade union not registered for that industry even if the employees had become members of the trade union concerned.
The appellants sought an order from the High Court to compel the building society to pay the dues to the first appellant. It was argued that the building society carried on the business of financial institutions and thus should belong to the banking industry for which the first appellant is registered. The refusal by the society to deduct union dues from the remuneration of employees who were members of the first appellant and pay the money to it was a violation of the fundamental right of the employees to join a trade union of their own choice. It was also argued that under s 54(1) of the Labour Act [*Chapter 28:01*] the banking union was entitled to demand that the building society respect the check-off scheme and deduct the contributions from the remuneration of its employees who are its members and pay them to it.
The respondents argued that the building society was not a banking institution and did not belong to the banking industry. Although the building society respected the rights of the employees to belong to whatever trade union they chose, the exercise of the right given to a registered trade union to levy and collect union dues was qualified by the requirements under the provisions of s 52(1) and s 54(1) of the Act. Section 52(1) restricted the exercise of the right to collect union dues from members employed in the industry or undertaking for which the trade union is registered.
The High Court rejected the application. On appeal, held:
(1) The building society did not belong to the banking industry or undertaking. The banking industry comprises banking institutions, which are companies registered in terms of the Banking Act [*Chapter 24:20*]. The business ordinarily carried on by financial institutions falls within the banking industry or undertaking when it is carried on by the registered bank itself or a subsidiary of such a bank. The carrying on of the business ordinarily carried on by a financial institution would not justify the inclusion of building societies in the banking industry. The core business of the building society is not carried on by registered banks or subsidiaries of such banks. The intention in defining banking institutions under s 3 of the Banking Act to exclude building societies is to keep the two kinds of institutions as separate undertakings or industries.
(2) The refusal by the building society to act in accordance with the demands made by the appellants was not a violation of the fundamental right of its employees to join a trade union of their choice. That right is a personal right, the exercise of which depends on the free will of the individual employee. Upon registration a trade union becomes a legal entity separate from its members, with its own rights and obligations which it can exercise and discharge. Under s 29(4)(h) of the Labour Act, a registered trade union is given the right to levy and collect "union dues" provided it complies with the requirements prescribed by s 52(1) as read with s 54(1) of the Act. The exercise of the right of freedom of association does not impose an obligation on the employer to deduct union dues from its employees who have joined a trade union and pay the money to the union without proof of the existence of the further factor, prescribed by the Act, that the trade union is registered for the undertaking or industry to which the employer belongs.
(3) The words "the trade union concerned" used in s 54(1) of the Act are not capable of two meanings. When a noun is used with the word "concerned" following it, the phrase is intended to refer to the subject forming the substance of the enactment which has been specifically identified earlier in the same section or in preceding sections, in order to avoid repetitive mention of the subject or object by its specific designation each time the need to refer to it arises. Here, the words refer to a registered trade union capable of claiming the rights the first appellant claimed against the employer in the position of the first respondent. A trade union is registered by its

founders for a particular undertaking or industry for the specific purpose of representing the interests of members employed in that undertaking or industry. Registration of a trade union in terms of s 36(1) of the Act is not a matter of mere formality. It is a matter of substance. It identifies the employees whose interest the trade union is under the obligation to represent in the collective bargaining process in its own right or in the capacity of an "agent union" in terms of s 31 of the Act. It provides the basis on which all the rights specified under s 29(4) of the Act are conferred on the "trade union concerned." One of the rights conferred on a registered trade union under s 29(4) of the Act is the right to levy and collect union dues. Section 52(1) makes it clear that "union dues" can be levied and collected by a registered trade union from members who are employed or engaged in the undertaking or industry for which it is registered for the purpose of using the money to fulfil its obligations to represent the members in that undertaking or industry. Section 54(1) requires that "union dues" be collected by an employer from his employees and transferred to "the trade union concerned". The ordinary and natural meaning of the words "the trade union concerned" as used in s 54(1) is the registered trade union concerned with the matters of the exercise of the rights and the performance of the duties relating to the levying and collection of union dues for the particular purpose of representing members employed in the undertaking or industry for which it is registered. Since s 52(1) gives the right to a registered trade union to levy and collect "union dues" as defined in s 2 for that specific purpose, as long as its registration remains valid, a trade union not registered for the undertaking or industry in which its members are employed has no right to demand that an employer should deduct money from the remuneration of his employees who are its members and pay the amounts to it.

Decision of Patel J in *Zimbabwe Banking & Allied Workers Union & Anor* v *Beverley Bldg Soc & Ors* 2007 (2) ZLR 117 (H) upheld.

Evidence – conspiracy – evidence of acts in connection with conspiracy – may be led before conspiracy itself proved

S v *Bennett (2)* HH-33-10 (Bhunu J) (Judgment delivered 5 February 2010)

See above, under CRIMINAL PROCEDURE (Evidence – conspiracy).

Evidence – hearsay evidence – admissibility in civil cases – application proceedings – when hearsay evidence admissible – need for source of information to be disclosed

Church of Province of Central Africa v *Jakazi & Ors (1)* HH-70-10 (Uchena J) (Judgment delivered 16 April 2010)

The applicant and first respondent had, in October 2009, agreed to a consent order being made regulating the control of church assets, including two stands in Mutare. In March 2010 the applicant's Registrar received a call from "a member of the public" who inquired from him whether the purchase price of the stands was negotiable. An affidavit to this effect was filed by the Registrar, but not by the person making the inquiry. The applicant brought an urgent application to stop the first respondent from disposing of the two stands. The applicant submitted that the case was urgent, as the stands were in the process of being sold, as was demonstrated by the inquiry from the member of the public.
Held: The application's urgency depended on the admissibility of evidence of the inquiry. Although first hand hearsay is admissible in terms of s 27 of the Civil Evidence Act [*Chapter 8:01*], the section is not applicable to cases where the hearsay evidence is tendered in application proceedings. It applies to first hand hearsay evidence in action proceedings. However, hearsay evidence is made admissible in urgent interlocutory cases by s 56 of the Act, provided that the source of the information is disclosed. *In casu*, the source was not disclosed; he was merely referred to as a member of the public. There was no evidence that the caller had recently received information about the stands being on sale and thus no proof of an imminent sale of the stands so to justify the hearing of the application on an urgent basis.

Family law – child – custody – award of – best interests of child – factors to be considered in determining what is in best interests of child

Mtengwa v *Mtengwa* HH-78-10 (Musakwa J) (Judgment delivered 13 May 2010)

The primary consideration in a custody dispute is what is the best interests of the child. In determining what is in the best interests of the child, the court must decide which of the parents is better able to promote and ensure the child's physical, moral, emotional and spiritual welfare. This can be assessed by reference to the following criteria. These are not set out in order of importance, and also there is a measure of unavoidable overlapping. Some of the criteria may differ only as to nuance. The criteria are the following: (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child; (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires; (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings; (d) the capacity and disposition of the parent to give the child the guidance which he requires; (e) the ability of the parent to provide for the basic physical needs of the child, the so-called "creature comforts", such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security; (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular; (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development; (h) the mental and physical health and moral fitness of the parent; (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo; (j) the desirability or otherwise of keeping siblings together; (k) the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration; (l) the desirability or otherwise of applying the doctrine of same sex matching; and (m) any other factor which is relevant to the particular case.

