**Latest update: 26 February 2012**

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

**Note: several of the cases added date from 2009. Those 2009 judgments were received well after ZLR 2009 (1), 2009 (2) and 2010(1) had been printed, and will be included in 2010 (2) – hence their inclusion here.**

## CASES DECIDED JUNE-DECEMBER 2010

**Administration of estates – *curator bonis* – fees – currency in which fees payable – work done before advent of new currency system – estate not wound up until after new currency system in force – value of estate expressed in US dollars – fee expressed as percentage of value of estate – curator entitled to payment in US dollars**

*Mutyasira* v *Gonyora* HH-218-10 (Chitakunye J) (Judgment delivered 28 October 2010)

The applicant had been appointed *curator bonis* in litigation involving a deceased. His appointment was set aside and he demanded to be paid his fee for the work he had done. This work had been done before the multi-currency system had been implemented in Zimbabwe. The respondent, who was the executor of the estate, contended that he could only be paid when the estate had been wound up. It was after the implementation of the multi-currency system that that the respondent advertised the first interim administration and distribution account for the estate. The account was drawn up in United States dollars. The applicant subsequently submitted his bill for the work done. After a hearing, the taxing master determined that the applicant's fee should be 10% of the value of the estate and that it should be paid in US dollars. The respondent argued that the fee should be based on Zimbabwe dollars, the currency prevailing at the time the work was done.

Held: the applicant's entitlement to payment arose from s 96 of the Administration of Estates Act [*Chapter 6:01*], under which he was entitled to receive out of the assets of the estate a reasonable compensation for his work in the administration of the estate, the amount to be assessed and taxed by the Master, subject to the review of the High Court. It was necessary for the applicant to wait until the respondent had lodged the account to have the Master assess and tax his fees. It was not possible to calculate the applicant's fees in Zimbabwean dollars when the executrix had used United States dollars. The respondent also claimed and was paid only in US dollars, even though some of her work had been done before the advent of the new currency system.

**Administration of estates – executor – duties – duty to act in good faith an in accordance with provisions of will – selling property contrary to provisions of will – sale a nullity – removal of executor – grounds – failure to perform duties according to mandate**

**Administration of estates – Master – duties and responsibilities – consent to sale of estate property – inquiry before granting such consent – need to take positive steps to verify application for consent to sale**

*Katsande* v *Katsande NO & Ors* HH-113-10 (Chitakunye J) (Judgment delivered 1 July 2010)

The applicant was one of the heirs to his late father's estate. The first respondent was the applicant's uncle and was executor of the estate. In his will, the applicant's father left two houses to the applicant. The first was left unconditionally; in respect of the second, the testator specified that it should only be disposed of if the estate was insufficient to meet any claims upon it, otherwise was to devolve to the applicant. After the first respondent's appointment as executor testamentary, he sold the first house to the third respondent, without obtaining the consent of the Master. Such consent was necessary as the applicant was a minor at the time. A purported consent for the sale was given some three months after the sale had taken place. The applicant sought an order setting aside the sale and removing the first respondent as executor. The buyer claimed that he was an innocent purchaser and that the sale should be allowed to stand.

Held: (1) an executor is required to act with utmost good faith and to ensure that everything is done for the benefit of the beneficiaries. Here, in terms of s 52 of the Administration of Estates Act [*Chapter 6:01*], the first respondent was appointed in terms of a valid will and was thus bound to act in terms of the law and provisions of that will. There was no ambiguity at all in the clauses relating to the two houses. The first respondent had no authority to sell the first house; the second could only be sold for purposes of meeting outstanding debts, if any.

(2) If the property was to be disposed of in any way (including the second property), the Master should have complied with s 122 of the Act, which requires him to make a chamber application to a judge for authority to

dispose of the property. This he did not do. Any consent by the Master in terms of s 120 to the sale was also of no effect, as the will did not provide for the sale of the first house; if anything it provided to the contrary.
(3) The purported sale of the first was thus a nullity. Not only did the first respondent not have the right or authority to do so from the will itself, but he also acted dishonestly and fraudulently in obtaining the Master's consent to sell. That consent was not proper in the light of the clear provisions of the will and the applicable law. Where an act is a nullity the innocence or otherwise of the other party to the act is irrelevant. The innocence of the third party could not turn a non-sale into a valid sale.
(4) The Master's Office needed to be more aware of the serious duties and responsibilities it has in deceased estates. Section 120 of the Act enjoins the Master to make an inquiry in order to be satisfied that the request being made would be to the advantage of the persons interested in the estate to sell the property. "Due inquiry" requires that the Master takes active or positive steps to verify the contents of the application before granting the consent. In cases where minors are the beneficiaries, it may ne necessary to appoint a *curator ad litem* to ensure that the interests of the minors are protected. Had such an inquiry been made *in casu*, the Master would easily have realized that the request was contrary to the provisions of the will as the house in question was unconditionally bequeathed to applicant and that, as the heirs/ beneficiaries were minors, s 122 of the Act needed to be complied with if such a request was to be granted.
(5) Where an executor lamentably fails to perform his duties according to the mandate given, there can be no good reason why he should remain in the office. It is only proper that he be removed from that office forthwith.

**Administrative law – review – court's powers to review proceedings of administrative bodies – power limited to legality of administrative action or decision – *audi alteram partem* rule – applicability – oral hearing at appeal not absolutely necessary**

*Mugugu* v *Police Service Commission & Anor* HH-157-10 (Gowora J) (Judgment delivered 21 July 2010)

The applicant was a police officer. He was convicted of a disciplinary offence and his appeal to the Commissioner was rejected. After his conviction, a board of inquiry was convened to determine his suitability to remain in the police force and recommended a reduction in rank and transfer from his existing posting. The Commissioner accepted the recommendation. The applicant unsuccessfully appealed to the first respondent. He then sought to bring the first respondent's decision on review. The ground he relied on was that the punishment recommended by the board was excessive. The applicant also alleged that there was bias on the part of the first respondent, in that the first respondent arrived at its decision without having regard to the record of proceedings of the board and without affording the applicant or his legal practitioners a hearing on the appeal lodged. The applicant also contended that the first respondent's bias was evident from the record, where he was castigated for not being grateful for not having been fired as a result of his transgressions. The primary issue was whether this was a ground of review or of appeal.
Held: (1) Judicial review is a process which is concerned with the examination and supervision by the courts of the manner in which administrative bodies have observed their obligations when related to the legislative requirements. The power to review is inherent in courts of superior jurisdiction, but such power is limited to the legality of the administrative action or decision. The Commissioner's power to convene the board was undisputed and the board itself was, in terms of s 50 of the Police Act [*Chapter 11:10*], granted the discretion to either find that a member is no longer fit to remain in the force or to reduce his rank. For the court to venture into the merits of the punishment imposed or the wisdom of the decision, without being empowered by the Act, would be tantamount to the court usurping the authority that has been entrusted to the administrative body by the Act. The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. It is not within the ambit of the reviewing court's power to substitute its own opinion for that of the administrative body. The function of the court is to ensure that the administrative body does not abuse the lawful authority entrusted to it, by treating the individual subjected to it under that lawful authority unfairly. If the circumstances show that the decision was reached fairly and in a reasonable manner, then the court would not have the power to intervene.
(2) On the record, there was no evidence of bias.
(3) The Act did not specify the manner in which the first respondent ought to determine appeals brought before it and thus it was safe to assume that the appeal would be on the record, as in a normal appeal. The underlying principle in the right to heard is that of fairness and natural justice, in that each person appearing before the administrative body is given an opportunity to put his position to that body. An oral hearing is not an absolute necessity but may be where the person has been given inadequate notice, is not allowed to present his case or has not been furnished with all the information alleged against him. When the initial board of inquiry was held, the applicant was heard. Dissatisfied with the result, he then launched an appeal. There is no suggestion that such an appeal should have been a re-hearing of the initial inquiry.

**Appeal – civil matter – appeal against interlocutory order or interlocutory judgment – order granting leave to execute pending appeal – such order interlocutory – leave to appeal required – appeal pending against main judgment – not permissible to grant stay of execution by means of urgent chamber application**

*Mohamed v Noormohamed & Anor* HH-180-10 (Mawadze J) (Judgment delivered 12 August 2010)

The first respondent obtained an eviction order against the applicant. The applicant noted an appeal against this order. The first respondent then applied for and obtained leave to execute pending appeal. The applicant noted an appeal against this order. The first respondent proceeded with the execution, obtaining a warrant for ejectment. The applicant brought an urgent application to prevent the ejectment from taking place. The applicant's counsel conceded that the appeal against the order granting leave to execute was invalid, as such order was interlocutory in nature. He argued, however, that the court could deal with the matter on the merits as the first appeal still was pending, and could on good grounds grant a stay of execution, after considering such factors as the prospects of success on appeal, the potentiality for irreparable harm or prejudice to either party if stay of execution were is granted or not and the balance of inconvenience or hardship to either party. He argued that real and substantial justice enjoined the court to grant the application.

Held: (1) the application was made on the basis of the second – admittedly invalid – appeal. In the papers filed of record, the argument had been that the order for leave to execute judgment pending appeal, though interlocutory, was definitive in nature hence appealable. The applicant was completely changing the thrust of his argument and new papers would need to be filed.

(2) There were also practical problems. Firstly, the court could not meaningfully deal with the merits and demerits of the matter unless it was sitting as an appellate court. That appeal was still pending and could not be partially dealt with under the guise of an urgent chamber application, particularly as the records of the proceedings in the lower court were not even before the court. Secondly, the applicant was simply trying to reverse the decision of the lower court when he knew the decision was not appealable. Both parties had argued the matter before the lower court, which exercised its discretion and granted the order for leave to execute pending appeal. The High Court could not review this decision in the absence of a proper application for review, as opposed to an urgent chamber application in the form and format filed by the applicant.

**Appeal – noting of – effect – appeal against order of court other than court of inherent jurisdiction – whether noting of appeal suspends operation of order against which appeal is made**

*Ritenote Printers (Pvt) Ltd* v *Adam & Co & Anot* HH-263-10 (Gowora J) (Judgment delivered 24 November 2010)

In two separate actions in the magistrates court, the respondent obtained eviction orders against the applicant from two premises it leased from the respondent. The applicant appealed against the magistrate's judgments in both matters. It also filed *ex parte* applications for an order staying execution of the judgment in both matters. The applications were dismissed by the magistrate. In the meantime pending judgment on those applications, the applicant filed applications in the High Court under certificates of urgency for orders staying execution of the judgments. The respondents opposed the granting of the applications. The respondent proceeded to execute against the judgment despite the noting of the appeal. The order from the magistrate dismissing the application for a stay of execution came after the process has started. The applicant sought an order restoring its occupation and the return of property taken. It argued that the noting of the appeal to the High Court against the judgment of the magistrates court mean that the respondent had to obtain leave to execute pending appeal.

Held: The common law position is that superior courts have an inherent jurisdiction to regulate their own procedures and process. A rule of practice therefore evolved whereby the operation of the judgment of a superior court is suspended upon the noting of an appeal against that judgment.

There is some divergence of the authorities in our jurisdiction as to whether this rule applies to appeals against judgments that do not emanate from courts of superior or inherent jurisdiction. Some authorities take the view that the concept of a rule of practice is appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. Section 40(3) of the Magistrates Court Act [*Chapter 7:10*] provides for the court to direct either that the judgment be executed pending appeal or that execution be suspended pending the determination of an appeal. This provision indicates the absence of an inherent discretion within the magistrates court for the automatic suspension of the operation of a judgment or order upon the noting of an appeal and is specifically intended to provide the court with the power to suspend the operation of a judgment upon the noting of an appeal.

Other authorities have held that, in the absence of a clear indication by the law giver to the contrary, the common law position – that the execution of all judgments is suspended upon the noting of an appeal – is not ousted by the silence of the legislation in terms of which an appeal is lodged. The reason for the common law rule is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by levy under a writ, or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from. The latter view is preferable, but the law needs to be clarified.
The damage that was meant to have been prevented *in casu* happened, not because the applicant did not seek to protect its interest, but because, due to uncertainty in the law, the respondent, as judgment creditor, proceeded to execute against the judgment despite the noting of the appeal. However, it was not clear how the court could rule in favour of the applicant. The applicant had the right either to appeal against the ruling of the magistrate or to seek a review. It chose to do neither and instead sought an order to stay execution. The High Court could not give an order that was different from the magistrate's order, as long as that order was extant.

**Appeal – right of – interlocutory order – magistrates court – order granting leave to execute pending appeal on main issue – not subject to appeal**

*Harrison & Hughson (Pvt) Ltd* v *Alstom Zimbabwe (Pvt) Ltd & Anor* HH-152-10 (Mutema J) (Judgment delivered 8 July 2010)

The respondent obtained an eviction from the magistrates court against the applicant. The applicant noted an appeal against the order, but the respondent applied for and was granted an application for leave to execute the eviction order pending the determination of the appeal. The applicant noted an appeal against the order granted to the first respondent to execute pending appeal and thereafter filed a chamber application for a provisional order staying the ejectment, alternatively, restoring it to possession of the premises.
Held: (1) granting the relief to stay execution would amount to overruling the magistrate's decision and also to determining the appeal when the court was not sitting as an appellate court.
(2) Appeals from the magistrates court are by choice of the appellant, but limited to judgments, rules, orders or decisions covered by paras (a), (b) and (c) of s 40(2) of the Magistrates Court Act [*Chapter 7:10*]. The common thread running through those provisions is that the judgment, rule, order or decision being appealed against must have the effect of a final and definitive judgment. It follows therefore that those orders or judgments which are of a purely interlocutory nature are not appealable. An order granting leave to execute pending appeal such as that granted in the instant case is purely interlocutory and thus does have the effect of a final judgment on the main suit, despite causing inconvenience to the applicant. It is, to all intents and purposes, not subject to appeal.

**Arbitration – award – challenge to – award granted following referral in terms of Labour Act – Labour Court having exclusive jurisdiction – registration of award – award granted following referral in terms of Labour Act – award not suspended nor set aside on appeal or review – High Court's power to register award**

*Samudzimu* v *Dairibord Hldgs Ltd* HH-204-10 (Chiweshe JP) (Judgment delivered 15 September 2010)

The applicant sought to register with the High Court an arbitral award made in his favour against the respondent. The respondent opposed the application on the basis that the award offended against public policy in terms of articles 34 and 36 of the Schedule to the Arbitration Act [*Chapter 7:15*]. The respondent had also lodged an appeal with the Labour Court against the award; that appeal was still pending. The question arose whether the High Court had jurisdiction, in view of the wording of s 89 of the Labour Act [*Chapter 28:01*].

Held: the extent to which the provisions of the Arbitration Act are applicable in labour matters is governed by s 98(2) of the Labour Act which provides that "subject to this section the Arbitration Act … shall apply to a dispute referred to compulsory arbitration". Section 98 provides for, *inter alia,* the referral of matters to compulsory arbitration, the appointment of arbitrators, appeals against decisions of arbitrators, reviews and other remedies. These provisions are detailed and comprehensive. It could not have been the intention of the legislature that parties aggrieved by the decision of an arbitrator in a labour dispute seek remedy in terms of articles 34 or 36 of Schedule to the Arbitration Act. These articles are not applicable where the award sought to be challenged relates to a labour dispute. The mechanisms for challenging such awards are provided for in the Labour Act and may be accessed through the Labour Court. No other court has jurisdiction to entertain such matters. However, with regard to registration of an award, for as long as the arbitral award has not been

suspended or set aside on review or appeal in terms of the Labour Act, there was no basis upon which the High Court could decline to register the award.

**Arbitration – award – registration – grounds on which registration may be refused – public policy defence – limited application of – effect of error on part of arbitrator – failure to plead public policy defence – not fatal if defence manifest from record**

*Husaihwevhu & Ors* v *UZ-USF Collaborative Research Programme* HH-237-10 (Gowora J) (Judgment delivered 20 October 2010)

If, in an application to set aside or register an arbitral award, the papers that are placed before the court establish the public policy defence, it would be an injustice not to afford the respondent the benefit of the defence merely because it was not specifically pleaded, as long as it is manifest from the record. If the registration of the award would be contrary to the public policy of this country and there is clear evidence to that effect in the record, the court would have to consider the defence and afford the respondent the protection under the Arbitration Act [*Chapter 7:15*].
The courts in this country have construed the defence of public policy very restrictively so that the objective of finality to arbitration is achieved. It follows that the grounds upon which an award may be set aside or those on which a court may refuse to register the award are very narrow. The import of the defence under articles 34 and 36 of the First Schedule to the Act is not to endow the court before which the award is to be registered or set aside with powers of appeal to determine the correctness of the decision by the arbitrator. The court would not be sitting as a court of appeal to adjudicate the correctness or erroneous nature of the reasoning of the arbitrator. Its task is to consider whether the award by the arbitrator is one that should not be registerable, having regard to the requirements of Articles 34 and 36 of the Arbitral Act. An award by an arbitrator is not contrary to public policy merely because the arbitrator was wrong in law or in fact in reaching the conclusion that he arrived at. The court may only intervene and uphold the defence of public policy where it is established that the reasoning or conclusion in the award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award.

**Arbitration – award – setting aside of – award contrary to public policy – meaning – fundamental principle of law being violated – award violating fundamental principle of law of contract – award defiant of logic – arbitrator refusing to accept lawful acknowledgement of debt**

*Chanakira* v *Mapfumo & Anor* HH-155-10 (Chiweshe JP) (Judgment delivered 21 July 2010)

The applicant and the first respondent entered into an agreement in terms of which the applicant advanced to the first respondent the sum of in foreign currency. As a return on this investment, it was agreed that the applicant would be entitled to 30 per cent of the capital sum invested "each and every month", regardless of the performance of the investment. Either party could terminate the agreement by giving one month's notice, in which that event the first respondent would be required to pay to the applicant the entire compounded capital, plus any outstanding returns before the expiry of the thirty day notice period. At the time the capital sum was advanced, neither party had sought exchange control approval for that transaction as then required in terms of the Exchange Control Regulations 1996. Similarly the first respondent's repayment in terms of the agreement would have required exchange approval. Following changes to the law in February 2009, the need to seek exchange control approval fell away. The first respondent failed to meet the terms of the agreement both before and after February 2009. The applicant terminated the agreement on 1 October 2009. However, on 13 October 2009, the parties entered into an acknowledgement of debt, in terms of which the first respondent acknowledged his indebtedness arising from his outstanding obligations under the terminated agreement. As assurance and security of his indebtedness, the first respondent surrendered to the applicant the title deeds of a property registered in his name. The parties failed to agree on the exact amount of money owed by the first respondent and referred the matter to arbitration. The arbitrator (the second respondent) found that as the agreement contravened the Exchange Control Regulations it was subject to that suspensive condition whose non-fulfilment rendered the agreement void, and that any loss must lie where it fell. The applicant sought an order setting aside the award. He contended that the award was contrary to the public policy of Zimbabwe *inter alia* because it was contrary to the substantive law of Zimbabwe.

Held: (1) In deciding whether an agreement is contrary to public policy, the interests of the community or the public are of utmost importance. Agreements which are contrary to law or morality are contrary to public policy and may not be enforced. The court's power to declare transactions or contracts contrary to public policy should be exercised with caution and with a view to do justice as between individuals. Public policy upholds the freedom of contract and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom. The power to declare contracts contrary to public policy should thus be exercised sparingly lest the whole field of contract is thrown into uncertainty as to the validity of contracts.
(2) As to the legality of the agreement, there was no doubt that the agreement was a legal and binding document. The performance of the agreement, however, would require the prior approval of the Exchange Control authorities. The agreement was therefore subject to that suspensive condition. The arbitrator thus erred in holding that the agreement was void on account of the parties not having obtained Reserve Bank approval in terms of the Exchange Control Regulations.
(3) An arbitral decision can only be held to be contrary to public policy if some fundamental principle of the law or morality or justice is violated or if it is so defiant of logic or accepted moral standards that the concept of justice in Zimbabwe would be intolerably hurt. It is a fundamental principle of the law of contract that the non-fulfilment of a suspensive condition does not render the contract illegal or void; it merely suspends the operation of all or some of the obligations of the contract until the occurrence of a future event. The arbitrator's award violated this fundamental principle of the law of contract.
(4) The arbitrator further erred in that he did not give effect to the terms of the acknowledgement of debt signed by both parties in October 2009, at a time when it was no longer a requirement to seek exchange control authority to transact in foreign currency. His refusal to recognize the acknowledgment of debt was so defiant of logic or accepted legal and moral standards that, if upheld, the concept of justice in Zimbabwe would be intolerably hurt.

