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CASES DECIDED JULY – DECEMBER 2014

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

Administration of estates – intestate succession – spouse – entitlement to matrimonial home – descendants of deceased – only entitled to specified portion of remainder of estate – agreement between heirs on alternative distribution – only applicable to remainder of estate

Dzomonda & Ors v *Chipanda & Ors* HH-535-14 (Tsanga J) (Judgment delivered 2 October 2014)

The applicants were the children of N, who died intestate in 2011. She had divorced the applicants' father. In 1995 she was granted a stand in Harare. In the same year she married the first respondent under customary law and solemnised a civil marriage in 1997. A house was built on the stand as a joint endeavour by both spouses. The applicants stated that they and the first respondent concluded an agreement after N's death, in terms of which the property was to be sold, with 30% of the proceeds going to the first respondent and the balance to the applicants. The first defendant averred that he was coerced into signing this agreement. In any event, the executrix distributed the property in accordance with the Deceased Estates Succession Act [*Chapter 6:02*], the result being that the first respondent got the house.

The applicants sought to enforce the agreement with the first defendant, arguing that the house could not be considered as "free residue" for inheritance by the first respondent only.

Held: Where a party dies intestate and had a civil marriage, the Deceased Estates Succession Act recognises the rights of the surviving spouse to inherit, as well as those of the children, if any. In the absence of children, the blood relatives who are entitled to inherit are also spelled out. The first enquiry is whether or not there is a surviving spouse. If there is, the spouse's share is prioritised in inheriting from the free residue of the estate. Where the estate has excess assets after the surviving spouse has received what is mandated by the law, then the spouse, together with the children, are accorded certain stipulated legacies. These depend on whether the marriage was in or out of community of property. If, as here, the marriage was out of community of property, and the deceased spouse leaves any descendants entitled to inherit *ab intestato*, the surviving spouse is entitled, in terms of s 3A, to receive the house or other domestic premises, as well as the household goods and effects.

The primary thrust of the Act is spouse-centred. A spouse inherits the household goods and effects as well as the domestic premises. If the estate still has residue after this has been done, then the spouse and the children inherit specified statutory legacies. Inheritance by the children, therefore, clearly depends on the size of the estate. Where the marital home is the only asset, as here, then the law is clear: it should go to the surviving spouse.

The context in which these provisions of the Act were introduced is important in deciding the effect of the legislation. The intention was clearly that the spouse should inherit the matrimonial home to allow for a continuation of the life the spouse was accustomed to living. The benevolence of the family could no longer be assumed, as evidenced by reports of property grabbing. The heir under customary law, in particular, who was supposed to act as a father figure and protect the widow, had increasingly, in modern society with its money based economy, become a dying breed. More often than not, his own interests became paramount. In any event, women had by then made significant strides in society in terms of pressing for the recognition of both their economic and non-economic contributions in the marital union and in present day society. They rightly expected to benefit from the sweat of their brows instead of being cast aside as insignificant "others" upon the death of a spouse.

The applicants' argument that s 3A should be read as inferring that, where the house is the only asset it must be sold and the spouse together with the children must inherit a share, is not supported by a reading of the section, nor by the history and context that led to its adoption. It must also be borne in mind that this was not a divorce, where the courts are enjoined to evaluate the extent of each spouse's contribution.

Even if the Act only applies to assets acquired during the subsistence of the marriage, the property in this matter was so acquired.

The "agreement" purportedly drawn up between the applicants and the first respondent was invalid. In terms of s 5 of the Act, there must be property devolved on the heirs in undivided shares. If there is, they can enter into an alternative distribution arrangement. Here, the only asset was the house and that had to be inherited by the surviving spouse. Nothing remained to be distributed to the heirs.

Administration of estates – surviving spouse – who is – woman married under customary law when husband's marriage under Marriage Act still extant – cannot be declared surviving spouse

Ncube v *Dube & Ors* HB-132-14 (Takuva J) (Judgment delivered 11 September 2014)

The plaintiff issued summons against the defendants claiming an order declaring her as the sole surviving spouse of L. Her claim was based on the fact that, at the time of the L's death, the first defendant had already commenced divorce proceedings against him. Further, she claimed that the first defendant had been separated from L for more than 12 years during which she and L were living as husband and wife. They had married under customary law, despite the fact that L and the first defendant were still married in terms of the Marriage Act [*Chapter 5:11*].
Held: the real issue was this: what is the legal status of a customary law marriage contracted when either of the parties was married to someone else in accordance with the Marriage Act? Under s 68(3) of the Administration of Estates Act [*Chapter 6:01*], once a party is married in terms of the Marriage Act, any subsequent "marriages" are invalid. A customary law marriage can only co-exist with a monogamous marriage where the former precedes the latter and not *vice-versa*. Any purported marriage between the plaintiff and L was invalid for the simple reason that it was preceded by a marriage contracted in terms of the Marriage Act. Consequently, she could not be declared the surviving spouse to L.

Administrative law – administrative authority – who is – local authority – duty to comply with Administrative Justice Act – requirement to give reasons for actions – relief which may be granted

Mhete & Ors v *City of Harare & Anor* HH-649-14 (Chigumba J) (Judgment delivered 26 November 2014)

The applicants were all elderly persons who had been leasing housing in a high-density suburb in Harare, under a rent to buy scheme. The lessor was the city council. Although the applicants had all lived in their respective houses for lengthy periods, and had been paying their rents, they were evicted without notice, without any reasons being given and without being provide with alternative accommodation. Requests for reasons were fruitless. After a few years, having obtained legal representation, the applicants brought an application in terms of s 4(1) of the Administrative Justice Act **[***Chapter 10:28***]** for an order in terms of s 4(c), (d) or (e) of the Act to compel the council to give reasons for its conduct, and to determine an application for the allocation of alternative accommodation by the applicants. The issue was whether a local authority could be compelled to give reasons for any administrative action that it takes, by any person who can show that such action has affected them; and if so, in terms of which statutory provisions, and what relief could be granted.
Opposing the application, the council stated that the administrative action complained of, and in respect of which applicants seek reasons took place more than three years earlier and the applicants' claims against it had prescribed. The council averred that the first applicant's certificate of occupation was cancelled because she had sub-let the house. The first respondent intimated that the first applicant's legitimate expectation of being offered to purchase the property ought to have been tempered by the qualification that, although each individual tenant was entitled to be offered to purchase the house that he or she lived in, this was subject to the house being suitable for sale. The houses in that particular area were not offered to the sitting tenants for sale because, at that time, they used septic tanks which the sitting tenants had no financial capacity to maintain, especially in light of the fact that those houses had always been earmarked to cater for the poorer members of society, and it was part of the council's social responsibility to reserve those houses for the poorer members of society.
Held: (1) the council was an administrative authority in terms of the Act. The action taken by the council, of evicting the applicants and of failing to allocate them with alternative accommodation when requested to do so, constituted administrative action as contemplated and defined in terms of the Act. The applicants used the correct legal instrument for the kind of relief that they were seeking: the mere giving of reasons where none have been supplied and an explanation where none had been forthcoming, despite reasonable efforts to obtain explanations. The Act also requires that reasons be given within a reasonable period after the administrative action is taken, or there is an omission to take appropriate administrative action. The court could use the Act to consider whether the evictions of the applicants by the first respondents, which evictions fitted within the definition of "administrative action", and the failure to allocate the applicants with alternative housing, were done in a lawful, reasonable and procedurally fair manner. Here, the actions were not lawful, reasonable or fair. The council failed to give reasons for its actions in writing when requested to do so; in regards to the request for alternative accommodation, the council was obliged to give written reasons within a reasonable period. It also breached s 3(2) by failing to give notice of the proposed eviction or room to make representation.
(2) In deciding on the appropriate remedy, the court must be guided by the provisions of s 5 of the Act, which stipulates that, for the purpose of determining whether or not an administrative authority has failed to comply with the provisions of s 3, the High Court may have regard to whether or not a breach of the rules of natural justice, where applicable, has occurred. The determining factors are numerous (s 5(a) to (n)). The principles of

natural justice imply a duty to give reasons for decisions. Being told why something is done is an important element in the fairness of a decision and it helps to inspire confidence in the decision.
(3) While any claim in respect of the evictions may have prescribed, the present application was not affected.