Family law – child – guardianship – application – mother applying for guardianship – father still alive – need to give notice of application to father – children's court – application to for guardianship of child – when court has jurisdiction to hear such application

Ex p *Ndoro* HH-119-10 (Uchena J) (Judgment delivered 17 June 2010)

The applicant, who was separated from her husband, applied to the children's court for the guardianship of the minor child of the marriage. The father of the child was not notified of the application. The court granted the application. On the review by the High Court:
Held: (1) under s 3 of the Guardianship of Minors Act [*Chapter 5:08*], during the subsistence of the marriage, and after divorce or separation but before the High Court or a judge has granted the sole guardianship to either of them, the father remained the minor's guardian. The applicant's application sought to take that guardianship from him. Doing so without notifying him offends against the *audi alteram partem* rule.
(2) The children's court in any event had no jurisdiction to grant guardianship to the child's mother. In terms of s 9 of the Act, that court can hear applications for guardianship by relatives, other persons having care and custody of the minor, or a probation officer, but only if the minor has no natural guardian or tutor testamentary. Where one of the minor's natural parents is alive, only the High Court can hear an application for guardianship.

Family law – child – guardianship – need for guardian to assist child in juristic acts – passport – right of child to a freedom of movement and thus to a passport – issue of passport not a juristic act requiring assistance of guardian

Dongo v *Registrar-General & Anor* S-6-10 (Makarau AJA, Chidyausiku CJ, Ziyambi & Garwe JJA & Gowora AJA concurring) (Judgment delivered 3 June 2010)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 22 – freedom of movement).

Family law – husband and wife – domestic violence – protection order under Domestic Violence Act [*Chapter 5:16*] – purpose of – courses open to party objecting to terms of order granted against him

Sibanda v *Sibanda & Anor* HB-16-10 (Ndou J) (Judgment delivered 15 April 2010)

The applicant and the first respondent were husband and wife. They were separated. The separation was an acrimonious one. The first respondent instituted proceedings against the applicant under s 11 of the Domestic Violence Act [*Chapter 5:16*]. She sought a provisional protection order against him. An interim protection order

was granted and subsequently confirmed. In addition, the magistrate granted an emergency monetary relief in favour of the first respondent against the applicant. The applicant noted an appeal against the confirmation of the protection order and the granting of the emergency monetary relief. In spite of the noting of the appeal, the clerk of court issued a directive against the applicant's salary. The applicant sought to have this directive reviewed and, simultaneously filed an application to stay the directive. The main complaint by the applicant in these two applications is that he was not notified of the directive before it was issued. The applicant based his application for review on failure to comply with the provisions of s 9(2) and (3) of the Maintenance Act [*Chapter 5:09*].
Held: the applicant did not seek revocation in terms of s 12 of the Domestic Violence Act, but chose to approach the court for review of the clerk of court's act. The purpose of the Act is to provide relief to victims on an interim basis whilst the other competent courts are still determining the main issues. In cases of divorce, the complainant party must be protected against violence. The complainant and the children must be maintained in the interim period. Children cannot wait for determination of the divorce or maintenance between their parents without provision for their maintenance. The Act provides instant relief orders to cater for this interim period. To allow suspension of such orders pending the determination of the main matter would defeat the purpose of the Act and the court should guard against abuse of its process to defeat the protective measures enshrined in the Act.

Interest – *in duplum* rule – applicability – delays caused by justice delivery system – effect of – not a reason to waive or vary *in duplum* rule

Produtrade (Pvt) Ltd v *Continental Bakeries (Pvt) Ltd & Anor* HH-29-10 (Chatukuta J) (Judgment delivered 17 February 2010)

The first respondent bought a consignment of flour from the applicant but did not pay for it by the due date, 4 February 2005. Summons was issued in April 2005, claiming the sum due plus interest from 4 February 2005. An application for summary judgment made in May 2005. The application was granted in July 2006 although the order did not state from what date interest was to run.
The respondents noted an appeal, but in March 2007 tendered a sum which represented the money due, plus interest. The appeal was then withdrawn. The applicant accepted the sum tendered but without prejudice, reserving their right to claim interest on the sum tendered. In November 2007 the applicant filed the present application, seeking payment of interest due on the capital sum from 4 February 2005 until the date of payment. The applicants argued that the order sought was to correct an ambiguity or omission in the order granted in July 2006. It also argued that the *in duplum* rule should not apply because proceedings had already been instituted and the delay was attributable to the justice delivery system.
Held: (1) the effect of the relief sought by the applicant was a correction of the order granted in July 2006, where the question of interest was indeed determined and an order was granted. However, there was an omission as to the date when interest was to commence running, so the order was incomplete and inoperative. The matter could therefore be determined in terms of r 449 (1)(b) of the High Court Rules.
(2) The basic principle is that upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which the cause of action was instituted. The debtor is equally not in control of the process by which interest accumulates, so the respondent could not be held accountable for the delays caused by the legal system. It therefore should not be penalised for enforcing its own rights to defend an action, particularly in such a case where there is a divergence of views on the application of the *in duplum* rule. It would not be in the public interest to penalise the debtor. There were no grounds for not applying the *in duplum* rule in this case.

International law – treaties – how state party to treaty may be bound by treaty – SADC Treaty – Zimbabwe bound by Treaty and amendment thereto – SADC Tribunal established under Protocol to Treaty – judgment of Tribunal – registration and enforcement thereof – not enforceable if contrary to public policy – meaning of public policy – contrary to public policy to violate international obligations – effect of judgment contrary to Constitution of Zimbabwe and undermining authority of Supreme Court – practical consequences of compliance – must also be considered

Gramara (Pvt) Ltd & Anor v *Govt of Zimbabwe & Ors* HH-169-09 (Patel J) (Judgment delivered 26 January 2010)

The applicants were among the successful parties in a in a matter that was adjudicated by the SADC Tribunal, arising out of the appropriation of their farm by the Government. They sought to register the Tribunal's decision for the purposes of its enforcement in Zimbabwe. The respondents argued that in terms of Article 22 of the SADC Treaty, before its amendment, the Protocol of the Tribunal required ratification by a member state in order for that state to be bound by it. Since Zimbabwe has not ratified the Protocol, it was not bound by it and was not subject to the jurisdiction of the Tribunal.

Held: (1) The overall effect of the relevant provisions of the SADC Treaty and Protocol of the Tribunal is that the decisions of the Tribunal are binding and enforceable within the territories of Member States, which are under an obligation to take the measures necessary for the execution of those decisions. Such enforcement is governed by the rules of civil procedure for the registration and enforcement of foreign judgments which are in force in the territory of the particular State in which the particular judgment is to be enforced.

(2) Zimbabwe has not taken any specific internal measures to domesticate the SADC Treaty or the Protocol of the Tribunal or to transform its obligations into effectual provisions of the municipal law. However, a State cannot invoke its own domestic deficiencies in order to avoid or evade its international obligations or as a defence to its failure to comply with those obligations. The fundamental tenet of international law is that *pacta sunt servanda*, that is, that every party to a treaty is required to perform its obligations in good faith and may not invoke the provisions of its internal law, including its constitution, as justification for its failure to perform the treaty. But it does not follow that the primacy of treaty obligations at international law must necessarily and invariably be taken into account in applying domestic law at the municipal level, even where there is a clear conflict between the two regimes. Any divergence between the two systems is reconciled on the basis that the State incurs international responsibility for having violated its international obligations and must accordingly effect the requisite reparations in order to satisfy its international responsibility.

(3) Under s 3 of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*], the judgments of any international tribunal designated under the Act may be registered. The SADC Tribunal has not been registered under the Act, but under the common law, although a foreign judgment is not directly enforceable, it constitutes a cause of action and will be enforced by our courts provided, *inter alia*, (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence") (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means. Provided that the judgment in question has been duly delivered by a court of recognised international competence and jurisdiction, it would be contrary to principle to restrict the scope of recognition proceedings by reference to the specific remedies enjoined by a given foreign judgment.