**Carrier – liability – carriage by land – goods lost through gross negligence of carrier or through theft by its employees – carrier's liability – extent to which carrier may exempt itself from liability**

*Tachiona & Anor* v *NRZ* HB-61-10 (Ndou J) (Judgment delivered 15 July 2010)

The plaintiffs entered into a contract of carriage with the defendant in terms of which the defendant was to transport two pieces of furniture on behalf of the plaintiffs from Harare to Bulawayo. One only piece was delivered; the other was probably stolen from the defendant in transit by the defendant's employees. The plaintiffs claimed the current market value for the lost item, as compensation; alternatively, they claimed specific performance. The consignment note that was issued to and signed by the first plaintiff for the transportation of the goods in question had a provision to the effect that the consignment was in accordance with the bye-laws, regulations and conditions published in the current edition of the Official Railway Tariff Book. This book was not shown to the plaintiff at the time. The defendant claimed that the amount of compensation due was based on the item's weight, and tendered an amount which was below the item's market value. The plaintiffs argued that, while they voluntarily signed the consignment note, the consignment note did not contain enough details concerning the issue of compensation and, in any event, the contractual terms were unfair, unreasonable and oppressive and thus unenforceable against them.
Held: (1) while carriers of goods may contract out of the strict liability imposed on them by the common law or by contract limit their liability, the clause exempting the carrier from liability must do so in clear terms, with express reference to negligence. In the absence of such clear terms, the clause is to be construed as relating to a different kind of liability and not to liability based on negligence. The excluding or limiting term must be brought to the attention of the party against whom its protection is sought or otherwise be within his knowledge. Whether or not the plaintiffs could be taken to be aware of the term, the defendant could not exempt itself from liability for theft by its employees. Theft or loss of a large item like that in question could only be attributed to "gross negligence or wilful malfeasance" as defined in the Tariff Book, and the defendant cannot therefore, be exempted from liability.
(2) This contract of carriage was a consumer contract as defined in s 2 of the Consumer Contracts Act [*Chapter 8:03*]. Section 5(1) of the Act allows a court to find a consumer contract to be unfair if it excludes or limits the liabilities of a party to an extent that it is not reasonably necessary to protect its interest, if it is contrary to commonly accepted standards of fair dealing or if it is expressed in a language not readily understood by the other party. The current contract was unreasonably oppressive in that it contained a provision that seeks to deny the plaintiffs adequate compensation for their goods. The Tariff Book sought to quantify the value of compensation to be paid in respect of goods lost or damaged by means of mass. This method was unreasonably oppressive, as mass alone is not a suitable standard used in evaluating assets. Further, the contract limited the

defendant's liability more than is reasonably necessary, as it resulted in owners of goods being transported not getting real compensation in the event of loss or damage. Finally, the terms of the agreement as contained in the Tariff Book were conveyed to the other party in a bad, vague and less than informative fashion.

**Company – corporate veil – lifting of – when permissible – company a shell controlled entirely by two persons for their own benefit – court entitled to lift veil and enter judgment against them**

*Agribank* v *Nickstate Investms (Pvt) Ltd & Ors* HH-231-10 (Gowora J) (Judgment delivered 20 October 2010)

A registered company is a legal *persona* in its own right and endowed with its own separate legal *persona* which is distinct from its shareholders. However, in certain exceptional circumstances, where the company is controlled in terms of activities and decisions by another person, the courts will allow the corporate veil to be lifted to reveal the real person behind the company. When the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association. Thus, where there has been fraudulent or improper use of a company a court is entitled to disregard the separate corporate personality of a company and pierce the veil. In a situation where the company was the vehicle through which the directors acquired property to enhance their estate, it would be just and proper to order that the corporate veil be lifted and judgment entered against all the company and its directors.

**Company – legal proceedings – authorization for – what must be shown – not always necessary for proof of resolution by company's board**

*Total Zimbabwe (Pvt) Ltd* v *Power Coach Express (Pvt) Ltd* HH-64-09 (Gowora J) (Judgment delivered 4 February 2009)

The applicant had obtained judgment against the respondent for the delivery to it of certain fuel tanks and ancillary equipment. The applicant then obtained a writ of execution, but the writ was not executed because the applicant discovered that the respondent had noted an appeal against the judgment. Negotiations ensued, during which it was agreed that the respondent would engage a firm of engineers to make tanks of the same specifications. The tanks were not manufactured within the stipulated period and in addition a dispute arose as to whether they had been manufactured according to the required specifications. Ultimately, there was no delivery of the tanks to the applicant in terms of the judgment and the applicant again brought the respondent to court for a declaratur confirming its entitlement to the tanks and an order enabling it to obtain delivery.
The applicant's founding affidavit was deposed to by the applicant's credit control manager, who averred that she was authorized to depose to the affidavit and that the facts that she deposed to were within her personal knowledge. The respondent put in issue her authority to depose to affidavit on behalf of the applicant, saying that no board resolution had been produced authorizing her to depose to an affidavit on behalf of the applicant. The respondent also claimed that she had no knowledge of the proceedings save for such facts as she might have been told by her predecessor. The respondent also claimed that the applicant was not entitled to the order as it has abandoned the judgment previously obtained.
Held: (1) where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorized to do so. The reason for proper authority to be established is to ensure that other litigants dragged to court by a person purportedly acting on behalf of an artificial person do not suffer any prejudice as a result of the litigation. The best evidence that the proceedings have been properly authorized would be an affidavit made by an official by the company annexing a copy of the resolution, but that form of proof is not necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf. Where a minimum of evidence has been adduced, as *in casu* establishing that the company has set litigation in process, in the absence of some evidence from the respondent pointing to a lack of authority for the litigation, then, in those circumstances, the court should not require the production of a resolution.
(2) The word "abandon" connotes a relinquishment by a party of a right or an item to the control of or in favour of another party. Such relinquishment would have to amount to an absolute surrender and the party so surrendering the right or item shall not reclaim the item or seek to enforce the right. Abandonment must be absolute in its effect and the person so abandoning must make his intention to abandon unequivocal. There can be no abandonment where a party alleged to have abandoned something still seeks a benefit from the thing he is alleged to have abandoned. The abandonment of the judgment would have been subject to the delivery by the

respondent of tanks with the same specifications as had been ordered by the court. There was no unequivocal abandonment of the applicant's rights to have the judgment enforced. In any event, the abandonment, if it was to be made should have appeared in the papers filed in relation to the relief being sought. In order for the respondent's contention to succeed, the papers would have to show that the applicant had relinquished its claim for delivery of the tanks and that it had no intention of pursuing the matter to recover the tanks in satisfaction of the judgment in its favour. In other words, the applicant must have renounced its claim to the tanks. It had not done so.

**Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 13 – protection of right to liberty – deprivation of liberty on reasonable suspicion of having committed an offence – need for State to show that conduct alleged would constitute offence charged – only then can question be determined of whether facts give rise to reasonable suspicion**

**Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(2) – application to refer allege breach of constitutional right to Supreme Court – only grounds on which such application may be refused – need to form opinion that application "frivolous" or "vexatious" – such an extraordinary remedy to be used only in clear and exceptional cases**

*Williams & Anor* v *Msipha NO & Ors* S-22-10 (Malaba DCJ, Chidyausiku CJ, Cheda JA, Ziyambi JA & Garwe JA concurring) (Judgment delivered 26 November 2010)

The applicants were officers of an organization the objective of which was the promotion of the rights of women in Zimbabwe. Together with about 300 other women, they went to an open ground outside a building complex in Bulawayo where they assembled. The building complex housed offices used by civil servants from various Government departments. The applicants and their associates sang, danced, chanted slogans and waved placards in the direction of the offices. The crowd remained calm and peaceful during and after addresses by the applicants. At the end of the addresses the police ordered the crowd to disperse. The applicants protested what they said was an unwarranted interference by the police with a legitimate exercise of the rights to freedom of assembly and freedom of expression. The rest of the people who had assembled dispersed as the applicants were arrested and taken to a local police station, where they were charged with the offence of contravening s 37(1)(a)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. This penalizes any person who acts together with one or more other persons present with him or her in any place or at any meeting with the intention or realising that there is a real risk or possibility of forcibly disturbing the peace, security or order of the public or any section of the public.

When they were later brought before a magistrate for remand pending trial, the applicants challenged the legality of their prosecution and remand on the ground that the facts on which the charge was based would not, if proved at the trial, constitute the offence with which they were charged and thus could not give rise to a reasonable suspicion in the mind of a police officer or a judicial officer, acting carefully, that they had committed the offence. They contended that, as that was the only ground on which the State was authorized by law to deprive them of personal liberty for the purpose of ensuring their appearance at the trial, the prosecution and remand constituted an arbitrary deprivation of personal liberty in contravention of s 13(1) and a violation of the right to the protection of the law guaranteed under s 18(1) of the Constitution. The magistrate nonetheless remanded the appellants. At a subsequent hearing, an application was made for the matter to be referred to the Supreme Court in terms of s 24(2) of the Constitution. The magistrate refused to do so, essentially on the grounds that he considered that the applicants were playing for time.

The applicants alleged that the magistrate failed to comply with the requirements of s 24(2) of the Constitution, resulting in an arbitrary refusal of access to the Supreme Court in violation of the fundamental right of the applicants to the protection of the law. The applicants also applied for an interim order restraining the magistrate and the third respondent (the Attorney-General) from commencing the trial pending determination of the matter by the Supreme Court. They argued that the facts alleged did not constitute a contravention of the section under which they were charged. The respondents argued that the Supreme Court had no jurisdiction in constitutional cases involving allegations of contravention of fundamental rights and freedoms to grant interlocutory relief by way of interim orders.

Held: (1) Under s 24(4) of the Constitution, the Supreme Court has the jurisdiction make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the fundamental human rights and freedoms guaranteed under Chapter III. A wide discretionary power is given to the Supreme Court as to the remedies it can employ to achieve the objectives for which the power conferred on it under s 24(4) was intended to be exercised. The only condition restricting the choice of a particular remedy is that consideration must be given to the question whether the remedy is appropriate for the

purpose of the enforcement or securing the enforcement of the fundamental human right or freedom found to have been violated or likely to be violated in relation to the applicant. The discretionary power is broad enough to permit the granting of interlocutory relief by way of an interim order restraining conduct which would otherwise have the effect of rendering the enforcement or securing the enforcement of the fundamental human right or freedom ineffectual. Here, the application for an interdict alleged that to start the trial pending resolution of the main application would constitute a violation of the applicants' fundamental right to the protection of the law guaranteed under s 18(1) of the Constitution. The court is empowered also to make any order that would preserve matters between parties to the main application in a state that would, as far as is possible, prevent substantial prejudice and injustice pending resolution by it of the dispute in the main application so as to enable it to render a meaningful and effective judgment. The court must be able to intervene, not only against the direct dictates of the judgment of the lower court, but also against its effects.

(2) Once the Supreme Court is seized with a matter, it has inherent jurisdiction to control its process. That jurisdiction includes the power to control the process of the court, including the prevention of execution of a judgment pending the hearing of an application. It thus has the power to restrain the magistrate and the Attorney-General from relying on the magistrate's decision to refuse refusing to refer the constitutional questions and from commencing the trial of the applicants pending final determination of the main application, because to commence the trial would tend to negate or render nugatory the judgment of the court on the main application when it is given. Applying the normal tests for when an interdict may be granted, this was a suitable case for granting interlocutory relief to the applicants.

(3) The right to an effective judicial protection of a fundamental human right or freedom requires that the judicial officer should act in accordance with the requirements prescribed by the Constitution for the protection of the particular right or freedom. When an application is made under s 24(2) to refer a constitutional question to the Supreme Court, the only restriction on the obligation to refer the question imposed on the judicial officer is the discretion given to refuse a request for a referral when in his opinion the raising of the question is "merely frivolous or vexatious". The formation of such an opinion is the pre-condition for the refusal of the referral. Although the formation of the opinion denotes a subjective state of mind, it presupposes compliance with a process in which objective procedural and substantive standards are observed and met. The opinion which the person presiding in the lower court is required to form is a particular opinion in the sense that he is expected to form it by reference to specific criteria. The judicial officer is required to have knowledge of the ordinary and natural meaning of the words "frivolous or vexatious", which constitutes the standard which he must conscientiously and objectively apply to the facts on which the question as to the contravention of the fundamental human right or freedom is raised. The word "frivolous" in its ordinary and natural meaning connotes an action or legal proceeding characterized by lack of seriousness, as in the case of one which is manifestly insufficient. The request would have to be found, on the facts, to have been obviously lacking in seriousness, unsustainable, manifestly groundless or utterly hopeless and without foundation in the facts on which it was purportedly based. The word "vexatious" means that the question is being put forward for the purpose of causing annoyance to the opposing party, in the full appreciation that it cannot succeed; it is not raised *bona fide* and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless. Accordingly, refusal of a referral of a question as to the contravention of a fundamental human right or freedom to the Supreme Court, which under s 24(4) of the Constitution is the court with original jurisdiction to determine the matter, is an extraordinary remedy intended to be used in clear and exceptional cases. Here, the magistrate proceeded on the assumption that the charge was valid and did not consider whether the application was frivolous or vexatious. The magistrate thus failed to comply with the requirements of s 24(2) of the Constitution.

(4) Under s 13(2)(e) of the Constitution, an accused person may be deprived of personal liberty where there is reasonable suspicion of him having committed a criminal offence. The judicial officer must therefore make a finding that the facts on which the charge laid on the accused person is based provide ground for a reasonable suspicion of him having committed the offence with which he is charged. Where the accused challenges the legality of the charge on the ground that the offence itself was not committed, the onus is on the State to first show that, if proved at the trial, the facts on which the charge is based would constitute the offence with which the accused person is charged. Only then would the question arise whether the facts provide ground for a reasonable suspicion that the accused committed the offence, as required by s 13(2)(e) of the Constitution. The magistrate was required to take into account the essential elements of the offence and the conduct which, if proved at the trial, would constitute the offence charged. He was required to apply the knowledge of the statute to the conduct actually committed by the applicants and decide whether it constituted the proscribed conduct.

(5) Section 37(1)(a)(i) of the Act proscribes acts which have as their direct and obvious consequence serious disturbance of the peace, security or order of the public or any section of the public prevailing immediately before the occurrence of the conduct. Examples would be acts of violence committed by people assembled together or a speech in which the speaker incites his audience to violence. The conduct does not in itself constitute the offence. It becomes an offence if it is intended to produce the consequence of forcible disturbance

of the peace, security or order of the public or any section of the public or when it is realised as a real possibility that forcible disturbance of the peace, security or order of the public or any section of the public would result from it. The primary object of the section is the preservation of the peace, security or order of the public. The statute is not intended to be used to punish acts for the commission of which the fundamental human rights to freedom of assembly and freedom of expression are protected under the Constitution. When properly construed, the statute presupposes that there are acts which can be committed by people gathered together at any place or at any meeting consonant with the maintenance of the peace, security or order of the public or any section of the public. As the exercise of the fundamental rights to freedom of assembly and freedom of expression presupposes the existence of an organized society in which the existence of peace, security or order of the public is the quintessence of the security of these liberties, they cannot be held to include in their exercise the right to virtually destroy that which is essential for their enjoyment. The statute is intended to be used to punish conduct which constitutes abuse of the fundamental rights to freedom of assembly and freedom of expression through behaviour or words which are inimical to public welfare. Whilst it does not proscribe advocacy of ideas it does proscribe advocacy of violent action. The applicants were simply exercising their fundamental rights to freedom of assembly and freedom of expression. Their conduct, if proved at the trial, could not constitute the offence they were charged with. What the applicants did was germane to the purpose for which the fundamental rights to freedom of assembly and freedom of expression are guaranteed under the Constitution. They did all they did in a peaceful gathering whilst preserving their willingness to act in conformity with the law. The acts they committed were acts to which the statute would not apply as the conduct was wholly protected by the Constitution.

**Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 21 – freedom of assembly and association – trade union – right to hold public gathering for *bona fide* trade union business purposes**

*ZCTU* v *OC Police KweKwe & Ors* HB-90-10 (Mathonsi J) (Judgment delivered 26 August 2010)

*See below, under* STATUTES (Public Order and Security Act).

**Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(2) – application to refer alleged contravention of Declaration of Rights to the Supreme Court – whether such application frivolous and vexatious – meaning of frivolous and vexatious – availability of other means of redress – not a reason not to refer matter – decision as to whether other means are adequate vests in Supreme Court**

*Chinanzvavana & Ors* v *A-G* HH-73-09 (Uchena J) (Judgment delivered 22 June 2009)

The applicants had all been indicted for trial before the High Court and a trial date had been set. On the trial date, they gave notice of their intention to apply for the referral of their case to the Supreme Court in terms of s 24(2) of the Constitution and applied for an order referring those questions to the Supreme Court.. The questions all arose out of the manner in which the applicants had been arrested and detained. The applicants alleged

- unlawful deprivation of liberty, having been held for more than 1½ months without being brought to court;
- inhuman and degrading treatment while so detained
- denial of protection of the law, on the basis that they had been kidnapped by state security agents, which kidnapping had been condoned by the police
- denial of access to their legal practitioners.

They raised the question of whether their trial in such circumstances was permissible.
The State opposed the application on the grounds that it was frivolous and vexatious. They also argued that the applicants had other remedies, such as an action for wrongful imprisonment.
Held: (1) A "frivolous and vexatious" application is an application of no merit mounted only for the purpose of harassing the respondent. In the context of s 24(2), the word "frivolous" connotes the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit, that a prudent person could not possibly expect to obtain relief from it. The word "vexatious", in contra-distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party, in the full appreciation that it cannot succeed; it is not raised *bona fide*, and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless. Unless the court finds the application is frivolous and vexatious, it must refer the matter to the Supreme Court. This determination is made after examining the questions the applicant seeks to refer to the Supreme Court and the applicable law. The examination is at this stage not aimed at determining the constitutional issues, but to test whether or not the questions raised are of a serious nature, or make the application frivolous and vexatious. In this assessment, the constitutional questions raised by the applicants must be assessed in light of the facts from

which they are alleged to arise. If the facts establish that the questions are worthy of the attention of the Supreme Court, then the court must refer the case; otherwise the application should be dismissed.
(2) The mere availability of other means of redress is not a bar to a referral of a case to the Supreme Court. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is insular and unacceptable. Having taken cognizance of the lawlessness, it would be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the applicant. In terms of the proviso to s 24(4), the Supreme Court decides and has to be satisfied of the adequacy of the other means of redress available to the applicant for referral. If the application for referral is not frivolous and vexatious, and it is alleged by the respondent that other remedies are available to the applicant, the Supreme Court must decide the issue. The court to which an application for referral is made cannot itself make that decision. To do so would usurp the functions of the Supreme Court.
(3) The circumstances under which the applicants were deprived of their liberty were not covered by any of the exceptions provided in s 13(2) of the Constitution. The referral on this point with thus not frivolous and vexatious.
(4) On the allegation of inhuman or degrading treatment, the applicants' evidence was not challenged. An unchallenged allegation of physical abuse by state officials cannot be held to be frivolous and vexatious.
(5) In terms of s 18(1) of the Constitution, every person is entitled to the protection of the law. "Every person" means every person, without exception. Even persons who are alleged or believed to have committed serious offences must be afforded the protection of the law. Their arrest must conform with the procedures specified by the Constitution and other laws of the country. Failure to afford protection to any such person entitles him or her to raise a constitutional issue. Denial of access to a legal practitioner is a contravention of s 13(3).
(6) On the issue of the applicants being tried in spite of their being brought to court illegally, there is an increasing acceptance by the courts of many countries that they cannot try accused persons abducted or kidnapped from outside their borders with the connivance of the state. The decided cases, though not dealing with local abduction or kidnapping, throw a shadow on the effect of illegalities in the bringing of accused persons to court. The court can use these cases as a guide to how the courts view illegality in general. The question was therefore reasonable and worthy of the attention of the Supreme Court.

**Contract – breach – remedies – specific performance – principles – party seeking specific performance must show has complied with own obligations under contract**

*Lasagne Invstms (Pvt) Ltd & Ors* v *Highdon Invstms (Pvt) Ltd & Ors* HH-188-10 (Gowora J) (Judgment delivered 1 September 2010)

An order for specific performance in favour of a litigant is entirely within the discretion of the judicial officer before whom the application has been made. An applicant who seeks an order for specific performance must perforce establish that he has complied with his obligations under the agreement. An applicant who seeks specific performance thus has an onus show that he is entitled to such an order in his favour. In respect of bilateral contracts, a party who seeks specific performance must first fulfil or be ready and able to fulfil his own obligation.

**Contract – carriage – clause limiting carrier's liability – need to bring such clause to other party's attention – effect of failure to do so adequately**

**Contract – carriage – when a consumer contract – unfair contract – carrier limiting amount of compensation to a sum based on weight of item carried – contact expressed in language not readily understood by other party – contract referring to another document – information being conveyed in vague and uninformative fashion**

*Tachiona & Anor* v *NRZ* HB-61-10 (Ndou J) (Judgment delivered 15 July 2010)

*See above, under* CARRIER (Liability).