Administrative law – *audi alteram partem* rule and legitimate expectation doctrine – application – limits to – no precise limit – overriding factor is fairness – legislative and constitutional recognition and endorsement of rule and doctrine

B (a juvenile) v *Min of Primary & Secondary Education & Ors* HH-476-14 (Mafusire J) (Judgment delivered 15 September 2014)

The applicant was a pupil at a high school. He had first been suspended, then expelled on the ground that he had masterminded and incited a strike that had occurred at the school and that he had vandalised school property. An urgent chamber application was brought to reverse the decision and to allow the applicant back into the classroom. This was on the basis that the school had not followed the requirements governing the expulsion or "exclusion" of students from schools, as set out in Education (Disciplinary Powers) Regulations 1998 (SI 362 of 1998) and the Education (Enrolment and Exclusion) Regulations 1998) (SI 363 of 1998). The applicant's main argument, though, was that, in expelling him, the school had violated the rules of natural justice and s 69(2) of the Constitution, in that not only had it failed to accord him a fair and public hearing, but also that he was expelled on grounds which were materially different from those set out in the suspension letter.
The applicant's evidence was that following the disturbances on the day in question, lessons had been suspended on the following day. The day after that he was asked to submit a report to the police, which he did. One of the school teachers had been present as he wrote down his report. After that every student was interviewed by some school teachers and a minister or priest, and was then that the applicant was served with a letter suspending him from school for 2 weeks. When he returned after the period of suspension, he was served with a letter of exclusion.
The respondents averred that the applicant had been accorded a fair hearing. He had been given an opportunity to present his side of the story on more than one occasion. It was not a requirement of the rules of natural justice that there be a formal hearing in all cases or that witnesses be made available for cross-examination. They conceded that the period of suspension should not have been for more than 7 days, but said that the letter was in fact one expelling the applicant. They said that basic ground for suspension and expulsion of the applicant was misconduct of a serious nature as contemplated by s 8(1) of SI 362 of 1998, in that he had been guilty of violent behaviour and destruction of school property.
Held: The *audi alteram partem* rule is basic to our jurisprudence and now, in s 69(2), forms one of the fundamental human rights and freedoms provided in the Constitution. Section 68 provides for the right to administrative justice. The Administrative Justice Act [*Chapter 10:28*], which predates the current Constitution, is one Act that seeks to give effect to the rights and freedoms enshrined in the Constitution on the *audi alteram partem* rule and its extension, the "legitimate expectation" doctrine. The content and practical application of the *audi alteram partem* rule and the legitimate expectation doctrine, as expressed in the Constitution and the Administrative Justice Act, are no different from the way the courts have consistently treated them in the past. The rule and the doctrine are products of judicial activism that were meant to fill up a lacuna in the law. The legitimate expectation doctrine simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body. Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard.
The *audi* rule and the legitimate expectation doctrine are flexible tenets whose proper limits are not precisely defined. The advent of the new Constitution and the Administrative Justice Act has not altered the position. A formal charge that is followed by a formal hearing, culminating in a formal verdict and a formal penalty, are not always absolute pre-requisites. *In casu*, the report that the applicant was asked to submit to the police was to investigate a possible crime. The applicant had not been charged with any disciplinary offences. Whether or not the letter of suspension was valid, the whole so-called disciplinary process by the school failed to measure up to the basic tenets of the *audi* rule or the legitimate expectation doctrine. There was no modicum of fairness in the whole process. The letter of suspension accused him of vandalizing certain items of school property and of engaging in hostile behaviour towards the school authorities. The expulsion letter accused him of inciting and masterminding the strike. He was expelled for reasons that he had not been suspended for or charged with. That was a violation of the *audi* rule and the legitimate expectation doctrine. The appropriate relief would be to enable him to attend classes in the normal manner pending the proper investigation by the school of the alleged case against him, and, if necessary, the proper conduct of a disciplinary process.

Appeal – criminal matter – suspension of portion of sentence relating to community service and restitution --refusal by trial magistrate to suspend such punishments pending appeal – appeal against such refusal – may be heard on same basis as appeal against refusal to grant bail

S v *Maseko & Anor* HH-433-14 (Matanda-Moyo J) (Judgment delivered 19 August 2014)

The appellants were convicted of fraud and sentenced to a period of imprisonment, part of which was suspended on conditions relating to future good behaviour and restitution, and part on condition that they perform community service. They applied for the suspension of the community service and payment of restitution pending appeal. Their application was rejected by the magistrate and they appealed to the High Court. The issue was whether such an appeal should be heard by a single judge, as a bail application, or by bench of two judges, like other appeals.
Held: this appeal was akin to an appeal where bail has been refused by a magistrate. Community service forms part of the sentencing options in our jurisdiction. It is a form of restriction imposed on an accused person who has been found guilty of committing an offence. When an accused person seeks suspension of the sentence of community service, all he is saying is that the court should suspend the operation of the sentence of community service until his appeal is determined. Equally so when he is seeking suspension of payment of restitution. At this stage the court is not dealing with the substantive appeal; it is merely looking at whether an appeal court is likely to set aside the conviction and sentence. Community service and restitution form part of the sentence. Community service is a deprivation of liberty, just like imprisonment. The bail court is thus the right court to entertain such an appeal. Obviously, this type of appeal, as an appeal against refusal of bail by a magistrate, must be speedily resolved. If treated as an ordinary appeal there is a real likelihood that by the time the appeal is heard, the appellants would have completed the punishment. This is just a respite between the present and the time the appeal is heard so as to avoid punishing individuals whose appeals enjoy good prospects of success.

Appeal – income tax – appeal against decision of Commissioner of Revenue Authority – nature of appeal – appeal a broad appeal, with rehearing of evidence – court not restricted to evidence provided to Commissioner – court entitled to exercise its own discretion

BT (Pvt) Ltd v *ZRA* HH-617-14 (Kudya J) (Judgment delivered 12 November 2014)

See below, under REVENUE AND PUBLIC FINANCE (Income tax – income – deductions allowable).

