Latest update: 13 February 2013

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

CASES DECIDED JANUARY – JUNE 2011

Administration of estates – estate administrator or non-testamentary executor – appointment – requirements – must have valid practising certificate issued under Estate Administrators Act [*Chapter 27:20*] – work done by assistant in company in partnership – must be done under direction of principal who is himself registered under Act

Filon & Anor v *Sibanda & Ors* HH-89-11 (Patel J) (Judgment delivered 3 May 2011)

Section 26(1) of the Estate Administrators Act [*Chapter 27:20*] prohibits any person registered under s 23 from performing, for gain, the work of an estate administrator or soliciting appointment as the a non-testamentary executor of a deceased estate, except in accordance with the terms and conditions of a valid practising certificate issued in terms of s 28. A company or partnership may carry on the business of an estate administrator under certain specified conditions relating to the direct control and management of a principal who is, *inter alia*, a registered person. However, even in this situation, in every premises where any such business is not done personally by the principal, it must be done under the direction of that principal by an assistant who is himself a registered person. Non-compliance therewith renders null and void any work done or appointment made pursuant to such conduct.

Administration of estates – executor – executor dative – appointment of by Master – executor testamentary still alive, holding office and not incapacitated – appointment of executor dative improper – acts carried out by executor dative of no legal effect

Katerere v *Chiangwa & Ors* HH-122-11 (Mavangira J) (Judgment delivered 15 June 2011)

In 1999 the applicant entered into an agreement for the sale of an immoveable property from a deceased estate, which was represented by the executrix testamentary. She was granted authority in terms of s 120 of the Administration of Estates Act [*Chapter 6:01*] to sell the property otherwise than by public auction. The immovable property was transferred to the applicant in April 2007. At some unspecified stage after the first sale, the second respondent, the heir to the estate, purported to sell the property to the first respondent. At that time, the ownership of the property did not reside in the heir. In 2006, the first respondent and another person brought an action in the magistrates court against the second respondent and others seeking the transfer of the property to themselves. The magistrate granted the order by default and the Master then appointed an executor dative for the sole purpose of effecting the transfer. In July 2007 the property was purportedly transferred to the first respondent. The applicant sought an order setting aside the transfer to the first respondent. He contended that the appointment of the executor dative during the lifetime of the executrix testamentary and during a period of time when the executrix testamentary was still holding office and was not incapacitated was not valid. He further contended that, when the second respondent sold the property, the second respondent had no title to pass and that the sale was made in the second respondent's personal capacity and without authority. He also contended that, when the second respondent sold the property, he knew that it had already been sold to the applicant as he had co-signed the agreement of sale between the applicant and the executrix testamentary.
The Registrar of Deeds expressed the opinion that, although the appellant's deed of transfer was lodged first, the first respondent's was processed first, thus rendering the appellant's deed invalid.
Held: (1) in term of ss 10 and 14 of the Deeds Registries Act [*Chapter 20:05*], when the registrar affixed his signature to the deed of transfer in favour of the applicant, the deed was with effect from that date deemed to be registered and ownership was conveyed from the deceased estate to the applicant. Thus the applicant became or was henceforth deemed to be the owner and the property no longer formed part of the deceased estate. It therefore followed that when three months later, it was purported to convey ownership of the property from the estate to the first respondent, the estate at that stage was no longer the owner thereof and it thus had no rights to transfer to the first respondent. The agreement of sale purportedly in favour of the first respondent therefore could not be valid.
(2) In any event, the executor dative having been appointed whilst the executrix testamentary was still alive, holding office, not incapacitated and still sane, was improperly appointed. The deceased had left a will in which the executrix testamentary was appointed. The Master was thus not dealing with an intestate estate. The

appointment of the executor dative was in the circumstances irregular and any acts carried out by him in the name of the estate would thus be of no legal consequence.
(3) Under s 11(1)(a) of the Act, transfers of land and cessions of real rights therein follow the sequence of the successive transactions in pursuance of which they are made. Although the deed of transfer in favour of the applicant was registered first, the Registrar's opinion that the deed was invalid could only be viewed as the registrar's opinion and not a statement or declaration of the legal position. In terms of s 8(1) of the Act, no deed of transfer shall be cancelled by a registrar except upon an order of court. There had been no order of court which has cancelled or authorised the cancellation of the applicant's deed of transfer, which therefore remained valid.

Administration of estates – family of deceased person – right of spouse and children of deceased person to occupy immoveable property occupied by deceased immediately before death – limitations on such right – rights of other persons in the property not affected

Morten v *Morten & Ors* HH-51-11 (Mawadze J) (Judgment delivered 15 February 2011)

The applicant was the widow of a man who owned a home in a retirement village. The village was run in terms of the constitution of the association which administered the village, as well as a notarial deed of servitude registered with the Deeds office regulating the rights and affairs of the members of the village. Under the constitution of the association, the applicant was below the minimum age for residence in the village. Because of the applicant's age, and for other reasons, the association sought to remove the applicant from the village. At first the second and third respondents locked her out of her house, but she was restored with the help of the police. However, her application for an interdict to prevent the respondents from removing her failed on the grounds that she had not established a right to be in the house. The first respondent, the administrator of the applicant's late husband's estate, was issued letters of administration in respect of the estate and together with the second and third respondents ejected the applicant from the house. The applicant sought an urgent spoliation order. The application was resisted on various grounds, including the argument that the application was bad in law.
Held: under s 10 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*], the spouse of a deceased person has the right to occupy any immovable property which the deceased had the right to occupy and which the surviving spouse was ordinarily occupying immediately before the death of the deceased. However, under s 11, this right does not derogate from or prejudice in any way the rights of "any other person whomsoever which existed prior to the date of the death of the deceased person". Under the constitution of the association, the applicant had no right to occupy the house. This did not mean, though, that the respondents were entitled to eject her from the flat without following due process of the law. The provisions of the constitution and the notarial deed of servitude dealt with the applicant's right to *habitatio* and could not be elevated to the status of a court order authorising the eviction of the applicant. The respondents should They should seek to enforce their rights through the courts.

Administration of estates – intestate succession – widow of deceased – widow married under customary law – second widow married to deceased under civil law – entitlement of each widow to inherit house she occupied at time of deceased's death

Ndlovu v *Ndlovu & Ors* HB-10-11 (Mathonsi J) (Judgment delivered 20 January 2011)

The deceased and the plaintiff were married under customary law in 1982 and that marriage remained in subsistence until the deceased died intestate in May 2002. There were two children born of the marriage. Although the parties once had their problems and lived apart, the marriage was never dissolved. When the deceased died, he was living with the plaintiff at the matrimonial home in Bulawayo, a home which they acquired together. In 1987 the deceased married the first defendant in terms of the Marriage Act, but they did not stay together long. That marriage was not dissolved, but the deceased went back to live with the plaintiff. No children were born of the second marriage. Both the widows claimed to be the heiresses to the deceased's estate.
Held: in enacting s 68(3) and (4) of the Administration of Estates Act [*Chapter 6:*01], the legislature had, by clear and unambiguous language, seen fit not only to recognise a customary marriage as valid for purposes of inheritance, but also to place such marriage at par with one solemnised in terms of the Marriage Act. By parity of reasoning, a spouse under a customary marriage stands at the same pedestal as a spouse under the Marriage Act. The legislature had unquestionably raised the status of a customary marriage to the same level as a civil marriage. There cannot be any clearer language by which to recognise such a marriage. This was borne by a

realisation that an African man will forever remain entangled in the web of customary law and invariably have a customary wife somewhere in the background, even as he upgrades himself by marrying someone else by civil rites. It is those customary wives which the legislature sought to protect.
The provisions of s 68F of the Act are also so clear as to admit of no ambiguity at all. Where the deceased is survived by two wives, as in the present case, and those wives live in separate houses, each wife is entitled to receive the house that she occupied at the time of the man's death, together with household effects in that house. Where the two wives shared the same house, they are entitled to joint ownership. This is so regardless of the status of the marriage as long as, in the case of a customary marriage, it was entered into before the civil marriage. The mischief that the legislature intended to address was that previously women married under customary law had faced ignominy of being chased out of their homes they toiled for if the husband married a younger wife who insisted on a civil Marriage. The law previously disinherited that customary law wife in favour of the new wife. The Act is silent as to what happens when the new wife has no house belonging to the deceased husband but considering the mischief sought to be addressed, it was never the intention of the law giver that where the two wives lived in different houses, the one without would be entitled to share the single house occupied by the other. That would defeat the whole purpose of the enactment.
The plaintiff was a spouse for purposes of the Act and entitled to receive the house she occupied and the household goods in it the exclusion of the first defendant.

Administration of estates – maintenance – dependant – claim by dependant for maintenance – considerations – what factors to consider in determining amount of maintenance, if any – when application should be made

Dzangai v *Est Chingarire & Anor* HH-106-11 (Mawadze J) (Judgment delivered 11 May 2011)

The applicant, the mother of two minor children she had with the deceased during their customary law union. The union was dissolved before the deceased died, but the deceased had continued to be solely responsible for the children's maintenance, paying, *inter alia*, school fees, clothing, food, shelter and medical expenses. The children had been going to a private school in Harare. After the deceased's death, the applicant moved to South Africa with the children, where they were enrolled in a private school. The applicant had to pay the fees. Finding the burden excessive, she sought to have the fees paid out of the estate. She claimed a lump sum in respect of each child, and sought an order that the deceased's matrimonial home be sold if the movable assets in the estate were insufficient.
The Master of the High Court pointed out that the lump sum claimed exceeded the value of the estate and that, apart from the applicant's children, there were other beneficiaries to be maintained: the deceased's surviving spouse, her child, and another child of the deceased's who was born out of wedlock.
Held: (1) as dependants, the applicant's two children were eligible for maintenance in terms of s 3(1) of the Deceased Persons Family Maintenance Act [*Chapter 6:03*]. In terms of s 3(2), an application for such maintenance should be made within three months of the grant of letters of administration to the executor. The resent application, having been made almost six months after the grant of letters of administration, was well out of time. No application for condonation was made to the Master and on that basis alone the application should be dismissed.
(2) the application in any case fell short of the requirements set out in s 7 of the Act. The applicant would have to show that a grant of maintenance would be just and equitable, taking into account such factors as
(a) the benefits, if any, the applicants would have been entitled to under the will or on intestacy;
(b) the period for which maintenance would be required;
(c) the number of other persons to be maintained from the estate; and
(d) the size and nature of the estate.
The claim failed to take these factors into account.
(3) While the court should always give preference to the best interests of the minor children in such applications, it still has to consider the interests of other beneficiaries. If the court were to order the sale of the matrimonial property, the rights and interests of the surviving spouse would be defeated. If the order sought were granted, there would be nothing left in the estate for the executor to administer. Taking all these factors into account, it would not be just and equitable to grant the order sought.

Administrative law – administrative decisions and acts – proceedings brought in terms of Administrative Justice Act [*Chapter 10:28*] – High Court's powers – court not entitled to substitute decision of administrative authority with its own decision

Mhanyami Fishing & Tpt Co-op Soc Ltd & Ors v *Dir-Gen Parks & Wildlife Mgmt Authority & Ors* HH-92-11 (Makoni J) (Judgment delivered 15 June 2011)

Two of the applicants were co-operatives registered in terms of the Co-operative Societies Act [*Chapter 24*:*05*] and the third was a company. They had all, for several years, held permits to conduct commercial fishing operations. These permits had been routinely renewed, but the respondent authority notified the applicants that their permits would not be renewed after the expiry of a fairly lengthy notice period. The applicants approached the High Court in terms of s 3(1)(a), as read with ss 4 and 5, of the Administrative Justice Act [*Chapter 10*:*28*], seeking an order setting aside the authority's refusal to renew their permits and requiring the authority to issue permits to them. The applicants cited the respondents as the "Director General, Zimbabwe Parks and Wildlife Management Authority NO" and "Zimbabwe Parks and Wildlife Management Authority". The respondents took four points *in limine*: (a) that under the Act, the High Court cannot substitute an administrative decision with its own decision; (b) that the applicants had failed to exhaust their domestic remedies under s 124(2) of the Parks and Wild Life Act [*Chapter 20*:*14*], the legislation under which fishing permits were granted; (c) that the deponents of the applicants' founding affidavits did not have the authority to sign the affidavits; and (d) that the respondents had been wrongly cited.

Held: (1) it is a general principle of our law that the courts do not lightly interfere with decisions made by administrative authorities in the absence of illegality, irrationality or procedural impropriety. The High Court can interfere with an administrative decision on the aforementioned grounds. In terms of s 4(2) of the Administrative Justice Act, the High Court may confirm or set aside the decision concerned or refer the matter back to the administrative authority concerned for consideration or reconsideration. The effect of granting the order to issue permits would be to substitute the decision of the respondents with that of the court. No such power is conferred on the court by s 4(2). Apart from the fact that the court would be taking over the functions of an administrative authority, there was not adequate information upon which the court could make a decision.

(2) Where domestic remedies are capable of providing effective redress in respect of the complaint and secondly where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for not doing so. Among the factors to be considered in determining whether the court can withhold its jurisdiction until domestic remedies are exhausted are: the subject matter of the statute (transport, trading licences, town planning and so on); the body or person who makes the initial decision and the bases on which it is to be made; the body or person who exercises appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any re-hearing on appeal; the powers of the appellate tribunal, including its power to redress or cure wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which an applicant complains

Section 124(1) of the Parks and Wild Life Act provides that any person who is aggrieved by any decision of an appropriate authority "may appeal" against the decision to the Minister of Environment and Natural Resources. Subsection (2) gives the Minister power to override the decision of the respondents. The appeal procedure was capable of providing effective redress to the applicant's complaint. The use of the word "may" in subs (1) is to give an aggrieved party a choice as to whether to appeal or not.

(3) Once a party raises an issue whether the deponent to an affidavit has authority to depose to an affidavit on behalf of an artificial person, then the other party must place before the court some form of proof that he is so authorised. For artificial persons, such proof will be in the form of resolutions. The deponents offered no evidence that they had been authorised to institute the proceedings on behalf of the applicants. They could have produced the resolutions annexed to the answering affidavits as the respondents had challenged their authority.

(4) Section 3 of the Parks and Wild Life Act establishes the Parks and Wild Life Management Authority which is a body corporate capable of suing and being sued in its corporate name. This is the entity that can be sued if there are any issues arising out of the Act. The authority is managed by the Parks and Wild Life Management Authority Board, which should have been cited as the first respondent, rather than the Director-General.

Administrative law – procedural requirements – failure to comply with – effect – act done without complying with such requirements *ultra vires* and void *ab initio*

BMG Mining (Pvt) Ltd v *Mining Commr, Bulawayo & Ors* HB-11-05 (Mathonsi J) (Judgment delivered 20 January 2011)

See below, under MINES AND MINERALS (Claim).

Administrative law – reasonable expectation – when may arise – existence of regular practice – no reasonable expectation arising where practice does not exist

Makromed (Pvt) Ltd v *Medicines Control Authority of Zimbabwe* HB-36-11 (Mathonsi J) (Judgment delivered 3 March 2011)

The applicant had been a wholesale dealer in medicines and pharmaceutical products since 2002. Such business was conducted by virtue of a wholesale dealer's permit issued by the respondent in terms of the Medicines and Allied Substances Control Act [*Chapter15:03*], which permit was valid for a period of one year. Accordingly, the applicant was enjoined to renew that permit annually before it expired. The applicant's last permit expired at the end of March 2009 without an application for renewal being made in the prescribed manner. The following month the respondent pointed out this failure and, following representations by the applicant, stated that it would allow the permit to be renewed on payment of the required fee. In spite of this indulgence (which was not sanctioned by the relevant legislation), the applicant failed to submit an application for renewal. Instead, it forged a permit and traded using the forged permit. When this was discovered, the applicant submitted an application on the necessary form and deposited the fee. The application was rejected. The applicant sought an order declaring the respondent's failure to renew the permit as constituting an unreasonable and unfair administrative action in breach of s 3 of the Administrative Justice Act [*Chapter 10:28*] and directing the respondent to forthwith renew its permit. It was submitted that the applicant had a legitimate expectation that a permit would be issued and accordingly was entitled to the relief provided for in s 4 of the Act.
Held: (1) In terms of both the Medicines and Allied Substances Control Act and the regulations, an application for a renewal of a permit can only be made before the expiration of the permit. Such an application may only be made on the prescribed form, accompanied by the prescribed fee. No such application was made by the applicant before its permit expired. The communication between the parties which came after that did not constitute an application for renewal which the respondent was required to consider.
(2) The law does not protect every expectation; it only protects a ''legitimate'' one. Legitimate or reasonable expectations may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Here, the applicant had been renewing its permit for several years in accordance with the provisions of both the regulations and the Act. At no time was it allowed to renew the permit after it had expired or without submitting the prescribed form. There was thus no general promise that renewal would be made out of time.

Administrative law – review – exhaustion of domestic remedies – principles – when court should withhold its jurisdiction until domestic remedies are exhausted – relevant legislation providing effective redress – court declining jurisdiction

Mhanyami Fishing & Tpt Co-op Soc Ltd & Ors v *Dir-Gen Parks & Wildlife Mgmt Authority & Ors* HH-92-11 (Makoni J) (Judgment delivered 15 June 2011)

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

Appeal – notice – validity – failure to state date of judgment appealed against or court from which judgment emanated – purpose of such requirements – appellant stating name of magistrate and relevant dates ascertainable from record – failure condoned

Wellcroft Invstms (Pvt) Ltd v *Modern Carpets (Pvt) Ltd* HH-38-11 (Kudya J, Hlatshwayo J concurring) (Judgment delivered 16 February 2011)

The purpose of requiring the date when the decision appealed against to be stated in a notice of appeal is to enable the respondent and the court to determine *ex facie* the notice of appeal whether the provisions of the rules prescribing the time limit in which the appeal should be instituted and the notice of appeal filed delivered and filed, were complied with. Where the notice of appeal did not state the date on which the judgments was given, but where the date could be ascertained from the record and it was clear that the appeal was noted timeously, it would not have been in the interests of justice to strike off the appeal for the appellant to apply for extension of time to comply with the rule and condonation for non-compliance. Similarly, where the notice of appeal did not state the court from the judgment emanated but did state the name of the magistrate, there was substantial compliance with the rules and no prejudice resulted to the respondent.

Appeal – noting of – effect – appeal from magistrates court – party wishing to execute despite notice of appeal must apply for order of execution – unsuccessful party wishing to stay execution must apply for such relief

Ritenote Printers (Pvt) Ltd v *A Adam & Co & Anor* S-15-11 (Chidyausiku CJ, in chambers) (Judgment delivered 31 May 2011)

The first respondent instituted an action in the High Court for the eviction of the applicant from two premises it had leased to the applicant. It also sought the payment of arrear rentals. This was done in two separate actions. The first action was referred to trial and a trial date was set. The other action was still at the pre-trial conference stage. At that stage the first respondent withdrew its actions in the High Court and then instituted the same proceedings in the magistrate's court. It was successful in the magistrate's court and the magistrate's court ordered the eviction of the applicant as well as the payment of arrear rentals. Dissatisfied with the magistrate's judgment the applicant appealed against it to the High Court. The applicant, most probably because of the wording of s 40(3) of the Magistrates Court Act [*Chapter 7:10*], concluded that the noting of the appeal would not suspend the order of the magistrate's court and accordingly filed an application in the magistrate's court for the stay of execution pending the determination of that appeal. The magistrate dismissed the application on the ground that she could not grant such relief, as the noting of the appeal had suspended the operation of her order. In spite of the ruling that the operation of the order had been suspended, the first respondent instructed the messenger of court to evict the applicant; this was duly done.
Held: What happens upon the noting of an appeal against the magistrate's judgment is governed by s 40(3) of the Act. A proper reading of the section reveals that it confers on the magistrate the power to stay execution despite the noting of an appeal. It also confers on the magistrate the power to order execution despite the noting of an appeal. It follows therefore that for the magistrate to exercise the discretion in terms of s 40(3) of the Act, the party seeking to have the discretion exercised in its favour has to make an application. Upon the making of such an application the magistrate exercises the judicial discretion and makes a proper determination. Thus a party, in this case the first respondent, that wishes to execute despite the noting of an appeal has to apply for the magistrate to exercise the discretion in its favour before it can execute the judgment. Equally, if the losing party, in this case, the applicant, wishes to stay execution despite the noting of an appeal, it has to apply for such relief.

Appeal – noting of – effect – common law position – judgment appealed against suspended – appeal against arbitral award in labour matter – common law position applicable

Dhlodhlo v *Deputy Sheriff, Marondera, & Ors* HH-76-11 (Gowora J) (Judgment delivered 30 March 2011)

The applicant had been employed by the fourth respondent. He was dismissed for misconduct. An appeal resulted in the matter being referred to arbitration; the arbitrator's award was in favour of the applicant. The arbitrator awarded back pay, cash in lieu of notice and damages in lieu of reinstatement. The amount to be paid in damages was specified, but the other sums were not quantified. The applicant had the damages award registered as an order of the High Court and then had a writ of execution issued. The fourth respondent's legal practitioner told the Deputy Sheriff that the execution had been stayed by an order of the Labour Court, which had granted the stay following the noting of an appeal against the award. The applicant took the view that the writ was valid until set aside by the High Court.
Both parties noted appeals against the award of damages.
Held: (1) under r 324 of the High Court Rules, a writ of execution remains valid until the judgment has been satisfied. Under r 34(1) of the Labour Court Rules 2006, where an order has been registered in terms of s 92B(3) of the Labour Act [*Chapter 28:01*], the court or a President sitting in chambers may order a stay of execution of the order. Section 92B of the Act allows for the registration of orders made by the Labour Court. It does not cover orders made by arbitrators. An arbitrator's award may be registered in terms of s 98(14). Section 92B does not provide for the suspension of orders of arbitrators.
(2) In any event, once an order has been registered with the High Court, it becomes an order of the High Court and the Labour Court, as a lower court, has no jurisdiction to control, vary, set aside or rescind the order. Only the High Court can do so, or the Supreme Court on appeal. Only the High Court can order a stay of execution.
(3) The proceedings against which the appeal was noted were conducted in the public domain law under the aegis of the Labour Act. As such, the common law presumption against the operation of judgments which have been appealed against operates, unless the Act provides to the contrary.
(4) For a litigant to appeal against a judgment granted in his favour and then attempt to execute against the judgment with which he has clearly expressed unhappiness is an abuse of process.