**Contract – interpretation – time – computation of – clause requiring rent to be paid "within 7 days of the due date" – meaning of – period of computation beginning on first day of period stated**

*Maplanka* v *B A Ncube Hldgs* HB-63-10 (Ndou J) (Judgment delivered 15 July 2010)

A lease agreement for a piece of land on which there was a filling station provided that the rent "shall be payable monthly in advance … on or before the first day of each month". The subsequent clause provided that "In the event of the rent …. being unpaid within seven days of the due date … the owner shall be entitled at his option to cancel the lease forthwith". The lessee paid the rent for one month on the 8th of the following month, and the lessor sought to have the contract cancelled and the lessee evicted. The issue was whether the lessor was entitled to this remedy.

Held: If the language used in the lease agreement is sufficiently clear in fixing the last day of payment, the court will give effect to the clear intention of the parties. On the other hand, if the language used in the lease is not sufficiently clear or explicit in fixing the last day of payment, the civil method of computation of time must be used, in which case the first day is included in, and the last day excluded from, the computation. "Within seven days of the due date" clearly means that payment is due within the first seven days of each month. The due date being the first day of the month, it follows that "within seven days" of that date must mean *within* a period of no more than seven days from due date, including the due date itself. In this respect the phrase "within seven days of due date" is clearly distinguishable and different from the phrase "within 15 days *after* the same should have become due". The phrase "within seven days of due date" suggests that counting starts from the due date itself. Accordingly, the meaning of "within seven days of due date" is reasonably clear and it refers to the first seven days of the month, that is to say, up to midnight of the 7th day of each month. Consequently, payment of rent on the 8th day of the month would be a breach of the contract of lease entitling the landlord to cancel the agreement of lease. The fact that the delay was merely one day would be wholly irrelevant to the plaintiff's entitlement to cancel the contract. As soon as the rent is not paid by midnight on the 7th of the month, the landlord acquires the right of cancellation. Whether rent is then subsequently paid does not affect this legal position except where the acceptance of the rent amounts to a waiver of the right of cancellation.

**Contract – pledge – *parate executie* – validity – when such provision valid – need to apply for judicial sanction to enforce agreement**

*Ceprat Farming (Pvt) Ltd* v *Brightland Farming (Pvt) Ltd* HH-213-10 (Mtshiya J) (Judgment delivered 29 September 2010)

In return for goods supplied, but not paid for, the respondent signed an agreement in which it pledged two cold rooms in payment of the debt. A final date for payment was stipulated and when the respondent did not pay, the applicant sought relief under the *parate executie*. The respondent argued that, in order to execute on the basis of the pledge agreement, the applicant ought first to obtain a judgment authorising the sale of its (the defendant's) property.

Held: The issue was not to prove a claim but to enforce an agreement. All that the applicant sought was judicial sanction to deal with the pledged assets. The common law, insofar as stipulations for *parate executie* are concerned, is that stipulations, which are not so far-reaching as to be contrary to public policy, are valid and enforceable; that, as a matter of practice, creditors seeking to enforce such stipulations should take the precaution of applying for judicial sanction before doing so; and that the debtor can avail himself of the court's assistance in order to protect himself against prejudice at the hands of the creditors.

The pledge agreement constituted clear consent by the respondent to *parate executie.* It established that the respondent indeed owed the plaintiff the sum in question. Accordingly, once the existence of the document is established and found to be authentic or genuine and to have been entered into freely and voluntarily, the applicant's case must succeed.

**Contract – validity – contract induced by extortion – void and unenforceable – no part severable**

*Dumbura* v *Muhwehwesa & Anoe* HH-80-09 (Kudya J) (Judgment delivered 15 July 2009)

The plaintiff entered into an agreement with the defendants under which he purported to agree that he had stolen a sum of money from the defendants and in recompense therefor was surrendering certain immoveable and moveable assets, including a house and five motor vehicles. The plaintiff was in remand on the allegations of theft. The plaintiff sought the nullification of the agreement and the return of the property. The evidence showed that he signed the agreement at the urging of the defendants' legal practitioner and in return for an undertaking that the defendants would withdraw the charges against him. He signed it in order to gain his liberty from the prison. Once the last of the vehicles was delivered, the legal practitioner advised the prosecutor handling the case that he was agreeable to the grant of bail.

It was argued on the plaintiff's behalf that the agreement was not freely executed, alternatively, that the agreement was illegal because it was based on extortion.
Held: while the plaintiff was legitimately in remand prison, the pressure exerted on him by the defendants' legal practitioner was untoward and unwarranted. He illegitimately influenced the process of bail. The agreement, being grounded on extortion, lacked severable clauses and, additionally, being a *pactum commissorium*, was void and unenforceable.

**Costs – *de bonis propriis* – legal practitioner – award of such costs against practitioner foisting dishonest application on court**

*Moyo & Anor* v *Hassbro Properties (Pvt) Ltd & Anor* HB-73-10 (Mathonsi J) (Judgment delivered 22 July 2010)

*See below, under* LEGAL PRACTITIONER (Conduct and ethics)

**Court – judicial officer – recusal – grounds for – bias – need for applicant to show a reasonable possibility of bias and to prove facts from which such possibility may be inferred – judicial officer having previously expressed an opinion in case – not *per se* a ground for disqualification**

*Pechi Invstms (Pvt) Ltd* v *Nyamuda* HB-142-10 (Cheda J) (Judgment delivered 18 November 2010)

Disqualification arises whenever a judicial officer's relation to the parties is such, or his interest in the case is such, or his knowledge of the facts of the case or of the antecedents of the parties is such, as would tend to bias his mind at the trial. The test of judicial bias is not whether there has been actual bias, but whether there is a real likelihood of bias, or whether a reasonable man in all the circumstances might suppose that there was an improper interference with the course of justice. The possibility of bias and not actual bias is all that the applicant has to prove, but he must prove facts from which the possibility can be inferred. The facts from which that possibility may be inferred must be special to the particular case, not a general consideration on the ground of which bias may be vaguely conjectured.
There is no rule which states that a judge is disqualified from sitting in a case merely because in the course of his judicial duties he has previously expressed an opinion in that case. There would be as little justification for such a rule as for a rule which laid down that a judge who in a judgment expressed his opinion as to the correct interpretation of an Act of Parliament could not sit in a subsequent case between different parties where the same question of interpretation was involved.
The duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important. An impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial. Judicial officers should adopt a robust approach.
Where bias is alleged, the judicial officer should bear in mind the possibility of lack of *bona fides* on the part of the applicant. Above all, it should be borne in mind that the applicant bears a weighty onus in proving not only his reasonableness but that of his apprehension.

**Court – jurisdiction – High Court – arbitral award – award granted following referral in terms of Labour Act – challenge to such award – Labour Court having exclusive jurisdiction to deal with such challenge**

*Samudzimu* v *Dairibord Hldgs Ltd* HH-204-10 (Chiweshe JP) (Judgment delivered 15 September 2010)

*See above, under* ARBITRATION (Award – challenge to).

**Court – magistrates court – jurisdiction – eviction order following on criminal conviction – nature of such order – such order an exercise of magistrate's civil jurisdiction – noting of appeal against conviction – whether magistrate entitled to order execution of civil order notwithstanding noting of appeal**

*Bruford* v *Attorney-General & Ors* HH-232-10 (Chiweshe JP) (Judgment delivered 13 October 2010)

The applicant was a farmer whose farm has been expropriated under the land reform exercise. The farm had been allocated to the fourth respondent. The applicant did not move off the farm and was prosecuted under s s 3(2) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. He was convicted and sentenced and issued with an order evicting him from the land to which the offence related. He noted an appeal against conviction and sentence. The first respondent applied to the magistrate for, and was granted, leave to execute the eviction order pending appeal on the grounds that the appeal had no prospects of success and that it had been filed for purposes of delay. The applicant filed an application to review the magistrate's decision on the grounds that the whole process was grossly irregular and the consequent order grossly unreasonable. It was argued the magistrate had no jurisdiction to order execution pending appeal. The Magistrate Court Act [*Chapter 7:10*] was silent in granting criminal courts further jurisdiction to issue orders to suspend or execute pending appeal any judgment given under criminal law. Being a creature of statute, the court had no inherent jurisdiction and, accordingly, no power to order execution of its own judgments despite noting of an appeal. A court which does not have inherent jurisdiction cannot issue orders for the execution of its own judgments pending appeal. The civil magistrates court is conferred by s 40 of the Act with specific authority to issue an order of execution pending appeal, but nothing in the Act extends the same jurisdiction to a criminal magistrates court. It was also argued that if the court were to qualify as a civil court, it would not have had jurisdiction to order eviction with regards to a property whose value was well in excess of the given monetary jurisdiction.
The respondents argued that the court, upon conviction and sentence, had to in addition, issue an eviction order. It would be an absurdity if the criminal court so issuing such orders were to be precluded from enforcing them. The magistrate's jurisdiction in cases such as the present derives from s 3(5) of the Gazetted Lands Act. The provisions of s 3(5) were peremptory.
Held: where the trial court is of the opinion that the appeal has no prospects of success and that it is being lodged only for purposes of delay, it may order execution of the order pending appeal. Once it is accepted that in terms of s 3(5) the magistrate has the jurisdiction to give the order he gave and that jurisdiction of necessity includes the power to execute the orders so granted, it must also be accepted that where an appeal is lodged or indicated, the magistrate may of his own accord or upon application, order execution pending appeal if he is of the view that the appellant's grounds of appeal are frivolous and without merit. Section 3 (5) refers to "any court". It does not distinguish between superior and subordinate courts. Thus the powers given under s 3(5) apply with equal efficacy, regardless of the level of jurisdiction of any such court as provided for in any other legislation. The magistrates court is one entity, endowed with both civil and criminal jurisdiction. There is no provision that says a magistrate cannot, in an appropriate case, exercise elements of both his civil jurisdiction and his criminal jurisdiction where the enabling Act so directs. The jurisdiction of a magistrate is conferred by the Magistrates Courts Act "and any other enactment." The magistrate's jurisdiction to issue an eviction order is, in terms of the Gazetted Lands Act, founded upon the conviction, not upon the monetary value of the land or occupation in question. The magistrate is directed to issue an eviction order upon conviction. No reference is made to his monetary jurisdiction nor is there a provision that says he can only issue such an order "subject to the jurisdiction conferred upon him by the Magistrates Court Act." To interpret the position otherwise would lead to a glaring absurdity.

*Editor's note: would the effect of this judgment be that a magistrate could order the execution of an award of compensation in a criminal case, in spite of the noting of an appeal against conviction? Under s 372 of the Criminal Procedure and Evidence Act* [Chapter 9:07] *such an award, when registered, has the effect of a civil judgment.*

**Court – small claims court – execution of judgment of – procedures applicable – procedures applicable to magistrates court to be followed – such procedures including interpleader proceedings**

*Masuku* v *Chinyemba & Ors* HH-63-09 (Bere J) (Judgment delivered 21 May 2009)

Where the messenger of court has attached goods in execution of a judgment debt and such goods are claimed by a party who is not the judgment debtor, then by operation of law it becomes incumbent upon the messenger of court to initiate interpleader proceedings in order to have the status of the attached property determined before execution can continue. It is only when such property has been determined to belong to the judgment

debtor that such property can be sold in execution of the judgment in issue. In terms of s 29(2) of the Small Claims Courts Act [*Chapter 7:12*], procedures in respect of execution of judgments in those courts follow the procedures laid down for the magistrates courts. The messenger would be wrong to blindly proceed with execution in the face of an applicant's claim in respect of the attached property. The Act does not oust the jurisdiction of the High Court in such a case. Unlike the small claims courts, whose operations are governed by statute, the High Court has full original civil jurisdiction over all persons and matters within Zimbabwe. Certainly, the creation of the small claims courts did not exclude the jurisdiction of the High Court in entertaining a case emanating from such courts where execution is being improperly carried out.

**Court – *stare decisis* – decisions of High Court – single judging departing from ruling ostensibly made by two judges – decision in an urgent chamber application – not a decision made by two judges**

*Mudekunye & Ors* v *Mudekunye & Ors* HH-190-10 (Bere J) (Judgment delivered 3 August 2010)

*See below, under* PRACTICE AND PROCEDURE (Application – urgent – certificate of urgency).

**Criminal law – defences – intoxication – whether can ever reduce murder to culpable homicide – mitigatory effect of intoxication – provocation – when may reduce murder to culpable homicide – person being provoked while intoxicated – such provocation mitigatory**

*S* v *Masina* HH-245-10 (Uchena J) (Judgment delivered 5 November 2010)

Diminished responsibility due to drunkenness and provocation, according to the non-statutory Roman Dutch criminal law, though capable of leading to a reduction of a murder charge to culpable homicide or an acquittal, does not ordinarily lead to such results, but to the accused being convicted of murder, the drunkenness and provocation being merely mitigatory.

Under the codified criminal law set out in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], the legislature altered the common law position on voluntary intoxication to the extent that that defence can never result in the reduction of a murder charge to that of culpable homicide. Section 222 of the Code introduced a new offence of voluntary intoxication leading to unlawful conduct, where the effect of the intoxication leads to the accused lacking the requisite intention, knowledge or realisation required to commit the crime originally charged. This new offence is not the same as culpable homicide, as culpable homicide does not attract the same sentence as murder (the crime originally charged).
Under the Code, intoxication is not a defence unless it is such that the accused lacked the requisite intent to commit the crime charged; it may be mitigatory (s 221(1)).

For provocation to reduce murder to culpable homicide, it must be such as would lead the accused to act without intention, or with intention but having completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances to lose his or her self-control (s 239(1)). If the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control, the accused is not be entitled to a partial defence but the court may regard the provocation as mitigatory (s 239(2)). Similarly, if a person, while in a state of voluntary intoxication, is provoked into any conduct by something which would not have provoked that person had he or she not been intoxicated, the court shall regard such provocation as mitigatory when assessing the sentence (s 224).

**Criminal law – offences under Criminal Law Code – s s 37(1)(a)(i) – acting with intent to disturb the peace, security or order of the public – what provision is aiming at – provision not intended to prevent public gatherings**

*Williams & Anor* v *Msipha NO & Ors* S-22-10 (Malaba DCJ, Chidyausiku CJ, Cheda JA, Ziyambi JA & Garwe JA concurring) (Judgment delivered 26 November 2010)

*See above, under* CONSTITUTIONAL LAW (Constitution of Zimbabawe 1980 – Declaration of Rights – s 13)

**Criminal law – offences under Criminal Law Code – sexual offences – rape – penetration – meaning**

*S* v *Tirivanhu* HH-219-10 (Uchena J) (Judgment delivered 16 September 2010)

Rape can only be committed when the accused's penis penetrates the victim's vagina. The penetration need not be full penetration; the slightest penetration is sufficient. There must, however, be evidence that there was penetration. In the absence of such evidence, an accused person cannot be convicted on a charge of rape. Merely to touch the outside of the female genitalia with the male organ does not constitute penetration, although a verdict of attempted rape may be appropriate.

**Criminal law – offences under Criminal Law Code – sexual offences – sexual intercourse with young person – charge must be one of rape where young female person is of or under the age of 12 years – age of young person – need to establish age accurately**

*S* v *Dube* HB-116-10 (Mathonsi J) (Judgment delivered 7 October 2010)

The accused, allegedly aged 18 years, was charged with having extra-marital sexual intercourse with a young person, in contravention of s 70(1)(a) of the Criminal Law Code [*Chapter 9:23*]. The age of the girl was said in the charge sheet to be 12 years, but no evidence of her age was led. The accused pleaded guilty but denied knowing her age. When the accused was questioned about his understanding of the essential elements of the offence, he did not admit knowing that she was a "young person" as defined in the Code. Section 61 defines "young person" as a "boy or girl under the age of 16 years". No minimum age is provided. The scrutinising regional magistrate was of the view that, in the light of s 64(1) of the Code, the accused should have been charged with rape. This section provides that "A person accused of engaging in sexual intercourse … with a young person of or under the age of 12 years shall be charged with rape … and not with sexual intercourse … with a young person". The trial magistrate was of the view that s 70(4) of the Act was permissive in that it provides that rape is a competent charge for intercourse with a female person below the age of 12 years. Because the complainant was aged 12 years and not below the age of 12 years, the magistrate considered that a charge under s 70(1) was competent.
Held: (1) It is always critical to determine the exact age of the complainant in cases involving the sexual abuse of children. This derives from the provisions of the Code which give rise to varying types of charges and the penalties to be meted out. What was placed before the court was patently incomplete, if not inaccurate, information. To say the complainant was aged 12 years was inaccurate and problematic, as it was not clear whether she was celebrating her 12th birthday on the day of the offence, or had already attained that age or was in her 12th year. It was therefore necessary to ascertain the exact age by means of her birth certificate and/or medical evidence as to her probable age if the date of birth was not known. None of this was done. The same applied to the age of the accused.
(2) The Code restates the common law position that young persons of and under the age of 12 are incapable of consenting to sexual intercourse. Offenders against this group should not be charged under s 70(1), which relates to sexual intercourse with a young person. Section 70(4) buttresses this position.

*Editor's note:* s 64(2) of the Criminal Law Code provides:

> "A person accused of engaging in sexual intercourse … with a young person above the age of 12 years but of or below the age of 14 years shall be charged with rape … and not with sexual intercourse … with a young person … unless there is evidence that the young person … was capable of giving consent to the sexual intercourse … and gave his or her consent thereto".

This subsection allows the prosecution to bring a charge other than rape, if there is evidence of consent, where the complainant is "above the age of 12 years but of or below the age of 14 years". Section 64(1) is misquoted in the judgment; consent is not mentioned.

The exact wording of s 70(4) is: "For the avoidance of doubt … *the competent charge* against a person who has sexual intercourse with a female person below the age of twelve years *shall be* rape … and not sexual intercourse with a young person" (my emphasis).

It would thus appear that, under s 64, if the young person has reached, but not passed, her 12th birthday, the charge *must* be one of rape, irrespective of whether there is evidence of consent. If she has passed her 12th birthday but has not passed her 14th birthday, the charge need not be one of rape if there is evidence of consent.

**Criminal law – offences under Criminal Law Code – theft (s 113) – trust money – what is – using trust money without having equivalent value to cover any deficiency**

*S* v *Westgate Invstms (Pvt) Ltd & Anor* HH-26-09 (Patel J) (Judgment delivered 5 March 2009

The accused, a company and its managing director, were originally committed by the magistrates court to appear for trial by the High Court on a charge of theft by false pretences. Due to the death of a principal State witness the matter was postponed. Five days before the date set for the trial, the State filed a fresh indictment charging theft by false pretences, alternatively, theft by conversion, as well as a revised summary of evidence. The alternative charge alleged that the accused them received into their possession from the Reserve Bank of Zimbabwe a sum of money, the property of the Reserve Bank, for the purpose of buying on behalf of Chegutu Municipality two tractors and a grader, it having been agreed that the money would be held in trust by the accused and used solely for the purpose of purchasing the t tractors and grader, but that the accused did not use the money for that purpose and instead converted the money to their own use. The accused had won a tender for the supply of the equipment to the municipality.

Before the trial started, defence counsel objected to the revised indictment as being irregular. The court ruled that since the accused had not as yet pleaded they would not suffer any prejudice by reason of the inclusion of the alternative charge in the indictment. They were then afforded the opportunity to prepare and file a fresh defence outline. This was duly done and the matter proceeded to trial on the revised indictment. At the close of the State case, the main charge was withdrawn, leaving only the alternative charge to be addressed. At the end of the trial, defence counsel again raised the procedural regularity of the revised indictment and argued that the alternative charge for theft by conversion was defective, because the accused had not been originally committed to trial on that charge by the magistrates court. He relied on s 103 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The evidence was that the payment to the accused was an advance payment in terms of the contract of supply between the accused and the Municipality. The accused were required as a precondition to obtain and furnish an advance payment bond for an equivalent sum. The accused did not have in their possession or under their control sufficient money either to meet the purpose for which the money was advanced to them or to repay the equivalent amount. The accused then used most of what was paid for purposes other than the purchase of the machinery. At some later stage the accused did try to procure two tractors through separate contracts and they did in fact attempt to partially fulfil their contract with the Municipality. The main question then was whether the money paid to the accused was trust money or simply a pre-payment between debtor and creditor. Put differently, were the accused entitled to use the money once they had received it for whatever purpose they deemed fit?

Held: (1) The purposes of committal by a magistrate, as required by s 103, are, firstly, to ensure that the accused is fully apprised of the charge or charges against him before he is tried and, secondly, to enable the magistrate to scrutinise the charges so as to determine, as is enjoined by s 89(1) of the Act, that there appears sufficient reason for putting on trial for any offence any accused person brought before him. Nothing in s 103 precludes the amendment or revision of a charge after committal by a magistrate and before commencement of trial by the High Court, so long as the accused is not materially prejudiced in the conduct of his defence.