(4) State parties to a treaty are at liberty to agree on the conclusion of a treaty by means other than the traditionally accepted procedure of signature followed by ratification or accession. It is therefore perfectly possible for a treaty or an amendment of the treaty to be adopted and enter into force for all the adopting States instantly, without further ratification or any other formality, if that is the means of adhesion agreed to by those States. In the case of the SADC Treaty, ratification by two-thirds of the signatory States was a pre-requisite for the entry into force of the Treaty itself. However, amendments to the Treaty are governed by an entirely different procedure: a decision of three-quarters of all the members of the Summit of the Heads of State or Government of SADC. A decision of the Summit to adopt an amendment is binding on all member states. The amendment becomes operative immediately thereafter and there is no need for any further ratification by member states in order to bring the amendment into force and effect. The Protocol of the Tribunal constituted an integral part of the Treaty and became binding on all member states without the need for its further ratification by them. It also follows that Zimbabwe thereupon became subject to the jurisdiction of the Tribunal and that the jurisdictional competence of the Tribunal in this case could not now be disputed. It would be legally unsustainable to espouse a major facet of the amended SADC regime and to simultaneously eschew those features of the same regime that are deemed to be politically inexpedient and unpalatable.

(5) Public policy must be considered not only in the confines of the domestic sphere but also in the regional and international context. In principle, it would generally be contrary to public policy for any state to violate its international obligations within the domestic realm. Because Zimbabwe is bound by the decisions of the SADC Tribunal at international law, by dint of its treaty obligations as well as international custom, it would be inconsistent with the public policy of Zimbabwe not to recognise and enforce any decision of the Tribunal at the municipal level, except insofar as that decision conflicts with statute or prior judicial precedent. Further, by adhering to the SADC Treaty as well as the Amendment Agreement and, therefore, by submitting to the jurisdiction of the Tribunal, the Government of Zimbabwe created an enforceable legitimate expectation, both within and beyond the borders of Zimbabwe, that it would comply with the requirements of the Treaty and

abide by the decisions of the Tribunal. However, this general rule is subject to a consideration of the facts of each individual case and the legal and practical consequences of recognising and enforcing the Tribunal's decision in that particular case in Zimbabwe.
(6) An indirect consequence of the Tribunal's judgment would be to impugn the legality of the land reform programme sanctioned by the Supreme Court. The potential conflict between the two decisions was actualized *in casu* because the effect of registering the Tribunal's judgment in Zimbabwe would be to challenge the decision of the Supreme Court within its jurisdictional domain and thereby undermine the authority of that Court in Zimbabwe. Further, if the Tribunal's judgment were to be registered and subsequently voluntarily complied with or enforced by court orders, the Government would be required to contravene and disregard what Parliament has specifically enacted in s 16B of the Constitution in respect of compensation for appropriated farms. Any feature of the judgment that conflicts with the Constitution could not, as a matter of public policy, be recognised or enforced in Zimbabwe. The notion of public policy cannot be deployed under cover of the common law to circumvent or subvert the fundamental law of the land. It would be patently contrary to the public policy of any country, including Zimbabwe, to require its government to act in a manner that is manifestly incompatible with what is constitutionally ordained.
(7) The enforcement of the decision would ultimately necessitate the Government having to reverse all the land acquisitions that have taken place since 2000. Apart from the political enormity of any such exercise, it would entail the eviction, upheaval and eventual relocation of many if not most of the beneficiaries of the land reform programme. This programme, despite its administrative and practical shortcomings, is quintessentially a matter of public policy. While the applicants were absolutely correct in expecting the Government of Zimbabwe to comply with its obligations under the SADC Treaty and to implement the decisions of the Tribunal, there was an incomparably greater number of Zimbabweans who shared the legitimate expectation that the Government would effectively implement the land reform programme and fulfil their aspirations thereunder. Given these countervailing expectations, public policy as informed by basic utilitarian precept would dictate that the greater public good must prevail.

Note: The SADC Tribunal judgment referred to was *Mike Campbell (Pvt) Ltd & Ors* v *Republic of Zimbabwe* SADC 2/07, summarised in Recent Cases 2008 (2).

Interpretation of statutes – "Golden rule" – when "may" should be construed as "must" – principles

Diocesan Trustees, Diocese of Harare v *Church of the Province of Central Africa* S-9-10 (Malaba DCJ, in chambers) (Judgment delivered 3 May 2010)

See above, under APPEAL (Dismissal of – failure to provide security for costs).

Landlord and tenant – tenant – statutory tenant– grounds for ejectment – allegation that lessor requires premises for own use – lessor requiring premises for use by a wholly-owned subsidiary company – not for "own use" of lessor

Old Mutual Life Assurance Co Ltd v *Raftopoulos* HH-102-10 (Mtshiya J) (Judgment delivered 23 June 2010)

The plaintiff sought the eviction of the defendant from premises that the defendant was leasing from the plaintiff. The plaintiff claimed that it wanted the premises for use by one of its wholly-owned subsidiary companies; the defendant disputed this, arguing that the real reason why the plaintiff was seeking his eviction was that he had refused to pay rent in foreign currency, that being illegal at the time.
Held: the lessor was the plaintiff. Irrespective of any relationship, the subsidiary company could not, in these proceedings, be defined as the lessor. The Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) are meant to define the relationship between the lessor and the lessee. Accordingly, when the lessor declares that it needs the leased premises for its "own use", it is logical that the lessee would understand that to mean "own use" by the lessor to whom rent is payable. The lessor cannot repossess the premises for the purpose of "leasing the premises to some other person". The plaintiff having conceded that the subsidiary company was a separate legal entity that would also be required to pay rent for the premises as a lessee, it was clearly established that the plaintiff wanted to lease the premises to another person – a third party.

Legal practitioner – admission – qualification – residence in Zimbabwe – practitioner ceasing to be resident – deletion from register of practitioners – at whose instance practitioner may be deleted from register – Legal Practitioners Act [*Chapter 27:07*] – ss 5 & 6

Legal practitioner – conduct and ethics – practitioners acting for party in litigation – should not enter into correspondence with presiding judge – correct method of corresponding with the court

Legal practitioner – practising certificate – issue of – Law Society's exclusive right to issue certificate – allegation that certificate improperly issued – need to bring law Society's decision on review

Sahawi Intl (Pty) Ltd & Anor v *Bredenkamp & Anor* HH-24-10 (Makarau JP) (Judgment delivered 2 February 2010)

The defendants' counsel had been admitted as a legal practitioner in 1981 (having previously practised as an advocate, before the re-organisation of the profession) but had moved to Cape Town in 2003. The plaintiffs' legal practitioners complained that he had been issued a practising certificate on the basis of a misrepresentation that he was a partner in a law firm in Harare. They also claimed that he no longer satisfied the residence requirements stipulated in s 5 of the Legal Practitioners Act [*Chapter 27.07*]. They argued that he should not have been issued by the Law Society with a practising certificate unless he was in possession of a residence exemption certificate issued to him by the Minister of Justice. They contended that the loss of normal residency in Zimbabwe by the defendants' counsel meant that he automatically lost his right of audience before the courts in Zimbabwe. They contended that any person can approach the courts for an order denying him such right. In making the complaint, the plaintiff's legal practitioners wrote to the Law Society and to the Minister, with copies being sent to the presiding judge.
Held: (1) It is a trite rule of professional ethics that the parties to litigation do not enter into any correspondence with the presiding judge. All correspondence to and from the court should be through the office of the Registrar. While the plaintiffs had every right to write to the Minister in connection with the matter, the fact that such a letter was copied to the presiding judge acted as an open invitation to the Minister to enter into direct correspondence with the court. Although the Minister correctly addressed his comments to the Registrar and not directly to the judge, the contents of the letter, which were meant for the judge's attention, ought to have been placed before the court in the form of an affidavit and not an unsworn statement. The letter gave an opinion on the applicable law and the interpretation to be placed on that law.
(2) The issuance of practising certificates is a matter that is in the exclusive administrative domain of the Law Society. Where the Society has acted irregularly in issuing a certificate, the court can play the role of oversight that it plays with regards to all inferior courts and other quasi-judicial tribunals. The plaintiffs were challenging the validity of that certificate, alleging that that it had been issued at best erroneously and, at worst, fraudulently. Despite such knowledge, no formal application was filed to have the practising certificate struck down. The correct manner to approach the court to set aside the decision of the Law Society to issue the defendants' counsel with a practising certificate was clearly by way of review.
(3) The defendants' counsel, being then resident in Zimbabwe, had been properly admitted as a legal practitioner in terms of s 5 of the Act. However, in terms of s 6 of the Act, when a legal practitioner ceases to be ordinarily resident in Zimbabwe or a reciprocating country and has not been issued with a residence exemption certificate, he may be deleted from the register of practitioners. Such de-registration can be at the instance of the practitioner himself or of the Law Society. As the plaintiffs did not seek such de-registration, it was not necessary to decide their *locus standi* to bring an application in terms of s 6 (2) of the Act or at common law for de-registration.
(4) Practising certificates are issued on an annual basis. The certificate issued to the defendants' counsel had lapsed by effluxion of time and could not be used to enforce a right of audience. It was therefore unnecessary to decide whether to condone a departure from the rules of court in order to convert the issues into a review.