Appeal – notice – validity – sufficient for exact nature of relief sought to be stated – not essential that relief sought must be one which court can grant – court may grant amendment

Gula-Ndebele v *Bhunu NO* S-34-10 (Ziyambi JA, Malaba DCJ & Garwe JA concurring) (Judgment delivered 7 February 2011)

The appellant had been removed from his post as Attorney-General, following the recommendations of a tribunal appointed by the President in terms of s 110 of the Constitution. Dissatisfied with the finding and advice of the tribunal, the appellant took the matter to the High Court on review, alleging that the decision of the tribunal was such that no reasonable tribunal on the evidence before it would have arrived at such a decision, and praying that the decision of the tribunal should be set aside. The High Court took the view that the advice of the tribunal and the removal from office by the President was one juristic act and that the President thus was a necessary party in the review proceedings and ought to have been cited. Accordingly, the court found, the application could not be decided. On appeal, the relief sought by the appellant was that the application to the High Court should be granted. The respondent argued that the relief sought could not be granted, as to grant it would necessitate a decision on the merits of the application, when the merits had neither been determined in the court *a quo* nor made the subject of the grounds of appeal. It was also submitted that the notice of appeal was invalid by reason of the fact that it sought a remedy which the Supreme Court was not competent to grant. No application was filed for amendment but in his heads of argument counsel for the appellant indicated that the relief now being sought was a remittal of the matter to the High Court, before a different judge, for a decision on the merits of the matter. The question was whether this fact renders the notice of appeal fatally defective because if it did, the notice of appeal was null and void and could not be saved by an amendment.
Held: Rule 29 of the Supreme Court Rules 1964 requires simply that the exact nature of the relief sought be stated in the notice of appeal. Thus, in so far as the prayer was for the appeal to be allowed and the application to be dismissed with costs, there was *prima facie* compliance with the rule. It is not necessary that the relief sought must be one which the court could grant and that a prayer which the court could not competently grant rendered the notice of appeal null and void. Once the prayer clearly sets out the nature of the relief sought, r 29(1)(e) has been complied with. The court can and may amend the notice of appeal upon application being made before the hearing, subject to the rules governing applications of this nature.

Arbitration – award – appeal against – labour matter – award appealed against suspended by noting of appeal

Dhlodhlo v *Deputy Sheriff, Marondera, & Ors* HH-76-11 (Gowora J) (Judgment delivered 30 March 2011)

See above, under APPEAL (Noting of – effect – common law position)

Arbitration – award – when becomes effective – not necessary for award to be registered to become binding – registration of award – only necessary for execution of award

Dudka & Ors v *Cheni Invstms (Pvt) Ltd & Ors* HH-124-11 (Makoni J) (Judgment delivered 15 June 2011)

The applicants bought residential units from the first respondent in a cluster housing scheme being developed by the second respondent on land owned by the first respondent. They also entered into building contracts with the second respondent. A dispute arose between the first applicant due to failure of the second respondent to fulfil its obligations in terms of the agreement. The dispute was referred to arbitration. The arbitral award was to the effect that the agreement of sale was valid. Since the second respondent had failed to comply with its obligations in the terms of the building contract, the first applicant was entitled to take over the construction of the house and the respondents were to transfer to her the share in the first respondent which would confer ownership and right to possession of the unit. When building contractors arrived to complete the work, they were told that the unit had been transferred to the third respondent. The other two respondents had similar problems. When the dispute arose and was referred to arbitration, they obtained an interim order to the effect that pending the finalisation of the matters, the first and second respondents were interdicted from selling, disposing of or transferring in whole or in part by way of share transfer or any one method the property in issue. Although the award was made in respect of the second and third applicants, it barred the selling or disposing of the whole property, which included the units of the other applicants. It was also ordered that the copy of the award be served on, *inter alios*, the Registrar of Deeds. The arbitrator's final award was in favour of the applicants and was subsequently registered with the High Court. The fourth applicant encountered a similar situation and later found that his unit had also been transferred to the third respondent.
The applicants then filed proceedings seeking the setting aside of the transfer of their units to the third, fourth and fifth respondents and an order to have the units transferred into their names. They contended (a) that when transfer was effected, this happened in defiance of a judicial caveat placed against the property; (b) that the

property transferred was *res litigiosa* and incapable of being alienated to the prejudice of the applicants; and (c) that the third, fourth and fifth respondents were not innocent third parties as they were or ought to have been aware of the dispute between the applicants and the first and second respondents. The third, fourth and fifth respondents argued that they were not part to the arbitration proceedings and could not have known of the arbitration award and could not be bound by it. They also contended that they were innocent purchasers who purchased their units for value.

Held: (1) In terms of art 17 of the Schedule to the Arbitration Act [*Chapter 7:03*], an arbitrator has power to order interim measures which include, *inter alia*, an interdict. In terms of art 35 an arbitral award shall be recognised as binding and upon application in writing to the High Court shall be enforced. Article 35 brings out two distinctive features of an arbitral award. The first one is its binding nature and the second one its enforceability. An award takes effect upon its grant. Its execution has no effect on whether it is binding or not. A party can chose to obey an award, in which event there would not be need for the award to be registered. Registration allows for execution. The respondents could not therefore succeed in their argument that when registration of transfer was effected to them, the award had not yet been registered with the High Court.

(2) The negligence or incompetence of the Deeds Office in failing to register the caveat resulted in the property in issue being transferred to the respondents, but it would not be fair and just to rule that this failure had the effect of nullifying the applicants' prior claim to the property.

(3) It was not necessary to decide the stage at which a subject matter becomes *res litigiosa* in arbitration proceedings. However, at the time that the property was sold and transferred, there was an interim arbitral award barring the transfer of the property pending the determination of the dispute between the applicant and the first and second respondents. The property was therefore *res litigiosa*. The first and second respondents thus had no authority to deal with the property the manner they did. The fact that a thing is *res litigiosa* does not preclude or prevent it from being alienated or similarly dealt with, as long as the rights of the non-alienating litigant in the *res* are protected. The agreement of sale of the *res litigiosa* between the litigating party and a third party is valid *inter partes*. The purchaser is bound by the judgment in the action and the successful party can recover the *res* from the new possessor by execution and without fresh proceedings. The sale between the third, fourth and fifth respondents and the first and second respondents was valid *inter partes* only. The applicants could recover the property from them.

Aviation – offences – placing dangerous goods on aircraft – appropriate charge

A-G v *Parmer* HB-86-11 (Ndou J) (Judgment delivered 23 June 2011)

See below, under CRIMINAL LAW Offences under Criminal Law Code [*Chapter 9:23*] (Crimes involving aircraft – placing dangerous goods aboard an aircraft).

Company – corporate veil – lifting of – when permissible – general policy considerations – companies forming part of a single economic entity – when permissible to treat such companies as a whole instead of as separate units – whether necessary to obtain prior court order to lift corporate veil before attaching property of subsidiary company within a group

Deputy Sheriff v *Trinpac Invstms (Pvt) Ltd & Anor* HH-121-11 (Patel J) (Judgment delivered 14 June 2011)

The Sheriff brought interpleader proceedings, having attached property belonging to the claimant company. The attachment had followed arbitral proceedings in which the judgment creditor had obtained an award against the claimant's holding company for arrears of salary. The claimant was one of a group of wholly-owned subsidiaries of the holding company, all of which were located at the same physical address. The judgment creditor had been employed by the holding company, and was deployable to serve any company within the group.

The claimant asserted that the attached property belonged to it and not to the holding company and that its property could not be seized without a court order lifting the corporate veil. The judgment creditor argued that the corporate veil should be lifted, as the claimant was merely a vehicle through which the holding company carried out its business, and that the plea was merely a ruse to defeat the judgment creditor's just claim.

Held: (1) While the cardinal principle of company law is that a company is a separate entity distinct from its members, , there are well established exceptions to the principle, grounded in policy considerations. 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. When the corporation is the mere *alter ego* or business conduit of a person, it may be disregarded. Where a corporation is organised or maintained as a device in order to evade

an outstanding legal or equitable obligation, the courts, even without reference to actual fraud, refuse to regard it as a corporate entity. Where fraud, dishonesty or other improper conduct is found, the need to preserve the separate corporate identity would have to be balanced against policy considerations which arise in favour of piercing the corporate veil. The court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would have to be considered on its merits. The exceptions to the general principle have also been extended beyond the realm of fraudulent or improper conduct to the situation where a single economic entity owns all the shares in its subsidiaries and controls every aspect of their operations. There is a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group. Where the operations of an economic group are so close as to be virtually indivisible, considerations of policy tend to militate against any legal separation of its integral units, for to do so would be to perpetuate an essentially corporate fiction. This may not invariably be the case, but the equities would certainly favour such an approach in dealings at arms length with innocent outsiders. *In casu*, the claimant's assertion of ownership over the seized assets was nothing more than a subterfuge designed to defeat the judgment creditor's uncontroverted and undeniably just claim. Even in the absence of any fraudulent or other improper motive, the overarching control exercised by the holding company over its subsidiaries clearly justified the treatment of the group as a single economic entity for the purpose of enforcing a debt incurred by any unit within the group, particularly where the judgment creditor was a former senior employee who was engaged to serve the entire group.
(2) As to whether it is it procedurally necessary for a judgment creditor to have obtained a prior court order lifting the corporate veil before attempting to attach the property of a subsidiary company, mere procedural technicalities should not be allowed to frustrate or impede the effective satisfaction of a just claim. There was no logic or practical reason in requiring the judgment creditor to institute fresh proceedings to pierce the corporate veil in circumstances where those proceedings would result in the same conclusion.

Company – director – change of – proof – returns from Registrar of Companies showing change of directors – extent to which such returns can be taken as evidence

Central African Bldg Construction v *Construction Resources Africa (Pvt) Ltd* HH-47-11 (Gowora J) (Judgment delivered 2 March 2011)

In 2004 the parties concluded a written agreement in relation to three immovable properties registered in the name of the plaintiff. This followed an earlier agreement in terms of which certain equipment was sold to the defendant. In terms of the agreement of sale, transfer of the properties would be effected after full payment of the purchase price. A rift developed between the parties on the implementation of the terms of the conditions of the two agreements and as a result the plaintiff notified the defendant that it had cancelled both agreements. It sought the eviction of the defendant from all three immovable premises on the grounds that it remained the registered owner of the properties. In seeking absolution from the instance, the defendant raised the issue of whether the action had been instituted by persons properly authorised to do so. The plaintiff argued that the real issue was whether or not the original directors had resigned and appointed two other persons as the only directors in the company. The plaintiff put in issue the form from the companies registry showing that the directorship had changed. The defendant argued that under s 12 of the Companies Act [*Chapter 24:03*] returns filed in the registry are *prima facie* proof of the correctness of the contents thereof.
Held: (1) the presumption provided for in the section would operate against the company in favour of any third parties doing business with the company, but not against its directors and shareholders where documents that have been lodged are disputed by the parties who are themselves supposed to lodge the documents. Further, in terms of the proviso to the section, the presumption is not available to a person who has knowledge to the contrary or is supposed to have such knowledge.
(2) In order for the defendant to successfully argue that the institution of proceedings on behalf of the plaintiff has not been authorized by the company it is necessary that the defendant place before the court a minimum of evidence suggesting that there is no such authority. Previous cases dealing with this particular point were matters brought either as petitions or on notice of motion, and the parties would have filed affidavits in which evidence was given as to the lack of authority or to its existence. The present case was an action and only one party had so far given evidence. It would cause an injustice if at this stage of the proceedings if the court were to find that the suit before has not been authorized, based on an application by a defendant who was yet to give evidence. As the existence of authority on the part of the persons purporting to act for the plaintiff or lack thereof depended on facts, it was necessary that the defendant should lead evidence that would assist in resolving the dispute.

(3) The form from the registry, which should be the best evidence, was disputed. As the defendant placed reliance on it, the defendant should explain how and when the document was originated and filed with the Registrar of Companies. This evidence was particularly necessary where the parties were in conflict as to whether or not ownership in the company had passed which would lead to a change in directors as a result of the change in shareholding.

Company – director – relationship to company – not necessarily an employee of company

Tobacco Sales Floors Ltd v *Swift Debt Collectors (Pvt) Ltd* HH-111-11 (Gowora J) (Judgment delivered 24 May 2011)

The applicant sought the eviction of the respondent from premises it had leased to the respondent. The lease period had expired. The applicant claimed that it wanted the premises for its own use. In answer to the papers filed by the respondent, the applicant filed an affidavit from a third party. The affidavit was attested by a member of the applicant's board of directors. The respondent challenged the admissibility of the affidavit, on the grounds that the director had an interest in the matter and was thus precluded by s 2 of the Justices of the Peace and Commissioners of Oaths (General) Regulations, 1998 (SI 183 of 1998) from attesting the affidavit. The applicant argued that the director fell within the exceptions allowed by para 3 of the schedule to the Regulations, in that the director was person a whose only interest arose out of his employment and in the course of his duty.
On the merits, the respondent resisted the application on various grounds, among which was an allegation that the lease had been extended verbally.
Held: (1) a director of a company occupies a position materially different from that of an employee. The mere fact of holding officer as a director creates no contractual relationship between the company and the director. The articles of association of the company do not create such a relationship. In addition, the occupation by a director of the position of director does not make him an agent of the company. It also does not make him an employee unless he has entered into a separate contract with the company as such. The director *in casu* was not an employee of the applicant, nor could he have attested to the affidavit in the course of his duties. It cannot be the function of directors of a company to attest to affidavits. The exception therefore did not apply to him.
(2) "Interest" in a matter goes beyond social or ethical interest: the term would be synonymous with an expectation of a favourable result from the court. Where the person administering the oath and ultimately commissioning the affidavit has an interest in the contents of the affidavit, there would be an element of bias on the part of the commissioner. Further, where the commissioner is associated with a party who filed proceedings in a matter and the commissioner is required to administer an oath to a deponent to an affidavit which has a bearing on the outcome of the litigation brought by the party he has an association with, then clear bias can be said to exist. A commissioner has a duty to ensure that a deponent to an affidavit swears to the truthfulness of the contents of the affidavit. If the commissioner himself is not just acquainted with the facts, but wishes them to be placed before the court and wishes that the court has regard to them in the resolution of a dispute, such commissioner has an interest going beyond mere social or ethical interest. The applicant had a proprietary interest to protect, and the commissioner, as a director in the board running the affairs of the applicant, could not be said be said to be a disinterested party.
(3) Where there is an allegation that disputes of fact exist, the court must, if possible, take a robust view and common sense approach and not take an over fastidious view of conflicts and must seek to resolve the dispute despite the apparent conflict. Before taking a robust view, however, the court must have concluded that there were real or genuine dispute of fact that exist.
(4) The applicant could only succeed if it proved that good and sufficient grounds existed for the respondent to be evicted from the premises it occupied. There were no set criteria for determining what amounted to good and sufficient grounds; each case must be decided on its facts. In the assessment of whether or not there are good and sufficient grounds on the papers presented by the applicant, the court must of necessity look at the *bona fides* of the applicant, who must also bring some small measure of evidence to demonstrate the genuineness of his assertion. He can normally scarcely do more, and it rests with the lessee resisting ejectment to bring forward circumstances casting doubt upon the genuineness of his claim. It is only the position of the lessor that has to be considered, that of the lessee being irrelevant for the enquiry. The legislation does not define what good and sufficient grounds are, but more importantly it only mentions the lessor not the lessee, reinforcing the views by the courts that the position of the lessee is not material.
(5) In deciding what notice to give to a lessee, the court must not just consider the needs of the lessor but must also assess the hardship likely to be suffered by the lessee if it is evicted from the premises. It is a value judgment based on all the equities of the case.

Company – judicial management – purpose of – distinction from liquidation – rights of owners and shareholders of company under judicial management – right to be involved in matters relating to operation of their company

Elgate Invstms (Pvt) Ltd & Ors v *The Master & Ors* HH-57-11 (Mtshiya J) (Judgment delivered 23 February 2011)

A company placed under judicial management does not automatically lose its ownership or shareholding. It is the management that changes, for the sole reason that, if properly managed, the company might move out of the problems that led to judicial management.

The purposes of a liquidation order are entirely different form those of judicial management. In former situation, the object is to wind up the affairs of a company and effect its dissolution; in the latter, the object is just the opposite, namely, to avoid liquidation, where there is a chance of the company surmounting its difficulties by proper management, namely, management by a person appointed as judicial manager to conduct the affairs of the company, subject to the supervision of the court. There is, accordingly, a fundamental difference between the function and powers of a liquidator and those of a judicial manager. There are also material differences between the rights of creditors. The owners and shareholders of a company under judicial management should never be ignored in any court which have a direct bearing on the operations of the companies under judicial management. The owners or shareholders have, through a court process, only divested management to the provisional judicial manager. They remain the owners or shareholders of the company under provisional judicial management, and that alone entitles them to involvement in any matter related to the operations of their judicially managed companies. Judicial management means that the court, through the Master of the High Court, is managing the affairs of the entities placed under judicial management, whether provisional or final. The provisional judicial manager only operates under the directions of the Master. It is therefore important and reasonable that any part wishing to vary the original directions of the court must seek leave to do so.

Company – legal proceedings – institution of – whether such proceedings authorized – what party alleging lack of authority must show

Central African Bldg Construction v *Construction Resources Africa (Pvt) Ltd* HH-47-11 (Gowora J) (Judgment delivered 2 March 2011)

See above, under COMPANY (Director – change of).

Company – legal proceedings – proceedings brought after winding up order granted – application for rescission of default judgment – such proceedings having effect of disposing of company's right of action – proceedings void

Company – winding up – by court – legal proceedings brought by company after winding up order granted – application for rescission of default judgment – such proceedings having effect of disposing of company's right of action – proceedings void

Thirdline Trading (Pvt) Ltd & Anor v *Boka Invstms (Pvt) Ltd & Anor* HH-130-11 (Uchena J) (Judgment delivered 29 June 2011)

The day after a provisional winding up order had been granted against the applicant company, an application was brought in the company's name for the rescission of a default judgment previously granted against it. The respondent argued that the application was a nullity in view of the provisions of s 213(a) of the Companies Act [*Chapter 24:03*], which provides that in a winding up by the court no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose. The applicant's counsel submitted that it is only proceedings to be proceeded with or commenced against the company being wound up which are affected by s 213(a) and that proceedings instituted by the company are not affected.

Held: in terms of s 213(c), every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void. The determination of the application for rescission would lead to the disposition of the applicant's right of action, which enabled it to make the application. Once a

determination is made on that right of action, the Master or liquidator cannot revisit that right of action, as the cause of action will have been finalized by the court's determination. There was no order of court authorizing the application for rescission, nor was the application at the instance of the Master or the liquidator. Accordingly, the proceedings were a nullity.

Company – winding up – voluntary winding up – procedure to be adopted – requirement to given notice of resolution to workers' committee – failure to do so making presentation of petition to court fatally irregular

Radiator & Tinning (Pvt) Ltd v *Radiator & Tinning (Pvt) Ltd Workers' Cttee & Ors* HH-278-10 (Mtshiya J) (Judgment delivered 19 January 2011)

The applicant had obtained a provisional order for the winding up of the company and sought confirmation of the order. A special meeting of the shareholders had passed a resolution for the "member's voluntary liquidation" of the company on the grounds that it was unable to meet its obligations. The respondents, being the workers' committee of the applicant and various employees of the applicant, opposed the application on the grounds that, because the winding up was voluntary, the workers' committee should, in terms of s 25A(5)(c) of the Labour Act [*Chapter 28:01*], have been consulted.
Held: since this was a voluntary winding up, the provisions of ss 242 and 243 of the Companies Act [*Chapter 24:03*] applied. Under s 243, a resolution for the voluntary winding up of a company shall not be deemed to have been passed unless the company has given not less than four weeks' notice of the resolution to the Registrar of Labour Relations and to the company's workers' committee (or, where there is none, to the company's employees). This requirement does not apply where all the employees are members of the company, which was not the case here. Consequently, the applicant should have given notice to the respondents. Because the winding up was voluntary, the proceedings under s 207, under which the applicant presented its original petition, were fatally irregular.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 16 (provision against compulsory acquisition of property without compensation) – reconstruction order under Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] – appointment of administrator and effect of powers given to administrator of affected company – such not amounting to acquisition of company or any of its assets or any share issued by company

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(9) – right to protection of the law – reconstruction order under Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] – need for such order to be confirmed by judge – s 18(9) not contravened

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – application for redress – allegation that Minister did not observe *audi alteram partem* requirement – not a constitutional matter – should be dealt with on review

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – application for redress – need to itemise what provisions of legislation are being challenged – not enough to allege that entire statute in contravention of Declaration of Rights

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – application for redress – when may be brought – pending matter in another court – unless constitutional question in issue in other court, application under s 24(1) permissible

African Resources Ltd & Ors v *Gwaradzimba NO & Ors* S-2-11 (Chidyausiku CJ, Malaba DCJ, Garwe JA & Cheda AJA concurring; Sandura JA's separate judgment is not yet available) (Judgment delivered 1 February 2011)

The first applicant, a company incorporated in the British Virgin islands, was the sole shareholder the second applicant, which in turn was the sold beneficial shareholder of SMM Holdings (Pvt) Ltd ("SMMZ"), a company incorporated in Zimbabwe. All these companies were under the sole beneficial shareholding and control of one M. In July 2004 M was declared a specified person in terms of s 6(1) of the Prevention of Corruption Act [*Chapter 9:16*]; the second applicant was specified a month later. The effect of the specification order, as

provided under s 10(1) of the Act, was that M could not perform any act as a director of the applicants or as their agent without the approval of the investigator assigned to him in terms of s 7 of the Act.

In September 2004 a reconstruction order was issued in respect of SMMZ by the third respondent, the Minister of Justice, initially in terms of temporary legislation; the order was confirmed by the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*]. The purpose of the legislation was to make provision for placing under reconstruction a company and its associates which, whilst indebted to the State, was unable, or unlikely to be able, to make repayment of the credit made to it from public funds on a date when repayment was due by reason of fraud, mismanagement or for any other reason. It had to further appear to the Minister that the State-indebted company had not become, or was prevented from becoming, a successful concern and that there was a reasonable probability that if the company was placed under reconstruction it would be enabled to pay its debts or meet its obligations and become a successful concern and that it would be just and equitable to place the company under reconstruction. By reason of the definition of "associate" in the legislation, all three applicants were deemed to have been placed under reconstruction in terms of the order issued in relation to SMMZ. The effect of the reconstruction order was to divest any other person vested with the management of the company's affairs from the date of its commencement and vesting such control and management of the company in an administrator appointed by the Minister.

The applicants brought an application under s 24(1) of the Constitution, alleging that the Reconstruction Act violated ss 16(1) (b), (c) and (d) and 18(9) of the Constitution, in that it "permits the State to expropriate property without notice, payment of fair compensation or judicial oversight" and "denies persons subject to it access to courts".

In limine, the respondents argued that the same questions forming the subject-matter of the application arose in proceedings in the High Court. Accordingly, the applicants ought to have requested judge in terms of s 24(2) of the Constitution to refer the questions to the Supreme Court for determination. It was argued that as no reference of the questions was made, the application in terms of s 24(1) was prohibited by s 24(3).