Appeal – trial court's findings – failure by trial court to give reasons – a fatal irregularity – failure to give full reasons – distinction from failure to give no reasons – appeal court's duty to endeavour to make sense of trial court's judgment

Premier Tobacco Auction Floors (Pvt) Ltd v *Mesoenyama & Anor* HH-632-14 (Uchena J, Mwayera J concurring) (judgment delivered 19 November 2014)

Failure to give reasons for judgment is a fatal irregularity which warrants the upholding of the appellant's appeal and the setting aside of the court *a quo*'s decision. Failure to clearly spell out the reasons for judgment is a different situation. A failure to give reasons for judgment, or a large portion of the trial court's considerations for judgment, must be distinguished from a failure to adequately analyse the evidence led. A poorly written judgment is a judgment. It cannot be equated to a situation where there is no judgment. It is dangerous to equate the situation where a large portion of the trial court's considerations remained stored in the judicial officer's mind instead of being committed to paper to poorly written judgments which, to an appreciable extent, spell out the court's findings but merely omit the details thereof. Judgment writing is a skill which judicial officers acquire and polish as they progress in the profession. Appellate courts should, in cases of poorly written judgments, endeavour to make sense out of the trial court's reasons for judgment. It is only when no sense can be made out of it, or no reasons for a particular finding were given, that it can be said the reasons for judgment or a part of the judgment, remained stored in the judicial officer's mind. The distinction must be found in the missing reasons for judgment.

Arbitration – award – form of – desirability of having single award instead of one on the merits and another on quantification, both of which may be subject of separate appeals

Arbitration – award – setting aside of – grounds – award contrary to public policy – meaning – quantification of loss – need for quantification to be based on determinable figures – arbitrator accepting one party's figures without any basis for doing so – award set aside

Pilime & Ors v *Midriver Entprs (Pvt) Ltd* HH-367-14 (Zhou J) (Judgment delivered 23 July 2014)

It is undesirable to deal with labour disputes before arbitrators or the Labour Court piecemeal. Such an approach, whereby an arbitrator or the Labour Court makes an award and sends the parties to try and negotiate the figures, failing which they then return for quantification, creates a multiplicity of cases. It even raises the issue of whether such an award is a final order which is appealable, or only becomes final upon the parties agreeing on quantum or after the arbitrator has quantified the loss following disagreement between the parties. The result is that there may be an appeal noted against the first part of the award as, on the face of it, it purports to be complete. When there is another award quantifying the loss to the employees that aspect of the award is equally susceptible to an appeal. Thus there may end up being more than one appeal in respect of what is in essence one dispute.

Labour procedures were meant to be as flexible and as informal as possible, but are now subject to the normal rules of procedure insofar as they result in orders (or awards) that are executable like orders of ordinary courts and are subject generally to the same rules relating to appeals. The time has come for arbitrators and the Labour Court to give final awards or orders unless the parties themselves have asked for an opportunity to negotiate the terms of the orders or awards.

Not every fault or mistake of an arbitrator, be it of law or fact, would fall within the ambit of the expression "contrary to the public policy of Zimbabwe", justifying the setting aside of the award. For it to qualify to fall within the meaning of that expression, the arbitrator's reasoning or conclusion must go beyond mere faultiness or incorrectness, and must constitute a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice would be intolerably hurt if the award was upheld or enforced. An award that contravenes a fundamental principle of law would be contrary to the public policy of Zimbabwe.

The concept of quantification of loss entails some assessment of the loss which is based on determinable factors. There can be no quantification when there is neither evidence nor a basis tendered to justify the figures being awarded. Where the amounts awarded by the arbitrator were not based on any evidence or some other valid ground, but were awarded merely because the respondent did not put forward its own figures, such an approach would constitutes a palpable inequity that subverts our concept of justice.

Arbitration – reference to – need for a dispute to exist falling within ambit of arbitration clause – one party acknowledging indebtedness to other but disagreeing on amount – not a dispute falling within ambit of arbitration clause – referral to arbitration refused

Sakunda Energy (Pvt) Ltd v *Barep Invstms (Pvt) Ltd* HH-689-14 (Zhou J) (Judgment delivered 10 December 2014)

The plaintiff instituted an action against the defendant for payment for fuel which it had delivered to the defendant. The defendant had signed an acknowledgment of debt, which it now claimed was induced by misrepresentation on the part of the plaintiff. Although agreeing that it owed money to the plaintiff, it said that a lower figure was due. The defendant also raised a special plea that the matter should be referred to arbitration, the relevant clause of the agreement between the parties providing that "Any dispute or difference between the parties relating to the rights or obligations of the parties under this agreement shall be referred to and determined by arbitration".

Held: in terms of art 8(1) of the Schedule to the Arbitration Act [*Chapter 7:02*], once it is established that a dispute falls within the ambit of an arbitration clause and the exceptions set out in art 8(1) are not established, then the court is enjoined to stay the proceedings and refer the parties to arbitration. The existence of a dispute is a prerequisite for the staying of proceedings and the referral of a matter to arbitration. The question of whether or not a dispute exists is one that the court could inquire into and determine. The dispute, if established, must be one which falls within the terms of the arbitration clause.

The plaintiff's claim was primarily founded upon the acknowledgement of debt signed on behalf of the defendant. The defendant now disputed the amount set out in the acknowledgement of debt. A dispute is a disagreement and the disagreement between the parties related to whether or not the amount stated in the

acknowledgment of debt was owed by the defendant. The dispute was not one relating to the rights or obligations of the parties under the memorandum of agreement. The question was whether the amount owed was as stated in the acknowledgment of debt. A determination of the dispute entailed a determination on the validity of the acknowledgment of debt, a matter which fell outside the scope of the arbitration clause.

Aviation – air carrier – liability – lost or damaged baggage – when carrier liable for more than the minimum compensation stipulated in Warsaw Convention – carrier acting recklessly and with knowledge of probable damage – liable for full compensation for damaged baggage – consequential or punitive damages – not provided for by Convention – carrier only liable for foreseeable damages

Jambga v *Ethiopian Airlines* HH-481-14 (Dube J) (Judgment delivered 17 September 2014)

The plaintiff claimed against an airline for the cost of three television sets which she had bought in China and was bringing back to Zimbabwe for re-sale. She had checked them in as part of her baggage. The sets did not arrive at the same time as she did, but a few days later, and when they did arrive they were damaged beyond repair. She also claimed consequential damages for loss of business and profit, being the loss of profits on 48 weekly trips to China. Her position was that if the televisions had not been damaged, she would have made more profits by buying and selling more television sets. The airline offered compensation in terms art 22(1) of the Warsaw Convention, which amounted to a little over a fifth of what was claimed for the sets, and denied any liability for more than the minimum provided in art 22(1) or for consequential damages.

The evidence was that the normal procedure when baggage is checked in is that the baggage is examined for any damages and other irregularities on checking in. If such exist, the passenger is advised and given "limited release" tags which are fixed to the baggage. The purpose of these tags is that the passenger does not hold the airline liable in the event of damage to the baggage or its contents. The passenger is usually asked to sign for any damage or irregular baggage. If the baggage is not properly packaged, the limited release tag is placed on the baggage. In this case, the plaintiff was not asked to sign a limited release tag in spite of what the airline staff considered to be inadequate packaging for the goods, nor did the items have "fragile" stickers placed in them by the airline. On the facts, there was no doubt that the baggage was mishandled while in the care of the airline, resulting in the sets being damaged.