Legal practitioner – conduct and ethics – drafting of pleadings, affidavits etc – taking of instructions from client – need to convert imprecise language used by lay persons into precise legal language

Jirira v *Zimcor Trustees Ltd & Anor* HH-98-10 (Makarau JP) (Judgment delivered 9 June 2010)

Litigants, unless they have been legally trained, do not frame their instructions to legal practitioners in legal terms. They are not expected to. They do not instruct their legal practitioners using terms that have any legal import. They invariably tell their stories using language that they are familiar with and language which they use every day. Some are good story tellers, some are not. It should not matter how the story is told: it is the duty of the legal practitioner to then reduce such instructions or stories into questions that demand legal answers and to draft their clients' pleadings or applications and affidavits accordingly. It is the duty of the legal practitioner to

screen, from the story told them by their clients, the legal issues arising and then to plead such with precision and in accordance with the law. To simply repeat the entire story as told by the client and using the imprecise language that lay people use may amount to incompetence on the part of the legal practitioner.

Legal practitioner – conduct and ethics – duty to court – legal practitioner having done acts which would buttress his clients case – likelihood of practitioner being called as witness to explain such actions – such partisan conduct inconsistent with duty to court – practitioner should not act for party in litigation

Central African Building Construction Co (Pvt) Ltd v *Construction Resources Africa (Pvt) Ltd* HH-112-10 (Gowora J) (Judgment delivered 30 June 2010)

One of the issues raised by the defendant's legal practitioner was that of just who were the directors and shareholders of the plaintiff company and whether the person who purported to represent the plaintiff had transferred his shares and directorship to the defendant or its representatives. The plaintiff's legal practitioner had, before the trial, been issued a proxy by that person, and on the basis thereof called a meeting of shareholders attended only by himself and at which a resolution was issued by himself appointing himself as director of the plaintiff. Following that appointment the legal practitioner, in the capacity of chairman of the directors' meeting, then issued a resolution which sought to ratify the institution of the proceedings before the court.
Held: (1) A legal practitioner's duty is to protect the interests of his client and to give legal advice. It is not his function to step into the shoes of the client and perform, on behalf of his client, acts that are materially related to the dispute before the court in an endeavour to buttress his client's case. To do so is especially reprehensible when the question of the plaintiff's authority to institute the current proceedings had been raised with him and he was aware that this alone could damage the success of the plaintiff's claim. Notwithstanding this fact and his legal knowledge, and, more importantly, his duty to the court, he had held a meeting attended only by himself as director of the company, at which he issued a resolution in terms of which his actions as a legal practitioner in instituting the proceedings were ratified by himself. In addition to this, a resolution passed by him under the guise of director of the plaintiff sought to nullify the appointment of defendant's nominees as directors. Even if the appointment had been irregular, it would be serious misconduct for a legal practitioner to then don his client's mantle and rectify the irregularity by nullifying the appointment.
(2) In circumstances where the actions of a legal practitioner may be such that he may be called as a witness as might happen *in casu*, it would be undesirable and indeed not in the interests of justice, if that legal practitioner were allowed to act for a party to the dispute. A legal practitioner should at all times retain his independence in relation to his client and the litigation which is being conducted. If he is to give important evidence in circumstances where his credibility may be called into question, his independence as a professional adviser to his client in the matter may be affected. If he is to testify as a witness, he acquires an interest in the matter which may make it difficult for him to discharge his professional duty to his client, and to this must be added the fact that his impartiality may be suspect due to his being a legal practitioner for one of the parties to the dispute. In assuming the mantle of his clients and accepting the proxies by which he then held meetings and passed resolutions that had a direct bearing on matters in hand, the practitioner clearly showed a partisanship with the plaintiff's case in a manner that was incompatible with his duty to the court. If he were called to give evidence this would be irregular indeed, as a legal practitioner is instructed to advise his client, and he cannot be a legal adviser and a witness. He can only assume one role not both.

Legal practitioner – fees – calculation of – reliance on Law Society's tariff – not permissible to use current tariff to calculate fees earned before such tariff came into operation – effect of demonetization of local currency and adoption of US currency as *de facto* currency

In re *Est Matimura* HH-12-10 (Bere J) (Judgment delivered 18 January 2010)

See above, under COSTS (Taxation – fees charged by legal practitioner).

Local government – mayor – election of – election by council – not competent for council to rescind election – circumstances in which council may elect a new mayor

Madamombe v *Bindura Municipal Council & Ors* HH-161-09 (Gowora J) (Judgment delivered 13 January 2010)

The applicant was one of the councillors elected to a municipal council at a general election. When the council first met, he was elected mayor. Two months later, a meeting of the council was called at which a motion was presented for the rescission of the applicant's election as mayor. The motion was passed and another councillor was elected as mayor. The applicant sought an order declaring that the council's decision was void and that he remained the mayor.

Held: in terms of s 103 of the Urban Councils Act [*Chapter 29:15*], where an election has taken place after a meeting of the council, a mayor or his deputy shall hold office until the appointment of a successor. A successor is only appointed if an election is held following a vacancy in the office of the mayor or his deputy, such vacancy having arisen either through resignation or by virtue of the operation of s 78 of the Act. In terms of s 78 the office becomes vacant if a councillor resigns, ceases to be qualified for election as councillor, is absent without leave of council from ordinary meetings of council during a consecutive period of two months, or from meetings of committees to which the councillor has been appointed for a consecutive period of two months, or is absent from ordinary council meetings for a period of six calendar months whether or not leave has been obtained, ceases to be a councillor in terms of s 22 of the Provincial Administration Act [*Chapter 29:11*], or has been suspended in terms of s 114 for a period in excess of thirty days, in which case his seat in council becomes vacant by operation of law. The Act does not provide for the vacation of the seat of a mayor or his deputy except in those situations. An election to fill the seat is only held if a vacancy arises from those situations. Since the position of mayor is a creation of statute, the election can only be changed in terms of the statute and the removal from office of a person from the position can only be effected under the provisions of the Act that created the position. Once a mayor ceases to hold office the respective council can then exercise its powers under the Act and elect a successor as provided for in s 103 (1) and (2). The Act has not provided for the passing of a resolution to remove the mayor from office and any resolution purporting to have that effect, in the absence of a statutory provision providing for the same, is clearly illegal and unprocedural. There is no provision for council to pass a resolution to remove the mayor who has been duly elected from office except under the provisions of s 103. While s 89 of the Act does provide for the rescission or alteration of a resolution passed by council at a subsequent meeting to that wherein the resolution being sought to be rescinded was passed, the section is not intended to apply to the election and vacation of office by an elected mayor, which position is specifically provided for under s 103.