(2) When trust money is handed to a person, it is the duty of the person to keep it in its possession and to use it for no other purpose than that of the trust. The person fulfils his duty if he accounts for or returns an equivalent amount. It is inherent in such a trust that that the person should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. If it is proved that the money was "trust money" i.e. money given to an agent with instructions to devote it to a specific purpose, then the use of that money for some other purpose without the retention of an equivalent liquid fund may well constitute theft. An advance payment is not necessarily and invariably indicative of an ordinary commercial pre-payment between debtor and creditor. In most cases, the probability is that that is what was contemplated by the parties; but it may still be necessary and relevant in each case to have regard to the intention and conduct of the parties in order to ascertain the true purpose of an advance payment. *In casu*, it was clear that all the parties, including the accused, unequivocally intended that the advance payment was to be used for the specific and clearly defined purpose of purchasing two tractors and one grader, and for no other purpose. The money was thus "trust money" and not merely "debtor-creditor money". The argument that the accused could not be convicted of theft as they lacked the requisite *mens rea* or intention to permanently deprive the Reserve Bank or the Municipality of their money ignores that fact that theft of trust money by conversion is a peculiar species of offence. Generally speaking, it is necessary for common law theft to establish an intention to effect a permanent deprivation. Ordinarily, therefore, *furtum usus* or unauthorised borrowing does not constitute theft at common law. In the case of money and other fungibles which are consumed by their use, the fact that the accused may at some later stage attempt to procure or restore the equivalent thing or amount to the complainant does not negative his intention to deprive at the time of conversion. Such conduct may serve to mitigate the wrongdoing but does not exculpate the wrongdoer. By using the advanced trust money without having retained an equivalent liquid fund to replenish or

cover the deficiency, the accused intentionally deprived the Reserve Bank of that money at the time that they converted it to their own use.

*Editor's note*: s 103 of the Criminal Procedure and Evidence Act was repealed by Act 9 of 2006 and re-enacted in substantially similar terms as s 65, with effect from 19 January 2007. The original committal in this case took place before the amendment came into effect.

**Criminal law – offences under Criminal Law Code – unlawful entry into premises – meaning of "premises" – premises do not include land in which a building is situated – correct charge to bring for unlawfully entering onto such land**

*S* v *Garanewako* HH-242-10 (Mutema J) (Judgment delivered 30 September 2010)

The accused was convicted of unlawful entry into premises, in contravention of s 131 of the Criminal Law Code [*Chapter 9:23*]. He had opened the sliding gate of the complainant's yard and entered the yard, where he was discovered. On review:
Held: the conviction was wrong. "Premises", for the purposes of s 131, means any movable or immovable building or structure used for human habitation or storage. The crime of unlawful entry into premises is nothing more that a codified version of the old offence of housebreaking with intent to commit a specified crime within the premises so broken into. The mere opening of a sliding gate of a perimeter wall surrounding the yard of a dwelling premises and only entering that yard as happened *in casu* can never legally found the crime of unlawful entry into premises. There is patently a world of difference between unlawful entry into premises and criminal trespass, which relates to and is limited to land as we know it (usually with written signs prohibiting entry) or an enclosed area on which is situated a building or structure ordinarily used for human habitation or for storage of property and is outside that building but is surrounded by a sufficient wall, fence or hedge that is continuous and has an entrance(s) either barred or capable of being barred by a gate or other means (what is commonly referred to as a yard).The correct charge should therefore have been criminal trespass as defined in s 132 (1)(a) of the Code.

**Criminal procedure – arrest – without warrant – requirement for reasonable suspicion to exist before arrest may be made – maximum period for which arrested person may be held by police before being brought to court – arrest – with warrant – requirement to bring arrested person before court with 48 hours**

*Dube* v *Officer Commanding ZRP Nkayi District & Ors* HB-125-10 (Mathonsi J) (Judgment delivered 21 October 2010)

Before arresting a person without a warrant (except a person who commits an offence in the presence of the arresting detail), the arresting detail must formulate a reasonable suspicion that an offence has been committed. Section 25(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] requires that there be "reasonable grounds to suspect" that an offence has been committed. Once the person is arrested and brought to a police station, s 32 of the Act demands that the person can only be detained for a period not exceeding 48 hours at a police station unless he is brought before a judicial officer who is the only authority empowered to order a further detention. No reckoning of time allows the detention of a suspect for a period exceeding 96 hours before being brought before a judicial officer. This procedure applies even in respect of 9th Schedule offences, as the 21 day detention allowed for such offences can only be ordered by a judicial officer. Police officers have no authority whatsoever to detain suspects beyond the prescribed period of time.
Even where a warrant for arrest is issued, s 34(3) requires the suspect to be brought "as soon as possible before a judicial officer on a charge of the offence" mentioned in the warrant.
It is regrettable that senior officers policing an entire region would believe that they have a legal right to detain suspects for a period of 14 days; no such right exists. It is also disturbing, to say the least, for a senior police officer, commanding an entire district, to admit that a suspect was arrested only for a crime docket to be opened later and for investigations to commence when the suspect was already languishing in custody. This means that, at time of the arrest, the arresting detail could not countenance any reasonable suspicion that the suspect had committed an offence. The requirement to bring suspects before a judicial officer within the prescribed period is meant to curb the excesses of police officers who erroneously believe they can keep suspects for 14 days without charge.

**Criminal procedure – bail – appeal – by Attorney-General against grant of – appeal from High Court – 7 day period within which to note appeal – does not include Saturdays, Sundays and public holidays**

*Dhlamini & Anor* v *Ministers of Home Affairs & Ors* HH-51-09 (Patel J) (Judgment delivered 30 April 2009)

The applicants were granted bail by the High Court; the Attorney-General immediately announced his intention of appealing against the grant of bail, and in terms of s 121(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CP&EA), the release of the applicants was precluded for a period of 7 days. Shortly afterwards, the Easter weekend intervened. As enjoined by s 121(1) of the Act, as read with s 44(5) of the High Court Act [*Chapter 7:06*], the Attorney-General filed an application for leave to appeal. This application was granted by the High Court 3 days later, and the appeal against the grant of bail was then filed with the Supreme Court on the same day. The issue then arose as to whether, in reckoning the 7 day period referred to in s 121, weekends and public holidays were to be included or excluded.

Held: s 44(5) of the High Court Act provides that, where a judge has made an interlocutory order or given an interlocutory judgement in relation to any criminal proceedings, the accused person or the Attorney-General may appeal to the Supreme Court against that interlocutory order or judgment. However, any such appeal is "subject to rules of court" and requires "the leave of a judge of the High Court". While it is very doubtful that the admission of a person to bail can properly be perceived as an interlocutory order or judgement, the refusal or grant of bail must be regarded as an interlocutory order or judgment "for the purposes of" s 121 of the CP&EA as read with s 44(5) of the High Court Act, and the practical effect of these provisions is that where the Attorney-General wishes to appeal against an admission to bail he has to obtain the leave of a judge. The "rules of court" referred to in s 44(5) of the High Court Act must be construed as being the rules governing appeals against interlocutory orders and judgements in criminal proceedings as distinguished from the rules governing bail applications and bail appeals. In other words, the reference to "rules of court" in s 44(5) of the High Court Act has no direct bearing on the interpretation and application of s 121 of the CP&EA.

Neither the CP&EA nor the Interpretation Act [*Chapter 1:01*] contain express guidance or assistance on how to compute the 7 day period. Rule 6 of the Supreme Court of Zimbabwe (Bail) Rules 1991 (SI 290 of 1991) restates the stipulation that an appeal from the High Court against the grant of bail must be filed within 7 days and then prescribes the specific procedure to be followed in noting such an appeal. Rule 3, in dealing with the reckoning of time, provides that a Saturday, Sunday or public holiday shall not be reckoned as part of such period. By contrast, r 3 of the High Court of Zimbabwe (Bail) Rules 1991 (SI 109 of 1991) explicitly includes Saturdays, Sundays and public holidays as part of the 7 day period for filing an appeal *to* the High Court. The Supreme Court (Bail) Rules were lawfully and procedurally enacted in terms of s 34 of the Supreme Court Act [*Chapter 7:13*]. To the extent that they are *intra vires* and consistent with that Act, they must be duly applied "for regulating all matters in relation to the proceedings of the Supreme Court" and "in relation to criminal cases, for carrying the criminal law, practice and procedure into effect". Rule 3 does not conflict with anything contained in s 121 of the CP&EA. Accordingly, the 7 day period stipulated in s 121 must be reckoned as excluding Saturdays, Sundays and public holidays.

*Editor's note*: as pointed out by the learned judge, this leaves the undesirable anomaly that, in the case of an appeal by the Attorney-General from the magistrates court, the 7 day period includes Saturdays, Sundays and public holidays. The decision could also mean that, by excluding Saturdays, Sundays and public holidays, the Attorney-General could have considerably longer than 7 days within which to note an appeal from a decision of the High Court – while the accused remains in custody. In view of the provisions of s 33(4) of the Interpretation Act, the period could end up as long as 11 days, even if there are no public holidays as well.

**Criminal procedure – bail – application – refusal of – grounds – applicant a danger to safety of public or particular person – applicant a child or young person – where should be detained – undesirability of keeping such applicant in remand prison if remand home available**

*S* v *K (a juvenile)* HH-66-09 (Uchena J) (judgment delivered 4 June 2009)

The applicant, a 17 year old juvenile, was indicted for trial before the High Court on two counts of murder. It was alleged, and not in dispute, that he shot both of his parents. He applied for bail pending trial, before he was asked to plead to the charges. The grounds for the application were an application at this stage that the applicant needed to be examined by a psychiatrist before the trial. The applicant alleged that he was suffering from a mental disability at the time he gunned down his parents. The issue for trial was whether or not he had the

necessary *mens rea* at the time he fired the fatal shots. The State produced a report by a doctor who examined the applicant and found that he is suicidal and a danger to himself and others.
Held: (1) this ordinarily would not be the best time for a bail application, as whatever bail the accused might be granted at this stage would be affected by his plea of not guilty, a plea which was unavoidable in terms of s 271 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In terms of s 169 of the Act, any bail granted before the accused tenders his plea will lapse when he pleads to the indictment and a fresh application would have to be made. However, *in casu* there was a need for the applicant to apply for bail before pleading to the two charges, but the application should have been preceded by an application for postponement.
(2) The fact that the shooting was not in dispute and that the applicant's mental state was in issue called for a careful consideration of whether or not the applicant was a danger to those he would stay with if he were released on bail. There was good reason for fearing that the applicant was not only a danger to himself but also to members of his family and to the public. In terms of s 117(2)(a)(i) of the Act, a reason for refusing bail would include the fact that the applicant was a danger to the safety of the public or a particular person. It was too risky to release the applicant into society when he had not been properly examined, and or treated, for the condition which triggered the events of the fateful day. However, it was not only undesirable for a juvenile to be kept in a remand prison, but such a course was contrary to the provisions of s 84 (1) of the Children's Act [*Chapter 5:06*], which stipulates that a young person shall not before conviction be detained in a prison or police cell or lock-up unless his detention is necessary and no suitable remand home is conveniently available for his detention. There being such a home available, the applicant would be detained there.

**Criminal procedure – charge – accused committed for trial on particular charge – amendment to such charge and inclusion of alternative charge – permissible provided accused not prejudiced in his defence**

*S* v *Westgate Invstms (Pvt) Ltd & Anor* HH-26-09 (Patel J) (Judgment delivered 5 March 2009)

*See above, under* CRIMINAL LAW Offences under Criminal Law Code (Theft).

**Criminal procedure – charge – improper splitting of charges – principles – accused should be charged with that offence which was his dominant purpose**

*S* v *Mupatsi* HH-73-11 (Mavingira J, Karwi J concurring) (Judgment delivered 23 November 2010)

The rule against splitting of charges (which could more aptly be described as a rule of practice against the duplication of convictions) was designed to prevent a duplication of convictions in a trial where the whole of the criminal conduct imputed to the accused constitutes in substance only one offence which could have been properly embodied in one all-embracing charge and where such duplication results in prejudice to the accused. Accordingly, where the accused, in pursuance of a dominant intention, commits a number of offences, the proper thing to do is to charge him with only that offence which was his dominant purpose. This does not mean that the test of "dominant purpose" is the only one to be applied; in some situations it may still be appropriate to charge the accused with more than one offence.

**Criminal procedure – committal for trial – committal by magistrate for trial in High Court – purpose of committal – amendment or revision of charge on which accused is committed – permissible provided accused not prejudiced in his defence**

*S* v *Westgate Invstms (Pvt) Ltd & Anor* HH-26-09 (Patel J) (Judgment delivered 5 March 2009

*See above, under* CRIMINAL LAW Offences under Criminal Law Code (Theft).

**Criminal procedure – committal for trial – failure to bring accused to trial within 6 months of date of committal – calculation of time period – interruption of 6 month period – may be interrupted when accused not available to stand trial for reasons beyond the control of the Attorney-General**

*S* v *Matapo & Ors* HH-142-10 (Musakwa J) (Judgment delivered 9 July 2010)

The applicants, having been arrested in May 2007, were committed for trial in June 2008. The matter was not set down for trial in spite of requests by the defence for various documents. In August 2008 an application relating to the constitutionality of the charges was heard; it was dismissed in November 2008 and the Supreme Court, to which the issue was then referred, rejected the constitutional application in December 2009. In March 2010 the applicants were notified of a trial date in June 2010. They brought an application for the dismissal of the case against them, arguing that, in terms of s 160(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], they were entitled to have the case dismissed as they had not been brought to trial within 6 months of the date of committal. It was argued that the only time they had not been available for trial was while the constitutional issue was pending. The Attorney-General argued that the calculation of the period within which the accused should have been brought to trial should take into account the times the High Court was on vacation. It was also contended that the six months that entitle a dismissal of the case must run uninterrupted.
Held: the prerogative of setting down a criminal matter for trial is that of the Attorney-General. The only time an accused person may be granted an earlier date is upon application before the court. Section 160(2) does not provide for the reckoning of the six months period, so the meaning given in the Interpretation Act must be relied on, that is, a "calendar month". "Calendar month" has two meanings, the second of which is the space of time from any date in any month to the corresponding date in the next. That was the appropriate meaning in the context of s 160(2). The only way the period could be interrupted would be if the accused were unavailable for trial. When an accused person is committed for trial he automatically becomes available for trial. The only time he is not available for trial would be for example, if he is too ill or, as here, when the trial process is interrupted by some other process like an application for referral of a constitutional issue to the Supreme Court. When the applicants were committed for trial in June 2008, the six month period within which they should have been brought to trial immediately commenced to run. Although between that date and the date the constitutional application was first heard the matter could not be tried because the defence had not been furnished with certain documents, that period should be counted as part of the six months within which the applicants should have been tried. Further, the fact that the High Court was on vacation on two occasions did not constitute a circumstance beyond the control of the Attorney-General. This was so because it could not be said the applicants were not available to stand trial.

**Criminal procedure – jurisdiction – accused person brought before court after illegal arrest and detention – whether court should decline jurisdiction**

*Chinanzvavana & Ors* v *A-G* HH-73-09 (Uchena J) (Judgment delivered 22 June 2009)

*See above, under* CONSTITUTIONAL LAW (Constitution of Zimbabwe – Declaration of Rights – s 24(2))

**Criminal procedure – remand – requirements for – need for court to be satisfied that facts alleged constitute offence charged – need for court to have reasonable suspicion that accused committed offence**

*Williams & Anor* v *Msipha NO & Ors* S-22-10 (Malaba DCJ, Chidyausiku CJ, Cheda JA, Ziyambi JA & Garwe JA concurring) (Judgment delivered 26 November 2010)

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

**Criminal procedure – trial – multiple accused – separation of trials – may only be ordered on application by prosecutor or accused – factors to take into account when application made**

*Ngwenya & Anor* v *Ndebele NO & Anor* HB-122-10 (Mathonsi J) (Judgment delivered 21 October 2010)

A separation of trials may not be ordered by the court *mero motu*; an application must be made by the prosecutor or one of the accused. If no such application is made, it is not an irregularity if the court does not *mero motu* order a separation and there would be no grounds for review arising from the failure to order a separation. If an application is made, the court has a discretion as to whether to order separation of trials. There is no rule of law that separate trials should be ordered where an essential part of one accused person's defence

amounts to an attack on a co-accused; this would be a matter is one which the court should take into account in determining whether to order separate trials or not. It is not correct to say that, where co-accused persons incriminate each other, even where there is no desire to use the evidence of any of them against the other, a separation of trials should be ordered.

**Customary law – chief – succession to chieftainship – collateral system of succession among Shona speaking people – principles**

*Mheki* v *Vhushangwe & Ors* HH-174-10 (Chatukuta J) (Judgment delivered 4 August 2010)

A chief is appointed by the President in terms of s 3 of the Chiefs and Headmen Act [*Chapter 29:01*]. In so doing, the President must give due consideration to the customary principles of succession, if any, applicable to the community over which the chief is to preside. Whilst among the Ndebele, the chief (*induna*) is selected by a system of primogeniture in which, upon his death, the office is passed on to his eldest son, a more complicated one is adopted by the Shona-speaking people. The principle varies with each community. Their chiefs are chosen by a collateral system in which the position is passed from the head of one of the "special families" to that of another. Each of these families is known as an "*imbahuru*" or "royal family" and on the death of a chief (*ishe* or *mambo*) his successor is selected from the representatives of two, three or even four "royal" families in the clan. Thus, when a chief dies, his office passes on to the representative of the next family until each has had its turn, when the cycle is repeated. One variation is that younger brothers succeed to elder brothers until the succession has been held by each in turn, when it reverts to the son of the first chief and then to the sons of the collateral lines. Another variation is that the eldest son, regardless of the position or rank of his mother, succeeds to the personal name and position of his father. When he dies, his next youngest brother or half-brother succeeds to the father's name, until the generation of sons of the father is exhausted and the eldest grandson succeeds to the name and position of his grandfather, the determining factor again being the order of birth amongst collateral grandsons. It is the task of tribal elders, mostly belonging to the ruling clan, and of other important kinsmen, to determine which candidate has the best rights to become chief. In the event of serious rivalry recourse may be had to a *svikiro* (spirit medium) of an important ancestor to ascertain the views and wishes of the ancestral spirits.

**Damages – assessment of – delict – *actio injuriarum* – principles – purpose of award of non-patrimonial loss – need for conservative approach – need for objective value to be placed upon injuries – bodily injury – assault by police on person taking part in peaceful demonstration – *contumelia* – assault in public place and photograph of assault published in newspaper – serious example of *contumelia***

*Nyandoro* v *Min of Home Affairs & Anor* HH-196-10 (Patel J) (Judgment delivered 7 September 2010)

The plaintiff claimed damages for an assault by members of the police force. He had been involved in a peaceful demonstration organised by a non-government organization. The police had broken up the demonstration. Most of the crowd ran away and dispersed, but the plaintiff was caught and assaulted by about 10 to 12 policemen. A photograph was published in a newspaper, depicting a policeman running behind the plaintiff and brandishing a baton within striking distance. The plaintiff fell to the ground and continued to be assaulted. He and others were taken to Harare's central police station, where he was further assaulted by 2 police officers. The injuries he received resulted in hospitalization and surgery. Because of his injuries, he was unable to continue with his two occupations, of ferrying goods from Harare to a rural company and selling produce from horticulture farming. His savings were exhausted in medical expenses. The quality of his life was greatly reduced as a result of the assault upon him and he was no longer able to assist his 3 dependant children who were still at school.
Held: (1) the assaults upon the plaintiff's physical integrity were unlawful in that they were perpetrated without lawful authority. They were also patently wrongful as being demonstrably incompatible with *boni mores* and the legal convictions of the community concerning the exercise of police powers.
(2) The broad purpose of an award for non-patrimonial loss is to enable the claimant to overcome the effects of his injuries and to provide psychological satisfaction for the injustice done to him. Since pain and suffering cannot be accurately measured, the quantum of compensation to be awarded can only be measured by the broadest general considerations. The compensation awarded should be assessed so as to place the injured party, as far as is possible, in the position he would have been in if the wrongful act causing him injury had not been committed. However, general damages do not constitute a penalty but are designed to compensate the victim and not to punish the wrongdoer. The court is entitled and has a duty to heed the effect its decision may have upon the course of awards in the future. Moreover, awards generally must reflect the state of economic

development and current economic conditions of the country. Consequently, they should tend towards conservatism lest some injustice be done to the defendant. No regard is to be had to the subjective value of money to the injured party and, therefore, the award cannot vary according to whether he is a millionaire or a pauper. Thus, the courts are not concerned with the probably erroneous value that a person would put on his own life and limbs, but with the dispassionate and neutral value which society at large would deem appropriate on the basis of the prevailing value of money in that society.
(3) In determining prospective loss, all the contingencies must be considered, including facts known at the date of the trial, in deciding whether or not there is a reasonable probability of pecuniary loss occurring in the future. In assessing pain and suffering, regard may be given to the age of the claimant because an older person has less resistance to pain than a younger person.
(4) The aspect of *contumelia* is as important as pain and suffering and it is necessary to take into account the public and private embarrassment suffered by the plaintiff as a result of the wrongful conduct. The plaintiff was initially assaulted in a public place in full view of his colleagues and passers-by. The photograph was also published for all of the newspaper's readers to see. The assault was aggravated by the fact that it was committed by members of the police who are State servants paid from public funds. The plaintiff was consequently humiliated and embarrassed and must therefore be entitled to appreciable damages for *contumelia*.