Held: art 22 creates strict liability for loss, delay or damage of passenger baggage. Where checked baggage is damaged lost or destroyed, the airline is automatically liable to compensate the passenger. The liability is premised on the presumption that the damage was caused by an occurrence during the carriage. The article limits liability of a carrier for baggage to 250 francs per kg which translates to $20 per kg, up to a maximum of 90 kg. Under arts 20 and 21 there are two defences available to the airline: that the damage was caused wholly or partially by the passenger's negligence or that it took all necessary and available measures to avoid the damage. The carrier must establish these defences

Under art 25, however, there is no limit to liability if the passenger can show that the damage to the baggage was caused deliberately or recklessly by the airline. The burden of proving wilful misconduct rests on the plaintiff. There has been debate and divergent views over whether the test to be applied in determining "recklessness and … knowledge that damage would probably result" is an objective or subjective test, but the majority view seems to be that the test should be subjective. With the objective test, a carrier is liable if it could not fail to be aware of the risk, whilst the subjective test requires actual knowledge. "Wilful misconduct" in this context means a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realisation of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.

In this case, the defendant airline, being aware of the risks attached to checking-in televisions sets, did not take all reasonable measures to avoid the damage. The airline staff observed the poor packaging and failed to take remedial action. Their focus seemed to be simply on avoiding liability in the event of damage to the televisions. They placed a "limited release" tag on the baggage without explaining the reasons for this action and without notifying the plaintiff. A limited release tag not brought to the notice of the passenger or signed or acknowledged by her cannot be binding on her. The staff, aware of the nature of goods they were dealing with, passed the televisions for checking in without fragile tags and so exposed the televisions to damage. They acted recklessly and with knowledge that damage would probably result.

The burden is on the carrier to prove contributory negligence of the passenger in terms of art 21 to be exonerated from liability. Where the carrier does not know what or who caused the damage, it cannot prove contributory negligence, which in any event was not pleaded.

There is a divergence of views in international law about the award of consequential damages arising from a carrier's wilful misconduct, but the preferable view is that whilst the language of the Convention does not limit the amount of damages recoverable, its language does not allow for recovery of punitive damages. To recover

special damages, the damages must be a foreseeable consequence of the alleged breach. The claim for consequential damages *in casu* must fail.

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

Air Zimbabwe (Pvt) Ltd & Anor v *Nhuta & Ors* S-65-14 (Ziyambi JA, Garwe & Patel JJA concurring) (Judgment delivered 15 September 2014)

The first respondent was a former employee of Air Zimbabwe Holdings (Pvt) Ltd, the second appellant. An award for outstanding wages and benefits had been made in his favour. He had subsequently, in September 2012, registered the award as an order of the High Court. He proceeded to execute and the disputed assets were attached by the Deputy Sheriff. They were released after promises were made to pay the first respondent, but when those promises were not fulfilled the assets were attached again. The assets belonged to the second appellant, by whom the first respondent was employed.
The appellants brought an application in the High Court, seeking the release of the seized assets. They alleged that by virtue of the provisions of s 8 of the Finance Act (No.2) of 2012, as read with the State Liabilities Act [*Chapter 8:14*] the attachment of the appellants' property to satisfy debts owed by either the first or the second appellant was in violation of the law and therefore illegal. Section 8, they argued, was enacted with the sole purpose of protecting, from attachment or execution, the property of the appellants as the successor companies of the Air Zimbabwe Corporation. The section referred to the Corporation "or any successor company". The appellants' argument was that the word "any" was meant to convey that any company formed by the shareholder or Board of the National Airline would automatically enjoy the immunity provided and that the second appellant such a successor company and would enjoy the immunity. The judge *a quo* rejected this contention. On appeal:
Held: it was clear from ss 2, 3 and 9A of the Air Zimbabwe Corporation (Repeal) Act (No. 4 of 1998) that only one successor company was contemplated by the legislature. Had the appellants' contention to the contrary been correct, the legislature would have expressed itself in words which lent themselves clearly and unambiguously to the meaning contended for by the appellants. It was not the intention of the legislature to extend such immunity to an indeterminate number of companies some shareholders or board somewhere could think of floating.

Bank – duty to customer – unauthorised transactions using customer's ATM card – when bank liable – customer not reporting loss promptly – customer liable for any transactions up to time report made – report to security guard at ATM – unless guard a bank employee, does not constitute report to bank

Zimbeva v *Kingdom Bank Ltd* HH-531-14 (Tsanga J) (Judgment delivered 1 October 2014)

The appellant lost her bank card in circumstances that were not made entirely clear by the evidence, but she delayed reporting the card and having been lost, and subsequently discovered that it had been used for a series of unauthorised transactions totalling some thousands of dollars. She claimed the missing sum from the bank, arguing that the bank was liable for her losses. She admitted disclosing her PIN code to her sister, although the latter had never had occasion to use it. A card she used was retained at an ATM as "stolen", but the likelihood was that this card was not hers but another person's and that the cards had been exchanged previously when she tried to withdraw money from a different ATM. When her card was retained, she reported the matter to the security guard on duty though not to the bank itself until she tried to withdraw cash at her bank.
Held: There is no specific legislation in Zimbabwe at present that addresses liability of banks for unauthorised ATM and EFTPOS withdrawals without a customer's consent. Any liability for refunding unauthorised withdrawals stems from the contractual relationship between a bank and its customer to protect the customer's funds. To protect customers from would-be abusers banks generally place reliance on risk minimisation, key measures including requiring customers to have a secret PIN to their card. The contractual duty on the part of the customer is to guard the PIN and card separately for the most part, save when transacting. The assumption by the bank is that only the customer has control of both these items. The duty to report is also on the customer, particularly since unauthorised withdrawals only come to the attention of the bank via the customer.
While the exact nature of the security guard's duties were not fully canvassed, the guard was not a bank employee. Reporting to the security guard would not absolve a customer from taking any other action on their card, as the contractual relationship between a customer and a bank is a completely different one. The contract

between the bank and a security firm remains at all times separate from the contract that the bank has with its client. The presence of a security guard at the premises should not be taken to establish a new type of contract between the customer and the bank, whereby the security guard is seen as acting as an agent of the bank. The appellant could have called the bank on its 24-hour Card Centre service, but did not do so. Only if a report had been made to the Card Centre could it be said that the bank would indeed have been negligent, if, after receiving a direct notification, it had not stopped transactions on her account.
If an unauthorised person gains access to a customer's ATM card and PIN, the possibility of an unauthorised withdrawal arises. The machine cannot determine whether the person who inserts the card and keys in the correct number is in fact an authorised person. The question is whether the customer may be debited with the amount of such an unauthorised withdrawal. A customer who obtains an ATM card realises that the whole system functions by means of a card coupled with a secret PIN number. The person also realises that the identity of the person who inserts and keys the number cannot be checked. It is thus reasonable to assume that the customer consents to accept a debit for any withdrawal made by means of a card and number. The customer will run the risk only until he informs the bank of the loss and possible unauthorised use of the card. With regard to EFTPOS transactions, they are irreversible unless there is evidence that they were wrongly carried out.