The applicants did not specify the impugned sections of the Reconstruction Act in the founding affidavit or in the draft order but in argument it was alleged that ss 4, 6, 12, 13, 18, 21, 22, 23, 25, 29, 30 and 31 of the Act contravened the Declaration of Rights. The main thrust of their case was that the Act was intended to enable the State to compulsorily acquire property belonging to companies indebted to the State and the shareholders of such companies. They also complained of the failure by the respondents to observe the *audi alteram partem* principle.

The applicants' affidavits were voluminous and replete with argumentative and irrelevant matters. The founding affidavit and its annexures ran into some 400 pages while the whole application ran into some 1000 pages.

Held: (1) In each of the cases in the High Court the affidavits which averred that the relevant provisions of the Act contravened ss 16 and 18(9) of the Constitution was deposed to by M. As M was a specified person with no legal capacity to litigate in matters involving the affairs of the companies under reconstruction without the approval of his investigator (which approval he had not obtained), the affidavits were null and void and accordingly the constitutional questions raised in them fell away. Accordingly, it was still competent for the applicants to proceed in terms of s 24(1).

(2) The purpose of founding affidavits is to set out succinctly the facts that form the basis of the cause of action. The litigant's legal practitioner should ensure that affidavits filed of record comply with the Rules. It is irresponsible and unprofessional for the legal practitioner to simply reproduce as affidavits the statements the litigant makes to his legal practitioner. Persistence with this type of pleading may lead to the court awarding *de bonis propriis* against the offending legal practitioners.

(3) When the Supreme Court sits as a constitutional court, it only considers constitutional issues. The alleged failure by the respondents to observe the *audi alteram partem* principle was an issue for review. It had no relevance to the constitutional issue.

(4) The purpose and intent of the Act is to prevent loss of public funds through fraudulent, grossly negligent or reckless management of companies indebted to the State. Essentially, the Act is about the replacement of failed management of a State-indebted company with new management capable of turning around the fortunes of the company and enabling the State-indebted company to meet its obligations. Such legislation is not unique to Zimbabwe. In relation to companies the word "reconstruction" has a fairly precise meaning: it denotes the transfer of the undertaking or part of the undertaking of an existing company to a new company with substantially the same persons as members as were members of the old company. Substantially the business and the persons interested must be the same.

(5) Section 4 of the Act sets out the juristic facts that have to be in existence before the Minister can issue an order for reconstruction. Unless those facts exist, an order may not be issued. The section does not provide for compulsory acquisition of property, even bearing in mind the very wide meaning of "property" in s 16 of the Constitution. The act provides a scheme, not to provide for the temporary or permanent acquisition of property, but rather to provide for the change of management of a company by providing for the removal of management that has failed to successfully manage the company to enable it to discharge its liabilities. Section 4 provides for

the appointment of the administrator to manage the affairs of the company placed under reconstruction. Management of a company is not an asset or property of a company or the shareholders; it is a mode or method of running the affairs of a company. All the assets of the company remain the assets of the company. The shares remain the property of the shareholders. Nothing is acquired either temporarily or permanently. All that happens as a result of a reconstruction order being issued is that there is a change in the management of the company. The confirmation proceedings stipulated in s 4 provide for both judicial oversight and an opportunity to the interested parties to be heard. This adequately meets the requirements of ss 16 and 18(9) of the Constitution.
(6) Section 6 of the Act confers on the administrator the control and management of the company and to take or recover possession of all the assets of the company. It also authorises the administrator as the new manager of the company to litigate on behalf of the company and to defend actions on behalf of the company. Acquiring the authority to sue or be sued as a representative of a company does not constitute compulsory acquisition of property of a company at all or as envisaged by s 16 of the Constitution.
(7) Section 12 of the Act empowers the administrator to deal with the property of "culpable persons", who are, in terms of s 10 of the Act, persons who were knowingly a party to the carrying on of the business of the company (a) recklessly; (b) with gross negligence; or (c) with intent to defraud any person or for any fraudulent purpose. Section 12(1) authorises the administrator to cancel a share, nullify any share, right or interest in or claim upon a company under reconstruction held by a culpable person obtained as a result of fraud committed by that person. Property acquired by fraud is unlawfully owned and s 16 of the Constitution was not intended to promote fraud and protect property acquired through fraud. The issuance of shares and the offering of such shares by the manager of a company to a creditor of a company in settlement of the debt owed to the recipient of the shares in an effort to turn around a company is not compulsory acquisition. It is essentially a settlement of a debt by the issuance of shares that are not owned by any shareholder.
(8) The general powers conferred on the administrator in terms of s 18 of the Act are conferred on the administrator for the purpose of acting for and on behalf of the company under reconstruction, to enable the administrator to run the affairs of the company, with a view to turning it around. The section does not compulsorily acquire any asset of the company from the company and allocate it either to the State or to any other person. Whatever is sold in terms of the section is done for and on behalf of the company and for the benefit of the company. Administering the company does not constitute acquiring that company.
(9) Section 23 empowers the administrator to issue shares or securities in the company under reconstruction in satisfaction of any credit owed to the State or any payment by the State in terms of a guarantee on behalf of the company under reconstruction. The issuance of these shares does not involve acquisition of the shares from anybody. These are shares issued by the administrator as a set off to what the State would have paid on behalf of the company. The rest of the powers outlined in this section are incidental to the management of a company for the purposes of turning it around, a process similar to the provisions relating to judicial management in the Companies Act [*Chapter 24:03*].
(10) Section 25 merely provides that where the intended object of the reconstruction is not achievable, that is to say, if it becomes apparent that it is not possible to turn around the company without advancing additional public funds to it and such funds are not available or the reconstruction scheme has been rejected by creditors and members, the provisions of the Companies Act shall apply. In other words, the company is forced into liquidation and is liquidated in terms of the Companies Act.

Constitutional law – Constitution of Zimbabwe 1980 – Schedule 8 – status of – integral part of Constitution and subject to normal rules of construction

Constitutional Law – Constitution of Zimbabwe 1980 – Schedule 8 – art 20.1.6(5) – provision limiting number of Ministers – appointment of extra Ministers – whether such appointment should be set aside

Constitutional law – interpretation of Constitution – liberal and purposive approach to be taken – effect of order – general inconvenience or injustice resulting – order should not be granted

Kufa & Anor v *The President & Ors* HH-86-11 (Chiweshe JP) (Judgment delivered 6 April 2011)

The composition of the executive arm of Government is governed by Schedule 8 of the Constitution of Zimbabwe, the first paragraph of which provides that the provisions of the Schedule shall prevail notwithstanding any other provision to the contrary elsewhere in the Constitution. Article 20.1.6 (5) of the Schedule provides that there shall be 31 Ministers, 15 nominated by ZANU-PF, 13 by MDC–T and 3 by MDC-M. In spite of that provision, the President, in consultation with the Prime Minister, appointed ten extra Ministers. The applicants sought an order declaring that the appointment of the extra Ministers was unconstitutional and therefore null and void.

At the hearing, counsel for the respondents raised *in limine* a point as to the jurisdiction of the court to hear and determine a "political question". He argued that Schedule 8 was the product of a political settlement and susceptible to change through political conduct. The Schedule raises political rather legal issues and any dispute arising there from is a matter for Parliament to resolve. While conceding that Schedule 8 came about as a result of the Global Political Agreement the applicants' counsel contended that once the terms of a political settlement are incorporated into the Constitution, they become part of our law. They can no longer be regarded as mere political issues – they become legal issues the import of which this court has jurisdiction to determine.
On the merits, the respondents argued that the provisions of Schedule 8 must be interpreted broadly and not restrictively and that the provisions of Art 20.1.6(5) relating to the complement of Ministers are directory rather than peremptory. The preamble to the Schedule acknowledges that the three parties have an obligation to establish a framework for working together in an inclusive government and that the formation of such a government will have to be approached with sensitivity, flexibility and willingness to compromise. Schedule 8 was an extra-ordinary provision in the Constitution placed there purely for political expediency. It therefore stood on an entirely different footing from the rest of the provisions of the constitution.
The applicants argued that the provisions under consideration, being clear and unambiguous, should be given their literal meaning.
Held: (1) the Constitution lies at the very foundation of the country's legal order. To suggest that any of its provisions are merely political matters would undermine the rule of law and negate the very foundation of a democratic society.
(2) The issue was whether in fulfilling their constitutional obligations, the respondents exceeded the mandate given to them in terms of Schedule 8 to the Constitution by appointing more than 31 Ministers. Schedule 8 is part of the Constitution by virtue of the Constitution of Zimbabwe Amendment (No. 19) Act (Act 1 of 2009) and the normal rules of statutory interpretation must apply. Once a political matter is inserted into the Constitution, it becomes justiciable. However, any remedy that the court may impose must take into account any adverse implications of such remedy on the political order of the day.
(3) The trend in the construction of constitutional provisions is that the courts have increasingly moved away from the strict interpretation urged by the applicants in favour of a liberal and purposive approach. This is the preferred approach both nationally and internationally. If the order that the applicants seek were to be granted, it would destabilize the government of national unity and cause unnecessary confusion within the body politic and prejudice the public interest at large. That cannot be said to be consistent with the intention of the legislature in enacting Schedule 8 to the constitution. The stated intention of the legislature was to create a government of national unity in which the three major political parties would be represented proportionately. It was intended that this government should achieve the objectives set out in the preamble to Schedule 8 and in the manner and spirit envisaged therein.
(4) The provisions of a statute which relate to a public duty seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, that is to say as directory only. Where, as in the present case, it is sought to invalidate the actions of such public officers and the consequences of doing so would result in serious general inconvenience or injustice, and, where such invalidation would not promote the essential aims of the legislature, such an order as to invalidation should not be granted. The figures set out in Art 20.1.6(5) had not been outrageously exceeded, given the complexity of Government administration and the proportion of representation as among the three parties remained largely the same. An anomaly had admittedly arisen but that does not warrant the grant of the order sought. In any event this is not an anomaly that the legislature itself cannot address in one way or another, given its wide powers**.**

Constitutional law – Parliament – Speaker – election – requirement for secret ballot – members displaying their ballot papers before placing them in the ballot box – such members' votes invalid – substantial compliance principle not applicable in this situation – election void

Moyo & Ors v *Zvowa NO & Anor* S-28-10 (Chidyausiku CJ, with Ziyambi & Garwe JJA concurring; Malaba DCJ & Sandura JA dissenting) (Judgment delivered 10 March 2011)

The first respondent, the Clerk of Parliament, convened the first meeting of Parliament in August 2008 for the purposes of swearing in the members of Parliament and electing the presiding officers. There were two candidates for the post of speaker, of whom the second respondent was one. In terms of s 39(2) of the Constitution, the Speaker is elected in accordance with standing orders; and under House of Assembly Standing Order No. 6, if more than one person is proposed as Speaker of Parliament, the Clerk is required to conduct an election of the Speaker by secret ballot. The election took place and the second respondent was declared the winner. The appellants, members of Parliament, brought an action to have the second respondent's election as

Speaker set aside. Six members of Parliament had, after marking their ballot papers in the booth, displayed the papers before depositing them in the ballot box. The appellants argued that Standing Order 6 was peremptory and enjoined the Clerk to conduct an election of the Speaker by secret ballot. They submitted that the display of the ballot papers before depositing them in the ballot box by some members of Parliament rendered the election of the Speaker null and void. The respondents argued when an election takes place by secret ballot each voter has the right to have his vote kept secret. This right to secrecy, like any other right, can freely be waived by a voter who chooses to make known how he voted. If a voter chooses to disclose how he voted, that cannot in itself compromise the secrecy of the ballot. Only when a voter is factually prevented from maintaining the secrecy of his or her vote is there is a violation of the secrecy of the ballot. The display by the six members of their ballot papers before depositing them in the ballot box was not a violation of the principle of a secret ballot. All that was required of the Clerk was for him to provide the guarantee that members of Parliament voted in secret if they so wished. Those who wished to penetrate the veil of secrecy, as did the six members in this case, were entitled to do so without contaminating the process. This argument was accepted by the High Court. On appeal, several cases from the United States were cited where the same argument found favour.

Held (*per* Chidyausiku CJ, Ziyambi & Garwe JJA concurring): (1) the courts in the cited cases were interpreting statutes in their jurisdictions; they were not making pronouncements on general jurisprudential principles. When interpreting statutes, courts are guided primarily by the wording and the context of the statutes. A court should not simply translocate one court's interpretation of a statute in that court's jurisdiction to an interpretation of a statute differently worded in its own jurisdiction.

(2) Nonetheless, where a constitutional provision confers on the voter the right to vote by secret ballot that right is intended to protect the voter, who has the right to waive that right without violating the secrecy of the ballot. Public policy requires that the veil of secrecy shall be impenetrable unless the voter himself voluntarily determines to lift it. However, s 39 of the Constitution, as read with Standing Order 6, is not a provision conferring the right to vote on a voter in the form of the Member of Parliament. These provisions prescribe how a particular officer in Parliament, namely the Speaker, is to be elected. The language is peremptory. It was thus not open to the Clerk or any member of Parliament to substitute the method of electing a Speaker with another method of his own choice, such as by open ballot. It was not open, for instance, to members to tell the Clerk that they were waiving their right to vote for the Speaker by secret ballot or that they wished to vote for the Speaker by open ballot either individually or as a group.

(3) Voting by secret ballot involves three essential procedures: (a) each member receives a ballot paper; (b) each member indicates on that ballot paper the candidate of his choice in private and to the exclusion of the public; and (c) having done so, the member deposits his ballot paper into the ballot box privately without disclosing the ballot paper to the world. Once the ballot paper has been deposited into the ballot box, the process of voting by secret ballot, so far as the voter is concerned, is completed. It would not be a violation of voting by secret ballot if the person discloses whom he has voted for at that stage.

(4) The six members, by displaying their ballot papers before depositing them in the ballot box, violated the secrecy of their ballots, thereby rendering their votes invalid for the purposes of s 39 of the Constitution, as read with Standing Order 6. This rendered their votes ineligible for counting for the purpose of determining the election of the Speaker. The Clerk proceeded to count these six votes as valid votes in determining the outcome of the election. This contaminated the process.

(5) Section 39 of the Constitution, as read with Standing Order 6, has not provided what should be the consequence of the non-compliance with this peremptory direction by Parliament. In this situation, the court needs to decide what consequence should follow from breach of the duty. The language of the relevant section is peremptory, having regard to the use of the word "shall". While the use of the word "shall" is no longer conclusive of the intention of Parliament to render invalid non-compliance, it certainly remains cogent evidence of such intention. Generally speaking, Parliament, just like an individual, uses the same words or language to evince the same intent and different words or language to evince a different intent is grounded in elementary common sense. It is permissible for a court to look at the language of another statute on similar or the same subject matter in the exercise to ascertain the intention of Parliament. Section 177 of the Electoral Act deals with the subject of the consequences of non-compliance with the Electoral Act. Under that section, only when non-compliance with the Act affects the result of the election should the election be set aside. In effect, the section incorporates into the Electoral Act the doctrine of substantial compliance.

(6) Section 39 of the Constitution, as read with Standing Order 6, provides for the election of the Speaker, but does not incorporate this principle. No draconian consequences would flow from a declaration of invalidity of the election. Parliament consists of a little over 200 members and ordering a re-election of the Speaker would not pose financial or logistical problems of any magnitude. Parliament should lead by example and should scrupulously obey its own laws. It is unacceptable that Parliament should seek to salvage a shambolic and chaotic election of a Speaker through the doctrine of substantial compliance.

Held (*per* Malaba DCJ, dissenting): (1) The appellants alleged that the Clerk failed to act in accordance with the requirements of the rule against counting invalid votes as secret ballots and as a result affected their rights or

legitimate expectation in the election. The first ground given was that there was "too much noise in the House", which resulted in the Clerk being unable to manage the activities of the members according to the prescribed procedure for the achievement of the purpose of the electoral law. On the facts, this allegation was not proved. The second ground was that it was unlawful for the members who displayed their ballot papers to do so and for the Clerk not to prevent them from doing what they did. The allegation was that this undermined the process by which the object of the electoral law was to be achieved, thereby violating the rights of the applicants to elect the Speaker by a secret ballot.

(2) The Clerk is appointed as the official to conduct the election required by s 39(1) where more than one person is proposed as Speaker and to conduct the election by a secret ballot. "Election" means the whole combined and continuous process for bringing about the result of the election. The process consists of a number of material steps prescribed by law, beginning with the call for the election and ending in the declaration of the result of the election. The right to vote is not affected by the requirement that the election should be conducted by a secret ballot. The statute relates to procedure alone and directs the mode in which the right to vote is to be exercised by the electors. The Legislature chose the secret ballot for its optimum benefits and imposed on the Clerk the general obligation to provide the mechanisms and procedures for the recording, processing and protection of the secret ballot. The secret ballot means that whilst the caster of the vote remains unknown the secrecy of the ballot is maintained and the vote has been effectively cast in the election of the Speaker. It is the valid vote to be counted to ascertain the result of the election of the Speaker by a secret ballot. So essential is the secrecy of the ballot to its validity that any departure by the voter from these conditions designed for the purpose of ensuring the maintenance of secrecy must render the vote void.

(3) The Clerk's task was to provide the mechanisms and procedures that enabled the voter to vote by a secret ballot to do so and to ensure that the vote given in secret was recorded, processed, protected and counted, to bring about the election of the Speaker. The primary object of any act performed by the Clerk was the maintenance of the secrecy of the ballot, unless the voter himself failed to observe strictly the conditions essential to the validity of the vote as a secret ballot. It was the Clerk's duty to detect conduct inconsistent with the exercise by the voter of the right to elect the Speaker in accordance with the procedure prescribed to ensure the maintenance of the secrecy of the ballot. If he detected such conduct, it was his duty to determine that the conduct of the voter had stripped the ballot of secrecy and to declare the vote invalid. Only valid ballots should be counted.

(4) The right to secrecy of the ballot is subject to the principle that everyone has a right to waive an advantage of a law made solely for his benefit and protection in his private capacity, provided he does so without infringing any public right or public policy. The right to vote by a secret ballot includes the right of the voter to disclose to any other person for whom he voted. He can, in the exercise of that freedom, decide to put a writing or mark on the ballot paper at the time he casts the vote by which he can be identified as the voter and for whom he voted. He may decide to display to others the ballot paper so as show for whom he voted. A secret ballot is not compulsory insofar as the voter is concerned.

(5) All members, including the six who displayed their ballot papers, had the right to waive the right to the secrecy of their votes. In displaying the ballot papers to others, those members exercised their right to share with any other person the knowledge for whom they voted. As long as they were not coerced or compelled to expose their ballot papers to others, they acted lawfully. The power conferred on the Clerk to conduct the election of the Speaker by a secret ballot is limited by the right of the voter not to maintain the secrecy of his or her ballot. The Clerk was not under any duty to stop or prevent the voters from voluntarily displaying their ballot papers to others so as to disclose for whom they had voted. The Clerk's duty to maintain the secrecy of the ballot requires that he should refrain from doing anything that would compel the voter to disclose to any other person how he voted, but he could not prevent the voter from freely exercising the right to disclose to whomsoever he chooses for whom she voted. The secrecy of the ballot is for the benefit of the voter.

(6) A right to vote must be exercised strictly according to the terms of the statute which confers it. Here, when the six members displayed their ballot papers to others, they voluntarily took their votes out of the election and rendered their ballots void and of no value in the election of the Speaker. The other votes, however, remained valid. The Clerk complied with the requirements of the legislation and most of the members cast valid votes. Discounting the invalid votes would not change the result of the election. The Clerk could have discounted the votes at the time; there was no reason why a court should go any further than the Clerk could have done. To declare the election void would be wholly disproportionate to the wrong committed. The intention of the Legislature must be that only irregularities which undermined the achievement of the object or purpose of the legislation of ensuring an election of the Speaker based on universal, equal, direct and personal vote freely expressed by a secret ballot should vitiate the election.

Held (*per* Sandura JA, dissenting): the object of the Standing Order is to protect the voter, mainly against intimidation and victimisation, by enabling him to vote freely and in secret for the candidate of his choice, without fearing that other people would know for which candidate he has voted. The object of the Standing Order was achieved in the election. None of the members were forced to display their ballot papers and the vast

majority did not. The degree of non-compliance with the Standing Order was insignificant. The principle that an election will not be set aside for non-compliance with the provisions of the electoral law if the election was conducted in accordance with the principles of the electoral law, and the non-compliance did not affect the result of the election, is well-established and has been part of the electoral law of this country for at least eighty-two years. It is based on common sense, for there would be no good reason for setting aside an election on the basis of an irregularity which did not affect the result of the election. The non-compliance did not affect the result of the election. It was irrelevant that the Standing Order did not re-state the principle of substantial compliance. The principle is based on common sense, which dictates that if an irregularity does not affect the result of the election, it cannot form a basis for the nullification of the election.

Contract – breach – anticipatory breach entitling innocent party to repudiate contract – what is – how such breach may be determined – remedies for breach – right of innocent party to cancel contract – right to claim damages – right to claim restitution

Blumo Trading (Pvt) Ltd v *Nelmah Milling Co (Pvt) Ltd & Anor* HH-39-11 (Patel J) (Judgment delivered 15 February 2011)

It is a fundamental premise of every contract that both parties will duly carry out their respective obligations. There is a presumption that in every bilateral contract, *i.e.* one in which each party undertakes obligations towards the other, the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations. Conversely, a party who has caused the other to commit a breach cannot found a claim on the breach. Acquiescence by one party in non-compliance by the other would mean that the first party is estopped from raising the non-compliance as a defence to a claim by the second party.

The test for determining whether a contract has been repudiated by way of anticipatory breach is not the repudiating party's state of mind, but on what someone in the position of the innocent party would think he intended to do. Repudiation is accordingly not a matter of intention, but one of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach. Due to the repudiation, the innocent party is excused from any steps that he must take in preparation for his own performance and will not fall into *mora* by failing to tender performance as long as he signifies his willingness to perform.

At common law, an anticipatory breach ordinarily entitles the innocent contractant to cancel the contract. Repudiation before the due date for performance by a party prospectively in default constitutes anticipatory breach of contract on which the aggrieved party may take action if he so elects.

An aggrieved contractant is entitled to claim damages arising from his co-contractant's breach of contract, including any breach of warranty. Special damages are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, it can be deduced that the parties actually or presumptively foresaw that they would probably flow from its breach (and thus, that it was within their contemplation). To ascertain what the parties actually contemplated, or may be supposed to have contemplated, the court may look to (a) the subject matter and terms of the contract itself; (b) the special circumstances known to both parties at the time they contracted.

In the event of non-delivery of the goods sold under a contract, the right of the aggrieved party to claim restitution from the defaulting party is ordinarily unchallengeable. Whether the wrongful act arises out of contract or tort, where there has been actual pecuniary loss which is capable of precise quantification, the rule which the law adopts is *restitutio in integrum*: the injured party is entitled to claim to be placed back in the same position as he would have been in had it not been for the defendant's wrongful act.