**Damages – assessment – loss of support – how should be calculated – what evidence is required – how resulting sum should be adjusted**

*Mabaire* v *Jailosi & Anor* HH-228-10 (Kudya J) (Judgment delivered 13 October 2010)

Damages for loss of support constitute general damages, and as such, are calculated as at the date of judgment. In most cases, the plaintiff relies either on medical or actuarial evidence; or on the general evidence of the deceased's earning capacity prior to his or her death; or on both. Where there is proof of loss of support, even in the face of inadequate evidence, the court is enjoined "to pluck a figure from the air". Judgment will, however, be denied to a plaintiff who through lack of diligence fails to produce evidence that would have been available to him or her. The total amount of loss of support that is arrived at may be subjected to two discounts. The first of these discounts caters for the capitalization rate of the award. This is often equivalent to the rate of interest that the plaintiff would earn on investing the award. The second discount caters for contingencies, such as errors in calculations, taxation and other unforeseen events. While the level of maintenance that the deceased used to provide to his family is important, the court cannot use the expenses incurred by the plaintiff to calculate the loss of support without reference to the deceased's earning capacity. It is a basic fact of life that expenses may often be much higher than a breadwinner's earning capacity, so to use the expenses to calculate the estimated loss of support may distort the award for loss of support to the prejudice of the defendant and would amount to an improper exercise of the court's discretion.

**Delict – negligence – proof of – *res ipsa loquitur* – applicability of – driver moving onto wrong side of road – whether proof of negligence**

*Mafusire* v *Greyling & Anor* HH-173-10 (Chatukuta J) (Judgment delivered 28 July 2010)

*See below, under* ROAD TRAFFIC (Negligence – duty of driver)

**Employment – contract – remuneration – agreement to pay employee in foreign currency – lawfulness of such agreement – requirement to pay employee in legal tender – meaning**

*McCosh* v *Pioneer Corporation Africa Ltd* HH-164-10 (Kudya J) (Judgment delivered 28 July 2010)

The plaintiff had been employed by the defendant at a time before the general use of foreign currency became lawful. His contract expressed his salary in Zimbabwean currency, although there later an acknowledgement of debt was issued by the defendant, expressed in foreign currency. The plaintiff claimed this sum from the defendant. It was argued on the defendant's behalf that the agreement to pay the plaintiff in foreign currency was unlawful, both under the exchange control legislation and under the Labour Act [*Chapter 28:01*], s 12A(1) of which requires employees to be paid in "legal tender".
Held: (1) an agreement to pay an employee in foreign currency is not unlawful, but, without the approval of the Reserve Bank, payment in foreign currency would be unlawful.

(2) Section 12A(1) restricts those employers who remunerate their employees in money to the use of "legal tender", to the exclusion of other modes of payment such as promissory notes, vouchers, coupons or any form other than legal tender. The phrase "any form other than legal tender" is of wide application: it restricts payment to the use of legal tender and excludes payment in kind or money that is not legal tender. Subsection (2) permits employers who are in occupations or industries that customarily pay remuneration in kind to do so. Section 12A(2)(e) puts it beyond doubt that remuneration in kind is not the same as remuneration in money and is clear proof that, in the mind of the legislature, legal tender in s 12A(1) was another name for "money". At that time, foreign currency did not constitute legal tender. Legal tender is the money of a country in actual use. It is such money in the legal sense as the legislature has so defined in the statutes organizing the monetary system and is the medium legally authorised by the State for the payment of debts. Foreign money is not legal tender, for not all money is legal tender, but all legal tender is money. Legal tender is such money as is the current "coin of the realm". At the time the acknowledgment of debt was entered into, the legal tender for the payment of salaries in Zimbabwe was local currency and not foreign currency.

**Employment – Labour Court – appeal from – question of law – what constitutes – disciplinary committee – whether properly constituted – whether employee waived right to challenge composition of committee – whether composition of committee amount to substantial compliance with code of conduct – all questions of fact, not law**

*Sable Chemical Industries Ltd* v *Easterbrook* S-18-10 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 14 September 2010)

The appellant company appealed against a judgment of the Labour Court, which had allowed an appeal by the respondent seeking an order setting aside his dismissal from employment by the appellant. The Labour Court had found, firstly, that the disciplinary hearing committee had not been properly constituted. Secondly, the Labour Court found that even on the merits, the alleged offences had not been proved and that at most what was proved was poor or lack of supervision which under the code of conduct, called for a severe warning or final written warning. The appellant argued that these decisions were wrong in law; in addition, it was argued that the respondent, by attending the disciplinary committee's hearing, had waived his right to impeach the composition of the committee; and that the Labour Court erred in law by ignoring the fact that it was impossible to strictly comply with the provisions of the code owing to the seniority of the respondent and that the disciplinary committee as constituted amounted to substantial compliance with the code of conduct.
Held: (1) an appeal from the Labour Court lies to the Supreme Court only on a question of law. What is a question of law, rather than fact, is well established. It is also well established that a serious misdirection on the facts amounts to a misdirection in law, as the giving of reasons that are bad in law constitutes a failure to hear and determine according to law.
(2) None of the persons who were supposed to constitute the disciplinary committee in terms of the appellant's code of conduct were involved in the deliberations of the committee. Instead, the appellant's acting general manager, whose participation in the disciplinary proceedings was not provided for in the code of conduct, presided over the inquiry on his own. The finding that the disciplinary committee was not properly constituted was a matter of fact and not law. The result was that the proceedings were a nullity.
(3) It is well established that whether waiver has taken place is a question of fact and not law.
(4) While proceedings before disciplinary hearing committees established under a code of conduct are intended to be flexible and less formal than proceedings in a court of law, it is not part of our law that tribunals can, under the guise of flexibility, violate the principles of fairness and do so with impunity. While it may have been impossible for the appellant to comply with the code because the contracts of the other managers had been terminated, the appellant should have considered other lawful options rather than proceed to violate the provisions of the code. Whether it was impossible to strictly comply with the provisions of the code and whether the disciplinary committee as constituted amounted to substantial compliance with the code were questions of fact and not law.
(5) In the absence of a suggestion that there was a misdirection on the facts, it could not be said that the court *a quo* erred in not finding the respondent guilty of the serious offence of gross negligence or inefficiency in the performance of his duties.

**Employment – Labour Court – arbitral award – award granted following referral in terms of Labour Act – challenge to such award – Labour Court having exclusive jurisdiction**

*Samudzimu* v *Dairibord Hldgs Ltd* HH-204-10 (Chiweshe JP) (Judgment delivered 15 September 2010)

*See above, under* ARBITRATION (Award – challenge to).

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

*Zimasco (Pvt) Ltd* v *Marikano* HH-148-10 (Mtshiya J) (Judgment delivered 21 July 2010)

The respondent was employed by the applicant. As part of his conditions of service, he had the use of a company vehicle and other items of value. The applicant terminated the respondent's employment, purportedly in terms of s 14(4) of the Labour Act [*Chapter 28:01*] and demanded the return of the various items. When the respondent failed to return them, the applicant brought a vindicatory action in the High Court. The following day, the respondent filed an application in the Labour Court, claiming that he had been unfairly dismissed. At the hearing in the High Court, the respondent pleaded *lis alibi pendens* and argued that the application should be dismissed. In addition, it was argued that the High Court did not have jurisdiction, as the property, having come into the respondent's possession through his employment by the applicant, could not be separated from a dispute that relates to his employment. The property formed part of his conditions of service in terms of the contract of employment.
Held: (1) for the special plea to succeed the respondent had to prove that (a) the action was *already* pending between the parties; (b) the plaintiff had brought another action against the same defendant; and (c) the action was based on the same cause of action and in respect of the same subject matter. The subject matter in the subsequent application in the Labour Court was unfair dismissal or unfair labour practice, whereas the application in the High Court was for vindication. There was therefore no pending matter and therefore the special plea could not stand.
(2) In terms of s 89(6) of the Act, the power to hear and resolve the labour dispute between the parties *in casu* resided in the Labour Court. The respondent's position was that once that labour dispute was resolved, he would surrender the applicant's assets, if need be. However, if the Labour Court were to rule in his favour, the withdrawal of the assets from him at this stage would lead to serious prejudice on his part, which the applicant could not easily compensate him for. The total cost to the employer of retaining an employee includes the employee's salary and *all* benefits. It would be untenable, *in casu,* to remove the assets in question from the respondent's disputed contract of employment. The employer's obligation to meet total costs of retaining an employee only vanishes when employment is finally terminated. The labour dispute now before the Labour Court was based a contract of employment. The assets *in casu* clearly formed part of the respondent's conditions of service. The respondent's disputed contract of employment gave him the right to hold onto the assets until the Labour Court declared that he does not enjoy such a right.

**Employment – trade union – rights of – public gathering – right to hold public gathering for *bona fide* trade union business purposes**

*ZCTU* v *OC Police KweKwe & Ors* HB-90-10 (Mathonsi J) (Judgment delivered 26 August 2010)

*See below, under* STATUTES (Public Order and Security Act).

**Employment – wrongful dismissal – damages in lieu of reinstatement – assessment – period of unemployment covering time when abandoned Zimbabwean currency was still in use – calculation of equivalent figure in US dollars – deduction for failure to mitigate loss – calculation of**

*Mpofu* v *Commissioner of Police & Anor* HH-8-11 (Karwi J) (Judgment delivered 29 September 2010)

The applicant had been dismissed from the police force following a conviction for assault. The dismissal took place before the determination of his appeal against the conviction. The appeal was successful and after lengthy litigation the Supreme Court held that the dismissal, being based on a conviction which had been quashed, was irregular. The court ordered that the matter be remitted to the High Court to determine whether the applicant should be reinstated or paid damages in lieu of reinstatement. The claim for reinstatement was abandoned and the issue was the quantum of damages. One of the considerations was how to deal with the fact that most of the

time when the applicant was unlawfully out of employment was during the Zimbabwe dollar era. The Zimbabwean currency having been effectively been abandoned, an award in that currency would be worthless.
Held: (1) The principles governing the payment of such damages are well settled. An employee is entitled to be awarded the amount of wages or salary he would have earned had it not been for the for premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach. It is also settled law that the employee must mitigate his loss. He cannot just sit and do nothing. If he fails to take up other employment when it would have been reasonable to do so, a deduction will be made in respect of the remuneration he would have earned from the substituted employment. Further, the measure of damages accorded such employee is the actual loss suffered by the employee represented by the sum due to him for the unexpired period of the contract less any sum he earned or could have earned during such latter period in similar circumstances.
(2) The figures proposed by the applicant, being based on his actual salary figures in local currency, converted at the various official rates prevailing at the time, produced an unrealistic total of around 4 times what the current salaries are in US dollars. The sum payable should be reduced accordingly. A deduction should also be made in respect of the employment which he could reasonably have been expected to have found.

Note: the Supreme Court judgment referred to is *Mpofu* v *Commissioner of Police & Anor* 2008 (2) ZLR 117 (S).

**Employment – wrongful dismissal – order for reinstatement – effect – court not entitled to create new contract of employment – order for reinstatement made after normal date for employee's retirement – no new contract created – employer obliged to pay only up to retirement date**

*Munhumutema* v *Tapambwa & Ors* HH-254-10 (Mutema J) (Judgment delivered 17 November 2010)

The applicant was dismissed from his employment by the third respondent bank in 1995. In June 1999 he had passed the date on which he would have been due to retire. The applicant appealed against the decision. In December 1999, the Employment Council for the Banking Undertaking, sitting as an Appeals Board, resolved that an incorrect code of conduct had been used. It allowed the appeal and ordered that the applicant be reinstated with full pay and benefits from the date of his initial discharge to the date that the hearing in terms of the correct code of conduct took place. The bank lodged an appeal to the then Labour Relations Tribunal. On 6 March 2003 the Tribunal dismissed the appeal and upheld the Employment Council's decision of reinstatement. The applicant having passed his retirement date by then, all that he was owed by the bank by way of back pay was calculated and tendered to him, together with an *ex gratia* lump sum payment, but the applicant rejected the tender. Thereafter, the bank approached the Labour Court to quantify the amount payable to the applicant. This was after the parties had in vain attempted to settle out of court. In 2007 the Labour Court ruled that the bank was barred from approaching the court until after purging its contempt of not complying with its earlier judgment upholding the Employment Council's decision of reinstatement. The applicant approached the Labour Court for a contempt order against the respondents and, when that court ruled that it had no jurisdiction, approached the High Court. The respondents argued that the order of the Labour Court was not one which could rise to contempt proceedings and that the ruling of the Tribunal had been complied with.

Held: upon reinstatement the ordinary contractual relationship between employer and employee resumes: the *status quo ante* dismissal is restored and the relationship should continue with all the rights and obligations under the contract of employment until such time as the contract is terminated on lawful grounds. The contract of employment between the parties was to run until the applicant attained the age of 60 years (his retirement age) in June 1999. It could only be extended if both parties agreed, which was not the situation here. What the bank did by calculating all salaries with corresponding increments together with interest that were owed to the applicant and tendering the same to him effectively amounted to reinstatement. The orders of the Appeals Board and of the Labour Relations Tribunal were made well after the applicant's retirement date provided for in the contractual relationship between the two parties. They could create no rights for the applicant outside the normal contract of employment between the parties, for to do otherwise would entail creating a new agreement for the parties. This no court is legally competent to do.

**Estoppel – requirements – representation by conduct or otherwise that person disposing of property entitled to do so – *culpa* – negligent representation by owner – compelling considerations of fairness – when estoppel may be based on such considerations**

*Chikadaya NO* v *Chenga & Ors* HH-211-10 (Kudya J) (Judgment delivered 22 September 2010)

*See below, under* PROPERTY AND REAL RIGHTS (Ownership – vindication)

**Evidence – foreign law – proof of – proceedings under Child Abduction Act [*Chapter5:05*] – how foreign law may be proved**

*Harris* v *Harris* S-11-10 (Cheda AJA, Malaba DCJ & Ziyambi JA concurring) (Judgment delivered 13 July 2010)

*See below, under* FAMILY LAW (Abduction – child – country of child's habitual residence)

**Evidence – identity – identification parade – proper conduct of – need for parade to be so conducted that the witness is not given any clue as to the identity of the suspect**

*S* v *Nkomo* HB-160-10 (Cheda J) (Judgment delivered 9 December 2010)

The applicant, who was seeking bail pending trial, was identified as the culprit by the complainant. The circumstances in which the identification took place were that as the applicant was brought to the charge office barefooted and was asked to put on his shoes in the presence of the complainant, a procedure which was unusual as it exposed him to the complainant who no doubt regarded him as the culprit and therefore proceeded to identify him as such.
Held: the identification parade was conducted in this manner was a mockery of justice. An identification parade is a procedure where a complainant or witness should independently identify the suspect or the wrongdoer without being given a clue which is designed to expedite police investigations. Identification parades should be conducted in a manner that excludes the possibility of any suspicion of bias or unfairness. Where an identification of a suspect has been made easier by a police officer's conduct, conscious or otherwise, the courts should be ready to condemn such proceedings without more ado. What occurred in this case could not pass the test of an identification parade. There should be fairness in the process. The probative value of personal identification at a parade conducted in a manner which does not guarantee fairness carries less weight as it would have been calculated to prejudice the accused.

**Evidence –onus – civil matter – onus lies on person who makes averment, whether positive or negative**

*Lasagne Invstms (Pvt) Ltd & Ors* v *Highdon Invstms (Pvt) Ltd & Ors* HH-188-10 (Gowora J) (Judgment delivered 1 September 2010)

The general principle regarding the burden of proof is simply stated as follows: he who avers must prove. Where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him.

**Family law – child – abduction – child born out of wedlock – mother agreeing to share custody of child with father – mother refusing to return children to father in breach of such agreement – father entitled to order under Child Abduction Act [*Chapter 5:05*]**

*Peacock* v *Steyn* HB-81-10 (Mathonsi J) (Judgment delivered 5 August 2010)

The applicant, a South African citizen, and the respondent, a Zimbabwean citizen, had cohabited for a number of years. Two children had resulted from their union. After the parties separated, they virtually shared custody of the children, who alternated between each of the parents over the years for one reason or another. The applicant continued providing material support for both the respondent and the children. The arrangement to share custody culminated in a concrete agreement at the beginning of year 2009, in terms of which the parties agreed that the applicant would take the children to South Africa, where he was based, and enrol them in a boarding school there. They further agreed that he would provide for the children while they were in South Africa and that during the school holidays he would facilitate their return to Zimbabwe for them to be with their mother. For a while the arrangement worked well, but at the end of one school holidays the respondent refused to return the children to South Africa. The applicant applied in terms of the Hague Convention on the Civil Aspects of International Child Abduction for an order that the children be released to him. The respondent argued that she was entitled to retain their custody as she was the sole legal guardian and custodian of the

children by Zimbabwean law, given that the children were born out of wedlock. The evidence showed that the children were well looked after when they were in South Africa and generally the respondent had been happy with the arrangement. The issue was whether the matter fell under the provisions of the Hague Convention which has, in Zimbabwe, the force of law by virtue of s 3 of the Child Abduction Act [*Chapter 5:05*]. In terms of the Convention, the removal or the retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person under the law of the State in which the child was habitually resident immediately before the removal or retention. Such rights may arise by operation of law, or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Held: The clear purpose of the Convention, as appears in the preamble and article 1, is to provide a mechanism to deal with the situation where children are wrongfully removed or retained from the jurisdiction of their habitual residence. It is only in very exceptional circumstances that the court will have a discretion to refuse to order their immediate return as the Convention has in mind a high degree of harm to the child and a high level of intolerability. By relinquishing custody rights to the applicant while the children attended school in South Africa, the respondent could not unilaterally vary or terminate that arrangement. The applicant was therefore entitled to be consulted before the children could be retained in Zimbabwe. While, under Zimbabwean law, the father of an illegitimate child has no inherent right over such child, here the father was already enjoying rights of custody. The retention of the minor children was therefore wrongful in terms of article 3 of the Convention. The issue was not the custody of the children, merely the enforcement of the Convention. Custody had already been determined by the agreement of the parties and the respondent had not lost her right over the children.

**Family law – child – abduction – country of child's habitual residence – meaning – when change of residence can be said to have taken place – interests of child – relevance of**

*Harris* v *Harris* S-11-10 (Cheda AJA, Malaba DCJ & Ziyambi JA concurring) (Judgment delivered 13 July 2010)

The appellant and respondent were husband and wife. They had married in the United Kingdom, where their child was born. The parties separated and the husband came to Zimbabwe, where his parents lived. By agreement with the wife, he brought the child to Zimbabwe. The agreement was detailed and in writing. It provided that the child would stay in Zimbabwe for approximately 3 months, then, provided certain conditions about the wife's accommodation and employment had been fulfilled, he would return to live with his mother in England. After the 3 month period was over, the mother demanded that the child be sent back. The appellant refused, claiming that the conditions had not been fulfilled. The respondent obtained an order from the High Court in terms of the Child Abduction Act [*Chapter 5:05*] for the return of the child. On appeal against the grant of the order, the appellant argued (a) that the retention of the child was not unlawful and that he had not breached the provision of the Hague Convention on Child Abduction; (b) that the child was not habitually resident in England immediately before the alleged wrongful retention; (c) that the High Court erred in making findings as to the current law of England by reference to a South African case decided in 2003 and that relevant English legislation was not proved in accordance with article 12 of the Convention; and finally (d) that it was not in the child's best interests to be returned to England having been in Zimbabwe a long time.

Held: (1) under article 3 of the Convention, the removal or retention of a child is unlawful if it breaches the rights of custody attributed to a person under the law of the State in which the child was habitually resident immediately before removal or retention and at the time of removal or retention those rights were actually exercised or would have been so exercised but for the removal or retention. The rights of custody may arise by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State in which the child was habitually resident immediately before the removal or retention. Here, there was an agreement which authorised the removal of the child from the custody of the mother in England.