Company – corporate veil – lifting of – when permissible – directors constituting *alter ego* of company – judgment against company – no need for separate court order to lift corporate veil before attachment of directors' property in satisfaction of judgment debt

The Sheriff & Ors v *Taruvinga &Ors* HH-628-14 (Matanda-Moyo J) (Judgment delivered 14 November 2014)

In these interpleader proceedings, the claimants were resisting the attachment of property said to belong to themselves in satisfaction of a judgment debt against a company of which they were the sole directors. After going from one premises to another, the sheriff had found that the company was operated from the claimants' home, where the property in question was attached. The claimants argued that the company was is a separate legal person from themselves claimants and as such its obligations could not be visited upon them. The attachment of their property was not done in terms of any order of court. The judgment creditors argued that the company did not have a registered office from where it operates. An attempt to execute at the given registered address of the company was no avail. That resulted in the judgement creditor directing the sheriff to attach property at the directors' residence, they being the persons who solely ran the company and were the *alter ego* of the company. It was not necessary to approach the court for the piercing of the corporate veil before attaching the property.
Held: directors of a company may be held personally liable for their actions when they have acted fraudulently or unjustly and when for the court to refuse to do so would deprive an innocent victim of redress for an injury caused by them. Where the directors have failed to observe separateness of themselves and the company, then that remedy should not be refused at interpleader stage. Where the directors are the *alter ego* of the company, the courts can confirm attachment of their property without them having been cited in the proceedings, because the *alter ego* of a company is always aware of the happenings of the company at any time and the issue of non-observance of the principle *audi alteram partem* rule does not apply. There is no reason to require the judgement creditor to institute fresh proceedings to pierce the corporate veil in circumstances where those proceedings would entail the same conclusion.

Company – criminal offence – liability – shareholders – not liable for criminal acts of company

S v *Meikle* HH-565-14 (Hungwe J, Mangota J concurring) (Judgment delivered 15 October 2014)

See below, under LAND (Occupation).

Company – director – liability – liability for business of company being carried out in recklessly or with gross negligence – meaning – concepts synonymous – both instances of *culpa* but not equating to *dolus*

Toakoana Trading (Pvt) Ltd v *van Rooyen & Anor* HH-684-14 (Mafusire J) (Judgment delivered 3 December 2014)

Under s 318(1) of the Companies Act [*Chapter 24:03*], the court may, if it appears that any business of a company was being carried on (a) recklessly; or (b) with gross negligence; or (c) with intent to defraud any

person or for any fraudulent purpose, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances mentioned shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.
A judicial officer called upon to impeach the conduct of directors of a company for perceived wrongful conduct in the running of the affairs of the company where harm has ensued must be careful to avoid an armchair approach in judging that conduct. Directors must of necessity be diligent in their conduct of business and devote their skill for the good of the company. In practice, they sometimes have to make important decisions on the spur of the moment and sometimes have to take drastic actions without much time to think through the consequences. Their perceived lack of foresight cannot readily be assessed on the basis of knowledge gained in hindsight. The courts accordingly are reluctant to interfere with the directors' business judgment.
"Recklessness" and "gross negligence" are practically synonymous in this context. They mean that the person concerned exhibits an "I don't care" attitude, where the person may not intend the harmful consequences of his actions which are reasonably foreseeable, but nonetheless persists with that conduct in total disregard of the harmful consequences. Despite the separate depiction of "recklessness" and "gross negligence" in s 318 of the Act, both refer to the conduct of business in an extremely bad manner. No matter how bad that conduct may be, the statute did not intend to equate "recklessness" or "gross negligence" with *dolus*. They both remain instances of *culpa*.

Company – winding up – by court – grounds – inability to pay its debts – what must be shown – "just and equitable" – broad nature of such ground – disappearance of substratum of company as ground for winding up – meaning of "substratum" in relation to a company – company established as a bank – banking licence surrendered – substratum thereby disappearing – bank – role in economy of country – effect of failure of bank

RBZ v *Royal Bank of Zimbabwe Ltd & Anor* HH-639-14 (Zhou J) (Judgment delivered 19 November 2014)

The first respondent ("the bank") was a registered commercial bank. In August 2004 it was placed under curatorship by the applicant owing to problems occasioned by its poor lending practices and corporate governance issues. Its assets were acquired by a new entity known as Zimbabwe Allied Banking Group. The bank was given back its banking licence in September 2010. It was not long afterwards that problems manifested themselves, which included serious undercapitalisation, persistent liquidity challenges and repeated losses. The bank failed to meet the minimum capital requirements for commercial banks. It continued to suffer loses. It had substantially less than the minimum capital requirement. It imposed a maximum daily withdrawal amount on its clients. Apart from failing to pay its creditors, it failed to give effect to transfers of funds from its clients' accounts into the accounts of third parties. It owed its creditors a total of US$2.27 million as at 31 May 2012. Statutory obligations were not being paid. It a cumulative loss of US$5.98 million as at 30 June 2012. Since its re-licencing the first had been using depositors' funds to cover its operational expenses, resulting in a non-funded deficit of US$4.1 million as at 14 June 2012.
Shareholders of the bank who opposed the application admitted its problems but alleged that attempts to secure investors were frustrated by the applicant. They contested the value of the assets and liabilities of the bank as stated by the provisional liquidator.
The applicant sought the winding up of the bank on the grounds that it would be just and equitable to do so. The reasons given by the applicant were admitted by the bank.
Held: (1) a company may be wound up by the court if, among other reasons, the company is unable to pay its debts or if the court is of the opinion that it is just and equitable that the company should be wound up. These are separate and distinct grounds. A company is deemed to be unable to pay its debts if any of the criteria set out in s 205 of the Companies Act [*Chapter 24:03*] are in existence. Section 205(c) provides that, in determining whether a company is unable to pay its debts, the court is enjoined to take contingent and prospective liabilities into account. Thus the liabilities need not be regarded as if they are immediately due and payable, but they must be considered for what they are, *viz*. contingent or prospective liabilities, that is to say, as factors having a bearing on the question whether the company is at present unable to pay its debts. Also, in order to determine whether a company is unable to pay its debts it is not necessary to prove that its liabilities exceed its assets; it is sufficient if it is shown that the company is in a situation of commercial insolvency. A company is considered to be commercially insolvent if it is unable to meet the current demands upon it, that is to say its day to day or current liabilities in the ordinary course of its business.
(2) The "just and equitable" provision is an omnibus provision in terms of which the court does not confine itself to the facts, but also to considerations of justice and equity. The manner in which the business of a company is being managed can be impugned to the extent of justifying a winding up by the court. Here, the bank was heavily indebted and that it is unable to meet its day-to-day liabilities. The depositors who held

accounts with it had not been refunded their money and the bank did not have the capacity to pay the depositors what was due to them. The imposition of a maximum daily withdrawal limit and the failure to pay the statutory obligations were sufficient evidence of a failure to meet the everyday liabilities. The report prepared by the provisional liquidator and the undisputed evidence tendered by the applicant illuminated the bank as a failed company with no prospects of ever being able to resume operations as a normal financial institution. Even if one were to accept the unsubstantiated assertion by the shareholders that the bank had assets which exceeded its liabilities, those assets had not been shown to be liquid assets or readily realisable assets out of which the bank could pay its debts.
(3) The business of banking occupies a central role in any economy. It has a potential to destroy confidence in an economy if not properly conducted. The business of banking entails, among other undertakings, the undertaking to pay cheques drawn upon the banker by its customers in favour of third parties and the conduct of current accounts in terms of which customers must be able to freely withdraw their money whenever the need arises. The relationship between a banker and its customer is basically a debtor and creditor relationship where an account is in the credit, and all money that lands into the banker's hands for the credit of a current account is to be taken as lent to the banker. The bank was unable to allow its customers to withdraw money as and when they needed it and imposed a small maximum daily withdrawal. There was serious abuse of depositors' funds. It was clear, therefore, that the bank was unable to pay its debts.
(4) The courts have found it just and equitable to wind up companies on the grounds of the disappearance of the substratum. In the context of company law, the substratum would be that business or undertaking which in the contemplation of the company's memorandum the company will carry on. In order to determine what the substratum of a company is, the court is not necessarily confined to the main object of a company as set out in the memorandum of the company, but is entitled to ascertain the main business which the company actually carries on. *In casu*, the name of the bank and evidence of its previous undertaking ineluctably show that it was established to carry on the business of banking, as a commercial bank. It had surrendered its banking licence. That meant that it was unable to carry on the business of banking, although it still owed depositors the funds which they deposited with it.
(5) The failure of the substratum of a company is established by proof that it has become objectively impossible for the company to achieve its objects; the intention of the company is irrelevant. The bank failed to meet the minimum capital requirement for a commercial bank, and owed large sums of money to creditors. It did not have the resources to start any banking business by whatever name. Justice and equity demanded that the bank be wound up in order to salvage what little might be recovered, for the benefit of its creditors.