Police – discipline – trial for offences under Police Act [*Chapter 11:10*] – trial by single officer – proceedings not subject to automatic review by High Court – when proceedings may be reviewed by High Court – court's power to interfere with proceedings – need for court to have record of proceedings – effect of conviction by single officer on subsequent proceedings in magistrates court

Chilufya v *Commissioner of Police & Ors* HH-89-10 (Uchena J) (Judgment delivered 21 May 2010)

The applicant, a non-commissioned officer in the police, was tried by a single officer on a charge relating to corruption and sentenced to 12 days' imprisonment. He appealed to the Commissioner of Police in terms of s 34(7) of the Police Act [*Chapter 11:10*] but his appeal was dismissed. He brought an application to the High Court for review of the proceedings. He alleged that the officer who tried him did not warn himself of the dangers of convicting on the evidence of accomplices or warn the accomplices before they testified. He also complained of "double jeopardy", as he was facing charges in the magistrates court arising out of the same conduct.

Held: (1) in terms of s 35(1) of the Act, the trial officer must as nearly as is possible comply with the rules of evidence and procedure as is done in the criminal courts. Where the officer significantly departs from those rules the proceedings may be set aside on review. The test applied in review proceedings is whether or not the proceedings are in accordance with real and substantial justice. A stay of sentence must only be granted if the record shows prospects of success, which can only be properly assessed from the totality of the proceedings. In this case the applicant had not placed the record of proceedings before the court. This made it impossible for the court to assess the applicant's prospects of success on review, as the standard of assessment on review must comply with the proviso to s 34(3) of the Act, which provides that no conviction or sentence shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the Commissioner, or the court on review, considers that a miscarriage of justice has actually occurred.

(2) The applicant had no right of automatic review by the High Court, as, in terms of s 31(1) of the Act, automatic review only applies to sentences imposed by a board of officers and exceeding level three or imprisonment exceeding one month. The case could therefore only be reviewed by the court if an application for review was filed, or if the matter was reviewable in terms of s 29 (4) of the High Court Act [*Chapter 7:06*]. The procedure under s 29(4) was, however, not applicable *in casu*, because the applicant claimed to have filed an

application for review. His legal practitioners must be allowed to represent him and seek justice for him. The courts should not be seen to be championing the cause of a legally represented applicant.
(3) The applicant could raise his conviction and sentence as a mitigating factor if convicted in the magistrate's court. A trial and conviction in terms of s 34(1) is, in terms of s 34(9), not regarded as a conviction in terms of any other law. It is regarded as a disciplinary action.

Practice and procedure – application – urgent application – certificate of urgency – who may sign such a certificate – no requirement that must be signed by legal practitioner from a firm other than applicant's legal practitioner's firm

Route Toute BV & Ors v *Sunspun Bananas (Pvt) Ltd & Anor* HH-27-10 (Chatukuta J) (Judgment delivered 2 February 2010)

The applicants were the owner of a farm which had been compulsorily acquired by the State in 2005. The second respondent had been allocated the farm and proceeded to move onto it. The applicants obtained a spoliation order in 2006, which order was confirmed in 2009. The order confirmed the applicants' right to continue occupying the farm until a valid notice of eviction was issued as well as their right to all plantations crops, crops and movable property on the farm until those were acquired in accordance with the law. In spite of the order, agents of the second respondent moved onto the farm. A further spoliation order was acquired. In spite of the spoliation orders, the second respondent harvested crops that were grown on the farm and sold them to the first respondent. When the first respondent became aware of the dispute, it stopped taking crops from the farm. The proceeds of the crops delivered were deposited in a lawyer's trust account. The applicants sought an order preventing the second respondent from taking any more of the applicants' crops and delivering it to the first respondent or anyone else, and to prevent the sum deposited in trust from being delivered to the second respondent.
The second respondent *in limine* raised 2 points: (1) that the certificate of urgency was not proper as it was signed by a legal practitioner from the same firm as that representing the applicants; (2) that the applicants had no *locus standi*, as ownership of the land and the crops thereon vested in the State.
Held: (1) the rules of court do not state that a legal practitioner who signs a certificate of urgency must not be from the same firm that represents the applicant in that matter. There was no conflict of interest, but even if there were a conflict, the application would still be urgent.
(2) The spoliation order referred to crops "belonging" to the applicants. In terms of s 16(1) of the Constitution, as well as the common law, growing things accede to the land. One cannot separate the produce derived from the plantation from the plantation itself. The applicants ceased to own the plantation and the crops therefrom when the farm was acquired by the State. The applicants, not being the owners of the farm, therefore did not have the *locus standi* to seek the relief claimed.

Practice and procedure – judgment – correction of – when permissible – omission in judgment – court entitled to correct judgment

Produtrade (Pvt) Ltd v *Continental Bakeries (Pvt) Ltd & Anor* HH-29-10 (Chatukuta J) (Judgment delivered 17 February 2010)

See above, under INTEREST (*In duplum* rule – applicability)

Practice and procedure – judgment – foreign judgment – recognition and enforcement of – limited circumstances in which correctness of foreign judgment may be reviewed – modification of foreign judgment – modification in accordance with provisions of foreign statute – need to properly prove provisions of foreign law

Venetian Blinds Specialists Ltd v *Apex Hldgs (Pvt) Ltd* HH-87-10 (Patel J) (Judgment delivered 24 June 2010)

The plaintiff sought an order recognising as binding and enforceable as against the defendant a judgment granted by the Supreme Court of Appeal of Malawi. Pursuant to that judgment, the plaintiff claimed in Zimbabwe the sums of USD848 662.50 (with interest) and MWK241 957.00 as well as costs. The plaintiff had been sued by the defendant in the High Court of Malawi, but successfully counter-claimed against the defendant. Because only general damages were awarded by the High Court the plaintiff had appealed. On

appeal, the plaintiff had been awarded general as well as special damages, equating to the amounts claimed on the summons. The award expressed in US dollars was by way of special damages for loss of profits. The defendant effected two separate payments to the plaintiff, one in Malawi kwachas in satisfaction of the High Court judgment and the other in Zimbabwe dollars pursuant to the Supreme Court judgment.

The summons incorporated two separate claims for interest. In respect of the Malawi kwacha award, the interest claimed was equivalent to the *in duplum* interest on the capital sum awarded. On the sum denominated in United States dollars, the plaintiff sought interest at the rate of 5 per cent per annum. The judgment itself did not specify interest on that sum, but the plaintiff argued that the rate was automatically determined by s 65 of the Courts Act [*Chapter 3:02*] of Malawi.

The defendant resisted the claim on the ground that it had discharged its obligations under the judgment; alternatively, that the Malawi court misdirected itself to the extent that it would be contrary to public policy to recognise and enforce its judgment in this country. The defendant argued that the court's award of special damages was based on the plaintiff's gross profit margin rather than its net profit, contrary to established rules on the calculation of damages. It is therefore arbitrary, erroneous and inimical to the notion of justice and consequently contrary to public policy.

Held: (1) The uniform approach in common law jurisdictions, as well as in South Africa, is to be extremely chary about delving into questions of legal or factual correctness. It is generally inappropriate to review a judgment of a foreign court of competent jurisdiction and to deny or withhold recognition, even if there is shown to be a clear misapprehension by that court of the law or facts founding its judgment. Public policy should only be invoked in clear cases in which harm to the public is substantially incontestable. While it might be accepted that the Malawi Supreme Court may have erred in calculating the quantum of special damages awarded to the plaintiff, it could not be said that its decision was so fundamentally flawed as to entail an affront to our notion of justice or some irreparable harm to the economic or social well-being of the community as a whole.