Contract – breach – remedies – specific performance – when appropriate – time of essence – not appropriate to order specific performance

Contract –cancellation – breach by one party of its obligations – when other party entitled to cancel contract – time of essence of performance – failure to perform in time entitling innocent party to cancel

Zimbabwe Electricity Transmission & Distribution Co v *Tecpal Creative Intl (Pvt) Ltd* HH-34-11 (Gowora J) (Judgment delivered 14 January 2011)

The applicant contracted with the respondent for the supply of diaries for the following calendar year, 2010. The respondent delivered just over a fifth of the number ordered. The applicant cancelled the contract and applied to court for an order for restitution of the balance of the purchase price paid to the respondent for the outstanding balance on the diaries. The respondent opposed the granting of the application, contending that it was not in breach and that further it had offered to deliver diaries to the applicant for 2011, which offer the applicant rejected. The applicant did not seek specific performance, on the basis that time was of the essence. The contract contained no specific forfeiture clause. The issue was whether the breach was a serious one, entitling the applicant to cancel the contract.
Held: (1) rescission of a contract is only permissible if a breach has occurred of a term which goes to the root of the contract. The materiality of the breach is also a relevant factor in the determination of whether rescission should be ordered or not. A debtor can commit a breach of contract by delaying or retarding performance of his duties under the contract, in which case he is held to be in breach at the expiry of the time fixed for the rendering of the performance. When the time for performance arrives and the debtor has neither performed nor tendered performance, then he is said to be in *mora*. Where no time for performance is fixed in the contract, the creditor may fix the time for performance by making demand upon the debtor for performance (*interpellatio*). In order to be effective, such demand should fix the time for performance. The time fixed must be reasonable in all the circumstances.
(2) The failure to deliver the diaries, especially after the respondent had been placed in *mora,* constituted breach of a vital term, going to the root of the contract, and entitling the applicant to cancel the contract. The respondent failed to deliver the diaries for use in 2010 and thus time was of the essence in this contract. Time is of the essence in what is usually described as a "mercantile transaction", that is to say, a contract in a fluctuating market or a market in which prompt delivery or payment is necessary to keep the wheels of commerce or industry turning. Here, the applicant required the diaries for use in 2010 and by implication time was of the essence, even if no specific date for delivery had been set.
(3) The court has a discretion on whether or not to grant specific performance. The court will not grant an order for specific performance where such order would create a disadvantage or hardship on one of the parties, or where it would result in an unfair advantage to one of the parties. The court will also not attempt to force parties against their will to maintain a continued relationship. An order compelling the respondent to effect specific performance would produce an unjust result, in that the applicant would end up with a large number of diaries for 2010, when it no longer had use for them.
(4) A party seeking restitution asks the court to place him in the same position that he would be if the contract had not come into being. Cancellation effectively puts a stop to further performance of the contract by both parties. By cancelling, the injured party is intimating that he is not prepared to accept performance on the contract by the debtor. The applicant, in view of the non performance by the respondent of its obligations, was no longer bound by the contract, so it was entitled to be placed financially in the position it would have occupied had the contract not been concluded. As it had accepted the partial delivery, it was entitled to the restitution of the value of the balance of the order.

Contract – *depositum* – loss of goods deposited – when bailee liable – "owner's risk" clause in contract — effect of – no need for bailee to prove he was not negligent

Rick's Upholstery (Pvt) Ltd v *Biddulphs (Pvt) Ltd* S-32-10 (Ziyambi JA, Chidyausiku CJ & Sandura JA concurring) (judgment delivered 8 February 2011)

The appellant left certain of his goods in storage at the respondent's premises. He signed, but did not read, a document which stated that the defendant "shall not be responsible for any loss or damage of any nature whatsoever sustained or suffered by the customer and however and from whatever cause arising even if the customer (*sic*) and/ or their servants and /or agents are negligent, the basis of this quotation being that work and storage will be effected entirely and solely at the customer's risk." He indicated that he wanted insurance but did not pay for any insurance. Some persons, who might have included an employee of the respondent, broke into the warehouse where the appellant's goods were stored and stole some of the appellant's goods. The appellant claimed a sum representing the value of the stolen goods. It was common cause that the stolen goods were deposited with the respondent under a contract of bailment or deposit.
Held: under a contract of bailment, the bailee must take the goods into his custody and must return the goods unscathed to the bailor when called upon to do so or at the conclusion of the contract. The bailee is not an insurer of the goods and is therefore not liable for the results of a *casus fortuitus*. The bailee avoids liability if he can prove that the loss of or damage to the goods was not caused by his negligence. An "owner's risk" clause appropriately worded could therefore serve not only to free the bailee from the *onus* of disproving negligence

but also to absolve him from responsibility for his own or his servants' negligence. The bailee for reward is not liable for failure to restore the property bailed if its loss or destruction occurs without negligence on the part of the bailee or on the part of his servant to whom he has entrusted the task of looking after the property. While the appellant was not shown the quotation on which the terms and conditions of storage were endorsed, he nevertheless signed the contract, specifically accepting the importation of those terms and conditions into the contract he signed. That did not make the terms and conditions invalid and inapplicable. The terms and conditions as endorsed on the reverse side of the respondent's quotation were binding on the parties. There was thus no need for the respondent to prove that he was not negligent. In any case, no negligence on the part of the respondent was established on the evidence. Nor was it established that an employee of the respondent that stole the goods or that that employee had been entrusted by the respondent with the care and safekeeping of the goods.

Judgment of Makarau JP in *Rix Upholstery (Pvt) Ltd* v *Biddulphs (Pvt) Ltd* HH-91-08 (to be reported in 2008 (2) ZLR 210 (H)) upheld.

Contract – illegality – contract entered into with aim of evading tax – such contract void *ab initio* – not enforceable in any way – *par delictum* rule – when may be relaxed – party not seeking such remedy – court not able to order restitution

Madziyire v *Makwabarara & Ors* HH-46-11 (Gowora J) (Judgment delivered 2 February 2011)

The applicant entered into an agreement with the first respondent, the sole shareholder in the second respondent, under which he would acquire all the shares in the second respondent and thereby acquire two pieces of land owned by the second respondent. Two written agreements were entered into. The first one reflected a price, a portion of which was to be paid as a deposit. The second, signed about two weeks later, showed the price as being half of that shown in the first contract, and without any requirement to pay a deposit. The applicant paid the higher price. The respondents alleged that the second agreement was drawn up in order to reduce the costs of transfer fees and stamp duties; the applicant alleged that the second agreement was intended to avoid problems with the first respondent's family about the purchase price. In any event, it was the second agreement that was submitted to the conveyancers; stamp duties, capital gains tax and conveyancing fees were calculated on the lesser sum. The applicant sought an order for specific performance.

Held: the second agreement was a continuation of the first and if the purpose was to defeat the *fiscus* then the whole transaction was tainted by illegality. While under s 44 of the Stamp Duties Act [*Chapter 23*:*09*], an agreement made for the purpose of defeating the object of the Act is declared void, in this situation no stamp duty was payable. The properties were not being transferred to the applicant; he was acquiring the second respondent, which owned the properties. However, under the Capital Gains Tax Act [*Chapter 23*:*01*] the sale of shares is subject to capital gains tax on any amount remaining after the deduction of any amounts permitted by law. The first and second respondents were not persons entitled to exemptions in respect of such a sale. The conclusion of a second agreement on which the transfer or submission to the Revenue Authority for the assessment of capital gains would have resulted in a lesser sum being levied for payment. Although the Act does not specifically declare that agreements whose effect is to deprive the *fiscus* of tax are illegal, s 29 of the Act, as read with s 98 of the Income Tax Act [*Chapter 23*:*06*] makes it clear that such contracts fall foul of statutes providing for the collection of revenue. The fact that the Capital Gains Tax Act itself, unlike the Stamp Duties Act, does not declare that agreements for the avoidance of capital gains tax are void does not in itself detract from the illegal nature of the transaction. In any event, it is a universal principle of common law that any agreement whose aim is to deprive the *fiscus* of revenue is illegal and therefore void *ab initio* and incapable of being enforced.

The second agreement being a continuation of the first agreement, in that the first reflected the real contract between the parties and the second being intended to facilitate the underpayment by either one or both of parties of stamp duties and capital gains tax, the first agreement itself was an illegal agreement. An illegal agreement is void of legal effect. The effect of an agreement being illegal is that neither party can bring an action founded on the agreement. The fact that the applicant paid the full sum of the purchase price did not validate the agreement. Although in suitable cases the courts will relax the *par delictum* rule and order restitution to be made, the applicant had not sought that remedy. He only sought specific performance, which could not be granted.

Contract – validity – contract entered into fraudulently – contract intended to defeat divorced wife's claim to matrimonial home – meaning of "fraud" in this context

Zingwe v *Gwanzura & Anor* HH-129-11 (Kudya J) (Judgment delivered 22 June 2011)

The first defendant and the second were formerly married. As part of their divorce settlement, it was agreed that the marital home, in which the wife (the first defendant) lived would be valued. Either could buy out the other on payment of a 50% share of the valuation, and had 3 months from the date of valuation to do so. In the event that neither could buy out the other, the property was to be sold by auction and the proceeds divided equally. Before the expiry of the 3 month period, the second defendant (the former husband) purported to sell the house to the plaintiff, who brought an action seeking the eviction of the first defendant. At issue in the case were: (a) whether the plaintiff was aware that the property was the subject of a matrimonial dispute; (b) whether or not the agreement between the plaintiff and second defendant was done fraudulently to defeat the court order; and (c) whether the first defendant was entitled to cancellation of the title deeds. After hearing evidence, the court concluded that the plaintiff was aware that the property was the subject of a matrimonial dispute. On the remaining issues:
Held: (1) the word "fraud", when used in relation to the type of disposition which can be attacked in a case of this kind, does not bear the same meaning as it bears in criminal law, or in the context of a contract induced by fraud. There need be no false representation or deceit by the husband in order to lay the disposition open to attack. It is equally clear, however, that not every disposition that has prejudiced the interests of the wife will be set aside at her instance. Every donation made out of the assets of a joint estate diminishes the estate, and so prejudices the wife. And the same applies to a transaction, other than a donation, which results in loss to the joint estate. But such dealings, *simpliciter,* are not open to attack. What must be shown is *dolus*, in the sense of an intention to prejudice the wife's interests. The plaintiff was aware of the first defendant's rights in the property. The husband intended to defeat the first defendant's rights. He acted clandestinely and with deliberate intention to defeat her rights and thus acted fraudulently and on the evidence it was clear that the plaintiff did so too.
(2) A registered deed may be cancelled by order of court, on the authority of s 8 of the Deeds Registries Act [*Chapter 20:05*]. Such action cannot be lightly taken, but even where there has been *justus error* the court must intervene. Here there has been fraudulent intent on the part of the registered holder and failure to cancel would be to deprive the innocent person of her rights, benefit the guilty and put a premium on deceit.

Court – community court – jurisdiction – chief – resolving of land dispute

Chihoro v *Murombo & Anor* HH-7-11 (Karwi J, Omerjee J concurring) (Judgment delivered 4 May 2011)

The appellant and respondent had been involved in a dispute over a piece of land in a communal area. The matter was taken to the local community court, presided over by the local chief. The court found the appellant to be the rightful owner of the land and ordered the eviction of the respondent. The respondent some months later brought the chief's decision on review to the magistrates court, which granted the respondent's application. The magistrate's reasons for doing so were that s 26 of the Traditional Leaders Act [*Chapter 29:17*] prohibits occupation of communal land other than with the approval of the rural district council. The same section confirms the administrative jurisdiction of council over the control, use and allocation of all communal land. The magistrate found that, by ordering the eviction of the respondent, the chief had effectively allocated communal land in contravention of s 26 of the Traditional Leaders Act. The magistrate further found that, by evicting the respondent, the chief had usurped the powers of the council which had authority over the land in question in terms of the Communal Lands Act [*Chapter 20:04*]. On that basis alone, the chief's judgment was annulled on the grounds of lack of jurisdiction.

The appellant appealed against this decision.

Held: the chief only entertained a dispute relating to land, and did not allocate land, the land in question having already been allocated a long time before. While s 16(g) of the Customary Law and Local Courts Act [*Chapter 7:*05] provides that a local court shall have no jurisdiction in any case to determine rights in respect of land or immovable property, s 5(1)(e) of the Traditional Leaders Act provides that a chief shall be responsible within his area for discharging any functions conferred upon him in terms of the Customary Law and Local Courts Act. Among the duties of a chief are adjudicating in and resolving disputes relating to land in his area (see s 5(1)(n) of the Traditional Leaders Act). *In casu*, the chief adjudicated and resolved a land dispute in his area. He did not allocate land. Allocation of land and resolving of a dispute are totally different things. Allocation of land involves the granting of rights, interest and title to land to an individual, whereas the resolving of a land dispute involves the entertainment of a dispute between or amongst individuals over an already allocated piece of land. The appellant brought a dispute before the chief for resolution; he did not bring a request for allocation of land. The chief accordingly had jurisdiction and the magistrate should not have set aside the chief's ruling.

Court – High Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of a labour dispute – court having jurisdiction

Ndlovu v *Highlanders Football Club* HB-95-11 (Cheda J) (Judgment delivered 30 June 2011)

An acknowledgment of debt, even if it arises from a labour dispute, does not fall within the definition of a labour dispute as envisaged by s 89(6) of the Labour Act [*Chapter 28:01*]. An acknowledgment of debt is nothing but a liquid document which is covered by the rules of the High Court, for which an application for a summary judgment can be applied.

Court – judge – role in law making – need for courts to tread a path which will avoid inequity and injustice in situation where legislative intervention is not forthcoming

Samanyau & Ors v *Pleximail (Pvt) Ltd* HH-108-11 (Mutema J) (Judgment delivered 8 June 2011)

See below, under EMPLOYMENT (Unlawful dismissal)

Court – judicial officer – recusal – grounds for – apprehension of bias – test – matter in which police officers were respondents – judge married to senior police officer – marriage not in itself ground for apprehending bias – more information required to warrant apprehension of bias

Mahlangu v *Dowa & Ors* HH-4-11 (Chatukuta J) (Judgment delivered 12 January 2011)

The applicant, a senior legal practitioner, had been arrested and detained. An urgent application was made for his release on bail and a declaration that his arrest and detention were unlawful. The first three respondents were police officers, cited in their personal or official capacities. Before the application could be heard he was granted bail by a magistrate. The urgent proceedings were converted to an ordinary application. At the hearing, the applicant's counsel sought the recusal of the presiding judge on the grounds that she was married to a senior officer in the police force and that she would be biased in favour of the respondents on the basis that the application related to her husband's subordinates and superiors respectively. The applicant also argued that because of her marriage the judge may have had prior knowledge of facts that would influence her in ruling in favour of the respondents.

Held: The test to be adopted in determining whether or not a judicial officer should recuse him or herself is well settled. The test is a two-fold, objective, test: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that 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. Where an applicant makes an application of this nature, the court should not take it as an affront. What defines the reasonableness of the applicant and the apprehension itself is the nature of the link or association between the judicial officer and the parties in the litigation. No reasonable person would entertain an apprehension that a judicial officer would be biased in favour of the police simply by virtue of a marriage to a police officer. A litigant must advance more information to warrant the apprehension. A sizeable number of matters before the court, both criminal and civil, relate to the police. There was no distinction between the present matter and those other matters where the police are litigants. The apprehension expressed by the applicant would mean that the judicial officer would have to recuse himself or herself from almost all the cases where the police and its officers are litigants. Such an apprehension would be unreasonable.

Criminal law – offences under the Criminal Law Code [*Chapter 9:23*] – crimes involving aircraft – placing dangerous goods aboard an aircraft (s 115) – not an offence of strict liability – need for *mens rea* to be proved

A-G v *Parmer* HB-86-11 (Ndou J) (Judgment delivered 23 June 2011)

The respondent put a starter pistol, as used for athletics, in his hold baggage when he checked in for a commercial flight. The pistol was not functioning and was being taken for repair. The pistol used blank

ammunition and could not be converted into a firearm. The pistol was detected before the flight leave and the respondent was arrested and charged with contravening s 115(1)(a) of the Criminal Law Code [*Chapter 9:23*] – placing "dangerous goods" on an aircraft. The relevant part of the definition of "dangerous goods" was "substances and things which by reason of their nature or condition may endanger the safety of an aircraft or of any person on board on aircraft". The charge sheet, however, also referred to ss 49 and 50 of the Civil Aviation (Security) Regulations 2006, which contain much wider definitions of "dangerous goods".
No evidence was led as to how the safety of the aircraft could have been endangered. No-one could have had access to the pistol while the aircraft was in flight. The respondent was acquitted. The Attorney-General applied for leave to appeal on a point of law against the acquittal. It was argued that the offence was one of strict liability.
Held: (1) the offence under the Code provided for imprisonment only. Accordingly, in terms of the proviso to s 17(5) of the Code, the offence could not be held to be one of strict liability; *mens rea* had to be proved.
(2) It was wrong to import into a charge under s 150 of the Code the definitions in provisions of ss 49 and 50 of the Regulations. The Civil Aviation Act [*Chapter 13:16*] made it quite clear that the offence which the State tried to import into the prosecution was in effect a "stand alone" offence. Part VII of the Regulations sets out a substantive offence and provides a penalty. If the prosecution had framed a charge under the Regulations it would have been entitled to use the definition contained in s 49 and the court would have been able to impose the penalty prescribed in s 79(5) of the Regulations. The State could have brought an alternative charge under the Regulations.
(3) The magistrate should have considered whether the essential elements of the offences under Part VII of the Regulations were present. If they were, he could, in terms of s 274 of the Code, have convicted the respondent of contravening the Regulations. Accordingly, leave to appeal should be granted.

Editor's note: on appeal, the High Court has the power under s 38A(2) of the High Court Act [*Chapter 7:06*] to (a) confirm the decision of the court *a quo*; (b) declare the verdict which it considers the court *a quo* should have given, without altering the judgment; or (c) where it is considered desirable, having regard to the interests of justice to do so, substitute a verdict of guilty and either pass sentence itself or remit the case to the lower court for the passing of sentence.

Criminal law – offences under Criminal Law Code [*Chapter 9:23*] – stock theft (s 114) – what constitutes "livestock" – equine animal – whether includes a donkey

S v *Makuvaza* HB-37-11 (Kamocha J) (Judgment delivered 3 March 2011)

"Livestock" is defined by s 114 of the Criminal Law Code [*Chapter 9*:23] as meaning "any sheep, goat, pig, poultry, ostrich, pigeon, rabbit or bovine or equine animal" or "any domesticated game" or the carcass or portion of the carcass of one of those animals. Unlike s 2 of the Stock Theft Prevention Act [*Chapter 9:18*], s 114 does not include an ass or donkey under the definition of livestock.
A person stealing livestock is guilty of stock theft. A person who is convicted of the theft or attempted theft of any equine or bovine animal is liable to a minimum sentence of 9 years' imprisonment.
A horse in Latin is known as *equus.* The word *equus* in zoology means the genus of ungulates including, horses, asses and zebras. However, the dictionary definition of "equine" is "belonging or relating to, or like, a horse or horses" or, when used as a noun, a horse. The word "equine" does not include an ass or donkey. It only relates to a horse or horses. A donkey is not an equine animal. Consequently, the mandatory minimum sentence is not applicable to the theft of a donkey.

Editor's note: if this judgment is correct, then it would seem to follow that the theft of a donkey is not theft of livestock at all, let alone an offence attracting a mandatory minimum sentence. With respect, this surely cannot be so.

Criminal law – offences under the Criminal Law Code [*Chapter 9:23*] – s 174(1)(a) – criminal abuse of duty as a public officer – showing favour – doing anything contrary to duty as a public officer for purpose of showing favour to another person – Minister ordering purchase of fuel from a supplier without going to tender – no other supplier available and critical fuel shortage in existence – no offence disclosed

S v *Mangoma* HH-135-11 (Bhunu J) (Judgment delivered 28 June 2011)

The accused, who was Minister of Energy and Power Development, was charged with criminal abuse of duty as a public officer, in contravention of s 174(1)(a) of the Criminal Law Code [*Chapter 9:23*]. He was alleged to have shown favour to a particular petroleum company by directing the chief executive officer of the procurement agency to purchase a quantity of diesel fuel from that company, thereby showing favour to the company. Alternatively, it was alleged that he had unlawfully directed the same person to purchase the fuel without going to tender, in contravention of s 5(4)(a)(i) as read with s 35 of the Procurement Regulations 2002 (SI 171 of 2002). During the period in question the accused was responsible for overseeing the procurement of fuel in terms of the Procurement Act [*Chapter 22:14*] and Regulations. The procurement of petroleum products was done through the National Oil Company of Zimbabwe (NOCZIM) which in turn had an entity called Petrotrade as its special purpose vehicle for the importation of fuel. Under s 30(2) of the Act, the procurement of commodities in excess of specified amounts without going to tender is authorised provided the procuring entity justifies in writing the need to purchase such commodities (including fuel) without going to tender.

It was common cause that during the period in question there was an acute shortage of fuel in the country. None of the traditional suppliers of fuel had any diesel for sale and the accused authorised the purchase of the fuel in question. He did so contrary to the advice of his officials, who were of the view that any purchases had to be done through the normal tender procedures.

Held: the purchase was lawful. Section 30(2) was meant to provide a safety valve to enable state procurement entities to procure commodities expeditiously for the benefit of the state and the nation at large in times of dire need and emergencies without following the cumbersome, time-consuming, normal tender procedures. No reasonable court could come to the conclusion that by merely directing the chief executive officer to purchase fuel without going to tender the accused was guilty of any criminal conduct. Whether or not the accused was abusing his office as a public official when he directed his subordinate to buy the fuel had to be determined by the motive and surrounding circumstances behind the order. When the accused issued the directive it was in times of extreme emergency. Strategic fuel reserves were down to less than a day's supply and there was no fuel from traditional suppliers. Queues were beginning to form at fuel outlets. The situation called for extraordinary measures to avert the emergency. His motive was clearly to avert the situation which threatened the country with extreme shortage of fuel. He could not be blamed for directing the purchase of fuel from the company when it was the only supplier with fuel at that time. There was no evidence that fuel could have been obtained from another supplier at a lower price, as no other fuel was available at the time. Accordingly, the accused should be discharged at the end of the State case.

Editor's note: section 35 of the Procurement Regulations states that "Any person who contravenes any provisions of these regulations shall be guilty of an offence" but provides no penalty. There is no general penalty provision in the Act, nor does s 31 of the Act (under which regulations may be made) provide for the creation of offences or the imposition of penalties. Section 30 of the Act does not create an offence. There would thus appear no legal basis for the alternative charge.