Constitutional law – Declaration of Rights – referral of alleged breach to Constitutional Court – current legal framework sufficient to deal with concerns raised by applicant – application for referral refused

Deputy Sheriff, Harare v *Kingsley & Anor* HH-507-14 (Bere J) (Judgment delivered 24 September 2014)

The sheriff had attached an immovable property registered in the name of the judgment debtor in this matter. The property, which was registered in the name of the judgment debtor, was the matrimonial home of the judgment debtor and his estranged wife, the applicant. She was living at the property. Divorce proceedings were pending. She claimed a right to the property and the sheriff instituted interpleader proceedings. The applicant then sought to have the matter referred to the Constitutional Court on a number of grounds, including the right to protection of the law and protection against discrimination.
Held: the application was frivolous and vexatious. The current legal framework in this country is sufficient to deal with the applicant's concerns. While the law relating to the right of a wife to the matrimonial estate, as determined by the principles of family law, and the rights of her husband in the same property as determined by the principles of the law of property has been described as unsatisfactory, there is a plethora of cases which show that the mere registration of a property in the name of a particular spouse is no bar to the court making an appropriate order contrary to such registration, as where, for example, it is shown that that the information in the Deeds Office is not reflective of the correct situation as regards the actual ownership of the particular property. The civil processes currently in force in this country could be invoked to protect the applicant's situation if she can demonstrate entitlement to the attached property. This could be achieved even through the filed interpleader proceedings.

Constitutional law B Constitution of Zimbabwe 1980 B Declaration of Rights B s 18 B right to trial within a reasonable time B allegation of inordinate delay B what must be shown B need for applicant to place evidence before lower court so that Constitutional Court may properly determine whether applicant=s

rights have been infringed B right to protection of the law B complainant in criminal matter making representations to Attorney-General B not constituting interference with Attorney-General=s independence

S v *Sengeredo* CC-11-14 Chidyausiku CJ; Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Patel JA, Hlatshwayo JA & Guvava JA concurring) (Judgment delivered 10 November 2014)

The applicant was charged in the magistrates court with two counts of fraud, both relating to the purported sale of the same house to two different people. He war arrested and made a statement to the police on 15 February 2009, after which he was placed on remand. On 5 November 2009, after attending court ten times, further remand was refused.
Some time in November 2010, a law officer in the then Attorney-General=s Office declined to prosecute, on the erroneous ground that the applicant=s conduct did not constitute a criminal offence. In May 2011, after representations from one of the complainants, the Attorney-General rescinded the decision not to prosecute and directed that the appellant be summoned to attend court. On 10 August 2011 the applicant was placed on remand and thereafter remanded a number of times until February 2012, when, following an application by the applicant, the magistrate referred the matter to the Supreme Court in terms of s 24(1) of the 1980 Constitution.
The issues for determination were (a) whether the applicant=s right under s 18 of the Constitution to a fair hearing within a reasonable time was violated; and (b) whether his right under that section to protection of the law was violated by the State, in that the Attorney-General rescinded his decision not to prosecute the applicant after receiving representations from one of the complainants.
In respect of the second issue, it was argued that a complainant=s representation to the Attorney-General to reconsider his decision in a criminal matter was unconstitutional and violated the accused=s right to protection of the law, as it undermined the independence of the Attorney-General.
Held: (1) the law with regard to stays of prosecution on the grounds of inordinate delay was now well settled. The court must consider (a) the explanation and responsibility for the delay; (b) the assertion of his right by the accused person; (c) the prejudice arising from the delay; and (d) the conduct of the prosecution and of the accused person in regard to the trial. To enable the court to properly determine these factors, certain peremptory requirements have to be met by the applicant making such an application. Evidence must be placed before the lower court as to the extent to which, if at all, the cause of the delay was the applicant=s responsibility; to whether at any time he had asserted his right to be tried within a reasonable time; and, even more importantly, to whether any actual prejudice had been suffered as a result of the delay. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on that record that the Constitutional Court hears argument and then decides whether a fundamental right had been infringed. Only in exceptional circumstances will an applicant be permitted to supplement the record of the proceedings before the lower court by the production of affidavits. Cogent reasons will have to be provided as to why the further evidence was not presented to the lower court. No such evidence was placed before the lower court. This failure was fatal.
(2) A complainant in a criminal matter has a substantial interest in the prosecution of an accused and is perfectly entitled to make representations to the Attorney-General regarding such prosecution. The Attorney-General is not bound to accept such representations. He can either accept or reject them, depending on whether or not he finds merit in the representations. Where he does not accept the representations the complainant is entitled to a certificate of *nolle prosequi*. The mere fact that representations had been made did not in any way interfere with the independence of the Attorney-General. This submission was as absurd as submitting that the court=s independence is compromised by submissions by counsel.

Constitutional law B Constitution of Zimbabwe 1980 B Declaration of Rights B s 18(1) B right to protection of the law B failure by lower court to refer to Supreme Court matter which was neither frivolous nor vexatious B breach of applicant=s rights B placing of accused person on remand, trial or on his defence when the allegations and/or the evidence led do not constitute an offence B also a breach of s 18(1)

Taylor-Freeme v *Senior Magistrate, Chinhoyi, & Ors* CC-10-14 (Chidyausiku CJ; Malaba DCJ, Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 8 October 2014)

See below, under LAND (Gazetted land – occupation of).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – right to fair trial within a reasonable period of time – long delay before person brought to trial – onus on person to show delay unreasonable – court must also have regard to society's interest in seeing trial brought to a conclusion
S v *Mukandi & Ors* CC-9-14 (Gowora JA, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Hlatshwayo JA, Patel JA, Guvava JA & Chiweshe AJA concurring) (Judgment delivered 25 September 2014)