(2) It must be assumed that s 65 of the Courts Act is confined to claims sounding in the official currency of Malawi. There is nothing in section or elsewhere in the Act to suggest that s 65 extends equally to claims sounding in all foreign currencies, in respect of which the permissible rate of interest applicable to civil claims will inevitably vary according to the currency concerned. Further, the plaintiff was seeking the recognition of a foreign judgment. For the court to recognise a foreign judgment, it must do so on the judgment *ex facie*, as duly certified by an authorised official of the foreign court. Accepting the plaintiff's argument would involve having to materially modify the expressly stated terms of the foreign judgment on the basis of a point of foreign law that has not been properly proven in terms of s 25 of the Civil Evidence Act [*Chapter 8:01*].

(3) With regard to whether the Malawi judgment had been satisfied, in the absence of contractual agreement between the parties or acquiescence by the creditor, a tender in local currency does not constitute sufficient discharge of an obligation sounding in foreign currency. The parties had agreed to transact their contract in US dollars, without reference to Zimbabwe currency, the defendant's tender in local currency did not constitute sufficient discharge of the judgment debt. However, taking in account the amount paid by the defendant in Malawi currency and converting it to US dollars at the then prevailing rate, the defendant's judgment debt (including interest) in terms of the Supreme Court award had been fully discharged by virtue of its payment to the plaintiff pursuant to the High Court judgment.

Practice and procedure – judgment – foreign judgment – registration and enforcement of – judgment of tribunal not specified under Civil Matters (Mutual Assistance) Act [*Chapter 8:02*] – when may be enforced by courts – public policy considerations – effect of

Gramara (Pvt) Ltd & Anor v *Govt of Zimbabwe & Ors* HH-169-09 (Patel J) (Judgment delivered 26 January 2010)

See above, under INTERNATIONAL LAW (Treaties).

Practice and procedure – judgment – summary judgment – application – onus on defendant wishing to resist application – what defendant must show

Stationery Box (Pvt) Ltd v *Natcon (Pvt) Ltd & Anor* HH-64-10 (Makarau JP) (Judgment delivered 14 April 2010)

The test to be applied in summary judgment applications is clear and settled. The onus resting on a defendant resisting summary judgment has been described as amongst the lightest that the rules of procedure cast on litigants. He does not have to prove his defence. He must merely allege facts which, if he can succeed in establishing them at the trial, would entitle him to succeed in his defence. The defence so set up must, however, be plausible and *bona fide*. Obviously implied in this test, but oft overlooked by legal practitioners, is that the defendant must raise a defence. The facts alleged must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating as they may be and which he may very well be able to prove at the trial of the matter, do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted. To defend a claim arising out of a contract of sale, the purchaser must attack either the existence of the agreement itself or the fact that the goods sold were not delivered to him. If other defences are raised, they must be raised explicitly. It is not the function of the court to put words into the defendant's mouth and thereby establish a possible defence on his behalf when the defendant fails to do so in his opposing affidavit.

Practice and procedure – judgment – summary judgment – pleadings – amendment of – not permitted – claim must be unanswerable and verified by affidavit – summary judgment may not be granted on basis of incorrectly stated claim

CABS v *Ndahwi* HH-18-10 (Makarau JP) (Judgment delivered 3 February 2010)

The plaintiff had loaned the defendant a sum of money, which was not repaid by due date. Summons was issued. The defendant entered appearance to defend. The plaintiff applied for summary judgment, which the defendant opposed, on the grounds that the sum loaned was a lower figure than that being claimed. At the hearing, the plaintiff applied to amend its summons by correcting the amounts stated in the declaration. The effect of the amendment would be to increase the amount claimed. The application for amendment was opposed.

Held: the general approach of the courts to the amendment of pleadings generally is well settled: the court will endeavour to permit the parties to a dispute to bring before it any issue upon which they seek to rely to avoid the possibility of stifling, upon technical grounds, an attempt by a party to bring up material facts before the court. Amendments to pleadings are generally granted unless there is some special reason to the contrary. However, summary judgment proceedings demand different considerations. This is because summary judgment is a drastic remedy that is based on the supposition that the plaintiff's claim is beyond impeachment on any material basis and that the plaintiff is merely being held back from getting judgment by the rigours of a full trial which are then curtailed to his advantage. For the plaintiff to gain such an unusual advantage over the defendant, he must meet certain the very stringent requirements as set out by the rules.

Plaintiffs wishing to use the speedy procedure of summary judgment must bring themselves squarely within the provisions of the rules. A plaintiff resorting to summary judgment must therefore have an unanswerable claim as pleaded in his summons and declaration and as verified in the affidavit that must be filed in terms of the rules. It follows that where the plaintiff's claim as pleaded in the summons or declaration is erroneously stated or is inaccurate for whatever reason and requires amendment, summary judgment cannot be granted on that claim, because the incorrect claim is not beyond reproach. Secondly, an incorrectly stated claim is not verifiable and thus cannot be the basis of an application for summary judgment. It cannot be amended for the procedure of summary judgment. Finally, a supplementary affidavit further verifying the claim cannot be filed. A supplementary affidavit can be filed for the purposes of dealing with issues raised in the opposing affidavit that have the effect of catching the plaintiff by surprise. The plaintiff cannot have two bites at the cherry and must ensure that the declaration and the verifying affidavit are unanswerable at the time of filing.

Practice and procedure – parties – citation – President – when should be cited – President's act in removing Attorney-General from office – President acting according to recommendation of tribunal – not permissible to cite tribunal members only without citing President as well

Gula-Ndebele v *Bhunu NO* HH-14-10 (Makarau JP) (Judgment delivered 27 January 2010)

See above, under CONSTITUTIONAL LAW (Attorney-General – removal from office).

Practice and procedure – parties – joinder – failure to cite party with direct interest in outcome and determination of matter – such non-joinder fatal

Rodger & Ors v *Muller & Ors* HH-2-10 (Patel J) (Judgment delivered 26 January 2010)

In terms of s 37 of the Parks and Wildlife Act [*Chapter 20:14*], the National Parks and Wildlife Management Authority, with the concurrence of the Minister, may "grant hunting or other rights over or in a safari area to such persons as he [*sic*] deems fit", subject to such terms and conditions as he [*sic*] may impose. The period of such rights shall not exceed 10 years.
While the non-joinder of a party is not necessarily and invariably fatal to the continuance or determination of any matter, r 87(1) of the High Court Rules does not absolve a litigant of the obligation to cite all relevant parties. The discretion of the court in this regard must be exercised so as to ensure that all persons who might be affected by its determination of the issues in dispute be afforded the opportunity to be heard before that determination is actually made.
The wording of s 37 means that the concurrence of the Minister is an essential statutory *sine qua non* to the grant of any hunting rights in a safari area. Although it is the Authority that actually administers and grants such hunting rights, it can only do so "with the concurrence of the Minister" and "subject to such terms and conditions as he may impose". Where the Minister has already approved the grant of hunting rights, he must of necessity be concerned with any dispute concerning the exercise or non-exercise of such rights. Where legal proceedings are brought and the determination of the court will impact upon and interfere with decisions already taken by the Minister, he is undoubtedly a highly relevant party to the proceedings with a very direct interest in the outcome and determination thereof. Failure to cite the Minister as a party would be fatal to the proceedings.
The stipulation in s 37 that the period of hunting or other rights shall not exceed 10 years clearly means is that any single hunting concession granted cannot exceed the period of 10 years. It may at any one time be granted for the maximum period of 10 years or for any shorter period. However, the provision does not preclude the grant of a further concession to a prior holder who has held one or more concessions amounting to 10 years, so long as the new concession does not exceed the maximum period prescribed.