Criminal law – statutory offences – Children's Act [*Chapter 5:06*] – s 7(1) – ill-treatment of children – forcing children whose parents had not paid fees to stand during lessons – such constituting ill-treatment – lack of means as a defence – irrelevance of

S v *Nyabeza & Anor* HB-1-11 (Cheda J, Ndou J concurring) (Judgment delivered 13 January 2011)

The appellants, the headmistress and deputy headmaster of a junior school, were charged with contravening s 7(1) of the Children's Act [*Chapter 5:06*], the allegation being that they ill-treated school children at the school by making all those children whose parents had not paid the fees and levies stand while receiving their lessons. This occurred whether or not chairs and desks were actually available. Where chairs were available, they were removed from the classroom. The appellants argued the reason why pupils were standing was because there were inadequate resources; and lack of adequate resources due to no fault of the offender is excusable under s 7(4) of the Act.

Held: (1) The appellants' actions showed a clear intention to punish those who had not paid. The process was very selective, with a desire to ill treat those who had not paid.

(2) The issue of fees directly relates to the law of contract. When a parent secures a place for a child at a school, a contract is entered between the school and the parent with regards to the payment of fees. The contract can either be express or implied. The parent undertakes to pay all fees which the school levies against the student from time to time. Failure by a parent to pay results in the institution of legal proceedings against the parent to recover the fees. No legal steps or proceedings can be taken against a minor who has no contract with the school to pay fees. To do so is an abuse of authority on the part of the school and constitutes an undue pressure to enforce payment of fees, using the pupil as a pawn. To shut pupils out of school premises, to force them to do

manual work and to withhold their school results in order to force parents to pay outstanding fees is illegal as it contravenes s 7(1) of the Act. While the authorities are entitled to their fees, they should resort to a legal way of recovering fees from the parents.

Editor's note: the offence under s 7(1) may be committed only by a parent or guardian of a child or young person. The term "guardian" includes "any person who has the custody, charge or care of the child or young person, either permanently or temporarily" and clearly could include a school teacher. It would thus be necessary to allege and prove that the accused is a "guardian", as defined. A charge under the Education (Disciplinary Powers) Regulations 1998 might, however, be more appropriate.

Criminal procedure – charge – alternative charge – need for such charge to be brought before court may convict accused of such charge – exceptions to this rule

Nyamande v *Min of Home Affairs & Ors* HB-14-11 (Kamocha J) (Judgment delivered 3 February 2011)

Where it is intended to charge an accused person with an alternative charge, he ought to be charged with both the main and alternative charge so that he can prepare his defence in respect of both charges. He must be heard in respect of each charge. He may elect to plead not guilty to the main charge but guilty to the alternative charge. He may plead not guilty to both the main and alternative charges, in which case the court may convict him of the charge that is supported by the evidence adduced before it. The court must find him not guilty of any charge which is not supported by the evidence before it. It is not competent for the court to convict the accused of both the main and alternative charge. Unless an alternative charge has been brought, it would not be competent for a court or reviewing authority to record a conviction on a charge which that court or authority considers more appropriate, unless the essential elements of the substituted charge are encompassed within the essential elements of the offence actually charged.

Editor's note: it is also competent to convict of an offence other than that charged if the charge is one for which a competent verdict is provided by the Fourth Schedule to the Criminal Law Code [*Chapter 9:23*].

Criminal procedure – charge – amendment of – accused indicted to High Court – accused not having pleaded – courses open to prosecutor wishing to amend charge

S v *Kurotwi & Anor (2)* HH-49-11 (Bhunu J) (Judgment delivered 15 February 2011)

The accused, along with three other persons, were indicted for trial before the High Court on a charge of fraud. The charges against the other three persons were withdrawn before plea. The accused were then served with a fresh charge and summary of the State case, different from those served on them by the magistrate at the time they were indicted to the High Court for trial. They objected to pleading to the fresh charge, arguing that it was improper and irregular for the prosecutor to prefer charges different from those upon which they were committed for trial without first seeking the leave of the court to do so. They argued that they had prepared their defence on the basis of the original charge, and it was therefore prejudicial for them to plead to the fresh charge which was based on a different set of facts, although the charge remains fraud. It was further argued that the original charge was framed in such a way as to omit an essential element which had since been incorporated into the fresh charge. Finally, it was argued that after the indictment it was incompetent for the State to unilaterally amend, substitute or vary the charge and summary of the State case without the leave of the court at a time when the trial was already pending before this court.

Held: (1) In terms of s 202 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], where a need arises to amend the charge in the course of a trial, it is only the court which can authorize the amendment, after considering the question of prejudice. Here, the amendment was unilaterally made by the State before plea but after committal for trial in terms of s 168 of the Act. Once the accused had been indicted, the High Court was seized with the matter and all procedures relating to the trial of the accused were firmly under the direction and control of the court. The accused is entitled as of right to demand that he be tried on that charge. The State is not at large at that stage to alter, amend or substitute the charge without the court's permission.

(2) While, in terms of s 320 of the Act, the Attorney-General has a right to withdraw a charge before plea and prefer new charges against an accused person, the condition precedent is that he must first withdraw the original charges against the accused before he can proceed to prefer fresh charges against the accused. *In casu*, a new charge could not be brought because the original one had not been withdrawn. If the prosecutor wants to amend the charge, then he must apply to the court and the court will make a determination. If he wants to prefer new charges against the accused, then he must first withdraw the original charge before plea. It was up to the prosecutor which way to proceed.

This judgment would appear to clarify the apparent inconsistency between the other judgments in this matter. – Editor

Criminal procedure – charge – amendment or withdrawal of – prosecutor's right to amend or withdraw charge after accused has been committed for trial – leave of court required

S v *Kurotwi & Anor (3)* HH-56-11 (Bhunu J) (Judgment delivered 17 February 2011)

The accused were committed for trial along with three others, the charges against who had been withdrawn before plea. The State intended to use the three others as State witnesses against the accused and applied to amend the original charge before plea to incorporate this development.
Held: The effect of s 137 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is that, once the High Court is seized with the matter pending before it, all procedures relating to the trial of the accused are firmly under the direction and control of the court. Accordingly, although the State is *dominus litis,* it would have to apply for an order for the withdrawal of charges against the accused's co-accused before plea. It would be grossly irregular for the State to simply drop charges against the accused's co-accused without first obtaining a court order to that effect. The situation cannot be different when it comes to the amendment of the charge before plea. Once an accused person has been served with an indictment and committed to the High Court for trial he is entitled, as of right, to demand that he be tried on that charge. The State is not at large at that stage to alter, amend or substitute the charge without the court's permission.
Generally speaking a party is entitled to make an amendment at any time before judgment, provided there is no prejudice to the other party. Here there was no prejudice to the accused which could not be cured by an adjournment to enable them to prepare their defence in light of the intended application.

Sections 9 and 320(3) of the Act would seem, with respect, to give the Attorney-General, or the prosecutor acting on his behalf, the absolute right to withdraw a charge at any time before the accused has pleaded, and to lodge a fresh indictment or charge or to issue and serve a fresh summons for hearing before the same or any other competent court. – Editor.

Criminal procedure – charge – dismissal of for want of prosecution – not itself a bar to further proceedings – person may not be committed to custody pending trial

S v *Matapo & Ors* HH-97-11 (Musakwa J, Omerjee J concurring) (Judgment delivered 24 May 2011)

The dismissal for want of prosecution of the case against an accused person in terms of s 160(2) of the Criminal Procedure and Evidence Act [*Chapter 9:*07] means that the person must forthwith be discharged from custody. It is, however, not a bar to further proceedings, but upon being served with a notice of trial the accused may not be required to pay further bail or to be committed to custody.
As to how an accused person whose case has been dismissed is brought to trial in terms of s 322 of the Act, it is not necessary that he be re-indicted before a magistrate in terms of s 66, which then enjoins the magistrate to commit the accused to custody. Section 66 provides for summary committal of an accused where the Attorney-General is of the opinion that any person is under reasonable suspicion of having committed an offence for which the person may be tried in the High Court. After committal for trial and the dismissal of the case in terms of s 160(2), the Attorney-General has no need to revisit the process of committal: it is inconceivable that he will formulate a second opinion over a matter in which he previously caused the accused to be committed for trial. In any event, in terms of s 137, as soon as the indictment has been lodged with the registrar, the case is deemed to be pending.

The learned judge points out that there are racial references in the High Court (Criminal) Rules 1964 (RGN 452 of 1964). These occur in rule 3, which deals with the requirements for the committing magistrate to ascertain the accused's arrangements for his defence. If the accused was an African, the district commissioner had to be advised. Clearly, as the learned judge points out, this provision is archaic. – Editor.

Criminal procedure – charge – withdrawal – Attorney-General's unfettered right to withdraw charge at any time, whether before or after plea

S v *Kurotwi & Ors (1)* HH-41-11 (Bhunu J) (Judgment delivered 8 February 2011)

The five accused were charged with fraud and indicted before the High Court. The prosecutor withdrew the charge against three of the accused before plea, with a view to using the three as witnesses against the remaining two accused. Counsel for the two remaining accused objected to the timing of the withdrawal of charges against the three accused persons. They argued that the case became pending in the court at the moment the charges were given to the registrar. That being the case, the withdrawal entailed an amendment of the original charge.
Held: s 76(4)(c) of the Constitution clothes the Attorney General with an unfettered absolute discretion to withdraw criminal proceedings he has instituted at any stage of the proceedings. Once the Attorney General has decided to exercise his discretion under that section, no person or authority, including the courts, can question his decision in this respect. If the prosecutor decides to withdraw the charge, the court must accept that decision. It does not matter whether or not the withdrawal is before or after plea.

This decision, with respect, seems inconsistent with that given in S *v* Kurotwi (3) *HH-56-11, above. – Editor.*

Criminal procedure – charge – statutory offence – definition from other legislation being imported into charge – not permissible

A-G v *Parmer* HB-86-11 (Ndou J) (Judgment delivered 23 June 2011)

See above, under CRIMINAL LAW Offences under Criminal Law Code [*Chapter 9:23*] (Crimes involving aircraft – placing dangerous goods aboard an aircraft).

Criminal procedure – discharge at close of State case – application for – bases on which application may be granted

Attorney-General v *Bennett* S-7-11 (Chidyausiku CJ, in chambers) (Judgment delivered 10 March 2011)

The respondent was charged in the High Court with various offences; he pleaded not guilty. He was discharged at the end of the prosecution case. The Attorney-General appealed against the discharge.
Held: (1) In terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the State is required to serve on the accused a summary of the state case, setting out the witnesses that it intends to call and a summary of the evidence that they will give. Similarly, the defence is required to furnish the State with a defence outline, in terms of which the accused sets out his defence to the charge and the evidence he intends to lead. At the close of the State case the State had not led the evidence it alleged in the State outline it would lead. Some of the evidence not led was critical to the linking of the accused to the offence. This critical evidence for the State was either ruled inadmissible or the State witnesses told a different story from that alleged in the summary of the State case. In terms of s 198(3) of the Act, if at the end of the State case, the court considers that there is no evidence that the accused committed the offence charged, or any other offence of which he might be convicted thereon, it *shall* return a verdict of not guilty. "No evidence" means (a) there is no evidence to prove the essential elements of the offence; or (b) there is no evidence on which a reasonable court, acting carefully, might properly convict; or (c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.
(2) In assessing the probative value of circumstantial evidence, the court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken; it must carefully weigh the cumulative effect of all of them together. Only after it has done so is the accused entitled to the benefit of any reasonable doubt which the court may have as to whether the inference of guilt is the only inference which can reasonably be drawn. *In casu*, each of the circumstances relied upon by the State had very little, if any, probative value; taken together, the various circumstances did not make a case for the accused to answer.

Criminal procedure – trial – conduct of – passing of sentence and recording of reasons therefor – need for reasons for sentence to be included in record at time sentence is passed, not reconstructed later after reasons given verbally *ex tempore*

S v *Mpofu* HB-21-11 (Mathonsi J) (Judgment delivered 10 February 2011)

It is a cardinal principle of our criminal justice system that before assessing an appropriate sentence a judicial officer must seriously engage in a pre-sentencing inquiry in order to gather as much information as possible to enable him or her to humanely and meaningfully assess sentence. Sentencing cannot be left to the caprices and instincts of the judicial officer. A thorough investigation should be carried out by the judicial officer before arriving at an appropriate sentence. Where the judicial officer gives an *ex tempore* judgment with reasons for sentence contained in his head, only to be inserted in the court record much later, he runs the risk of someone concluding that he did not apply his mind to the case at hand. Indeed, it is a misdirection for the judicial officer not to record the reasons for sentence, a misdirection which entitles the reviewing judge to interfere with the sentence.

Criminal procedure – trial – delays in bringing case to trial – delay caused by prosecution in order that juvenile offender should be old enough at time of trial to be treated as an adult – such a course unacceptable and likely to bring administration of justice into disrepute

S v *Ncube* HB-20-11 (Mathonsi J) (Judgment delivered 10 February 2011)

The accused was aged 18 years at the time he was convicted of the rape of a 12 year old girl. At the time of the offence, however, he was aged 16. Although he did not deny the act, the case took so long to get to trial that he had turned 18 before the trial. He was, accordingly, treated as an adult for the purposes of sentence.

Held: the decision of the prosecution, as was so apparent in this case, to withhold the matter while biding time for the accused to attain the age of 18 and arraigning him before a magistrate thereafter in order to secure a stiffer sentence by virtue of the fact that the accused would not be entitled to a sentence of corporal punishment, was unacceptable. This conduct was extremely undesirable and brought the administration of justice to serious disrepute. The State should not be allowed to benefit from its own default, as it were, deliberately designed to gain an unfair advantage over young offenders.

Criminal procedure – trial – juvenile offenders – need to treat juveniles as special category of offender – need for juvenile offender to be assisted or legally represented at trial – age of child or juvenile offender – need for age to be established as soon as possible after arrest – reasons for establishing age – legislative provisions and international instruments governing treatment of juvenile offenders

S v *Ncube & Ors* HH-139-11 (Mawadze J) (Judgment delivered 24 June 2011)

Judicial officers should always bear in mind that children in conflict with the criminal law constitute a special category of offenders for which there are specific and peculiar legislative provisions, both within our jurisdiction and other international conventions, designed to deal with such offenders. Useful guidance can be sought from both the United Nations Convention on the Rights of the Child (1990) and the African Charter on the Rights and Welfare of the Child (1999). Article 17 of the Charter deals in some useful detail with the administration of juvenile justice in relation to children in conflict with the criminal law. Guidelines are given on such issues as arrest, detention, the presumption of innocence, legal representation and other related matters. Article 40 of the Convention sets out what may be deemed to be minimum standards to be met by the criminal justice system in dealing with children in conflict with the criminal law.

In our jurisdiction, the Criminal Procedure and Evidence Act [*Chapter 9*:*07*] (see ss 191, 195, 196, 197, 351, 352 and 353) and the Criminal Law (Codification and Reform Act) [*Chapter 9*:*23*] (see ss 6, 7, 8, 63 and 70) have a number of sections that specifically provide for how the courts should deal with juvenile offenders and juvenile witnesses who are both in contact or in conflict with the criminal law.

Section 191 of the Criminal Procedure and Evidence Act provides that, if a child is below 16 years and is being tried in the magistrates court, he or she may be assisted by a natural or legal guardian, or the court may appoint another person to assist the juvenile. This practice should be extended to all juveniles, even those over 16. It is desirable for such children to be legally represented. In our civil law minors or juveniles cannot represent themselves in any proceedings but in our criminal justice system such minors are given capacity to represent themselves, as it were. This is harsh and in violation of the children's rights as enshrined in both the Charter and the Convention. The concept of placing of a juvenile particularly a very young child unrepresented and unassisted by its parents on trial before a magistrate is inherently repugnant. It might well be thought that to place such a child in a position where he or she is expected to conduct his own defence in an alien environment in adversary proceedings is to expect far too much.

The issue of age of a juvenile offender is a crucial factor to which the court should apply its mind in all criminal proceedings. The inquiry into the juvenile offender's age should start at the time of arrest if the courts are to properly protect the rights of children in conflict with the criminal law. Where a child is put on trial, an inquiry

into the child's age must be made, because from that inquiry many other important considerations flow. If the child is under 14 years at the time of the alleged offence, the first decision is whether there is evidence to displace the presumption that the child did not have criminal capacity. Even if such evidence is available, the next question is whether, as a matter of policy, such a young person should be subjected to the might of the criminal justice system. Other methods of dealing with such an offender might be appropriate.
Without knowing the age of the accused and whether they are juveniles or not, there is a real danger is that the accused persons might be subjected to an improper and incompetent penalty or sentence.
Our courts have always emphasised the need for the trial court to carry out a full and meaningful pre-sentence inquiry in order to arrive at an appropriate sentence. This would include obtaining probation officers' reports. A meaningful inquiry should be made either in relation to the circumstances surrounding the commission of the offence or circumstances peculiar to the offenders. This might entail calling the accused's parents or guardians or school authorities to shed light in the matter. The need for the probation officer's reports in cases of this nature cannot be over- emphasized. While the court face challenges in their dealings with the Department of Social Welfare, this can never be a just cause to proceed to sentence juvenile offenders without gathering all useful information to guide the court on the question of sentence. Even in the absence of a probation officer and probation officers' reports, a trial court handling the matter of a juvenile should be innovative and seek to involve the family of the juvenile before coming up with a management scheme or sentence. To simply proceed without both the probation officer's report and involvement of the juvenile's family is akin to proceedings in complete darkness.
The enthusiasm with quite a number of magistrates sentence juvenile offenders to corporal punishment even for non serious offences is a matter of concern. This may be an easy way out in disposing of a matter, but in dealing with juveniles in conflict with the criminal law the courts' primary concern is to safeguard the rights of these children rather than to complete the proceedings as quickly as possible. By taking the latter course, the court may end up imposing a retributive rather than a rehabilitative type of sentence. In most cases involving juveniles in conflict with the criminal law, the court should refer such cases to the children's court, where other various options of dealing with the juveniles are available. Where corporal punishment has been imposed, it is not possible to correct a misdirection on review, except in an academic sense.

Criminal procedure – trial – outline of State case – discrepancies between State outline and witness's evidence – need for discrepancy to be explained

S v *Wairosi* HH-29-11 (Uchena J) (Judgment delivered 4 February 2011)

Any serious difference between the State's outline and a complainant's or witness's evidence during the trial cannot be held against the complainant or the witness, as they do not take part in the preparation of the State's outline. The difference must, however, be satisfactorily explained as it will be fatal to the State's case if it remains unexplained when the State closes its case. The reason for drawing an adverse conclusion is that, because of the conflict between the two, a doubt is raised as to whether the State witnesses are being truthful. Such a conflict may easily be explained by the production of the complainant's statement to the police. But if this is not done, so long as that conflict is unresolved at the end of the hearing, the benefit of the doubt must be accorded to the accused; for it would not be possible to say that the State has proved the case which it undertook from the onset to prove, and has therefore proved its case beyond a reasonable doubt.

Criminal procedure (sentence) – general principles – community service – when should be considered in lieu of imprisonment – failure to inquire into suitability of community service – a serious misdirection

S v *Chireyi & Ors* HH-63-11 (Mawadze J) (Judgment delivered 22 February 2011)

Imprisonment is a rigorous form of punishment and should be resorted as a last resort. Where an appropriate prison sentence falls within the general limit of effective 24 months imprisonment, the court should consider imposing community service instead. To make no inquiry into the suitability of community service and to give no cogent and sound reasons as to why community service is inappropriate constitutes a serious misdirection.

Criminal procedure (sentence) – general principles – death sentence – *allocutus* before passing of sentence – purpose of – courses open to court if doubts raised about extenuating circumstances or verdict

S v *Wairosi* HH-53-11 (Uchena J) (judgment delivered 15 February 2011)

The opportunity given to a person convicted of murder to inform the court of any reason, or say anything on why the death sentence should not be imposed on him is an important stage of a murder trial, during which the

convicted person may inform the court if any of the statutory reasons for avoiding the death sentence are applicable to his case. He can, for example, tell the court that he is now over seventy years old, or was below 18 years at the time he committed the offence. His being allowed to say anything which will result in his not being sentenced to death enables him to raise other issues, including facts which may touch on the propriety of the conviction. He may at this stage say things which prove that there are extenuating circumstances, or that he did not commit the offence. If what he says is believed, the court may recall its finding that there are no extenuating circumstances, or even the recall the verdict of guilty.

Criminal procedure (sentence) – general principles – juvenile offenders – full and meaningful pre-sentence enquiry essential – desirability of obtaining probation officer's reports – other courses open to court where such reports not available – corporal punishment – when should be imposed – should not be imposed as a means of completing proceedings quickly

S v *Ncube & Ors* HH-139-11 (Mawadze J) (Judgment delivered 24 June 2011)

See above, under CRIMINAL PROCEDURE (Trial – juvenile offender)

Criminal procedure (sentence) – offences under Criminal Law Code – assault – factors to consider – full enquiry required in order to assess proper sentence

S v *Chireyi & Ors* HH-63-11 (Mawadze J) (Judgment delivered 22 February 2011)

Each of the factors (in addition to others) listed in s 89 (3) of the Criminal Law Code [*Chapter 9:*23] should be carefully weighed in deciding whether to impose a custodial or a non custodial sentence in cases of assault. There should be an inquiry into the circumstances of the assault, that is, the reason for and the manner of the assault. This reasoning process should be evident from the trial magistrate's reasons for sentence. Where a magistrate fails to carry out any meaningful pre-sentence inquiry and the mitigation recorded is unhelpful and perfunctory, such scant pre-sentence information is unhelpful in arriving at an appropriate and just sentence.

Criminal procedure (sentence) – offences under Criminal Law Code – murder – *allocutus* – purpose of – courses open to court following *allocutus*

S v *Wairosi* HH-53-11 (Uchena J) (judgment delivered 15 February 2011)

See above, under CRIMINAL PROCEDURE Sentence – General principles (Death sentence).

Customary law – application – succession – right of eldest son to inherit entire estate – inherently unjust – justice of case demanding that general law should be applied

Zvavamwe v *Mpofu & Ors* HB-32-11 (Mathonsi J, Kamocha J concurring) (Judgment delivered 24 February 2011)

E, a widow, died in 1986; her husband had died in 1967. There were 5 children of the marriage; by the time of the current action, the 3 sons had themselves died. The two daughters were the first two respondents. At the death of her husband, E had inherited the family home in Bulawayo. That inheritance was not in accordance with customary law as an African woman was then regarded as a perpetual minor, incapable of owning or inheriting her husband's immovable property. After E's death, her eldest son A, his wife (the appellant) and his family remained in the house.

A distribution plan in respect of the estate was drawn up, in which the magistrate ruled that all E's children were entitled to inherit in equal shares. The appellant argued that A was, as the eldest son, entitled under customary law to inherit E's estate, to the exclusion of the other children. It was further argued that the estate could not devolve according to the inheritance regime provided for in the Administration of Estates Act [*Chapter 6:01*], the relevant provisions of which came into effect through Act No. 16 of 1998 which did not have a retroactive effect.