The applicants sought a permanent stay of their prosecution on charges of fraud, alternatively contravening the Prevention of Corruption Act [*Chapter 9:16*]. The first three applicants were members of the Central Intelligence Organisation and the fourth was a businessman. The first applicant was a law graduate and qualified to practise in Zimbabwe. They were first arraigned in March 1999, granted bail and then remanded at intervals until January 2000, when the State announced it needed more time to prepare its case. The applicants were removed from remand and the State advised to proceed by way of summons. The prosecution was not ready to proceed until December 2002.
In July 2001, no further action having by then been taken by the State, the first applicant left the country and went to Canada for ten years, until he was deported back to Zimbabwe for reasons unrelated to the present case. The other applicants remained within Zimbabwe for most of that time. When the first applicant returned in September 2011, summons was served on him, and subsequently on the other applicants, for trial to start in December 2011. The matter did not start then, and was remanded until mid-January 2012, when the matter was, at the request of the applicants, referred by the presiding magistrate to the Supreme Court in terms of s 24(2) of the Constitution of Zimbabwe 1980. The issue was whether the applicants' right under s 18(2) to a fair trial within a reasonable period had been infringed.
The State averred that it would have been imprudent to have tried the other three applicants in the absence of the first applicant, and until he was sent back to Zimbabwe the prosecution was unable to proceed.
Held: in determining such an application the following factors are to be taken into account: (a) the length of the delay; (b) the reasons for the delay; (c) the assertion by the accused of his or her right to a speedy trial; and (d) the prejudice to the accused caused by the delay. Here, the length of the delay was presumptively prejudicial. The onus was on the applicant to establish that the delay was unreasonable. Lesser delays than that *in casu* had been held to be unreasonable. The applicants had not suggested that the delay up to December 2002 was unreasonable.
The events that intervened between the time when the applicants were first charged and the eventual setting down of the matter for trial would serve to afford an acceptable explanation for the inordinate delay. The test for determining whether there has been an unreasonable delay or not requires an objective analysis of all the factors surrounding the entire process, including any challenges and problems that the prosecuting authority might have been faced with during the relevant period. The attitude and actions of the accused persons are also a consideration in the assessment.
There was no basis for holding that, because the immigration authorities and a department within the police force were aware of the first applicant's departure from Zimbabwe, the prosecuting authorities must also have been aware. He would have been aware that, unless charges had been withdrawn after a plea was tendered in court, those charges remained pending.
The court had to strike a balance between the interests of the accused person and those of society. As much as an accused person has the right to assert that his constitutional rights should be given effect to, it is in the interest of a functioning society that suspected perpetrators of a crime be brought to trial.
Although the first applicant made allegations about the prejudice that he had suffered, the others did not make any specific averments. The yardstick for ordering a permanent stay of prosecution is not simply a question or issue of fairness to the particular accused, although it is an important consideration. The court also has to consider whether there is an abuse of the court processes by the prosecuting authority for some ulterior motive. It is also of importance to consider whether the continuation of the prosecution is inconsistent with the recognized processes of the administration of criminal justice and so constitutes an abuse of court process. Finally, the court, when considering whether a delay is alleged to have prejudiced an accused's right to a fair trial, must have regard to the interest that society has in the resolution of the culpability of an accused person, especially when a permanent stay of prosecution is sought.
The applicants had the onus of showing that a trial after such a lengthy period would prejudice them in their defence. They had not done so. The charges they faced were very serious and the amount involved was considerable. The allegations related to fraud involving government funds and taxpayers would have an interest in the outcome of criminal charges concerning fraud allegedly committed in respect of state funds. When weighed against the prejudice that the applicants alleged they would suffer from a delayed prosecution, society would be justified in expecting that the criminal trial be brought to its logical conclusion.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – application for matter to be referred to Supreme Court – allegation that right to trial within reasonable period has been breached – duty of lower court to consider whether a constitutional issue has been raised – not for lower court to decide who is to blame for delay – consideration of issue by Supreme Court – need for applicant to give evidence in support of application

Matiashe v *Mahwe NO & Anor* CC-12-14 (Garwe JA, Chdiyausiku CJ, Malaba DCJ, Ziyambi JA & Patel JA concurring) (Judgment delivered 4 December 2014)

The applicant had been arrested on allegations of fraud and placed on remand in June 2007. In February 2008 the charges were withdrawn. However, in July 2012 she was served with a summons to appear on charges of fraud in August 2012. On 21 August 2012 she filed an application in the magistrates court seeking a declaration that the decision by the Attorney-General to try her after six years violated her right to the protection of the law enshrined in s 18 of the former Constitution and that the matter be referred to the Supreme Court in terms of s 24(2) of that Constitution. She claimed that the delay of six years during which no trial had taken place was wholly attributable to the State and that she had always been available to stand trial. She also claimed that a defence witness had relocated to Europe and was not available. It was not disputed that on 24 July 2009 and 2 November 2010 the applicant had filed a complaint with the police against the complainant and his wife. Evidence was led from the police about the applicant's allegations against the complainant and that it was eventually decided that the complainant would be prosecuted first. If he was acquitted, then the applicant would be tried. In the event, the complainant was acquitted, and the applicant was then summoned. The magistrate took the view that since the applicant had participated in the agreement which had contributed to the delay she could not now be heard to complain and accordingly found the application to be frivolous and vexatious.
Held: (1) the delay of over five years in the prosecution of the matter was presumptively prejudicial and the applicant was entitled to challenge the decision of the State to prosecute her on a charge of fraud in respect of which she had been charged more than five years previously. In dismissing the request for referral, the magistrate did not ask himself whether a constitutional issue arose from the proceedings. He considered that the applicant had contributed to the delay and that she was trying to further delay the day of reckoning. He was wrong in determining the application on the basis of who was to blame for the delay. The decision to refuse to refer the application was wrong and it violated the applicant's right to the protection of the law as provided in s 18(1) of the former Constitution.
(2) On the merits, the length of the delay was inordinate and sufficient to trigger an inquiry into the possible breach of the applicant's rights under s 18(2). However, the applicant did not give oral evidence to refute that given by the police, whose evidence remained largely uncontroverted. An applicant must adduce evidence and be cross-examined on it. The absence of *viva voce* evidence can be fatal, because it is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on the record from the lower court that the Supreme Court hears argument and then decides if a fundamental right had been infringed.
(3) In the circumstances, the State had offered a reasonable explanation for the delays.
(4) As to whether the applicant had asserted her rights, she had done so up to the point when further remand was refused. However, she thereafter laid complaints against the complainant and made allegations against certain police officers. The totality of the circumstances suggested that whilst in 2008 she asserted her rights, from 2009 she did not and was content to go along in the hope that perhaps the criminal allegations would go away.
(5) The issue of prejudice should be assessed in the light of the interest of the accused which the speedy trial right was designed to protect. Three such interests have been identified: (i) to prevent oppressive pre-trial incarceration (ii) to minimize anxiety and concern of the accused and (iii) to limit the possibility that the accused will be impaired in his defence. Without oral evidence on the points, it was not possible to say whether the applicant suffered anxiety or was prejudiced in her defence by the unavailability of her witness.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(5) – party having shown that enactment not reasonably justifiable in a democratic society – rule *nisi* calling on responsible Minister to show cause why enactment should not be declared to be in contravention of Constitution – object of giving Minister such opportunity – review powers not given to executive

Chimakure & Anor v *A-G* CC-6-14 (Malaba DCJ, with Chidyausiku CJ, Ziyambi, Gwaunza, Garwe, Gowora, Hlatshwayo, Patel & Guvava JJA concurring) (Judgment delivered 22 July 2014)

The Constitutional Court issued a rule *nisi* pursuant to s 24(5) of the former Constitution, calling on the Minister of Justice to show cause, on the return day, why s 31(a)(iii) of the Criminal Law Code [*Chapter 9:23*] (publishing or communicating false statements prejudicial to the State) should not be declared to be *ultra vires* s 20(1) of the former Constitution and accordingly invalid. The Minister had not been a party to the proceedings. Under s 24(5), the Minister had a right to be given an opportunity to persuade the court that, although s 31(a)(iii) of the Code infringed the fundamental right to freedom of expression, it was reasonably justifiable in a democratic society.