Practice and procedure – parties – joinder – non-joinder of possibly relevant parties – determination of issues not directly affecting their rights and interests – court's discretion to allow matter to proceed without joining them

Practice and procedure – parties – *locus standi* – members of Parliament challenging election of Speaker – such members having direct interest in outcome of election and thus having *locus standi*

Moyo & Ors v *Clerk of Parliament & Anor* HH-28-10 (Patel J) (Judgment delivered 9 March 2010)

See above, under CONSTITUTIONAL LAW (Parliament – Speaker).

Practice and procedure – parties – *locus standi* – company – company subject to reconstruction order – associate company – only administrator entitled to bring action on behalf of such company or any associate company

SMM Hldgs Ltd v *Min of Justice* S-5-10 (Chidyausiku CJ, Malaba DCJ & Sandura JA concurring) (judgment delivered 11 May 2010)

See above, under COMPANY (Legal proceedings).

Practice and procedure – pleadings – amendment of – when may be allowed – application for summary judgment – amendment of pleadings not permitted

CABS v *Ndahwi* HH-18-10 (Makarau JP) (Judgment delivered 3 February 2010)

See above, under PRACTICE AND PROCEDURE (Judgment – summary judgment – pleadings)

Practice and procedure – provisional sentence – acknowledgement of debt – liquid document – what constitutes – any clear, unequivocal and unambiguous written promise to pay – liquid document embodying illegal agreement – provisional sentence not proper

Sibanda v *Mushapaidze* HH-56-10 (Makarau JP) (Judgment delivered 24 March 2010)

Rule 20 of the High Court Rules 1971 provides that where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document. The term "liquid document" is not defined in the rules, but the courts have held that any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document. Thus, any letter, to the extent that it is clear, unequivocal and unambiguous and contains an acknowledgment of debt, can constitute a liquid document for the purposes of the rules on provisional sentence. Where the letter is ambiguous, or where an offer to make payment is conditional, the letter would not constitute a "liquid document".
Provisional sentence may not be granted on a liquid document that embodies an illegal agreement, as to do so is tantamount to lending legality to the agreement albeit provisionally.

Practice and procedure – provisional sentence – acknowledgement of debt – need for acknowledgement of debt to be valid – transaction behind acknowledgement tainted by breach of statutory provisions – not proper for provisional sentence to be granted – matter stood over for trial

Mavindidze & Anor v *Mukonoweshuro* HH-43-10 (Patel J) (Judgment delivered 9 March 2010)

The plaintiffs claimed provisional sentence founded on an acknowledgement of debt signed by the defendant. The defendant resisted the claim on various grounds relating to the nature and correctness of the capital sum claimed, the application of the *in duplum* rule, the liquidity of the acknowledgement of debt and the legality of the entire transaction.
Held: the acknowledgement, being in writing, signed by both parties and clearly stipulating the amounts owed by the defendant to the plaintiffs, constituted a liquid document within the ordinary meaning of r 20 of the High Court Rules 1971. However, it was not clear that the acknowledgement was a valid acknowledgement for the purposes of granting provisional sentence. If the acknowledgement was founded on a genuine investment, it fell foul of s 5(1) of the Asset Management Act [*Chapter 24:26*]. If it was premised on a disguised loan, the total sum inclusive of capital and interest claimed by the plaintiffs might well exceed the amount legally claimable under the *in duplum* rule. Further, the acknowledgement and the loan underlying it fell to be governed by the provisions of the Moneylending and Rates of Interest Act [*Chapter 14:14*]. The established principle of our law is that anything done contrary to a direct statutory prohibition is generally void and of no legal effect. The mere prohibition operates to nullify the act, particularly where it is visited with a criminal sanction. It followed that the transaction and the acknowledgement were susceptible to scrutiny for compliance with the *in duplum* rule as well conformity with the governing statutes. Moreover, if the transaction were found to be tainted with illegality, it would be necessary to consider the relevant facts surrounding its conclusion as well as the respective degrees of turpitude attributable to the parties in order to determine the extent of its illegality and its enforceability under the *par delictum* rule. It would be patently improper for the court to grant provisional sentence on a liquid document that was evidently fraught with illegality and the matter should stand over for trial.

Prescription – date on which debt arose – date on which plaintiff becomes aware of debtor's identity – second defendant's identity only being revealed during trial of matter between plaintiff and first defendant – prescription only commencing at date of revelation of second defendant's identity

Cotton Co of Zimbabwe Ltd v *Mobil Oil Zimbabwe Ltd & Anor* HH-69-10 (Makarau JP) (Judgment delivered 21 April 2010)

The plaintiff brought an action against the first defendant in March 2005. The claim arose out of an allegation that, during a period ending in December 2002, the first defendant had not delivered the amount of fuel that had been paid for by the plaintiff. The trial began in October 2008. In March 2009, at the conclusion of the trial, the plaintiff applied to have the second defendant joined in the proceedings. It had emerged during the proceedings that in 2006 the first defendant had disinvested from Zimbabwe and sold all its assets to the second defendant.

After the application for joinder, the second defendant filed a special plea, alleging that the plaintiff's claim had prescribed. The plaintiff argued that the identity of the second defendant as a debtor was unknown to the plaintiff until the trial of the matter when the disposal of assets by the first respondent to the second respondent was disclosed and accordingly, in terms of s 16 (3) of the Prescription Act [*Chapter 8.11*], the debt was not due.
Held: ordinarily, the defences available to the first defendant were also available to the second defendant. On the merits, the second defendant had no independent defence to offer as it did not transact with the plaintiff before it took over the first defendant's assets and business in 2006. Had the first respondent successfully raised the issue of prescription, this would have equally shielded the second defendant. However, the second defendant could not rely on the facts that would have sustained a plea of prescription against the first defendant, as the causes of action that the plaintiff had against each defendant, whilst the same, arose on different dates. The plaintiff's right to sue the second defendant only accrued in March 2009 during the trial, when the disposal of assets to the second defendant was revealed. Before that, the plaintiff had no cause of action against the second defendant as it was unaware of its identity and of the facts that would make the second defendant liable for the debts of the first defendant. Prescription against the second defendant could only have commenced running from the date of the disclosure. It should be remembered that the whole purpose of the Prescription Act and other statutes of limitations is to penalize the dilatory creditor but not a creditor who is unaware, through no fault of his own, of the cause of action at his disposal.

Property and real rights – land – crops growing thereon – ownership of – vests in owner of land

Route Toute BV & Ors v *Sunspun Bananas (Pvt) Ltd & Anor* HH-27-10 (Chatukuta J) (Judgment delivered 2 February 2010)

See above, under PRACTICE AND PROCEDURE (Application – urgent application – certificate of urgency).

Property and real rights – ownership – movables – vindication of – what owner must show – possessor holding property in terms of employment contract – dispute as to lawfulness of termination of contract – possessor having right to retain property pending resolution of dispute

DHL Intl (Pvt) Ltd v *Madzikanda* HH-51-10 (Makarau JP) (Judgment delivered 17 March 2010)

See above, under EMPLOYMENT (Labour Court – jurisdiction – dispute between former employer and employee – unresolved dispute).

Property and real rights – ownership – vindicatory action – need for applicant to establish ownership – action not available until ownership obtained

Gardner v *Dampier Development & Ors* HH-72-10 (Makoni J) (Judgment delivered 12 May 2010)

See above, under CONTRACT (Sale – *res litigiosa*).

Property and real rights – *res litigiosa* – whether *res litigiosa* may be alienated

Gardner v *Dampier Development & Ors* HH-72-10 (Makoni J) (Judgment delivered 12 May 2010)

See above, under CONTRACT (Sale – *res litigiosa*).