Held: the matter could be resolved by reference to s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] which sets out the choice of Law principles to be applied in a situation of this nature. Where the

legislature has given the courts the latitude to apply either customary law or general law, having regard to the nature of the case and the surrounding circumstances, the courts should purposely refrain from applying customary law if its application would lead to an injustice. It is absurd for a first born son to seek to inherit the entire estate of his parent to the complete exclusion of his siblings. Other than the historical accident of being born ahead of others, there is no other justification for such a situation. The law must be used to protect the other members of that family against the acquisitive tendencies of the first born son, as clearly all of them are entitled to benefit from the estate. E had inherited the house from her husband by virtue of general law, which meant that the family elected to be governed by general law, in so far as inheritance was concerned. The estate should therefore be distributed in accordance with the Administration of Estates Act.

Customary law – chief – dispute over land – jurisdiction – chief having jurisdiction to settle land disputes – no jurisdiction to allocate land

Chihoro v *Murombo & Anor* HH-7-11 (Karwi J, Omerjee J concurring) (Judgment delivered 4 May 2011)

See above, under COURT (Community court).

Customary law – marriage – subsequent marriage under civil law – neither marriage dissolved – death of husband – entitlement of widow under customary law to inherit house she occupied at time of husband's death

Ndlovu v *Ndlovu & Ors* HB-10-11 (Mathonsi J) (Judgment delivered 20 January 2011)

See above, under ADMINISTRATION OF ESTATES (Intestate succession).

Damages – assessment – delictual – adultery – principles – *contumelia* and loss of *consortium* – how damages for each to be assessed

Muhwati v *Nyama* HH-137-11 (Mawadze J) Judgment delivered 30 June 2011)

The plaintiff claimed damages from the defendant for adultery with the plaintiff's husband. She claimed specific sums under a number of heads: *contumelia*; loss of *consortium*; emotional stress and embarrassment; breakdown of marriage and loss of support. The action was not defended.

Held: the plaintiff's marriage had been virtually destroyed. She had lost her husband of 24 years to the defendant. Her dignity and self-esteem had been lowered in the eyes of her peers, workmates, fellow church members and the public at large. Her children, though majors, had lost a father and all the financial support. The defendant's conduct had caused immense emotional stress and embarrassment to the plaintiff. It was, however, not an easy task to quantify all these findings into financial terms. A claim for adultery damages is generally premised on two aspects, which are damages for *contumelia* and damages for loss of *consortium*. Other aspects like emotional stress, embarrassment and breakdown of marriage all fell under the ambit of *contumelia* and loss of *consortium*. *Contumelia* is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by the adultery commuted by a defendant with his or her spouse. Factors the court should take into account in arriving at an estimate of the damages due to the plaintiff for *contumelia* include:

- the character of the spouse involved
- The social and economic status of the plaintiff and defendant
- Whether the defendant has shown contrition
- The need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse
- The level of awards in similar cases.

Consortium relates to loss of comfort, society and service of wife or husband as a result of the adultery committed by the defendant.

Damages – assessment of – delictual – personal injury – general damages – no requirement for mathematical precision – if sufficient evidence exists to enable court to make an estimate, court should do so – effect of inflation on claim

Mbundire v *Buttress* S-13-11 (Garwe JA, Ziyambi JA & Cheda AJA concurring) (Judgment delivered 24 May 2011)

The appellant was involved in a road accident with the respondent, as a result of which the appellant sustained serious injuries. He was taken to hospital in a coma and detained in the high dependency unit for 17 days. He spent 7½ months at a rehabilitation centre. He spent a total of about 1½ years undergoing hospitalization. Before the accident the appellant had been active in sport and that he had been in charge of sport and discipline at a senior boys' school in Harare.

The appellant claimed for general damages, future expenses and replacement value for his motor vehicle. In respect of the last, the appellant had originally claimed a sum in local currency, based on the value of the car at the time, but shortly before the trial altered the claim to one expressed in US dollars.

The trial court found that the accident was the result of gross negligence on the part of the respondent. In considering the appellant's claim for general damages, the court found that the appellant would require surgical operations, regular physiotherapy and medication for the rest of his life. The court also found that he experienced weaknesses of the forearm and arm on the left side and that he would suffer from pain for a very long time. However, the court took the view that, in the absence of evidence from the two doctors who attended to the appellant, the extent of his disability was debatable. On that basis the court granted absolution from the instance. The court also granted absolution on the claim for future expenses, holding that, as the appellant had failed to show how many sessions he would be required to undertake, the court could not assess the future expenses that he was likely to incur. Finally, the court granted absolution on the claim for the value of the car, holding that since delictual damages are calculated as at the time of the delict, the appellant had failed to explain satisfactorily the delay between the time of issuance of the summons and the time when quotations were obtained. In particular, the court was of the view that consideration of factors such as inflation in the calculation of delictual damages would amount to altering the quantum of the debt and would be in conflict with the principle of currency nominalism.

Held: (1) if it is certain that pecuniary damage has been suffered, the court is bound to award damages. Where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, the court must use it and arrive at a conclusion based upon it. Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damage to make an appropriate award in his favour. If there is evidence upon which an estimate not unfair to the defendant can be made, the court should not refuse to make an award merely on account of the deficiencies in the case presented upon the plaintiff's behalf. Those deficiencies would normally operate to the disadvantage of the plaintiff in that the court would normally tend towards conservatism in computing the damages. *In casu*, It certainly would have helped had the appellant undergone further examination so that the exact degree of his injuries could have been ascertained. This notwithstanding, the evidence placed before the court was sufficient to enable the court to make an award.

(2) The damages claimed were in local currency and was at the time of the claim a reasonable sum. However, because of hyper-inflation, and because of the provisions of legislation introduced when the multi-currency system was introduced, the amount claimed was reduced to a trivial sum. Whether the appellant's application to substitute the claim with one based on US dollars would conflict with the principle of currency nominalism had not been explored. The best course would be to remit the matter to the trial court for consideration of the whole question of damages.

(3) The basic principle underlying an award of damages in the Aquilian action is that the compensation must be assessed so as to place the plaintiff, as far as possible, in the position he would have occupied had the wrongful act causing him injury not been committed. The fall in the value of money is to be taken into account in considering comparable awards, but the allowance for inflation is a rough one and should incline towards conservation.

(4) On the claim for the value of the car, the appellant was obliged to prove his claim for damages for the damaged vehicle as at the date of the delict. The amended claim in US dollars made shortly before the trial had no basis in law. A monetary debt has to be paid according to its nominal value and, to take account of inflation, interest is then added onto that debt until payment is made in full. In any event, until the introduction of the multiple currency system in February 2009, it was generally not competent to institute claims for amounts denominated in foreign currency.

Damages – quantification – principles – object of awarding damages – what should be taken into account when assessing loss suffered by injured party

Dururu Tpt (Pvt) Ltd v *Mutamuko NO & Anor* HH-95-11 (Patel J) Judgment delivered 31 May 2011)

An award of damages seeks to attain the financial equivalent of restitution in kind insofar as this is possible. The courts are not obliged to adopt any specific method of calculation but should endeavour to assess an amount that is fair towards all of the parties concerned. Each case will obviously depend on its own facts. The basic objective is to place the plaintiff, as far as may be possible, in the position he would have occupied had the wrongful act causing the injury not been committed. The level of compensation that is assessed must take into account not only the positive loss suffered by the plaintiff but also the negative loss in the form of gains which the plaintiff was prevented from making in consequence of the defendant's wrongful act. As a general rule, the party claiming damages must lead all the evidence which it is possible for him to lead. In the specific case of damage to a motor vehicle, the measure of damages is the sum which would in fact be required to give the plaintiff complete reparation. This must equate to an amount that is not only necessary but also fair and reasonable. In this regard, it does not invariably suffice simply to produce a quotation or statement of account from a reputable firm.

Delict – *actio injuriarum* – adultery – claim for damages – how damages to be claimed – damages for emotional stress and embarrassment – not claimable separately – fall under head of *contumelia*

Muhwati v *Nyama* HH-137-11 (Mawadze J) Judgment delivered 30 June 2011)

See above, under DAMAGES (Assessment – delictual – adultery**).**

Employment – Labour Court – jurisdiction – arbitral award registered with High Court – such award thereby becoming an order of the High Court – Labour Court having no jurisdiction to order stay of execution

Dhlodhlo v *Deputy Sheriff, Marondera, & Ors* HH-76-11 (Gowora J) (Judgment delivered 30 March 2011)

See above, under APPEAL (Noting of – effect – common law position).

Employment – Labour Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of a labour dispute – High Court having jurisdiction

Ndlovu v *Highlanders Football Club* HB-95-11 (Cheda J) (Judgment delivered 30 June 2011)

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

Employment – unlawful dismissal – damages in lieu of reinstatement – calculation of – currency in which may be awarded – local currency worthless due to inflation – award may be made in foreign currency – date at which award should be calculated

Samanyau & Ors v *Pleximail (Pvt) Ltd* HH-108-11 (Mutema J) (Judgment delivered 8 June 2011)

The applicants had been dismissed from their employment with the respondents. The applicants challenged their dismissal in the Labour Court, which found for them and ordered their reinstatement, alternatively, payment of damages in lieu of reinstatement. The respondent opted to pay damages, caused their quantification on 10 December 2008 equivalent to 5 years' salary using a cut off date of 5 July 2007. In February 2009, after the multi-currency system had been introduced, the respondent tendered payment in Zimbabwe dollars. The tender was rejected and the applicants sought an order for payment in US dollars. They argued that the principle of currency nominalism has no place in labour law as it would be at variance with the Labour Act's aim of achieving social justice. Further, they sought a declaration to the effect that damages in lieu of reinstatement have to be paid in an effective manner, that is, in an amount, currency and quantity that achieves fairness as required by the Act. A successful appellant, they argued, should have a discretion to choose payment of damages in the currency that will redress the injury suffered and adequately compensate him for the loss as well as to fulfil the objectives of the Labour Act. Interpreting the order of the Labour Court to mean payment in Zimbabwe dollars would amount to making the order a *brutum fulmen* because the Zimbabwe dollar, by the

time of the tender, had became *de facto* valueless and useless. This would amount to non-payment thereby reducing court orders into empty judgments which would be both unfair and against public policy.
The respondent argued that the matter was *res judicata*; that the High Court had no jurisdiction, this being a labour matter; and that the court had no right to order payment in US dollars when the applicants' contracts entitled them to payment in local currency.
Held: (1) the matter was not *res judicata*: the original dispute before the Labour Court was concerned with the lawfulness or otherwise of the applicants' dismissal and the quantum of damages payable in lieu of reinstatement. That court did not deal with the issue of the form of currency of payment, which was the gravamen of the present application. The present application was not to reverse, amend or modify the Labour Court's order, but simply for a declaratory order that in view of the introduction of the multi-currency and the judicial and State recognition of the *de facto* redundancy of the Zimbabwe dollar, a successful litigant may choose to be paid in any applicable foreign currency in the country and that payment in a moribund currency is not an effective fulfilment of the court's order.
(2) The court's jurisdiction was not ousted by s 89(6) of the Labour Act; the court was still entitled to issue declaratory orders, which the Labour Court was not entitled to issue.
(3) It is not impermissible for the judiciary to make law by way of decided cases if an opportunity presents itself to plug a legislative gap especially where not to do so will leave many an unlawfully dismissed employee languishing in the asylum of financial misery. The applicants were not asking the court to declare that the principle of currency nominalism no longer has any place in our common law generally; they were simply asking the court to pronounce that following the introduction of the multi-currency regime in February 2009 and the concomitant disuse of the Zimbabwe dollar which had become moribund as a result of economic and many other circumstances which had conspired to facilitate this major unprecedented conflagration, and Parliament has remained in a near catatonic state in addressing this occurrence, the court should declare that in the realm of employment relations, the principle of nominalism has for now, no place until economic normalcy has been restored. To allow an employer tender damages in lieu of reinstatement in the form of Zimbabwe dollars in February 2009 would be tantamount to giving someone an ordinary stone and expect him to transact using that stone as a medium of exchange. It does not make any sense in any sane society. On principles of equity, this court should tread a path that will avoid inequity and injustice where legislative intervention is not forthcoming.
(4) The principle of currency nominalism works fairly in an economy which can be described as normal or stable or at the very worst, in which inflation is not hyper, not like in an environment with a runaway inflation as was the case in this country in the period immediately preceding the introduction of the multi-currency regime. After introduction of multiple currency system in February, 2009 it is beyond cavil that the Zimbabwe dollar died a natural death by disuse. To then give someone such currency which no one in the country was prepared to accept in any transaction, let alone beyond our borders, as damages in lieu of reinstatement and after having laboured for the employer for periods ranging between 25 and 46 years like what the respondent did in *casu* is not only immoral but an infringement of a human right. If judges continue to cling to their precedents in such a scenario of social and economic change, like the grasp of an epileptic during a fit, they will certainly be sacrificing the fundamental principles of justice and fairness for which they stand. The court has a discretion to award judgment in that currency that will redress the injury suffered and adequately compensate the plaintiff for the loss. Where the local currency has been rendered valueless by inflation, to award damages in the local currency might be to deny a plaintiff the redress that he seeks. In that situation judgment should be in the foreign currency. In a multi-currency regime, where the local currency has become moribund, to award damages to an unlawfully dismissed employee who has toiled for the employer for between 25 and 46 years in such local currency is not only clinging to a positivist jurisprudential approach but iniquitous and offends against all known tenets of justice in a civilised and democratic society. Such an award should not be a *brutum fulmen* but must be meaningful and beneficial to the beneficiary.
(5) In calculating the rate of salary, the rate used at the time of the reinstatement order should be used, not that applicable at a later date. The official rate of exchange used at the time should apply.

Evidence – circumstantial evidence – probative value of – need to assess cumulative effect of all evidence

Attorney-General v *Bennett* S-7-11 (Chidyausiku CJ, in chambers) (Judgment delivered 10 March 2011)

See above, under CRIMINAL PROCEDURE (Discharge at close of State case).

Evidence – vulnerable witness – appointment of intermediary or support person – need for court to consider possible effect of appointment on mind of vulnerable witness

S v *Wairosi* HH-29-11 (Uchena J) (Judgment delivered 4 February 2011)

The intention of s 319H of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is to guard against the effect the appointment of an intermediary or support person will have on a vulnerable witness's evidence, in the sense that, in the case of the appointment of an intermediary, the questions are put in the manner deemed appropriate by the intermediary. Taking out the sting from the questions may bring out answers not consistent with the question asked. If that happens, the prosecutor or defence counsel should point that out, or ask the question in a different manner. The section is also meant to allow the court to assess the effect of the appointment of an intermediary or support person on the mind of the vulnerable witness and the resultant effect of that frame of mind on the witness's evidence. The appointment of a support person does not, in terms of s 319H(3), include the receiving and answering of questions through the support person, but merely the rendering of moral support. The court should also consider the effect which the appointment will have on the mind and subsequent conduct of the vulnerable witness. In the case of the appointment of an intermediary, and the use of a separate room, the witness could, due to the relaxed atmosphere from which he will be testifying, lose the effect of the oath or admonition to tell the truth, and drift away into the world of play, losing the need to tell the truth.

Family law – child – ill-treatment of – school teachers – forcing children whose parents had not paid fees to stand during lessons – such constituting ill-treatment and an offence under s 7(1) of Children's Act [*Chapter 5:06*] – lack of means as a defence – irrelevance of

S v *Nyabeza & Anor* HB-1-11 (Cheda J, Ndou J concurring) (Judgment delivered 13 January 2011)

See above, under CRIMINAL LAW Statutory offences (Children's Act [*Chapter 5:06*] – s 7(1)).

Family law – husband and wife – divorce – division of property – immovable property registered in joint names – when division other than a 50:50 split may be ordered

Kanoyangwa v *Kanoyangwa* HH-23-11 (Chitakunye J) (Judgment delivered 27 January 2011)

The parties were husband and wife. The husband sued the wife for divorce; she counter-claimed for a 50:50 division of a house that had been bought and registered in the joint names of the parties. The plaintiff argued that, as the property and the transfer fees were paid for entirely from his retrenchment package, the defendant did not deserve a 50% share.
Held: Where, as in this case, the immovable property is registered in the joint names of the spouses, this fact must be recognised as a starting point, because where a property is registered in joint names the presumption is that it is held in equal shares unless proved otherwise. In order to take a spouse's share and transfer it to the other there ought to be some solid ground for so doing. Here, the plaintiff's retrenchment package was not the couple's savings over a period of time. It was not like a loan where repayments would be needed and whereby during the period of repayment the defendant would take care of some aspects to cushion the plaintiff. This was a case where the defendant's share could be tempered in favour of the plaintiff and a 65:35 split would be appropriate.

Family law – husband and wife – divorce – division of property following divorce – sale of matrimonial home – home sold by husband – whether sale intended to defeat wife's rights in property

Zingwe v *Gwanzura & Anor* HH-129-11 (Kudya J) (Judgment delivered 22 June 2011)

See above, under CONTRACT (Validity).

Immoveable property – registration of – same property registered twice – first deed of transfer processed after second – first deed nevertheless valid and ownership conveyed in terms thereof

Katerere v *Chiangwa & Ors* HH-122-11 (Mavangira J) (Judgment delivered 15 June 2011)

See above, under ADMINISTRATION OF ESTATES (Executor – executor dative).

Immoveable property – title deed – cancellation – when court may order cancellation – fraud on part of registered holder of deed

Zingwe v *Gwanzura & Anor* HH-129-11 (Kudya J) (Judgment delivered 22 June 2011)

See above, under CONTRACT (Validity).

Interpretation of statutes – fiscal legislation – strict construction required – no room for equitable construction

Heywood Haulage Invstms Central Africa (Pvt) Ltd v *Commr-General ZRA* HH-81-11 (Chiweshe JP) (Judgment delivered 30 March 2011)

See below, under REVENUE AND PUBLIC FINANCE (Income tax).

Land – acquisition – land acquired by State – holder of "offer letter" in respect of such land – right to seek relief against former owner of land who remains thereon

McGregor v *Saburi & Ors* HH-33-11 (Chiweshe JP) (Judgment delivered 23 February 2011)

The applicant was the owner of a farm was compulsorily acquired by the State in terms of the Land Acquisition Act [*Chapter 20:10*]. He failed to vacate the farm within the prescribed period and was charged with and convicted of contravening s 3 of the Gazetted Land (Consequential Provisions Act [*Chapter 20:28*]. The sentence imposed included, as required by law, an order for the applicant's eviction from this farm. He filed a notice of appeal against both conviction and sentence. When the applicant returned to the farm, he found the first respondent and others in possession of the farm. As they would not leave, he brought an application for a spoliation order.

Held: (1) while the applicant had been in "peaceful and undisturbed occupation" of the land and therefore entitled to a spoliation order under the common law, statutory provisions override the common law. Following the acquisition by the State of the land and the provisions in terms of s 3 of the Gazetted Lands (Consequential Provisions) Act that the applicant should vacate the land within the prescribed period, he cannot at law claim possession of the land he is required to have vacated, nor, if he has not vacated such land, can he claim to be in peaceful and undisturbed possession. Such an interpretation of the provisions of that Act would lead to an absurdity and subvert the clear intention of the legislature. The intention of the legislature is to create vacant possession on acquired land in order that the beneficiaries of the land reform programme may benefit through resettlement thereon. If the State does not secure vacant possession, the intention of the legislature would obviously be frustrated. The former owner or occupier of gazetted land loses all rights over such land. Ownership vests in the State and continued occupation after the prescribed period without authority is illegal and renders such owner or occupier subject to prosecution.

(2) The holder of an offer letter has authority granted by the owner of the land, that is, the State, to occupy and utilize the land in question. He has a right and a legitimate interest to access the property. That right is enforceable against any other person who may seek to deprive him of it or frustrate his enjoyment of the same. The holder of an offer letter is perfectly entitled to seek an eviction order against persons who may illegally be in occupation of such property. He may not, however, take the law into his own hands and act without a court order. The offer letter confers upon its holder the *locus standi* to approach the courts for appropriate relief.

Land – acquisition – land acquired by State – land subject to bilateral investment agreement – such land subject to acquisition – right of owner of land to challenge acquisition – such right removed by s 16B of Constitution

Forrester Estate (Pvt) Ltd v *Chirume* HH-40-11 (Chiweshe JP) (Judgment delivered 23 February 2011)

The applicant was the owner of a farm. The applicant's majority shareholders were German nationals whose investment was protected by a "Bilateral Investments Promotion and Protection Agreement (BIPPA), which was signed by the Governments of Zimbabwe and Germany in 1995. A portion of the farm was gazetted for

acquisition for "resettlement" and allocated to the respondent. He was given an "offer letter" and forcibly occupied the portion of the farm. Prior to the occupation the applicant was in peaceful and undisturbed possession of the property. The applicant argued that the property had not been acquired by the State. In so arguing, it has relied on various judgments of the High Court in which it has been consistently held that the purported acquisition of the property through a notice issued in terms of s 5 and orders issued in terms of s 8 of the Land Acquisition Act [*Chapter 20:10*] were in contravention of the BIPPA signed between Zimbabwe and Germany and therefore were of no legal force or effect.
Held: (1) the piece of land was identified in the *Gazette* and therefore was acquired by the State in terms of s 16B(2)(a) of the Constitution.
(2) Section 16B(3)(a) of the Constitution provides that a person having any right or interest in land that has been acquired shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge. This meant that the applicant was precluded from challenging the acquisition of the property in court and the court was in turn precluded from entertaining any such challenge. In any event, even though the property was subject to a BIPPA, it was capable of proper and lawful acquisition in terms of s 16B of the Constitution.

Land – communal land – allocation – who may allocate – chief having no jurisdiction to allocate land

Chihoro v *Murombo & Anor* HH-7-11 (Karwi J, Omerjee J concurring) (Judgment delivered 4 May 2011)

See above, under COURT (Community court).