(2) Whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of the case. It is one thing to cease to be habitually resident in country A and another to become habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he leaves it with a settled intention not to return to it but to take up long term residence elsewhere. However, he cannot become habitually resident in another country in a single day: an appreciable period of time and a settled intention to remain will be necessary to enable him to become so. Here, the child was born in England and lived there up to the time of his removal to Zimbabwe. He must therefore be regarded as having been habitually resident in England until his removal and retention. He was not moved to Zimbabwe with the intention to make Zimbabwe his home for an indefinite period. He was going to be here with his father temporarily while his mother made the arrangements referred to in the agreement.

(3) The agreement did not grant exclusive custody to the father.
(4) The interests of the child cannot be used to resist the child's return where the issue of such interest arises because the father wrongfully retained him. Under article 12 of the Convention, where, at the date of the commencement of the proceedings before a judicial authority, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. In this case the respondent made the application within the required time limit, so the question of delay in claiming the return of the child does not arise.
(5) Under article 12, proof of the foreign law is not subject to the normal evidential requirements.

**Family law – husband and wife – divorce – division of property following divorce – wife's right to matrimonial home – extent of such right where property registered in husband's name – sale of home – whether wife entitled to have sale set aside**

*Musariri* v *Mutavayi & Ors* HH-226-10 (Musakwa J) (Judgment delivered 21 October 2010)

The plaintiff and the first defendant had been married for 12 years, then were divorced. Following their divorce, the court awarded 50% of the value of the matrimonial home to the plaintiff. The house was then sold, for value, to the second defendant. The plaintiff's share of the purchase price, less the agent's commission, was transferred to her. She sought an order setting aside the sale of the house, alternatively, an order declaring that the sale was valid only in respect of the first defendant's half share.
Held: For the plaintiff to succeed, it was not enough for her to claim that she had a right to the property as a former spouse of the first defendant or that the second defendant had knowledge that she had an interest in the property. There had to be proof that the property was sold in order to defeat her or that it was not sold for value. The plaintiff's consent to the disposal of the property was not required, because she did not hold any rights to the property. The court order awarding her a half share of the property did not amount to a conferment of title to the property. The rights of husband and wife must be regarded as purely personal *inter se*; that these rights as a matter of law do not affect third parties.

**International law – treaties – SADC Treaty – arts 4(c) and 6(1) – protection of the rule of law – right to an effective remedy – state refusing to pay judgment debts – a breach of obligation to uphold the rule of law – State Liabilities Act [*Chapter 8:14*] – s 5(2) – provision that state property may not be executed against in satisfaction of judgment debt – such provision discriminatory – provision also breach of right to equality before the law and right to equal protection of the law**

*Gondo & Ors* v *Republic of Zimbabwe* SADC-5-10 (Pillay P, Mtambo & Mondlane JJ concurring) (Judgment delivered 9 December 2010)

The applicants had all, in various actions*, been awarded damages against the Minister of Defence following acts of violence perpetrated on them by members of the army and police. In spite of the judgments, the awards of damages were not paid. The government relied on the provisions of s 5(2) of the State Liabilities Act [*Chapter 8:14*], which provides that State property may not be executed against to satisfy a judgment debt. The applicants brought proceedings before the SADC Tribunal, seeking an order that the government was in breach of the SADC Treaty by failing to obey the orders of the courts and that s 5(2) of the Act, by immunizing the State against enforcement of judgment debts, was also a breach of the Treaty. The applicants also contended that the respondent's failure to ensure the availability of effective remedies amounted to a breach of the principles of human rights provided for in articles 4(c) and 6(1) of the Treaty. The applicants also requested that the amounts of damages (which had been awarded in Zimbabwe currency) be revalorised, following the hyper-inflation that had affected the value of the currency.
Held: (1) Articles 4(c) and 6(1) of the Treaty created an obligation on member states to respect, protect and promote human rights, democracy and the rule of law. The right to an effective remedy was a fundamental right embraced by the concept of the rule of law. Where a state failed to provide effective remedies, it breached its obligation to uphold the rule of law.
(2) On the issue of s 5(2) of the Act, a similar provision in South Africa had been held to be unconstitutional in that it elevated the state above the law. The section was also discriminatory, because it treated judgment creditors who had obtained judgments against the state differently from creditors who had obtained judgment against private litigants. This breached the right to equality before the law and the right to equal protection of the law. The section was thus in breach of the respondents' obligation under articles 4(c) and 6(1) of the Treaty,

and that granting the state immunity from the execution of judgment debt had an adverse effect on the rule of law.
(3) Article 12(h) of the SADC Charter of Fundamental Social Rights provided for revalorisation in that it allowed for adequate inflation-adjusted compensation. As such, the Tribunal found that the damages awarded the applicants needed to be revalorised in the interest of justice, to ensure that the real or actual value of the compensation orders is received by each applicant. The agents of both sides should meet, under the supervision of the registrar of the Tribunal, to agree to a mutually satisfactory adjustment of the amounts of the damages.

*See, for example, *Gweshe v Min of Defence* 2006 (1) 189 (H) – *Editor.*

**Jurisdiction – principles – effectiveness – when foreign court has jurisdiction – submission to jurisdiction – sufficiency of**

*Tiiso Hldgs (Pvt) Ltd* v *ZISCO* HH-95-10 (Patel J) (Judgment delivered 6 July 2010)

*See below, under* PRACTICE AND PROCEDURE (Judgment – foreign judgment).

**Land – acquisition – former owner of acquired land refusing to vacate – conviction under s 3(5) of Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] – eviction order following conviction – noting of appeal against conviction – magistrate nevertheless entitled to order execution pending appeal**

*Bruford* v *Attorney-General & Ors* HH-232-10 (Chiweshe JP) (Judgment delivered 13 October 2010)

*See above, under* COURT (Magistrates court – jurisdiction).

**Land – acquisition – preliminary notice of acquisition – application for confirmation of acquisition withdrawn by Minister – land nonetheless listed in Schedule 7 of Constitution – ownership of land vesting in State**

*Cedor Farm (Pvt) Ltd* v *Min of State for Land & Ors* HB-65-10 (Kamocha J) (Judgment delivered 15 July 2010)

The applicants were farmers whose farms had been gazetted for compulsory acquisition in terms of s 5(1) of the Land Acquisition Act [*Chapter 20:10*]. Thereafter they reached an agreement with the responsible Minister whereby the applicants each surrendered part of their agricultural holdings and the Minister agreed to withdraw his application to the Administrative Court (which at that time had jurisdiction in such disputes) for confirmation of the acquisition. The agreement in each case was then taken to the Administrative Court for it to be made into a court order. The effect was that the particular pieces of land were "delisted" and that ownership of the respective pieces of land reverted to the original owners, the applicants. In spite of this agreement, the farms were itemized in Schedule 7 of the Constitution as pieces of land which constituted land referred to in s 16B (2)(a)(i) of the Constitution.
The applicants argued that their pieces of land had been returned to them by orders by consent which were made into court orders by the Administrative Court. They contended that s 16B(2)(a)(i) and (ii) did not vest their ownership of their pieces of land in the acquiring authority. Since the court orders returned their pieces of land to them, they had acquired real rights in the properties. The Minister had withdrawn the applications to confirm. No legislation can act retrospectively to take away acquired rights. They had worked on and improved the farms on the understanding that the pieces of land were theirs to do as they wished.
Held: Their pieces of land had been identified in GN 144A of 2002 gazetted on 5 April 2002 and appeared as item 44 in Schedule 7 of the Constitution. There could be no doubt that the legislature took a deliberate effort to acquire the two farms and vested the rights in them to the State. The provisions of s 16B(2)(a)(i) expressly stipulated that the particular farms were acquired and vested in the State with full title. It is a correct statement of the law that where the legislature wishes an enactment to have a retrospective effect it must expressly say so. Section 16B expressly states that despite the protection enshrined in the Declaration of Rights all agricultural land that was identified prior to 8 July 2005 would be compulsorily acquired for resettlement purposes. The provisions of 16B(2)(a)(i) were deliberately intended to take away the prior existing rights of all the owners of agricultural land itemized in Schedule 7. The suggestion by the applicants, that the legislature should have

specifically stated the provisions were also meant to overrule orders of court made by consent, was untenable. In terms of s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*], they were now occupying, holding or using gazetted land without lawful authority. This did not mean that the respondents could interfere with their possession without due process of law.

*Note:* compare the decision of Makoni J in *Matanda (Pvt) Ltd* v *Min of National Security & Ors* HH-178-10 (judgment delivered 11 November 2009), where it was held that ownership of a piece of land which had been erroneously listed in Schedule 7, notice of acquisition having been withdrawn, remained with the original owner. – *Editor.*

**Land – acquisition – rural land – challenge to acquisition – courts having no jurisdiction to entertain challenge to acquisition – former owner of acquired land – no right to remain on land – offer letter or other document in respect of acquired land – rights given by such document – person to whom such document is issued has right to occupy land – right of such person to seek eviction order against former owner**

*CFU & Ors* v *Min of Lands & Ors* S-31-10 (Chidyausiku CJ; Malaba DCJ, Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 26 November 2010)

The applicant farmers' union and a number of commercial farmers brought an application in terms of s 24 of the Constitution, seeking relief under various heads. The farmers in question were owners or occupiers of land that had been acquired by the State in terms of s 16B of the Constitution. In terms of s 16B, former owners or occupiers of land that has been acquired must cease occupation of the acquired land within ninety days. The ninety days had since expired but the individual applicants had remained in occupation of the land. They complained that (a) they were being improperly treated because of their race in contravention of s 23 of the Constitution; (b) they were being denied protection of the law and equality before the law under s 18 of the Constitution; (c) they were being unfairly tried on charges of contravening section 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*]; (d) the racial imbalance sought to be addressed in the land reform programme had been achieved, rendering any further evictions of white farmers unlawful; and (e) the public officials mentioned in the body of the application and affidavits had breached their duties in terms of s 18(1a) of the Constitution to uphold the rule of law and to act in accordance with the law. They asked for a moratorium on any further evictions, prosecutions and acquisitions.

Held: (1) Former owners and/or occupiers whose land has been acquired by the acquiring authority in terms of s 16B(2)(a) of the Constitution cannot challenge the legality of such acquisition in a court of law. The jurisdiction of the courts has been ousted by s 16B(3)(a) of the Constitution

(2) The Gazetted Lands (Consequential Provisions) Act and, in particular, s 3 of that Act, is constitutional. Accordingly, all Zimbabweans have a duty to comply with the law as provided for in that Act and prosecutions for contravening the Act are constitutional and therefore lawful.

(3) Every former owner or occupier of acquired or gazetted land who has no lawful authority is legally obliged to cease occupying or using such land upon the expiry of the prescribed period (90 days after the acquisition). By operation of law, former owners or occupiers of acquired land lose all rights to the acquired land upon the expiration of the prescribed period.

(4) A former owner or occupier of acquired land who without lawful authority continues occupation of acquired land after the prescribed period commits a criminal offence. If the former owner or occupier continues in occupation in open defiance of the law, no court of law has the jurisdiction to authorise the continued use or possession of the acquired land.

(5) Litigants who are acting outside the law, that is, in contravention of s 3 of the Act, cannot approach the courts for relief until they have complied with the law.

(6) A permit, an offer letter and a land settlement lease are valid legal documents when issued by the acquiring authority in terms of s 2 of the Act and s 8 of the Land Settlement Act. The holder of such permit, offer letter or land settlement lease has the legal right to occupy and use the land allocated in terms of the permit, offer letter or land settlement lease.

(7) The Minister may issue land settlement leases in terms of s 8 of the Land Settlement Act [*Chapter 20:01*]. In doing so he is required to comply with the other provisions of that Act.

(8) While s 3(5) of the Act confers on a criminal court the power to issue an eviction order against a convicted person, it does not take away the Minister's right or the right of the holder of an offer letter, permit or land settlement lease to commence eviction proceedings against a former owner or occupier who refuses to vacate the acquired land. The holder of an offer letter, permit or land settlement lease has a clear right, derived from an Act of Parliament, to take occupation of acquired land allocated to him or her in terms of the offer letter, permit

or land settlement lease. The Legislature conferred on the holder of an offer letter, permit or land settlement lease the *locus standi*, independent of the Minister, to sue for the eviction of any illegal occupier of land allocated in terms of the offer letter, permit or land settlement lease.
(9) The holders of offer letters, permits or land settlement leases are not entitled as a matter of law to self-help. They should seek to enforce their right to occupation through the courts. Where therefore the holder of an offer letter, permit or land settlement lease has resorted to self-help and the former owner or occupier has resisted, both parties are acting outside the law. If either party resorts to violence, the police should intervene to restore law and order.

**Landlord and tenant – tenant – statutory tenant – when statutory tenancy is created – terms of statutory tenancy – relocation of lease of expiry – no real distinction from statutory tenancy**

*Total Zimbabwe (Pvt) Ltd* v *Appreciative Invstms (Pvt) Ltd* HH-268-10 (Kudya J) (Judgment delivered 1 December 2010)

The meaning of statutory tenancy is provided in s 22 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983). Statutory tenancy is the legal relationship borne out of a lease that has "expired either by the effluxion of time or in consequence of notice duly given by the lessor (in which the lessee) however continues to pay the rent due, within seven days of due date; and performs the other conditions of the lease." A lessee who, by virtue of s 22, retains possession of any commercial premises is, so long as he retains possession, entitled to the benefit of all the terms and conditions of the original contract of lease, so far as those terms and conditions are consistent with the provisions of the regulations. The effect of the two sections is that the original lease is renewed to the extent that it is consistent with the regulations. A relocation after a lease has expired is a new contract which may be express or tacit. If the re-letting is express, the question which of the terms of the expired lease form part of the new contract is a question of interpretation. Where the relocation is tacit, there is a presumption that the property is re-let at the same rent and that those provisions that are incident to the relationship of landlord and tenant are renewed. Provisions that are collateral, independent of and not incident to that relationship are not presumed to be incorporated in the new letting. There is not much difference between a statutory tenancy and a tacit relocation. As in a tacit relocation, the terms and conditions of the original lease that are incident to the relationship of landlord and tenant and consistent with the provisions of the Commercial Premises Rent Regulations, as opposed to those that are collateral and independent, are renewed.

**Legal practitioner – conduct and ethics – certificate of urgency – need for practitioner to be satisfied that matter is genuinely urgent – duty towards client – duty to restrain clients from abusing court process and making untruthful statements – costs *de bonis propriis* – award of such costs against practitioner foisting dishonest application on court**

*Moyo & Anor* v *Hassbro Properties (Pvt) Ltd & Anor* HB-73-10 (Mathonsi J) (Judgment delivered 22 July 2010)

The applicants had been evicted from premises that they were leasing, after default judgment had been obtained against them. Applications for condonation of late noting of appeal against the default judgment had been lodged but not pursued. After their eviction, the first applicant deposed to an affidavit in support of an urgent application for a stay of execution of the eviction order, well knowing that the eviction had already taken place. A junior legal practitioner issued a certificate of urgency, in which she alleged that the respondent had not established his rights in respect of the property.
Held: Legal practitioners, as officers of the court, are required by the rules to certify a matter urgent only after applying their own mind and judgment to the circumstances of the matter. Having done so, they must reach a personal view which they pass to a judge, certifying in their honour and name that the matter is urgent. Where a lawyer cannot reasonably entertain the belief that he professes in the urgency of the matter he risks a conclusion that he not only acted dishonestly but also wrongfully. Legal practitioners who certify matters as urgent when they have not bothered to apply their minds at all to the facts of the matter or even read the papers and those who saddle the courts with such dishonest applications will not only be visited with costs *de bonis propriis* but also with an order that they should not recover any fees from their clients.
When the applicants lodged this application they had already been evicted, a fact they did not disclose to the court. Their application for condonation had, for all intents and purposes, been abandoned. Legal practitioners have a duty to restrain their clients from abusing the process of the court and from making untruthful assertions, yet this application was littered with not only wrong conclusions of the law but downrightly mendacious statements.

**Legal practitioner – conduct and ethics – criminal matter – practitioner acting *pro Deo* – duty to take instructions from accused in person – duty to apply entire mind to case and to use all his skills to represent the accused – failure to do so constitutes misconduct**

In re *Chivaura* HB-113-10 (Cheda J) (Judgment delivered 7 October 2010)

A legal practitioner was assigned a criminal case, in which he was to represent the accused *pro Deo*. He submitted a detailed outline of the defence case. When the date of trial came, it emerged that the practitioner had not at any time seen the accused or taken instructions from him; the outline of the defence case was based upon the accused's statement to the police.
Held: the legal profession requires honesty, integrity and professionalism. A legal practitioner should be truthful, candid and fair in all his dealings with both his client and the court. Counsel allocated a *pro Deo* matter is expected to represent the accused to the best of his ability. A charge of murder is one of the most serious charges an accused person can face, as, upon conviction, he can receive capital punishment. For that reason, the legal practitioner representing such a person should apply his entire mind to the case before him and employ all his skills in order to assist his client. He is enjoined to personally take instructions from the accused who is his client. Failure to perform his duty with diligence and competence amounts to negligence and may amount to misconduct if it has a sting of impropriety.
With regard to taking instructions, a legal practitioner must be reasonably satisfied of both the client's identity and his mental capacity. This makes it essential that he should see the client personally. He also has a duty to advise his client on any aspects which call for advice. The advice must be given with complete frankness and honesty. This duty cannot be performed if he does not see the client. A legal practitioner who misrepresents a client in the way happened here is *prima facie* guilty of unbecoming and unprofessional conduct.

**Mines and minerals – mining claim – registered – title to claim – may not be disputed after having been held for two years – interruption of running of period – Mines and Minerals Act [*Chapter 31:05*] – s 58**

*Min of Mines & Ors* v *African Consol Resources plc & Ors* HH-205-10 (Hungwe J) (Judgment delivered 6 September 2010)

*See below, under* PRACTICE AND PROCEDURE (Judgment – rescission).

**Negligence – motoring case – sudden emergency – driver's prior negligence making it impossible for him to avoid accident – defence of sudden emergency not applicable**

*S* v *Thompson* HH-259-10 (Kudya J, Uchena & Chatukuta JJ concurring) (Judgment delivered 24 November 2010)

The appellant, who was driving a car towing a trailer, was involved in an accident in which a child was killed. The appellant's vehicle was at the tail end of a convoy of four cars. He was not familiar with the road or how to get to their destination. He failed to notice the sign indicating a primary school ahead, the school itself and the crossing ahead sign for school children. These were all on his left hand side. The latter sign was 600 m before the scene of the accident. The appellant was driving at a speed below the maximum allowed speed. There was fairly high grass along the side of the road and the child suddenly emerged from the grass and ran into the road without checking whether it was safe for her to do so. The appellant took avoiding action but was unable to avoid hitting the child, who died instantly. The appellant raised the defence of sudden emergency.
Held: In these cases, the court does not only look at the actions of the driver when the crisis occurred but also beforehand. Here, when the crisis occurred, there was nothing that the appellant could do to avoid the accident. However, before this he had driven negligently, in that he failed to see the school, its sign post and the danger warning sign when he ought to have done so. The appellant's focus must have been on keeping pace with the vehicles that were in front of him and he thereby incapacitated himself from keeping a proper look out of his surroundings. Had he done so, he would have taken adequate preventive measures to avoid the collision. Having made it impossible for himself to deal with what was then no doubt a sudden emergency, he could not call in aid the doctrine of sudden emergency.

**Practice and procedure – abandonment – of claim or judgment – what constitutes abandonment**

*Total Zimbabwe (Pvt) Ltd* v *Power Coach Express (Pvt) Ltd* HH-64-09 (Gowora J) (Judgment delivered 4 February 2009)

*See above, under* COMPANY (Legal proceedings).

**Practice and procedure – affidavit – founding affidavit – affidavit filed on behalf of a company – what deponent must aver – not always necessary to prove resolution by company to authorize litigation**

*Total Zimbabwe (Pvt) Ltd* v *Power Coach Express (Pvt) Ltd* HH-64-09 (Gowora J) (Judgment delivered 4 February 2009)

*See above, under* COMPANY (Legal proceedings).

**Practice and procedure – application – urgent – certificate of urgency – legal practitioner's duties before issuing such certificate**

*Moyo & Anor* v *Hassbro Properties (Pvt) Ltd & Anor* HB-73-10 (Mathonsi J) (Judgment delivered 22 July 2010)

*See above, under* LEGAL PRACTITIONER (Conduct and ethics)

**Practice and procedure – application – urgent – certificate of urgency – who may sign such certificate – competent for legal practitioner from firm representing applicant to sign certificate – not necessary for practitioner in another firm to do so**

*Mudekunye & Ors* v *Mudekunye & Ors* HH-190-10 (Bere J) (Judgment delivered 3 August 2010)

A lawyer in the firm representing the applicant in an urgent chamber application filed the certificate of urgency required by r 242(2)(b) of the High Court Rules 1971. Counsel for the respondent objected, arguing that it was not competent for a legal practitioner to either attest to an affidavit or sign an urgency certificate for and on behalf of a client who is being represented at his firm, as such lawyer has an interest in the matter. In so doing, he relied on the decision in *Chafanza* v *Edgars Stores Ltd & Anor* 2005 (1) ZLR 301 (H), a judgment of Cheda J, in which Ndou J concurred. Some judges had treated this decision as binding on them as it was, on the face of it, a decision of two judges and the principle of *stare decisis* obliged them, as judges sitting alone, to follow the decision.