Property and real rights – spoliation order – entitlement to – unlawful occupier of land – person occupying land which had been acquired by State – another person receiving offer letter from State in respect of such land – such person not entitled to deprive occupier of possession – need for occupier to be lawfully evicted before holder of offer letter entitled to occupy property

Spencer & Anor v *Min of Lands & Ors* HB-11-10 (Kamocha J) (Judgment delivered 25 February 2010)

The applicants sought a spoliation order against the third respondent, who had moved onto their farm. The farm had been expropriated by the State and allocated to the third respondent. The applicants had remained on the farm and continued farming operations beyond the periods allowed by the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. No steps had been taken by the State to have them prosecuted and evicted in terms of the Act.
Held: there was no doubt that the applicants were occupying, holding or using gazetted land unlawfully. They had no legal basis to occupy, hold or use the farm and living quarters and were, in law, guilty of an offence for which there were high penalties. Evicting them without following the procedure laid down in section 3(5) of the Act would, however, be improper as the law protects even unlawful possessors. The respondents should not take the law into their own hands as such conduct cannot be countenanced or condoned. A person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by the due process of law, and if he is interfered with the court will restrain such interference pending the taking of action against him for ejectment by those who claim that he is in wrongful possession. The fact that the applicants had no legal right to continue to live on the farm and would have no defence to proceedings for ejectment does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the respondent's conduct that the occupation by the applicant carried with it penal consequences.

Property and real rights – spoliation order – *locus standi* – unlawful occupier of land – person occupying land which had been acquired by State – another person receiving offer letter from State in respect of such land – such person not entitled to deprive occupier of possession – need for occupier to be lawfully evicted before holder of offer letter entitled to occupy property

Forrester Estate (Pvt) Ltd v *Vengesayi & Anor* HH-19-10 (Patel J) (Judgment delivered 2 February 2010)

The applicant had obtained a spoliation order against the respondent, who had moved on its farm after receiving a letter of offer for the farm. The farm had been expropriated by the State. The respondent noted an appeal and moved back onto the farm. The applicant sought leave to execute pending appeal. The respondent argued that he had good prospects of success on appeal.
Held: the preponderance of case authority was against the respondent's argument. An offer letter does not entitle the holder to occupy the land allotted to him before the current occupier has been duly evicted by due process of the law. Consequently, the offeree cannot resort to self-help in order to dispossess or eject the occupier, no matter how intransigent the latter may be in his refusal to vacate the property. The offeree must wait until the State has taken steps to evict the occupier though a court order granted by a court of competent jurisdiction under the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] or otherwise. In the absence of such court order or the consent of the current occupier, the offeree has no self-executing right to occupy the land. The full bench of the Supreme Court in *Botha & Another v Barrett* 1996 (2) ZLR 73 (S) at 79 enunciated the traditional requirements for the grant of a spoliation order. This traditional approach has been adopted in the overwhelming majority of the decisions of the High Court and should continue to be followed, for the fundamental reason that recognising any resort to self-help without a court order is the surest recipe for disorder, degenerating into possible violence and the abnegation of the rule of law.

Review – domestic remedies – exhaustion of before bringing matter on review – members of Parliament challenging election of Speaker – no procedure in Standing Orders of Parliament allowing for formal objections during election of Speaker – members entitled to approach court for relief

Moyo & Ors v *Clerk of Parliament & Anor* HH-28-10 (Patel J) (Judgment delivered 9 March 2010)

See above, under CONSTITUTIONAL LAW (Parliament – Speaker).

Road traffic – offences – negligent driving – prohibition from driving following conviction – classes of vehicle to which such prohibition extends – when court may order that prohibition shall not extend to class of vehicle other than that driven at time of offence

S v *Sabau* HH-110-10 (Patel J) (Judgment delivered 3 June 2010)

See above, under CRIMINAL PROCEDURE (SENTENCE) (Statutory offences – negligent driving – prohibition from driving).

Statutes – Parks and Wildlife Act [*Chapter 20:14*] – s 37 – grant of hunting rights in safari area – section providing that period of such rights shall not exceed 10 years – does not preclude grant of further concession to prior holder

Rodger & Ors v *Muller & Ors* HH-2-10 (Patel J) (Judgment delivered 26 January 2010)

See above, under PRACTICE AND PROCEDURE (Parties – joinder).

Statutes – Prevention of Corruption Act [*Chapter 9:16*] – person specified in terms of Act – not entitled to act as director or agent of company or manage affairs of company without approval of investigator – s 10(1)

SMM Hldgs Ltd v *Min of Justice* S-5-10 (Chidyausiku CJ, Malaba DCJ & Sandura JA concurring) (judgment delivered 11 May 2010)

See above, under COMPANY (Legal proceedings).

Statutes – Protection of Wild Life (Indemnity) Act [*Chapter 20:15*] – s 3 – indemnification of acts done in good faith in connection with suppression of unlawful hunting – "in good faith" – meaning – onus on State to show that act not done in good faith

S v *Never* HH-66-10 (Kudya J) (Judgment delivered 7 April 2010)

In terms of s 3 of the Protection of Wild Life (Indemnity) Act [*Chapter 20:15*], no criminal liability shall attach to any person who, at the relevant time, was an indemnified person (which includes a game ranger employed by the Parks and Wild Life Management Authority), in respect of any act or thing done by him in good faith for the purposes of or in connection with the suppression of the unlawful hunting of wild life. The words "in good faith" accentuate the need for honesty, and hence the absence of an ulterior motive, in relation to anything done for the purposes of, or in connection with, the suppression of the unlawful hunting of wild life. If an "indemnified person" is prosecuted for any act done by him in these circumstances, the onus lies on the State to prove a *prima facie* case against the accused person that he acted dishonestly or with an ulterior motive. Where such evidence is not forthcoming, the accused is entitled to his discharge at the end of the State case.

Statutes – Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] – company subject to reconstruction order and its associated companies – s 18(1)(e) – power to bring and defend legal proceedings– such power vested in administrator of company subject to such order

SMM Hldgs Ltd v *Min of Justice* S-5-10 (Chidyausiku CJ, Malaba DCJ & Sandura JA concurring) (judgment delivered 11 May 2010)

See above, under COMPANY (Legal proceedings).

Words and phrases – "concerned" – meaning in a statute when word "concerned" follows a noun

Zimbabwe Banking & Allied Workers' Union & Ors v *Beverley Bldg Soc & Ors* S-3-10 (Malaba DCJ, Sandura & Cheda JJA concurring) (Judgment delivered 11 May 2010)

See above, under EMPLOYMENT (Trade union).

Words and phrases – "liquid document" – meaning

Sibanda v *Mushapaidze* HH-56-10 (Makarau JP) (Judgment delivered 24 March 2010)

See above, under PRACTICE AND PROCEDURE (Provisional sentence – acknowledgement of debt – liquid document).

Words and phrases – Protection of Wild Life (Indemnity) Act [*Chapter 20:15*] – s 3 – "in good faith" – meaning

S v *Never* HH-66-10 (Kudya J) (Judgment delivered 7 April 2010)

See above, under STATUTES (Protection of Wild Life (Indemnity) Act [*Chapter 20:15*] – s 3).

Words and phrases – "public policy" – meaning of

Gramara (Pvt) Ltd & Anor v *Govt of Zimbabwe & Ors* HH-169-09 (Patel J) (Judgment delivered 26 January 2010)

See above, under INTERNATIONAL LAW (Treaties).

Words and phrases – "secret ballot" -- meaning

Moyo & Ors v *Clerk of Parliament & Anor* HH-28-10 (Patel J) (Judgment delivered 9 March 2010)

See above, under CONSTITUTIONAL LAW (Parliament – Speaker).