Landlord and tenant – lease – termination – notice – grounds for ejectment – "good and sufficient grounds" – what landlord must show – what tenant must show in order to resist claim for ejectment – Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) – s 22(2)

Landlord and tenant – lease – notice of termination – validity – notice in respect of commercial premises wrongly citing regulations applicable to dwelling houses – main purpose of notice otherwise clear – notice valid

Wellcroft Invstms (Pvt) Ltd v *Modern Carpets (Pvt) Ltd* HH-38-11 (Kudya J, Hlatshwayo J concurring) (Judgment delivered 16 February 2011)

An eviction order had been granted against the appellant following notice of termination of lease of commercial premises, which the respondent wanted for its own use. The respondent had given notice, purportedly in terms of the Rent Regulations 2007 (which regulate the lease of dwellings) instead of the Commercial Premises (Rent) Regulations 1983. The appellant argued that the notice of termination was invalid and that the respondent failed to establish good and sufficient grounds to justify the eviction of the appellant.
Held: (1) it was not necessary for the lessor to state in the notice the statute under which he was giving the lessee notice to vacate. The main apparent purpose of the notice was to advise the lessee of the termination of the lease at the expiration of three months. An objective assessment of the lessee's behaviour showed that it perfectly understood that it was being requested to leave the premises at the end of the notice period.
(2) For the court to find that the lessor had good and sufficient grounds to order the ejectment of the tenant, the court is enjoined to predominantly look at the needs and circumstances advanced by the lessor to the exclusion of the needs and circumstances of the lessee. All that the respondent was required to do in the court *a quo* was to bring some small measure of evidence to demonstrate the genuineness of its assertion that it required the premises for its own use. For the appellant to defeat the claim, it would have had to show that the respondent did not genuinely desire the use the premises but wanted to evict the appellant, firstly, because it had declined to pay a higher rental and, secondly, in order to lease the premises to a tenant who was willing to pay a higher rental. In the absence of such evidence the appeal must fail.

Landlord and tenant – tenant – statutory tenant – eviction of – good and sufficient cause for requiring eviction – can include fact that property is required for repairs and renovations directed by local authority

Arjun Invstms (Pvt) Ltd v *Mutambirwa & Ors* HB-64-11 (Cheda J) (Judgment delivered 16 June 2011)

To successfully claim to be a statutory tenant, a person must comply with the requirement to pay rent arising from the lease agreement. It is through that compliance that the person may seek and obtain protection from the

courts. A landlord who wishes to evict a statutory tenant must show good and sufficient cause for requesting an order for the eviction of the tenant. Good and sufficient cause would include that the landlord it required the property for repairs and renovations as directed by the local authority. If the repairs are urgent and carried out while the tenant remains in occupation, the landlord may require him to vacate the premises, as it would be physically impossible for such repairs and renovations to be effected while any person is in occupation of the rented property.

Landlord and tenant – tenant – statutory tenancy – when created – requirements to be observed by statutory tenant

Landlord and tenant – tenant – statutory tenant – eviction – grounds for – "good and sufficient grounds" – landlord requiring premises for his own use – what landlord must show – tenant in breach of lease – failure to pay rent – amount of rent not agreed – requirement to pay fair rental – what constitutes "fair rental"

John Sisk & Son Zimbabwe (Pvt) ltd v *Altem Entprs (Pvt) Ltd & Anor* HH-83-11 (Patel J) (Judgment delivered 31 March 2011)

Under ss 22 and 23 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), when a lease expires by effluxion of time or in consequence of notice duly given by the lessor, a statutory tenancy is automatically created. The new relationship between the parties is subject to the same rights and duties and is governed by the same terms and conditions as applied under the contractual lease, except where these are inconsistent with the Regulations. Thereafter, the statutory tenant is entitled to remain in the leased premises and cannot be evicted so long as he continues to pay the rent due, within seven days of the due date, and performs the other conditions of the lease. The "rent due" is the fair rent fixed by the Commercial Rent Board or, in any other case, the rent due in terms of the lease.

An order for the eviction of a statutory tenant may only be granted where the lessor has good and sufficient grounds for requiring such order, other than that the lessee has declined to agree to an increase in rent or that the lessor wishes to lease the premises to some other person. What constitutes "good and sufficient grounds" for the eviction of a statutory tenant is not susceptible of exhaustive definition, but it is settled law that such grounds exist where the lessor genuinely requires the use of the leased premises for the operation of a business. The landlord need do no more than assert his reasons in good faith and then bring some small measure of evidence to demonstrate the genuineness of his assertion; it then rests upon the lessee who resists ejectment to bring forward circumstances casting doubt on the genuineness of the landlord's claims. Once the court is satisfied that the lessor wishes to use the premises for his own purpose, the reason that has actuated him to make that decision is irrelevant and has no bearing on his *bona fides*. Moreover, it is the position of the lessor that has to be considered and not that of the lessee or his needs or circumstances. The fact that the landlord is prepared to incur some loss in order to facilitate its own business operations does not preclude the right to repossess its property, though it may cast doubt on the landlord's *bona fides*.

Even if the landlord is unable to show "good and sufficient grounds" for eviction of a statutory tenant, he is entitled to cancel the lease if there has been a breach of the lease agreement. Such a breach could include failure to pay the rent on due date and sub-letting the premises where the agreement specifically prohibits a sub-lease.

Where the amount of rent payable has not been agreed upon by the parties, the lessee must pay that amount which it contends represents a fair rental. Failure to do so entitles the lessor to cancel the lease and repossess the tenanted premises by ejecting the lessee. Offering a derisory amount which could not possibly represent a fair rental for the premises would not relieve the tenant of his obligations. The tenant's contention as to what represents a fair rental must be reasonably formed and defensible by some commercial criterion.

Landlord and tenant – statutory tenant – eviction of – landlord alleging good and sufficient grounds for eviction – what constitute "good and sufficient" grounds – what landlord must show – period of notice of eviction – factors which court must consider

Tobacco Sales Floors Ltd v *Swift Debt Collectors (Pvt) Ltd* HH-111-11 (Gowora J) (Judgment delivered 24 May 2011)

See above, under COMPANY (Director).

Legal practitioner – conduct and ethics – duty to court – legal practitioner having actively participated in client's affairs before court hearing – practitioner should not act for party in litigation

Core Mining and Minerals Resources (Pvt) Ltd v *Zimbabwe Mining Development Corp & Ors* HH-280-10 (Mavingira J) (Judgment delivered 5 January 2011)

The fifth respondent (the Minister of Mines) directed that the board of the first respondent should investigate and establish, amongst other issues, the applicant's shareholding as well as the "standing" of its current shareholders. The Minister wanted a professionally compiled report and a "suitable person" to be identified to undertake the investigation. The person then appointed was a legal practitioner who later appeared as counsel for the first, second and fifth respondents. He had, before the litigation, attended a meeting of the first respondent's board and given advice there. He was involved in the investigations that were conducted and which led to the prosecution of the deponent to the applicant's founding affidavit.

The applicant urgently sought an order preventing the respondent's counsel or his firm from appearing for the respondents.. The applicant argued that where a legal practitioner gives legal advice to a board of directors, such legal practitioner cannot thereafter represent the same client as a legal practitioner. It also argued that the firm should not to be allowed to represent the first and second respondents in the proceedings as the affidavits that they filed on behalf of those respondents were prepared and commissioned by the same firm. This, it was argued, was unethical conduct which the court should not countenance.

Held: (1) counsel's and his firm's involvement could not for the purposes of the proceedings be said to be merely that of a legal practitioner. He had participated in the pertinent affairs at a level that precluded him from appearing for the respondents as a legal practitioner in the proceedings. He had aligned himself so closely with his client's case that he had displayed an interest in the case going beyond that of a legal practitioner. It is not the function of the legal practitioner to step into the shoes of the client and to perform acts that are materially related to the dispute before the court in an endeavour to buttress the case of his client. (2) An affidavit should be sworn before a commissioner of oaths who is independent of the office in which it is drawn. It should not be taken before a member of the firm who is acting in the case and such an affidavit will not be admitted.

Local government – mayor – election and removal of – procedure – not possible for council to remove mayor by a mere resolution – when a new mayor may be elected

Wakatama & Ors v *Madamombe* S-10-12 (Garwe JA, Ziyambi JA & Cheda JA concurring) (Judgment delivered 8 November 2010)

The respondent was one of several candidates who were elected in 2008 as councillors of the Bindura Municipality. At the council's first meeting after the election, the respondent and the second appellant were elected mayor and deputy mayor respectively. About two months later, a councillor drafted a motion for the rescission of the resolution in terms of which the respondent had been elected mayor. The councillor made it clear that the intention was to move a motion to pass a vote of no confidence on the respondent as mayor. He made a number of allegations of impropriety on the part of the respondent as justification for the motion. The motion, having been seconded by other councillors, was referred to the acting chamber secretary who in turn referred the same to the third appellant who was the town clerk. The town clerk convened a council meeting to deliberate on the motion. The respondent queried the correctness of the procedure that had been followed. When it became clear that some of the councillors supported the procedure adopted, the respondent declared the meeting closed and left the chamber in the company of three other councillors. The remaining councillors continued with the motion under the chairmanship of the second appellant, the deputy mayor. Following those deliberations the resolution in question was rescinded and the appointment of the respondent and the second appellant as mayor and deputy mayor was rescinded. Immediately thereafter the first and second appellants were elected mayor and deputy mayor respectively.

The respondent obtained an order from the High Court declaring the election of the first and second appellants to be null and void and further declaring the respondent as the lawfully elected mayor. The court was of the view that s 89 of the Urban Councils Act [*Chapter 29:15*], on which the appellants sought to rely, related to general resolutions of council in ordinary meetings and did not apply to the situation where council sought to remove a duly elected mayor from office. In particular, the court held that a councillor elected as mayor cannot be lawfully removed from the position by a resolution passed by councillors in a meeting in the absence of the seat of the mayor falling vacant as provided for under s 103 of the Act. On appeal, one of the issues raised was whether the application should have been dismissed because the Minister of Local Government was not cited.

Held: (1) the non-joinder of the Minister was not fatal. The provisions of r 87 of the High Court Rules 1971 were clear and allowed of no ambiguity.

(2) While it is correct that s 28 of the Interpretation Act [*Chapter 1:01*] provides that the power to appoint a person to an office necessarily includes the power to remove or suspend him, this power must, in terms of s 2 of the Act, be read against the specific provisions of a particular enactment. In s 103 of the Urban Councils Act, the process of electing a mayor is set out. The meeting at which the mayor is elected must be chaired by the district administrator. The person elected holds office until the election or appointment of a successor. A successor can only be appointed if the seat of the councillor who is mayor or deputy mayor becomes vacant by virtue of s 103 as read with s 78(2) of the Act.
(3) Section 89, which sets out how resolutions of councils may be rescinded or altered, is a general provision which relates to resolutions passed at ordinary meetings of the council. The meeting at which a mayor is elected is not an ordinary meeting which ends in a resolution. There is no need for a resolution before the person elected as mayor assumes the position. If the appellants' submission that a mere council resolution would suffice to remove a mayor from office were to be taken to its logical conclusion, a situation could arise where there could be a motion by one councillor removing a mayor and another motion re-electing the same mayor by another councillor. This surely could not have been the intention of the legislature.

Notes: (1) the High Court's judgment is reported as *Madamombe* v *Bundura Municipal Council & Ors* 2010 (1) ZLR 1 (H).

(2) Although the judgment is dated 8 November 2010, it seems likely that this was the date on which the court announced its decision; the judgment itself has a 2012 number and only became available late in 2012, too late to be included in 2010 (2) ZLR, which has already been printed. It will be included in 2011 (1) ZLR, which is under preparation.

Mines and minerals – claim – registered claim – cancellation of registration – grounds for – allegation of "overpegging" of another claim – procedure to follow – cancellation on grounds that area reserved against prospecting – procedure to follow

BMG Mining (Pvt) Ltd v *Mining Commr, Bulawayo & Ors* HB-11-05 (Mathonsi J) (Judgment delivered 20 January 2011)

The applicant had pegged and registered certain mining claims. The third respondent's holding company complained to the first respondent, the Mining Commissioner for the Bulawayo District, alleging that claims already registered by the third respondent had been over-pegged by the applicant. The first respondent then purported to cancel the applicant's claims. She claimed to be acting in accordance with s 50 of the Mines and Minerals Act [*Chapter 21:05*], which allows cancellation where the site pegged was reserved against prospecting and pegging. The applicant sought a declaration that it was the lawfully registered owner of the claims.
Held: If the cancellation was in breach of the Act, such cancellation was void *ab initio* because anything done by an official in excess of the powers conferred upon him or without following the procedure for such cancellation is null and void. Section 50(2) requires the mining commissioner, *inter alia*, to give at least 30 days' notice to the affected party of the intention to cancel the registration. Even if the section applied (which was unlikely, given that the area was not reserved against prospecting and pegging under ss 31 or 35, and s 258(3) has no bearing and the pegging method has not been questioned), the first respondent had not complied with the procedure for cancellation set out in subss (2) and (3) of s 50. This therefore meant that her actions not only offended the *audi alteram partem* principle but also that failure to comply with the mandatory procedural requirements renders her decision *ultra vires* s 50. If the first respondent had reason to believe that the registration of applicant's claims was questionable or that there might have been a case of overpegging, her duty was to investigate the matter thoroughly and act in accordance with the provisions of the Act. Overpegging complaints should be dealt with in terms of ss 353 and 354 Act, which had not been followed. She appeared to have acted simply on the basis of the complaint made on behalf of the third respondent and did not conduct any meaningful investigation, let alone commission a survey in terms of s 353. The application would therefore be granted.

Police – discipline – trial of member by a single officer for breach of Police Act [*Chapter 11:10*] – such member not entitled to request trial before magistrates court

Nyamande v *Min of Home Affairs & Ors* HB-14-11 (Kamocha J) (Judgment delivered 3 February 2011)

A member of the police force who is tried for an offence under the Police Act [*Chapter 11:10*] by a single officer is not entitled to demand that he be tried by a magistrates court instead. This right is only given by s 32 of the Act to a member who is brought for trial before a board of officers.

Practice and procedure – affidavit – attestation – affidavit should be sworn to by independent commissioner of oaths

Core Mining and Minerals Resources (Pvt) Ltd v *Zimbabwe Mining Development Corp & Ors* HH-280-20 (Mavingira J) (Judgment delivered 5 January 2011)

See above, under LEGAL PRACTITIONER (Conduct and ethics)

Practice and procedure – affidavit – attestation – who may attest to affidavit – person having an "interest" in matter to which affidavit relates – such person not entitled to attest affidavit – exceptions – person whose interest arises from employment – director of company seeking eviction of tenant – whether director has an interest in matter

Tobacco Sales Floors Ltd v *Swift Debt Collectors (Pvt) Ltd* HH-111-11 (Gowora J) (Judgment delivered 24 May 2011)

See above, under COMPANY (Director).

Practice and procedure – affidavit – authorization of deponent – failure by deponent to assert that deponent on behalf of an artificial person had been authorized – other party raising issue of authorization – steps to be taken to deal with issue

Mhanyami Fishing & Tpt Co-op Soc Ltd & Ors v *Dir-Gen Parks & Wildlife Mgmt Authority & Ors* HH-92-11 (Makoni J) (Judgment delivered 15 June 2011)

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

Practice and procedure – affidavit – founding affidavit – contents and purpose of – should set out facts succinctly – voluminous and argumentative affidavits not in compliance with rules of court

African Resources Ltd & Ors v *Gwaradzimba NO & Ors* S-2-11 (Chidyausiku CJ, Malaba DCJ, Garwe JA & Cheda AJA concurring; Sandura JA issued a separate judgment, which is not yet available) (Judgment delivered 1 February 2011)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – s 16)

Practice and procedure – affidavit – validity – affidavit deposed to by person under a legal disability – such affidavit void

African Resources Ltd & Ors v *Gwaradzimba NO & Ors* S-2-11 (Chidyausiku CJ, Malaba DCJ, Garwe JA & Cheda AJA concurring; Sandura JA issued a separate judgment, which is not yet available) (Judgment delivered 1 February 2011)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – s 16)

Practice and procedure – application – use of application procedure – when proper – in event of conflicting evidence, correct course is to proceed by way of action

Morris v *Morris & Anor* HH-71-11 (Mawadze J) (10 March 2011)

See below, under PRACTICE AND PROCEDURE (Rescission of judgment).

Practice and procedure – attachment – to found or confirm jurisdiction – attachment a pre-condition to issue of process against foreign defendant – leave of court required

Chirongoma v *TDG Logistics & Anor* HB-6-11 (Mathonsi J) (Judgment delivered 27 January 2011)

The plaintiff, an *incola* of Zimbabwe issued summons against the first defendant, a South African company, and the second defendant, its South African insurer, claiming the replacement of its motor vehicle and a trailer damaged as a result of a collision with the first defendant's haulage truck in 2007. He also claimed certain damages which arose as a result of the same accident. At the time the summons was issued the plaintiff had not obtained a court order for attachment of the first defendant's property to confirm or found jurisdiction against the defendants. About a month and a half after the summons was issued, the plaintiff filed an application seeking an order for attachment of property to found jurisdiction and exactly 2 months after the summons had been issued the order of attachment of property was granted. The order authorised the Deputy Sheriff to impound any of the first respondent's vehicles crossing the border into Zimbabwe or already in Zimbabwe in order to found jurisdiction. This the Deputy Sheriff duly did; the impounded vehicle was released when the first defendant paid deposit of money to confirm jurisdiction. Thereafter the first defendant excepted to the summons and declaration as being null and void in that the summons was issued and sent for service against the first defendant before the plaintiff had obtained an order of attachment to found or confirm jurisdiction. It also averred that the attachment order did not validate the summons and declaration as the granting of the attachment order was a condition precedent to the issue of process; and that the order was invalid because as it ordered the attachment of first defendant's property which was not within the jurisdiction of the courts of Zimbabwe at the time that the order was granted.

Held: in terms of s 15 of the High Court Act [*Chapter 7:06*], the plaintiff has the burden of having to satisfy the court, before the issue of process, that the *peregrinus* is present within Zimbabwe for arrest or has property within the country capable of attachment. At the time the summons was issued, neither the first defendant nor its property was located in Zimbabwe. In addition, no authority or permission had been obtained from the court to issue the process. The argument that the word "court" included the Registrar that by issuing the process the registrar had permitted and directed its issue without an order for attachment could not be accepted. The attachment order has been issued in error, as the court's permission had not been obtained for the summons to be issued. Permission could not be granted in retrospect: attachment or the existence of the defendant or his property within Zimbabwe is a condition precedent to the issue of process. The attachment order was a nullity and no legal rights flowed from it.

Practice and procedure – judgment – currency in which judgment may be expressed – judgment may be expressed in currency which will redress loss suffered – local currency rendered worthless due to inflation – appropriate to give judgment in foreign currency

Samanyau & Ors v *Pleximail (Pvt) Ltd* HH-108-11 (Mutema J) (Judgment delivered 8 June 2011)

See above, under EMPLOYMENT (Unlawful dismissal)

Practice and procedure – motion proceedings – dispute of fact – approach court should take – need for dispute to exist before taking robust view

Tobacco Sales Floors Ltd v *Swift Debt Collectors (Pvt) Ltd* HH-111-11 (Gowora J) (Judgment delivered 24 May 2011)

See above, under COMPANY (Director).

Practice and procedure – parties – citation of – Parks and Wild Life Management Authority – Authority itself and Board should be cited

Mhanyami Fishing & Tpt Co-op Soc Ltd & Ors v *Dir-Gen Parks & Wildlife Mgmt Authority & Ors* HH-92-11 (Makoni J) (Judgment delivered 15 June 2011)

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

Practice and procedure – parties – company – right of director to bring action on behalf of company – allegation that director not authorized to bring action – what party making such allegation must show

Central African Bldg Construction v *Construction Resources Africa (Pvt) Ltd* HH-47-11 (Gowora J) (Judgment delivered 2 March 2011)

See above, under COMPANY (Director – change of).

Practice and procedure – parties – joinder – failure to join interested party – not fatal

Wakatama & Ors v *Madamombe* S-10-12 (Garwe JA, Ziyambi JA & Cheda JA concurring) (Judgment delivered 8 November 2010)

See above, under LOCAL GOVERNMENT (Mayor).

Practice and procedure – rescission of judgment – principles – discovery of new documents – need for documents to have existed at time judgment was given – not permissible to rely on document created subsequently

Morris v *Morris & Anor* HH-71-11 (Mawadze J) (10 March 2011)

The applicant was the half-brother of the first respondent. Their deceased mother had made a will in 1981, under which both parties were beneficiaries. However, in late 2005, two months before her death, she made another will which excluded the applicant. The first respondent was appointed as executrix. The applicant brought an application, which was granted by default (the first respondent being out of the country), for the first will to be declared to be the valid will and for the appointment of the first respondent to be set aside. The basis of the application was that the second will was a forgery. The applicant then had the house, the principal asset of the estate, transferred into his name. This was done without the permission of the Master. The applicant then sold the house to a third party, although the transfer did not take place.

The first respondent, on learning of these events, obtained a court order setting aside the order that had been granted in default. Nine months later, the applicant brought the present application, in which he sought the setting aside of the order obtained by the first respondent. In support of his application he sought to adduce evidence from a forensic scientist which purported to show that the two wills were not signed by the same person. He claimed that it had always been his contention that the second will was forged but that he had not had counsel nor the funds to obtain a scientific report. The forensic report was a photocopy and without an explanation from the scientist was meaningless.

It was argued on behalf of the first respondent that the matter raised by the applicant was *res judicata*. It was improper and irregular for the applicant to seek a declaratory order by way of court application without first seeking to rescind or to have set aside the judgment. The dispute surrounding the 2005 will could not be resolved on the papers alone but through a trial where evidence should be led.

Held: (1) where there is conflicting evidence the correct course is to proceed by way of action rather than by motion proceedings. The consequences of choosing the wrong procedure are clear. If a litigant has reason to believe that facts essential to the success of his claim will probably be disputed and chooses to proceed by notice of motion, he does so at his peril: the court, in the exercise of its discretion, might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application.

(2) *In casu*, a final and definitive judgment on the matter had been delivered by a competent court. The general rule is that, once a final judgment or order has been given, neither the judge who gave it nor any other judge of parallel jurisdiction has the power to alter, rescind, vary or set it aside except in few instances recognised at common law or by the rules of court. One of the accepted grounds is discovery of new documents which, had they been available at trial, would have entitled the applicant for relief to judgment in his favour. The person applying to set aside the judgment must not only show that he was ignorant of the existence of the subsequently discovered documents but there must be a *justa causa* for the ignorance. Proof of the clearest possible description must be presented that it was not the applicant's fault that the document was not discovered before judgment. No document had been discovered which was in existence at the time the judgment was given. The document should have been in existence at that, so it would have been improper for the applicant subsequently to get a new document in the form of a forensic report and on that basis to request that the order be revisited. In

any event, the forensic report would not have settled the issue, as it contained the opinion of a scientist and that opinion could be challenged.