Held: (1) the decision in *Chafanza* was not a decision of two judges sitting together. It was given following an urgent chamber application, which would have been heard by a single judge. There was no indication that the matter had been heard by two judges, an event that would have been extremely unusual. The decision was thus persuasive but not binding.

(2) In terms of r 242(2), it is competent for an unrepresented applicant to file an urgent application without a certificate of urgency. Such an application is regarded as a complete application. The need for a certificate of urgency only arises where the applicant is legally represented. Rule 242(2) does not in any way lay down that a legal practitioner who signs an urgent certificate must not be from the same law firm representing the applicant. If it was intended that a legal practitioner, other than the one from the law firm representing the applicant, should prepare the certificate of urgency, the rule would have specifically stated so. The legal practitioner who prepares the court papers is in a better position to make an evaluation of his client's case and objectively give the court his honest and professional view as regards what r 242(2) envisages. This responsibility cannot be left to a legal practitioner who is a total stranger to the applicant and the application. With or without a certificate of urgency, the presiding judge determines the question of urgency. A certificate of urgency prepared by a legal practitioner representing the client or by a legal practitioner from the same law firm does not in any way reduce the court's discretion in determining the question of urgency. If anything, the court is better off with that kind of certificate, as opposed to being guided by a legal practitioner from a different law firm who is either not connected with the case or may have been overwhelmed by the voluminous nature of the application and therefore ends up blindly preparing or merely signing a certificate of urgency because he has been requested to

do so by a fellow legal practitioner. While an affidavit should be attested by a commissioner of oaths who is impartial, unbiased and independent in relation to the subject-matter of that affidavit, this requirement does not apply to certificates of urgency.

**Practice and procedure – application – urgent – certificate of urgency – who may sign such certificate – certificate not fatally defective if signed by party's legal practitioner**

*Williams* v *Katsande & Anor* HH-198-10 (Mawadze J) (Judgment delivered 20 August 2010)

While a certificate of urgency may under certain circumstances be deemed to be improper and while it may be undesirable for a legal practitioner to sign a urgent certificate for and on behalf of a client who is being represented by such practitioner's law firm, that on its own would not make the certificate of urgency fatally defective.

**Practice and procedure – execution – pending appeal – need for respondent on appeal to make special application – not enough to raise issue in heads of argument or oral submission**

*Potential Invstsms (Pvt) Ltd & Anor* v *Tayali & Ors* HB-136-10 (Ndou J) (Judgment delivered 4 November 2010)

At common law the noting of appeal against a judgment suspends the operation of that judgment. At common law the court granting the judgment enjoys inherent jurisdiction to order execution of that judgment despite the noting of an appeal, but the successful party has to make a special application for such relief. It is not enough to raise the issue in heads of argument and oral submissions. 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.

**Practice and procedure – interdict – when may be ordered – effect of interdict would be to review or reverse earlier decision of same court – interdict not permissible**

*Aepromm Resources (Pvt) Ltd* v *Mazowe & Ors* HH-192-10 (Mtshiya J) (Judgment delivered 31 August 2010)

The applicant brought an urgent application before the High Court, seeking an order declaring a notice of an extraordinary general meeting of the applicant, called by the respondents, be declared null and void and preventing the respondents from acting as directors of the applicant. The application was dismissed as being not urgent. The applicant noted an appeal against this ruling. The applicant then brought an application before the High Court, seeking an order interdicting the respondents from holding the meeting that had been called.
Held: if the interdict were granted, the effect would be to reverse the court's earlier ruling. Whilst it was possible for the Supreme Court to be moved to grant an urgent hearing to an appeal already before it, what the court was being asked to do was to review the court's earlier decision. That was not permissible. The relief sought was the same as the one earlier prayed for.

**Practice and procedure – interpleader proceedings – property attached in execution – requirement for messenger of court to institute interpleader proceedings when property claimed by a third party – such requirement applicable to execution in respect of judgment in small claims court**

*Masuku* v *Chinyemba & Ors* HH-63-09 (Bere J) (Judgment delivered 21 May 2009)

*See above, under* COURT (Small claims court).

**Practice and procedure – judgment – by consent – setting aside of – good and sufficient cause – what constitutes – defendant consenting to judgment but plaintiff not applying for judgment – plaintiff**

**planning to amend its claim – judge *mero motu* granting judgment – good and sufficient cause to set aside judgment**

*First Class Entprs Ltd* v *Scanlink (Pvt) Ltd* HH-187-10 (Gowora J) (Judgment delivered 1 September 2010)

The applicant had filed summons against the respondent for damages arising from a breach of contract. The claim was expressed in Zimbabwe dollars, the currency officially in use at the time. At the pre-trial conference, the respondent offered to settle the claim for the amount claimed in the summons. The plaintiff declined and indicated that it would be amending its claim. The matter was referred to trial on the understanding that the plaintiff would file an amendment to its claim before the trial. A trial date was set. About a week before the trial date, the defendant's legal practitioners told the plaintiff's legal practitioners that they had filed a consent to judgment in terms of the summons. A day later, the plaintiff filed an application to amend its claim. However, unbeknown to the plaintiff, the consent to judgment that had been filed by the defendant had been granted on the same day by the trial judge in chambers. The plaintiff's legal practitioners, unaware of this, told the defendant's legal practitioners that it had always been the plaintiff's intention to amend its claim and so would not accept the consent. The plaintiff, on discovering that judgment had been entered in its favour, applied to have the judgment set aside. It was argued that, since this was a judgment the plaintiff did not seek, the court had good and sufficient cause to set the judgment aside. The court could only have granted the judgment upon application by the plaintiff and that in the absence of such application the court did not have grounds for entering the judgment. The plaintiff also contended that the judgment given did not discharge the defendant's liability.
Held: a judgment entered by consent may under r 56 of the High Court Rules be set aside for good and sufficient cause. In determining what would constitute good and sufficient cause., there are three broad factors: (i) the explanation given by the applicant for his default; (ii) the *bona fides* of the application to rescind the judgment; and (iii) the *bona fides* of the merits of the defence. It is impossible to frame an exhaustive definition of what would constitute sufficient cause; any attempt to do so would merely hamper the exercise of a discretion which the rules have purposely made very extensive and which it is desirable not to abridge. The rules permit a plaintiff, where the defendant has filed a consent to judgment, to make a chamber application for the judgment to be granted in its favour, and the court seized with the trial may then enter judgment. The procedure followed was not in accordance with rr 54 and 55 of the Rules. The plaintiff did not apply for judgment; the court *mero motu* granted it. The judgment was thus granted by consent and this fact constituted good and sufficient reason to set the judgment aside.

**Practice and procedure – judgment – foreign judgment – recognition and enforcement of – principles – jurisdiction of foreign court – defendant submitting to jurisdiction – sufficiency of – finality of foreign judgment – need for plaintiff to show that foreign judgment final – provisional judgment not enforceable**

*Tiiso Hldgs (Pvt) Ltd* v *ZISCO* HH-95-10 (Patel J) (Judgment delivered 6 July 2010)

The applicant issued summons for payment of the sum of some 6 million euros together with interest and costs of suit. The summons was issued more than 3 years after a default judgment had been entered against the defendant in Frankfurt, Germany,, the rights in which judgment had been ceded to the applicant. The defendant raised a plea in abatement regarding the enforceability of the foreign judgment. The main issues for determination were (a) whether the foreign judgment was contrary to natural justice because of the failure to serve court process properly or at all; (b) whether part of the amount claimed by the plaintiff before the Frankfurt court had prescribed at the time that the claim was instituted; (c) whether the Frankfurt award was unenforceable *ab initio* in the absence of any executable assets belonging to the defendant in Germany; and (d) whether or not the Frankfurt judgment was final and conclusive for the purposes of its recognition and enforcement in Zimbabwe.
Held: (1) the general requirements for the recognition and enforcement of foreign judgments are: (i) the foreign court in question had the requisite international jurisdiction or competence according to our law; (ii) the judgment concerned was final and had the effect of *res judicata* according to the law of the forum in which it was pronounced; (iii) the judgment must not have been obtained by fraudulent means; (iv) it must not entail the enforcement of a penal or revenue law of the foreign State; (v) it must not be contrary to public policy in Zimbabwe; and (vi) the foreign court must have observed the minimum procedural standards of justice in arriving at the judgment.
(2) Although a mere procedural irregularity will not debar recognition, there must have been reasonable notice of the proceedings to the persons affected and adherence to the *audi alteram partem* principle. The evidence was that the respondent was issued a summons and failed to respond to it.
(3) Prescription is a substantive matter and, as such, falls to be determined by the *lex causae* and not the *lex fori.* The law of Germany is the *lex causae* and it is that law that determines the question of prescription. In this

regard, the defendant did not adduce any evidence as to the German law of prescription. In any event, it would not be competent for a court in Zimbabwe to review the correctness or otherwise of the Frankfurt court's determination, if any, as to whether or not the claim had prescribed under the law of Germany. In proceedings for the recognition of a foreign judgment, it would be quite improper to pronounce upon the merits of any issue of fact or law tried by the foreign court and to review or set aside its findings. The effect of the Frankfurt judgment was a *novatio necessaria* of the original debt sued upon. While such *novatio* did not necessarily entail the creation of a new obligation, the clear effect of the judgment was to provide a new right of action enforceable as such. Under s 15(a)(ii) of the Prescription Act [*Chapter 8:11*], a judgment debt only prescribes after 30 years.

(4) The principle of effectiveness that underlies the law of jurisdiction, in its absolute sense, is that the court will only have jurisdiction if it controls the person or property of the defendant, as the mere consent or submission of the defendant to the jurisdiction of the court affords no absolute guarantee that the court's judgment will be effective. However, nowadays submission is widely recognised in legal systems across the world as a ground of international competence justifying the enforcement of the judgment of a foreign court to which the defendant has submitted. A defendant's express submission to the jurisdiction of a foreign court suffices, *ipso facto*, and without any further jurisdictional ground, to endow that court with the requisite international competence, enabling and allowing the recognition and enforcement of its judgments under the common law, regardless of whether the defendant may or may not have had any executable assets in the foreign country.

(5) A foreign judgment will not be enforced unless it is a final judgment and has the effect of *res judicata* according to the law of the forum that pronounced the judgment. The fact that it is subject to appeal does not affect its finality for the purposes of recognition, but if an appeal is actually pending our courts would probably exercise their discretion not to recognise the judgment. Finality must be alleged and proved by the party seeking to enforce the judgment. A provisional judgment of an internationally competent foreign court will not be enforced or recognised. The finality and conclusiveness of the judgment should appear *ex facie* the record. There should, if necessary, be a due and proper translation. Here, the translation of the document from the court in Frankfurt stated that the judgment was provisional or preliminary and only provisionally enforceable. Without anything explaining the relevant law of Germany, by way of written law or judicial decisions, as would conform with the requirements of s 25 of the Civil Evidence Act [*Chapter 8:01*]. In the premises, it must be held that the judgment *in casu* was not final and conclusive for the purposes of its recognition and enforcement in this jurisdiction.

**Practice and procedure – judgment – rescission – application – whether can be made when appeal against same judgment is pending – grounds – judgment obtained by fraud – not a final discharge of court's function – court's power to rescind judgment**

*Min of Mines & Ors* v *African Consol Resources plc & Ors* HH-205-10 (Hungwe J) (Judgment delivered 6 September 2010)

The first applicant, the Minister of Mines, sought the rescission of an order granted in favour of the respondents nearly a year earlier. The respondents had registered certain mining claims which they had previously pegged. The order stated that the respondents' claims remained valid, Various ancillary orders were also issued. An appeal was noted to the Supreme Court by the second and third applicants.

The first applicant initially sought directions under r 4C of the High Court Rules, claiming that the respondents had acted fraudulently, in that the respondents (other than the first respondent) had not been incorporated at the time the claims were registered in their names and that under s 20 of the Mines and Minerals Act [*Chapter 31:05*] only a juristic person may be granted a prospecting licence. The applicant also alleged that the respondents did not disclose that the area under which the claims in issue fell were part of an area reserved against prospecting and pegging. The respondents argued that the matter was not "before" the judge, as he was *functus officio* and the matter was the subject of an appeal. They said that the first respondent had acquired the other respondents as "shelf companies", which they were assured had been incorporated. They were, in any event, incorporated a short time after the registration of the claims, so there was no prejudice. The respondents also argued that the applicants should not be heard as they had not complied with the interim order issued by the Supreme Court. Further, the respondents argued that it was not competent to bring an application for rescission when there was an appeal ending on the same matter.

Held: (1) once a court has duly pronounced a final judgment, it becomes *functus officio*. Its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases. Under the common law, the court has power to rescind a judgment obtained by default of appearance provided that sufficient cause

has been shown. In respect of rescission of judgment in terms of the High Court Rules, this is a matter for the discretion of the court, which discretion should be exercised judicially. Wilful default or gross negligence on the part of the applicant constitutes no absolute bar to the grant of the indulgence of rescission but it is a factor, although a weighty one, which is to be taken into account together with the merits of the defence raised to the plaintiff's claim, in the determination of whether good cause for rescission has been shown.
(2) While the court normally does not have jurisdiction to temper or interfere with its own judgments, because in relation thereto it is *functus officio*, it does have jurisdiction over orders made in interlocutory and procedural matters. The court has powers to set aside such orders for good and sufficient reasons, including the fact that the basis of the order has been destroyed or shown to be non-existent. The distinction between interlocutory matters and those in which final orders are made is that, in final orders and judgments, the matter takes on the character of *res judicata,* the essence of which is that the issue, having been fairly contested by the parties, is finally resolved. By extension, it cannot be said that a matter was fairly contested when the party resorted to concealing relevant information from the court in what may amount to fraud. Where, therefore, a party could show such fraudulent concealment of information relevant to the determination of the issue to be decided then the court should, under its common law discretion, exercise its powers and grant rescission. A final discharge tainted by fraud should not be permitted to stand. Another exception is where a judgment has been procured in some circumstances of ignorance of relevant documents to the contrary: this also would not constitute a final discharge of the court's function.
(3) Unlike a fugitive from justice or an outlaw, a party in contempt is not absolutely barred from being heard in a court of law. The court can still hear him even before he has purged his contempt, if the interests of justice so demand. This is because, unlike a fugitive from justice who has placed himself beyond the reach of the law by leaving the jurisdiction, the person in contempt is within its reach, and the weight of the law can descend on him at any time. The first applicant had not disqualified himself from seeking the assistance of the court in asserting his rights. Firstly, he was not party to the order given by the Supreme Court. Secondly, he could not be characterized as a fugitive from justice in the sense that he has put himself beyond the physical reach of the courts. He was still amenable to justice. As for the other applicants, they were State enterprises in court by virtue of a court directive. It would be absurd if the court were to order a party to appear before it and then refuse to hear it on the basis of the dirty hands doctrine. In any event, justice would not be served if these two entities were not permitted to argue their case.
(4) There is nothing in principle preventing a party from pursuing an application for rescission while an appeal against the same judgment is pending.
(5) On the question of fraud, this was a mining claim. Under s 2 of the Act, mining rights are held by the President in trust and on behalf of the citizens. The public therefore has a vested interest in who is registered to extract this resource; how transparently was the registration of such rights conducted; who stands to benefit from the manner the rights in question are dealt with; and so on. A company that is not duly incorporated cannot lawfully carry out any juristic act unless there exists a pre-incorporation contract by virtue of which mandated natural persons can lawfully carry out such acts for subsequent ratification by the company. Without incorporation a company cannot pass any resolution to authorize anyone, even its own promoters, to act for it in any lawful transaction. It could not make an application under s 20 of the Act.
(6) The respondents' title was not protected by s 58 of the Act: they never acquired any rights in the first place since they did not exist when the Assistant Mining Commissioner purported to issue such "rights" to them. In any event, in order to benefit from s 58, the respondents should have held the title to the mining rights for two years. They acquired the "rights" in 2006; by the end of that year the first applicant had effected the initial cancellation. That juristic act interrupted the running of the two year prescriptive period.

**Practice and procedure – judgment – summary judgment – when may be granted – what defendant must show to avoid summary judgment – multiple claims in summons – summary judgment may only be granted in respect of all claims – not permissible to sever claim to seek summary judgment for part of claim**

*van Hoogstraten* v *James & Ors* HH-272-10 (Makoni J) (Judgment delivered 8 December 2010)

Summary judgment is a drastic remedy in which the plaintiff, whose belief is that the defence is not *bona fide* and entered solely for dilatory purposes, should be granted immediate relief without the expense, and delay of trial. It has far reaching consequences, as it effectively denies the defendant the benefits of the fundamental principle of the *audi alteram partem* rule. It can only be granted to the plaintiff when all proposed defences to the plaintiff's claim are clearly inarguable both in fact and in law. The defendant does not have to establish a defence on the probabilities. All he needs to allege are facts which disclose a defence. These facts, if pleaded and accepted at the trial, must be sufficient to establish the defence.

The applicant cannot use the affidavit in summary judgment proceedings to amend the summons and declaration. It is merely supposed to verify the cause of action.
The procedure of summary judgment is not available in a claim for damages which are not liquidated. It may only be granted in respect of all the plaintiff's claims in his summons, not only such as he selects as the separate subject of summary judgment. To allow parties to amend or sever claims at summary judgment would defeat the whole purpose of having the procedure.

**Practice and procedure – parties – *locus standi* – party in contempt – whether can be heard – distinction from fugitive from justice**

*Min of Mines & Ors* v *African Consol Resources plc & Ors* HH-205-10 (Hungwe J) (Judgment delivered 6 September 2010)

*See above, under* PRACTICE AND PROCEDURE (Judgment – rescission).

**Practice and procedure – parties – *locus standi* – trustees of a trust – need for such trustee to aver his capacity – trustee not validly appointed or exercising powers after term of office has expired – no capacity to act**

*Trustees, Leonard Cheshire Homes Zimbabwe* v *Chiite & Ors* HH-267-10 (Uchena J) (Judgment delivered 15 December 2010)

*See below, under* TRUST (Trustee – appointment).

**Practice and procedure – parties – substitution of – plaintiff bringing action against statutory corporation – corporation's business wholly taken over by a successor company – not permissible to amend summons to add or substitute the company**

*Shah* v *Air Zimbabwe Corporation* HH-133-10 (Kudya J) (Judgment delivered 1 July 2010)

The plaintiff issued summons against Air Zimbabwe Corporation following a flight on an Air Zimbabwe aircraft. The defendant excepted to the summons, on the grounds that the defendant had ceased to exist, both at the time the cause of action arose and at the institution of proceedings, by virtue of the Air Zimbabwe Corporation (Repeal) Act 1998, under which Air Zimbabwe (Pvt) Ltd was established. The company took over all the functions, assets, liabilities and staff the Corporation. The plaintiff through his erstwhile legal practitioners filed a notice of amendment. He indicated his intention to apply at the commencement of trial to amend his summons and declaration by the addition of "'and/or Air Zimbabwe (Pvt) Ltd' after Air Zimbabwe Corporation wherever it appears".

Held: The legal position that existed after 23 March 2000 was that the excipient existed in form only. The application to amend the summons and declaration in the manner proposed by the plaintiff was a disguised application, firstly for joinder and secondly for substitution. The amendment sought was a novelty in this jurisdiction as it combined the conjunctive "and" and the disjunctive "or". Such an amendment was vague and embarrassing and would have to be struck out. It did not fulfill the requirements for a joinder contemplated by r 85 of the High Court Rules. The plaintiff had failed to demonstrate both some common question of law or fact and some entitlement to the relief claimed that arose from transactions performed by both the defendant and Air Zimbabwe (Pvt) Ltd.

**Practice and procedure – plea – *lis alibi pendens* – need for action to be already pending and in respect of same subject matter – action brought subsequently – plea not sustainable**

*Zimasco (Pvt) Ltd* v *Marikano* HH-148-10 (Mtshiya J) (Judgment delivered 21 July 2010)

*See above, under* EMPLOYMENT (Labour Court – jurisdiction).

**Practice and procedure – plea – *res judicata* – previous litigation between parties – matter in magistrates court dismissed because of failure by plaintiff to appear – rules of court specifically providing that such a dismissal not a defence in any subsequent action**

*Pasipanodya NO* v *Ruwizhi NO & Anor* HH-82-09 (Bhunu J) (Judgment delivered 22 July 2009)

Under the common law, the defence of *res judicata* is unavailable where the matter has not been previously determined on the merits. In respect of cases in the magistrates court, this common law rule has been restated in rr 4 and 5 of Order 33 of the the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980). These rules make it clear that a default judgment in the magistrates court does not amount to a final judgment giving rise to the special plea of *res judicata* in subsequent proceedings involving the same parties for the same or substantially similar cause of action. Rule 5 is couched in peremptory terms, as it provides that "the withdrawal or dismissal of an action or a decree of absolution from the instance shall not be a defence to any subsequent action".

**Practice and procedure – plea – *res judicata* – what is – decision on ancillary matter essential to determination of main matter – such decision part of main decision and constituting *res judicata***

*Potential Invstsms (Pvt) Ltd & Anor* v *Tayali & Ors* HB-136-10 (Ndou J) (Judgment delivered 4 November 2010)

For a plea of *res judicata* to succeed, it is not necessary that the cause of action, in the narrow sense in which term is sometimes used, should be the same in the later case as in the earlier case. If the earlier decision necessarily involved a judicial determination of some question of law or fact in the sense that the decision could not have been legitimately or rationally pronounced without at the same time determining that question or issue, then that determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be *res judicata* in any subsequent action between the same properties in respect of the same subject matter.

**Practice and procedure – pleadings – amendment of – procedure to be adopted – need to make written application to court**

*Agribank* v *Nickstate Investms (Pvt) Ltd & Ors* HH-231-10 (Gowora J) (Judgment delivered 20 October 2010)

Pleadings can be amended at any time before judgment is issued. The courts will grant an amendment to pleadings unless the application to amend is *mala fide* and provided the amendment should not be seen to cause prejudice to the other litigant which cannot be cured by an order of costs necessitated by the need to further postpone the matter. The overriding consideration is that the parties should be, so far as is possible, able to place all the issues in contention between them before the court and enable the court to ventilate all aspects of the dispute between the parties. The procedure is not specifically laid down in the rules of court, but the practice is that an application has to be made to court for the amendment to be granted, the procedure being governed by r 226 of the High Court Rules 1971. An amendment made, other than by a written application, is irregular, though in appropriate circumstances the irregularity may be condoned under r 4C.

**Practice and procedure – point of law – when may be raised – may be raised at any time if it goes to root of the matter, provided no unfairness to other party results**

*Trustees, Leonard Cheshire Homes Zimbabwe* v *Chiite & Ors* HH-267-10 (Uchena J) (Judgment delivered 15 December 2010)

*See below, under* TRUST (Trustee – appointment).

**Practice and procedure – process – service of – claim against the State – claim against Police – when process must be served on Commissioner and when may be served at a police station**

*Hungwe & Anor* v *Mawereza* HB-49-10 (Cheda J) (Judgment delivered 15 July 2010)

The respondent, a junior police officer, had been convicted of a disciplinary offence by a police board. An appeal to the Commissioner, the second applicant, failed. The respondent brought the matter on review. The process was served on the first applicant, the president of the disciplinary board, at his office in Bulawayo. There being no appearance for the applicants, the review application was granted. The applicants sought to have the order set aside, on the grounds that they had not been properly served with the process, as required by r 43B of the High Court Rules 1971. They argued that service should have been on the Commissioner, at his office.
Held: Order 5A, under which r 43B falls, applies only to claims against the State where the claim is sounding in money. Any other court process should be served at any police station for onward transmission to the Commissioner. Indeed, the Commissioner was aware of this, as he had instructed all police stations to forward court papers relating to either review or appeal matters to the force's legal services in Harare.

**Practice and procedure – striking out – of defence – must be on application by other party – not competent for judge to strike out defence *mero motu***

*Mereki* v *Forrester Estate (Pvt) Ltd* HH-199-10 (Mtshiya J) (Judgment delivered 15 September 2010)

A judge has no power to strike out a defendant's defence *mero motu* for failure to comply with directions in terms of r 182 of the High Court Rules. There must, in addition to the failure, be an application by the other party.

**Prescription – running of – foreign judgment – prescription of claim based on such judgment – issue of prescription determined by *lex causae* – need to show that claim was prescribed in terms of foreign law**

*Tiiso Hldgs (Pvt) Ltd* v *ZISCO* HH-95-10 (Patel J) (Judgment delivered 6 July 2010)

*See above, under* PRACTICE AND PROCEDURE (Judgment – foreign judgment).

**Property and real rights – ownership – vindication – estoppel – negligent representation – when owner of property can be estopped from vindicating property from third party – compelling considerations of fairness – when estoppel may be based on such considerations**

**Property and real rights – *res litigiosa* – alienation of – *res litigiosa* may not be sold after institution of proceedings – when a thing becomes *res litigiosa* – alienation after *litis contestatio* – need to protect rights of non-alienating party**

*Chikadaya NO* v *Chenga & Ors* HH-211-10 (Kudya J) (Judgment delivered 22 September 2010)

The plaintiff was the widow of one C and was the executor of his estate. C had registered a second house in Harare in the name of his brother. This was to circumvent the policy of the city council that one person could not own more than two properties in the high density suburbs. C sought an order from the High Court to compel his brother to cede his rights in the house to him. The High Court rejected the application as being in breach of the dirty hands principle, but the Supreme Court ordered that the matter be remitted to the High Court to be decided on the merits. This resulted in an order in favour of C. When he sought to enforce the order, he found that the city council had transferred the property to his brother. It then emerged that before the High Court's first decision, but after the institution of proceedings, C's brother had executed an agreement of sale under which the defendant bought the property. Although aware of the High Court's first decision and the fact that an appeal was pending against that decision, the brother passed transfer of the property to the defendant.
C instituted proceedings, seeking the cancellation of the sale and transfer of the property to the defendant; the transfer of the property to him and the eviction of all parties claiming occupation through the defendant; and costs. He averred that the defendant took transfer of the property when he was aware that the rights, title and interest in the property held by the brother were being challenged in the Supreme Court. The defendant was thus a *mala fide* purchaser who obtained defective title. Alternatively, C claimed that he was entitled to the relief of

*rei vindicatio* as against the defendant; alternatively, he claimed damages representing the replacement value of the property. The defendant claimed that he purchased the house through an estate agent and was unaware of the legal dispute.
Held: (1) The onus of showing that the defendant was a *mala fide* purchaser lay on the plaintiff. She was not personally involved in the dispute between C and his brother. She did not know the defendant until the pre-trial conference. C, who alleged that he alerted the defendant to the dispute at the time that he appealed to the Supreme Court against the first judgment, died before he could testify. C had alleged this in an answering affidavit. In terms of ss 27(1) and 28(1) of the Civil Evidence Act [*Chapter 8:01*], C's affidavits were admissible. The only rider placed by s 27(4)(b) of the Act was the weight to be attached to them, regard being had to the incentive he might have had to conceal or misrepresent any fact. On the fact, the probabilities were that the defendant must have been aware of C's claims to the ownership of the rights, title and interest in the property when he purchased the rights in the property. Consequently, he was a *mala fide* purchaser and on that ground alone the plaintiff would be entitled to the relief sought.
(2) The *rei vindicatio* is a remedy that is available to the owner of property for its recovery from the possession of any other person. The two essential elements of the remedy are (a) proof of ownership and (b) possession of the property by another person. The High Court's second judgment had awarded the rights, title and interest in the property in dispute to C and determined, as between the brothers, C was the holder of the rights, title and interest in the property. The brother purported to be the owner and disposed of the property in the full knowledge that the property did not belong to him. He did so in order to cheat and defeat C, the true owner, of his rights in the property. The true owner of property is entitled to recover it from any person who has possession of it without his consent. C was the true owner of the rights, title and interest in the property and the defendant had possession of it. The plaintiff was entitled to the remedy of vindication.
(3) The defendant could not rely on estoppel to prevent vindication. Firstly, there was no representation, by conduct or otherwise, by C which would have entitled the defendant to conclude that the person who disposed of the property was the owner of it or was entitled to dispose of it. Secondly, while estoppel may operate where the person who acquired his property did so because, by the *culpa* of the owner, he was misled into the belief that the person from whom he acquired it was the owner or was entitled to dispose of it, there was no such negligence here. Thirdly, while despite the absence of *culpa*, the owner may be precluded from asserting his rights by compelling considerations of fairness within the broad concept of the *exceptio doli*, this was not such a case. Whatever improvements the defendant made, and whatever they cost, he did so fully aware of C's claim. The compelling considerations of fairness were in favour of C.
(4) The final question was whether a *res litigiosa* could be alienated. A thing that is the subject matter of litigation may not be sold after the institution of action. In a real action (action *in rem*) the thing becomes *res litigiosa* on the service of summons, while in a personal action that status is achieved at the closure of pleadings. Here, it was unnecessary to determine whether the rights were real or personal rights as at the time of alienation summons had been served and pleadings closed. Under either heading, the contested rights were *res litigiosa.* A *res litigiosa* also may not be alienated after *litis contestatio* without protecting the rights of the non-alienating party. Here, the sale of the rights in the property after the closure of pleadings without protecting C's rights therein rendered it a nullity.

**Property and real rights – spoliation order – application for – defences to – length of time taken to bring application – relevance of – applicant not in possession – complete defence**

*van den Berg & Anor* v *Lang* HB-129-10 (Mathonsi J) (Judgment delivered 21 October 2010)

The applicants had at some stage occupied and operated mining sites owned by the respondent. The facts did not show clearly on what basis they did so; there appeared to be some sort of partnership or tribute agreement. A dispute arose between the parties and the respondent took possession of the sites. The applicants sought a spoliation order; the respondent averred, in answer, that the applicants had abandoned the sites and that as owner he was entitled to re-take possession. He also argued that the applicants were not entitled to bring a spoliation application several months after the event; they should have acted immediately.
Held: (1) Although, depending on its length, the period of delay may not *per se* constitute a bar to the grant of a spoliation order, it could well be a relevant factor in deciding whether the dispossession had been consented to.
(2) A respondent may, as a general rule, raise only two defences in spoliation proceedings:
(a) the applicant was not in the peaceful and undisturbed possession of the thing in question at the time of deprivation; or
(b) the respondent has not committed spoliation .
With regard to the first defence, the respondent may prove that the applicant did not exercise the measure of physical control which was necessary to acquire or retain possession or that the intention to derive a benefit

from holding the thing was absent. Regarding the second defence, the respondent may, for instance, prove that his act of dispossessing the applicant was in fact not unlawful, in that it amounted to counter spoliation, was justified in terms of some or other statutory enactment, or took place with the consent of the applicant. The applicants did nothing to rebut the averment that they had abandoned the sites, so the defence must succeed.

**Revenue and public finance – currency – currency in which debts payable – fee for work done before advent of new currency system – whether payment must be in old currency – fee based on value of estate – value determined only after new currency system introduced – payment may be made under new system**

*Mutyasira* v *Gonyora* HH-218-10 (Chitakunye J) (Judgment delivered 28 October 2010)

*See above, under* ADMINISTRATION OF ESTATES (*Curator bonis*).

**Review – grounds for – gross irregularity in proceedings or decision – failure to adhere to a peremptory procedural requirement – such failure constituting a gross irregularity – granting eviction order when issue of non-payment of rent had been referred to trial – also a gross irregularity**

*Sibanda* v *Gumbo & Anor* HB-139-11 (Mathonsi J) (Judgment delivered 28 October 2010)

The applicant had entered into a lease agreement with the first respondent's wife. Although he had no power of attorney from her, the first respondent sought an eviction order against the applicant for non-payment of rents. The applicant entered appearance to defend but the first respondent sought summary judgment. The application for summary judgment was set down at less than the 7 days' notice required by Order 15 r 1(2) of the Magistrates Court (Civil) Rules 1980. The magistrate rejected the applicant's argument that the first respondent had no *locus standi* and granted and order for eviction but held over for trial the issue of whether the rents had been paid or not. The applicant brought the magistrate's decision on review, arguing that there were gross irregularities in the proceedings.
Held: under s 27(1) of the High Court Act [*Chapter 7:06*], any proceedings or decision may be brought on review before the High Court on the grounds, *inter alia*, of gross irregularity in the proceedings or decision. The failure to give the applicant the required notice of the application for summary judgment, which was a peremptory provision in the rules, was a gross irregularity. It was an irregularity to hold that the first respondent had *locus standi*, when there was no privity of contract between him and the applicant. It was also an irregularity to grant an eviction order, when the issue of non-payment, which would be the only grounds for eviction, had been put in issue.

**Road traffic – negligence – duty of driver – driver moving onto wrong side of road – whether proof of negligence**

*Mafusire* v *Greyling & Anor* HH-173-10 (Chatukuta J) (Judgment delivered 28 July 2010)

There is no obligation on a person who is driving along a road to ride through all the ruts and other rough patches on the left of the road. He is at liberty to avoid such obstacles. If he can find a better part of the road, he is entitled to ride on that part of the road, especially when driving in the country, but then he must use more care than when he is on his own side of the road. If there is a vehicle in the way, and he wishes to pass it, then whether the road on his left is rough or not he must keep to his left. If he does drive on the incorrect side of the road, he must exercise greater care and take every precaution to avoid colliding with vehicles approaching him: persons travelling on the correct side of the road have a paramount right and are entitled to preference in the use of the road. If any danger of collision arises, it is his duty first to give way. He must swing to his left as far, and as quickly, as possible in the face of approaching vehicles. Failure to do may be negligence. If a collision occurs between two vehicles travelling in opposite directions along the same road when the defendant's vehicle is on the incorrect side of the road, the fact that it is on the incorrect side of the road is, as a general rule, *prima facie* evidence of negligence. When a plaintiff proves that the defendant's vehicle for no apparent reason suddenly swerved on to its incorrect side of the road, an inference of negligence could, in the absence of an explanation, be drawn against the defendant: *res ipsa loquitur*. The defendant is then required to produce evidence sufficient to displace the inference of negligence which arises from the fact that he was on the wrong side of the road. If he

fails to do so, the *prima facie* evidence becomes sufficient to discharge the onus which rests on the plaintiff. But if the defendant gives an explanation, the plaintiff can succeed only if, at the conclusion of the case and on the evidence as a whole, there is a balance of probabilities in his favour that the defendant was negligent.

**Statutes – Public Order and Security Act [*Chapter 11:17*] – regulation of public gatherings – gatherings exempt from requirements of Part IV – include gatherings held by registered trade union for *bona fide* trade union business purposes**

*ZCTU* v *OC Police KweKwe & Ors* HB-90-10 (Mathonsi J) (Judgment delivered 26 August 2010)

The applicant was a registered trade union and the umbrella body of several trade unions nationally which are affiliated to it. It had branches throughout the country and its core business was championing the interests of its members. It planned to commemorate the 1972 Hwange mine disaster by undertaking a peaceful procession along one of the streets in Kwe Kwe and observing a moment of silence. It notified the police of its plan and requested a police escort to protect its members during that activity. The police stated that the procession should take place in Hwange and that the procession was "not approved". Further approaches from the applicant were met with the same reaction. The applicant approached the court on an urgent basis seeking authority to go ahead with the procession and an interdict against the respondents barring them from interfering with or stopping the commemoration activities.

Held: Zimbabwe is a democratic country and the freedom of assembly and association is enshrined in s 21 of the Constitution. Persons are entitled to assemble freely and associate with other persons, particularly to form trade unions and other associations for the furtherance of their interests. Sections 23, 24, 25 and 26 of the Public Order and Security Act [*Chapter 11:17*], which govern the holding of public gatherings and set out the procedure to be followed by those intending to hold such gatherings, had no application in this case, as, in terms of s 26A of the Act, they did not apply to, *inter alia*, gatherings held by a registered trade union for *bona fide* trade union purposes for the conduct of business in accordance with the Labour Relations Act [*Chapter 28:01*]. The commemoration of the mine disaster was such business. The orders sought would accordingly be granted.

**Statutes – State Liabilities Act [*Chapter 8:14*] – s 5(2) – provision that state property may not be executed against in satisfaction of judgment debt – such provision discriminatory – provision also breach of right to equality before the law and right to equal protection of the law**

*Gondo & Ors* v *Republic of Zimbabwe* SADC-5-10 (Pillay P, Mtambo & Mondlane JJ concurring) (Judgment delivered 9 December 2010)

*See above, under* INTERNATIONAL LAW (Treaties – SADC Treaty).

**Trust – trustee – appointment of – need for trustee to hold office in accordance with trust deed – trustee staying on after expiry of term of office – actions and decisions by such trustee invalid – appointment of trustees by court – when court may appoint trustees to ensure continuation of trust**

*Trustees, Leonard Cheshire Homes Zimbabwe* v *Chiite & Ors* HH-267-10 (Uchena J) (Judgment delivered 15 December 2010)

The trustees of a home for permanently disabled people had given notice to the residents of the home and sought their eviction. During the lengthy trial, it emerged that the trustees had all remained in office for periods longer than allowed for in the deed of trust. The defence sought to raise this issue as a point of law; the trustees objected.

In terms of the deed of trust, the trust had to consist of not less than two and not more than six trustees. The evidence showed that there were three trustees still within their five year terms at the meeting where it was resolved to eject the defendants, but by the time the trustees purported to resolve to institute the present litigation, the terms of all but one of the trustees had expired..

Held: (1) a point of law which goes to the root of the matter may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed. The over staying of trustees was a point of law which went to the root of the case. Here, if all the trustees had over stayed and while thus incapacitated had resolved to evict the defendants, their resolution would be invalid as they were at the time of making it not validly appointed trustees. They might also have no *locus standi in judicio* to prosecute

the claim for eviction. Raising the issue during cross-examination, as occurred here, would not be unfair to the plaintiff, which could re-examine its first witness on that issue and would lead its other witnesses on it. There was no definitive law that required the issue of the validity of the trustees' resolution to be specially pleaded. To proceed without resolving the validity of the trustees' resolution would have been a fruitless exercise. divorced from reality, and would lead to a wrong decision. Had the point not been raised by counsel, the court could have raised it *mero motu*.
(2) The fact that there were three validly appointed trustees meant the original decision to evict was valid. The fact that more than two validly appointed trustees decided on some of the defendants moving on at that meeting settled the issue of the validity of that decision. However, in respect of the decision to bring the present litigation, the terms of all but one of the trustees had by then expired. Other trustees had been purportedly appointed by trustees whose terms had expired. The power to assume additional trustees cannot be exercised by a former trustee whose term of office has expired. The single trustee could not make valid decisions on behalf of the trust, as the required quorum was two.
(3) While the provisions of a trust must be interpreted purposively to give effect to the objectives of the trust, that must be done without disregarding some provisions of the trust instrument. The purpose for which the trust was created could be gleaned from the whole scheme of the deed of trust and the construction must be in agreement with all the provisions of the deed of trust. Under s 7 of the Companies and Associations Trustees Act [*Chapter 24:04*], the High Court may, on the application of an interested person, appoint trustees to ensure the continuation in existence of a trust. It is the trust that the law is interested in sustaining, not decisions of trustees whose terms of office have expired or trustees appointed by persons who had no mandate to act for the trust. The objectives of the trust and the manner in which trustees must hold office were clear. It was also clear that the trustees exceeded their terms of office. The court could not, in order to give effect to the objectives of the trust, interpret the deed of trust in a manner inconsistent with the limitation of the trustees' terms of office. The objective of the trust is for it to be managed, in favour of disabled people, by people holding office in compliance with its provisions. The court could not uphold invalid decisions made by trustees who no longer had the mandate to manage the affairs of the trust.
(4) On the issue of *locus standi*, the general principle is that a person who is *de facto* administering a trust as trustee has *locus standi* in any matter relating to the trust; so has a person who claims to be the rightful trustee and seeks confirmation of his status. However, a trustee bringing an action or application should aver his capacity, and that he was properly appointed by a given instrument, or by order of court.

**Words and phrases – "abandonment" – of a right – meaning**

*Total Zimbabwe (Pvt) Ltd* v *Power Coach Express (Pvt) Ltd* HH-64-09 (Gowora J) (Judgment delivered 4 February 2009)

*See above, under* COMPANY (Legal proceedings).

**Words and phrases – "legal tender" – Labour Act [*Chapter 28:01*] – s 12A(1)**

*McCosh* v *Pioneer Corporation Africa Ltd* HH-164-10 (Kudya J) (Judgment delivered 28 July 2010)

*See above, under* EMPLOYMENT (Contract – remuneration).

**Words and phrases – "frivolous" – "vexatious"**

*Williams & Anor* v *Msipha NO & Ors* S-22-10 (Malaba DCJ, Chidyausiku CJ, Cheda JA, Ziyambi JA & Garwe JA concurring) (Judgment delivered 26 November 2010)

*See above, under* CONSTITUTIONAL LAW (Constitution of Zimbabawe 1980 – Declaration of Rights – s 13)