Practice and procedure – summary judgment – defence to – need to show facts which would amount to a defence – facts alleged not constituting a defence – defendant raising unliquidated counter-claim – need for defendant to aver sufficient facts to disclose cause of action – quantum of claim – need to establish quantum

Birria Invstms (Pvt) Ltd v *Art Deal (Pvt) Ltd & Anor* HH-266-10 (Gowora J) (Judgment delivered 12 January 2011)

The plaintiff sought summary judgment against the defendants seeking an order declaring that a lease agreement was invalid, alternatively, that the lease agreement be cancelled, together with the refund of various sums paid to the defendants in terms of the lease. The plaintiff claimed that there had been a mistake as to the identity of the premises to be leased, in it was expecting to lease a whole floor of the building in question, not just the portion which it was allowed access to. The defendants resisted the application, claiming that, despite the mistake in the contract about the address of the premises, a contract came into being. They also alleged facts which amounted to a counter-claim against the plaintiff, on several different grounds. The total sum claimed from the plaintiff exceeded that which the plaintiff was demanding.
Held: (1) It is an essential term of a contract of lease that the property that is the subject matter of the agreement be described with sufficient clarity for the contract not to be found void for vagueness. The improper description of the area that the plaintiff was to occupy was a unilateral mistake which could be attributed solely to the defendants. The parties were clearly not in agreement. There therefore existed a fundamental mistake as to the description of the premises being let. Due to the lack of clarity as to what was being leased no contract came into being. Thus the facts alleged by the defendants as the basis of their defence to the claim would not entitle them to succeed at trial and were thus not a sufficient basis for this defence to the application for summary judgment.
(2) A defendant who admits the claim is entitled to raise an unliquidated counter-claim as a defence. In order to succeed in the counter-claim as a defence to the application for summary judgment, the defendant must aver sufficient facts as to disclose a cause of action in the counter-claim. If the counter-claim exceeds the main claim, it constitutes a defence in respect of the whole claim; and if the counter-claim is less than the main claim, the defendant may pay the balance into court and in this way raise a valid defence to whole main claim. On the other hand, if the defendant raises an unliquidated counter-claim without in any way establishing its quantum or indeed making an effort to establish it, and where it appears that, in all probability, the counter-claim will be appreciably less than the main claim, and no payment into court was made, such counter-claim in does not disclose a *bona fide* defence for the purpose of summary judgment. *In casu*, the facts alleged by the defendants were not sufficient to disclose a cause of action, and summary judgment would therefore be granted.

Practice and procedure – summary judgment – defendant raising triable issue – what defendant needs to allege – what facts should be placed before court – what opposing affidavit must aver

Ashanti Goldfields Zimbabwe Ltd v *Matimura & Ors* HH-54-11 (Gowora J) (Judgment delivered 23 February 2011)

The plaintiff sued the various defendants, who were its former employees, for eviction from the houses they occupied and sought summary judgment against the defendants. The plaintiff's case was that the defendants were occupying the houses in terms of leases and that, as the defendants had not paid the rent, they should be evicted. The defendants' case was that they were not tenants, having purchased the properties in terms of the so-called lease agreements. The plaintiff contended that the court had to determine whether or not the parties entered into an agreement of sale in respect of the houses in question and whether or not the respondents were entitled to an order for the transfer of the stands into their names; and, lastly, whether or not the plaintiff had any grounds for the ejectment of the defendants from the houses they are occupying. In arguing for an order for summary judgment the plaintiff contended that the Supreme Court had already, in an earlier case involving the plaintiff and other employees, determined that the lease signed by the plaintiff and each of the employees did not constitute an agreement for the sale of the houses as contended by the defendants. The defendants argued that the facts in their cases were different.

Held: the only issue for determination at this stage was whether the plaintiff had any grounds for seeking ejectment. The other matters were for determination at the trial. At the stage of the summary judgment, it was enough for the court to decide whether the defendants had raised a *prima facie* defence to escape summary judgment. It was not necessary to make a decision as to whether or not the contract executed by the parties was a lease agreement or an agreement for the sale to the employees of the properties they are occupying.
To show that he has a *prima facie* defence, the defendant only needs to allege facts which, if he can succeed in establishing at the trial, would entitle him to succeed in his defence at the trial. It is not necessary for the defendant to make out a case for the probable success of his defence at this stage. The onus on him at this stage is much lighter than at the trial stage. What is required therefore of a defendant is that he should place before the court such facts as would show a *prima facie* defence to the application for summary judgment. The facts must be sufficiently detailed, to the extent that the court hearing the application can be satisfied that the defence being proffered is a plausible one. The affidavit must not just contain the facts that he seeks to rely upon: the facts themselves must be such that they reveal a defence that can be sustained at trial. There is need therefore for the opposing affidavit to go beyond what is contained in the plea. In addition, the averments in the affidavit must themselves lead to a plausible defence or be such that the court hearing the application concludes that an injustice is likely to occur if summary judgment were to be granted in favour of the plaintiff. In effect, the defendant has to allege facts which convince the court that there are triable issues between the parties and that an order for summary judgment would result in an injustice to one if not both parties.
Based on the documents submitted by the defendants, it appeared that the parties may well have gone beyond a simple lease agreement in respect of the residences that the employees were occupying and summary judgment would therefore not be appropriate.

Practice and procedure – summons – validity – foreign defendant – requirements before summons may be issued – leave of court required to issue process – need for defendant to be present within Zimbabwe or to have property within Zimbabwe that may be attached – Registrar's permission to issue process not sufficient

Chirongoma v *TDG Logistics & Anor* HB-6-11 (Mathonsi J) (Judgment delivered 27 January 2011)

See above, under PRACTICE AND PROCEDURE (Attachment)

Property and real rights – possessor – improvements effected by – compensation for – entitlement to – useful expenses and necessary expenses – distinction between – compensation to which possessor entitled

Matshazi v *Mlotshwa & Anor* HB-25-11 (Ndou J) (Judgment delivered 17 February 2011)

A possessor's right to compensation for improvements to the property of another is determined according to his status as a possessor i.e. whether he is a *bona fide* possessor, a *mala fide* possessor, a lawful occupier, a *bona fide* occupier or a *mala fide* occupier. A *mala fide* possessor is a person who holds a thing *animo domini*, but who is fully of the fact that he is not the owner there. Such a person is entitled to claim necessary expenses (*impensae necessariae*) which were incurred for the preservation or protection of property. Necessary expenses may be recovered in full. The right to compensation for useful expenses has not yet been authoritatively settled in our law, though the weight of authority seems to be in favour of the view that he is so entitled. It is not sufficient that there is an increase in the market value of the property, but the expenditure must result in an actual tangible improvement of the land. In respect of useful expenses, the possessor is entitled to recover either an amount equal to the value by which the farm has been enhanced or the actual expenditure incurred, whichever is the lesser. The owner may be released from liability to compensate if the improvements were not useful to him and the expenditure excessive, regard being had to his means and position.

Property and real rights – *res litigiosa* – *res* the subject of arbitration proceedings – when *res* can be said to become *litigiosa* – interim arbitral award barring transfer of property – property *res litigiosa* – alienation of *res litigiosa* – effect – sale valid *inter partes* only

Dudka & Ors v *Cheni Invstms (Pvt) Ltd & Ors* HH-124-11 (Makoni J) (Judgment delivered 15 June 2011)

See above, under ARBITRATION (Award – when becomes effective)

Property and real rights – spoliation order – entitlement to – former owner of expropriated land – has no right to be on land – not entitled to spoliation order

McGregor v *Saburi & Ors* HH-33-11 (Chiweshe JP) (Judgment delivered 23 February 2011)

See above, under LAND (Acquisition).

Property and real rights – spoliation order – entitlement to – occupier of immoveable property being removed by other persons having right in property – such other persons having no right to remove occupier without court order

Morten v *Morten & Ors* HH-51-11 (Mawadze J) (Judgment delivered 15 February 2011)

See above, under ADMINISTRATION OF ESTATES (Family of deceased person).

Revenue and public finance – income tax – payment thereof in foreign currency – employee's remuneration in foreign currency – remuneration not including payment in kind – tax no payable thereon in foreign currency

Heywood Haulage Invstms Central Africa (Pvt) Ltd v *Commr-General ZRA* HH-81-11 (Chiweshe JP)
(Judgment delivered 30 March 2011)

The applicant, for the three months before the multi-currency system came into effect in Zimbabwe, availed to its employees fuel coupons and food hampers as part payment of remuneration due to them. The rest was paid in local currency. The applicant had for the period under consideration paid employee tax in local currency. The respondent asserted that the fuel coupons and food hampers should be treated as remuneration in foreign currency and that PAYE in respect thereof should have been paid by the applicant in foreign currency. The applicant contended that the issuance of fuel coupons and food hampers could not, as a matter of law, be regarded as remuneration in foreign currency. The applicant sought a declaratory order to the effect that PAYE in foreign currency was not due. The respondent argued that since the applicant obtained the fuel coupons and food hampers using foreign currency and that the employees would in turn redeem them on the market in the form of foreign currency, PAYE should be paid in foreign currency. Alternatively, the respondent argued that the payment of remuneration in the form of fuel coupons and food hampers was a scheme aimed at avoiding the payment of tax in foreign currency. Finally, it was argued that "remuneration" paid in foreign currency was money or any other property, corporeal or incorporeal, having ascertainable money value, paid in United States dollars or Euros or any of the designated currencies, to an employee by way of a salary, wage, etc.
Held: In terms of para 3(1)(a) of the 13th Schedule to the Income Tax Act [*Chapter 23:06*] where remuneration from which employees' tax is required to be withheld is wholly or partly remuneration paid in foreign currency, the employer must remit PAYE in respect thereof in foreign currency, that is, in United States dollars or Euros or any other currency denominated under the Exchange Control (General) Order. The definition of remuneration restricted remuneration paid in foreign currency to payment in foreign currency. It did not include payment in kind, even if such kind might have been acquired by the employer using foreign currency or redeemed by the employee in foreign currency. In interpreting tax legislation, one must give effect strictly to the words used by the legislature. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in common; nothing is to be implied. One can only look fairly at the language used.

Revenue and public finance – procurement of commodities by State – requirement to purchase through tender process – when procurement may be made without going through tender

S v *Mangoma* HH-135-11 (Bhunu J) (Judgment delivered 28 June 2011)

See above, under CRIMINAL LAW (Offences under the Criminal Law Code [*Chapter 9:23*] – s 174(1)(a) – criminal abuse of duty as a public officer)

Revenue and public finance – Reserve Bank of Zimbabwe and Zimbabwe Revenue Authority – separate legal entities – money collected by Revenue Authority – must be paid into Consolidated Revenue Fund – government expenditure – must be authorised by Act of Parliament and paid from Fund – Reserve Bank having no authority to make payment on behalf of State

ZRA v *RBZ & Anor* HH-127-11 (Gowora J) (Judgment delivered June 2011 – date not given)

In pursuance of its obligations under the Revenue Authority Act [*Chapter 23:11*], the applicant, the Zimbabwe Revenue Authority, collected certain sums of money which were deposited in its account with two commercial banks. Pursuant to a directive issued through a monetary statement from the Governor of the respondent, the Reserve Bank of Zimbabwe, certain of the sums thus collected were "swept" into accounts held by the respondent with those same commercial banks. Both parties are statutory bodies, capable of suing and being sued in their own names. In spite of demands, the respondent did not return the money, claiming that it had been used for government expenditure. The applicant sought an order directing that the monies be paid back to it. It argued that all expenditure had to be accounted for in terms of the Constitution and that it was accountable to the Comptroller and Auditor-General.
Held: (1) the money held in the accounts constituted revenue collected by the applicant in terms of s 4 of the Revenue Authority Act. It was incumbent on the applicant to pay the money into the Consolidated Revenue Fund, which is established in terms of s 101 of the Constitution. Any expenditure on behalf of the government must emanate from the Consolidated Revenue Fund and be authorized by an Act of Parliament in terms of ss 102 and 103 of the Constitution. There was no statutory authority for the respondent to use the funds. There was no legal basis for the argument by the respondent that, as banker to the State, it had obligations to make payments as directed by the Minister of Finance.
(2) While the parties might both function under the Ministry of Finance, there were separate legal entities set up under separate Acts of Parliament. Each had its own board. There was no legal instrument authorizing the "sweeping" arrangement. Accordingly, the money should be repaid.

Revenue and public finance – tax – payment of – tax due to revenue authority in US dollars – overpayment previously made – previous overpayment made in US dollars to Reserve Bank and monies paid to revenue authority in local currency – not a payment to revenue authority in US dollars – not permissible to set off payment to Reserve Bank against debt due to revenue authority

Murowa Diamonds v *Commr-General, ZRA* HH-1-11 (Gorowa J) (Judgment delivered 12 January 2011)

The applicant owed the revenue authority certain sums of money in the form of withholding tax. The sums were payable un US currency, the tax obligation having been incurred since the introduction of the multi-currency system in Zimbabwe. When the revenue authority proposed to make the applicant's bank its agent for the collection of the sums due, the applicant sought an order preventing it from doing so. It averred that in the two years before the introduction of the multi-currency system, it had overpaid withholding tax. Accordingly, it sought to set off the overpayment against the tax that was due. When the earlier tax was paid, the applicant had, for reasons that were not fully explained, paid certain sums in foreign currency to the Reserve Bank, and the Reserve Bank had paid the revenue authority in local currency. At the time, there was no obligation to pay withholding tax in foreign currency. The revenue authority argued that any payment made to the Reserve Bank in foreign currency was not in terms of any legal obligation. Any withholding tax paid in local currency was not an overpayment in foreign currency. The applicant argued that, as both the Reserve Bank and the revenue authority fell under the umbrella of the *fiscus*, the payment made by the applicant should be recognized as having been received by the State; and that as long as it can be shown that the government benefited from the payment, then the set-off should be implemented in favour of the applicant.
Held: (1) Set-off is a process whereby debts which are mutually owed between the same parties are extinguished. In order that one debt may be set off against another, it is a prerequisite that both debts be liquid. In addition, the debts must clearly be between the same parties. However, in respect of government departments, a debt owed by one department cannot be off set against one owed to a different department. *In casu,* the entities in respect of which set-off was being claimed were not *strictu sensu* government departments. They existed in terms of enabling statutes and were completely separate legal *personae* in their own right, with their own boards of directors.
(2) It could not argued that the exercise by the revenue authority of its powers was improper where monies were admitted to be due and owing. The authority could be barred from exercising those powers only if it was acting improperly or if there was some irregularity in the manner in which the powers are being exercised, or that the sums sought to be collected from the exercise are not in fact owed to the *fiscus. In casu*, there was no allegation

that the respondent was improperly seeking to appoint an agent. There was also no suggestion that the withholding tax was not due. What the applicant sought to rely on was a payment made to a party, not then appointed as agent for the respondent, and which payment did not sound in US dollars when it was apparently credited to an account of the revenue authority. The US dollar payment remained in the account of the Reserve Bank.

Roads and road traffic – evidence – assessment – credibility of witnesses – need to test evidence against real evidence available

Dururu Tpt (Pvt) Ltd v *Mutamuko NO & Anor* HH-95-11 (Patel J) Judgment delivered 31 May 2011)

Credibility in collision cases cannot be measured by demeanour, but only by comparing the testimony against the real evidence. The testimony of the witnesses must be tested against the real or extrinsic evidence available, such as the sketch plan of the scene of the accident, the damage occasioned to the motor vehicles involved, and the facts recorded in the traffic accident report book. Similarly, where a witness makes an assertion that is mechanically impossible, one cannot judge his veracity by reference to his demeanour, but by applying the laws of physics.

Set-off – debt – debt due to taxpayer by an organ of the State – when can be set off against tax owed by taxpayer to revenue authority – money paid to Reserve Bank – not a payment to revenue authority

Murowa Diamonds v *Commr-General, ZRA* HH-1-11 (Gorowa J) (Judgment delivered 12 January 2011)

See above, under REVENUE AND PUBLIC FINANCE (Tax – payment of).

Statutes – Procurement Act [*Chapter 22:14*] – s 30 – requirement for State to procure goods through tender process – circumstances where purchase other than through tender lawful

S v *Mangoma* HH-135-11 (Bhunu J) (Judgment delivered 28 June 2011)

See above, under CRIMINAL LAW (Offences under the Criminal Law Code [*Chapter 9:23*] – s 174(1)(a) – criminal abuse of duty as a public officer)

Statutes – Public Order and Security Act [*Chapter 11:17*] – power of police to control or prohibit meetings – police being of view that meeting could result in disorder – whether police obliged to consult convener – failure by police to do so – may be cured by evidence led at appeal to magistrates court

Biti v *Chimboza NO & Ors* HH-143-12 (Chiweshe JP) (Judgment delivered 19 March 2011)

The applicant, a senior official in a political party, notified the regulating authority in terms of s 25 of the Public Order and Security Act [*Chapter 11:17*] of his party's intention to hold a rally about a week later at a particular venue. The regulating authority responded by advising the applicant that the venue had already been booked by another organisation. The applicant then sent another notice advising the regulating authority of his party's intention to hold a rally at another on the same date. The regulating authority advised the applicant that the proximity and timing of the intended rally was clashing with a rally held by another party, which would be held on the same date, at a venue some 500 metres away. On neither occasion did the regulating authority invite the applicant for consultations, negotiations, amendment of the notice or any other issues as provided for under s 26(3) of the Act. Instead, the regulating authority issued a prohibition notice in terms of s 26(9). The applicant then filed an appeal with the magistrates court in terms of s 27B of the Act. The regulating authority gave evidence at the appeal hearing. On the basis of that evidence the magistrate dismissed the appeal and confirmed the notice of prohibition.

The applicant argued that the second respondent had failed to comply with the peremptory provisions of the Act. The resultant prohibition order was therefore a nullity and the magistrate therefore should have granted the appeal. The applicant argued that the Act did not give the regulating authority any discretion based on his

experience or otherwise to dispense with the laid down procedures. The relevant provisions were mandatory and not merely directory, to be dispensed with at the discretion of the regulating authority.
The respondents, whilst conceding that the regulating authority had not abided by the relevant provisions of the Act, argued that the nature of the perceived threat was within his operational competency and experience. It was his experience that the holding of rallies by different parties at adjacent venues invariably led to violent clashes between supporters of rival parties. In the circumstances, therefore, he was justified in dispensing with the holding of consultative meetings as the threat was capable of assessment without the input of third parties. In any event, he did not have sufficient manpower to neutralise the perceived threat. For these reasons, he had decided to issue the prohibition order.
Held: (1) The provisions of s 26(3) were couched in positive language and, on the face of it, would appear to be intended to be mandatory provisions to be complied with strictly by the regulating authority. In that case, the regulating authority erred in issuing a prohibition order in the absence of any credible information given on oath. He also erred in failing to invite, as he would be required to do, the convener and other stakeholders to a consultative meeting to discuss the threat and the options available. However, by calling for evidence on oath from the regulating authority and hearing the parties, the magistrate in essence cured the defects or omissions inherent in the manner in which the regulating authority had initially proceeded. Having done so and no doubt having found the information given on oath to have been credible, the magistrate confirmed the prohibition order.
(2) *Prima facie* the procedures specified in s 26(3) to be complied with by the regulating authority will only be set in motion if the regulating authority receives information of a threat of disruption of traffic or of public order. If no such information is received then it can reasonably be argued that the regulating authority need not proceed as prescribed. Here, the regulating authority, without receiving any adverse information from a source other than himself, was of the opinion that, because of certain facts known to himself or drawn from his own operational experience, it would be imprudent to authorise the demonstration, meeting or public procession. In this situation, the consultation procedures cannot be triggered, because the legislature has not said that is what should be done. To fetter a regulatory authority's discretion in the manner suggested by the applicant would severely curtail the effective discharge by the police of their constitutional mandate – to maintain law and order in the country. In any event it would not be prudent to require that a member of the police force be obliged to hold consultations in the manner prescribed to test the reasonableness or otherwise of any information known to him through operational experience or other source privy to him or the force at large. Such information might well be sensitive or privileged the disclosure of which might well be detrimental to public order and security.

Statutes – Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] – ss 4, 6, 12, 13, 18, 21, 22, 23, 25, 29, 30 and 31 – not in contravention of ss 16 and 18 of the Constitution

African Resources Ltd & Ors v *Gwaradzimba NO & Ors* S-2-11 (Chidyausiku CJ, Malaba DCJ, Garwe JA & Cheda AJA concurring; Sandura JA's separate judgment is not yet available) (Judgment delivered 1 February 2011)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – s 16)

Trust – trustee – duties – removal from office by court – grounds for

Mashoko v *Mashoko/Chikosi Family Trust & Anor* HH-12-11 (Karwi J) (Judgment delivered 3 March 2011)

In deciding whether or nor to dissolve a trust or remove a trustee, the court has to be satisfied that the continued trusteeship does not endanger the interests of the trust and its beneficiaries.
A trustee must observe fiduciary duties when executing his duties. The three main principles which govern the administration of trusts are:

- the trustee must give effect to the trust instrument so far as it is lawful and effective
- the trustee must exercise his or her powers with care, diligence and skill which can be reasonably expected of a person who manages the affairs of another
- except as regards questions of law, the trustee is bound to exercise an independent discretion.

The courts must be guided by the welfare of beneficiaries when faced with the task of dissolving a trust or removing a trustee from office. Some of the commonly accepted grounds for the removal of a trustee from office are:

- where, without explanation, a trustee transfers trust funds from a safe investment into a personal account
- where a trustee deliberately refrains from advising a co-trustee of a decision to be taken on behalf a trust

- where a trustee treats trust property as his own; and
- where a trustee allows grave misconduct by a co-trustee in the administration of the property of the trust and thus exercises no control over trust property.

Wills – validity – will not complying with formalities prescribed by Wills Act [*Chapter 6:06*] – when Master may accept document as a will – procedure when Master's acceptance found to be unreasonable

Filon & Anor v *Sibanda & Ors* HH-89-11 (Patel J) (Judgment delivered 3 May 2011)

Under s 8(1) of the Wills Act [*Chapter 6:06*], the formalities for a valid will are: it must be in writing and signed by the testator, or some other person in his presence and at his direction, in the presence of two or more competent witnesses present at the same time, and each competent witness must sign the will in the presence of the testator and of the other witness. The object of these formalities is to eliminate, as far as possible, the perpetration of fraud, speculation and malpractice. Section 8(5) provision enables the Master to accept a document as a will, even though it does not comply with all the formalities for the execution of wills, where he is satisfied that the document drafted or executed by a person who has since died was intended to be his will. This does not create a rebuttable presumption in favour of the validity of any document purporting to be a will that is presented to the Master. The correct position is that a will which is complete and regular on the face of it is presumed to be valid, unless the contrary is shown. A will that is incomplete or irregular is presumed to be invalid, unless it is covered by one of the statutory exceptions. In terms of the exception provided by s 8(5), a will that does not comply with all the prescribed formalities may be accepted as a will by the Master, but only if he is satisfied that the document was drafted or executed by the deceased and that it was intended to be his will. If the facts show that the Master acted unreasonably in accepting a document as a will, the Master's finding may be set aside.

Words and phrases – matter in which person "has an interest" – meaning of "interest"

Tobacco Sales Floors Ltd v *Swift Debt Collectors (Pvt) Ltd* HH-111-11 (Gowora J) (Judgment delivered 24 May 2011)

See above, under COMPANY (Director).