On the return day no affidavit was filed by the Minister. What was filed was a lengthy document containing a critical review of the whole judgment of the court. The purpose of the document was to show that the court had misdirected itself in finding that s 31(a)(iii) had the effect of interfering with the exercise of the right to freedom of expression enshrined under s 20(1) of the former Constitution and that the court erred in holding the *prima facie* view that s 31(a)(iii) of the Criminal Code was not reasonably justifiable in a democratic society. There was no attempt to show the existence of factors, which were not brought to the attention of the court, consideration of which would have persuaded it not to accept the *prima facie* view that the enactment was not reasonably justifiable in a democratic society.

Held: it was not the purpose of s 24(5) of the former Constitution to give to the executive review powers over decisions of the court. The object of s 24(5) was to give the responsible Minister, who was not party to the proceedings challenging the constitutional validity of an enactment, responsibility, an opportunity to put before the court facts within his knowledge, and of which the court was unaware, with the view of persuading it not to find that the enactment is not reasonably justifiable in a democratic society. The reason is that the determination of the question of whether an enactment is reasonably justifiable in a democratic society requires a court to take into account a variety of factors at play in a democratic society. Some of the factors may relate to the policy behind the enactment. The executive is responsible for the formulation of legislative policy as adopted by the legislature. It is because of this important position of the executive in the formulation of legislative policy that a Minister may have knowledge of factors that show that the legislation is reasonably justifiable in a democratic society. His task is to assist the court to arrive at a just decision on the question of the constitutional validity of the legislation. The fact that no affidavit was filed by the Minister meant that nothing said in the document satisfied the object of s 24(5).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – duty of State organs to protect freedoms set out in Declaration (s 44) – ill treatment by police of members of the force – breach of constitutional duties and members' constitutional rights

Tichivanhu & Ors v *Officer in charge, Morris Depot, & Ors* HH-690-14 (Bere J) (Judgment delivered 4 December 2014)

The applicants, all junior police officers, had each charged with and convicted of violating sections of the Police Act [*Chapter 11:10*] for which they were each ordered to undergo different lengths of detention at the police detention barracks. Upon their release from the barracks, they were each handcuffed and deposited at Morris Training Depot for what the respondents alleged was a retraining programme to assist in the "rehabilitation" of the officers. They were effectively detained at the Depot and subjected to harsh treatment, details of which were given in evidence. This "retraining" was purportedly authorised by a circular issued by a senior police officer, which gave the duration of the retraining as ranging from between 6 weeks to 3 months. It also authorised a reduction in salary. The applicants sought an order for their release.

Held: (1) Section 29 of the Police Act deals exhaustively with a list of punishable conduct and what is deemed to be the appropriate penalty is specified in the same Act. The circular attempted to redefine some of the violations and prescribe further punishment in complete violation of the Act. The circular was clearly *ultra vires* the Act. It could not be justified as being standing orders issued in terms of s 9 of the Act, for which Ministerial approval is required.

(2) The advent of the new Constitution, with its elaborate provisions on the need to recognise and protect fundamental human rights of the citizenry irrespective of their station in life, makes it mandatory for every citizen of this country to be conscious of such rights. For our police officers, policing must be executed in full compliance with the Constitution. Under s 44 of the Constitution, the State and every person, including juristic persons, and every institution and agency of the Government at every level must respect, protect, promote and fulfil the rights and freedoms set out in the Declaration of Rights. One such right, under s 86(3)(c), is the right not to be tortured, or subjected to cruel, inhuman or degrading treatment or punishment. The evidence showed that the respondents were guilty of deliberate violations of not only their own governing Act but of the Constitution as well.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to freedom from torture or cruel, inhuman or degrading treatment or punishment (s 53) – no limitation on such right permissible – corporal punishment of male juveniles in terms of s 353(1) of Criminal Procedure and Evidence Act – no longer consistent with Constitution

S v *C (a juvenile)* HH-718-14 (Muremba J) (Judgment delivered 31 December 2014)

The accused, who was aged 15 years, was convicted of the rape of a 14 year old girl. He was sentenced to receive a moderate correction of 3 strokes with a cane, this punishment being allowed for by s 353(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It was also specifically allowed for by s 15(3) of the 1980 Constitution. The issue was whether, with the introduction of the 2013 Constitution, such punishment remained lawful.

Held: In the 2013 Constitution the right to freedom from torture or cruel, inhuman or degrading treatment or punishment is provided by s 53. This states that "No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment". Section 86(3)(c) provides that no law may limit, *inter alia*, the right not to be tortured or subjected to cruel, inhuman or degrading treatment punishment. If the legislature had intended corporal punishment to remain as part of our law it would have limited the right by categorically stating that moderate corporal punishment inflicted in execution of the judgment or order of a court shall not be held to be in contravention of that right, as was the situation under the old Constitution. Further provisions in the new Constitution which protect the right to personal security, equality and non-discrimination. Section 52(a) provides for the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private sources, while s 56(3) provides for freedom from discrimination on the grounds of, among other things, sex, gender and age.

Internationally, corporal punishment is regarded as violence against children and as a breach of fundamental human rights. It is considered inhuman and degrading as it violates children's physical integrity and demonstrates disrespect for human dignity and undermines the self-esteem of children. It is said to treat children as half-human beings thereby breaching the principle of equal protection before the law and non-discrimination. There are regional and international conventions which protect these rights and the right to freedom from torture, inhuman and degrading punishment. Zimbabwe has ratified and acceded to some of them: the Convention on the Rights of the Child; the African Charter on Human and Peoples' Rights; the International Covenant on Civil and Political Rights; and the African Charter on the Rights and Welfare of the Child.

By becoming a State Party to these conventions, Zimbabwe agree to be bound by these conventions. As such it has international legal obligations to respect, protect and fulfil human rights for everyone within its jurisdiction. As a State Party it is duty-bound to enact the necessary legislation to give domestic effect to them. It is evident from Part 3 of Chapter 4 of the new Constitution that Zimbabwe has endeavoured to fulfil its international legal obligation in protecting the rights of the children. Section 81 thereof elaborates on the rights of children. Of significance are ss 81(1)(a) and (e) which make it clear that children are not half-human beings, as they ought to be treated equally as adults and protected from all forms of abuse including violence. It follows that the new Constitution does not allow for the imposition of corporal punishment and thus s 353(1) of the Criminal Procedure and Evidence Act is now a law which is inconsistent with or *ultra vires* the Constitution.

In view of the fact that the accused was sentenced after the new Constitution had come into operation the trial magistrate ought to have employed the provisions of the new Constitution in sentencing the accused. Since the new Constitution has outlawed corporal punishment, the trial magistrate should have considered other sentencing options in rape cases in respect of juvenile offenders. What is important when punishing juveniles is the need to have the child rehabilitated back into society and his family. Options available include: (a) under s 351(2)(a) of the Criminal Procedure and Evidence Act the court may refrain from passing sentence and refer the matter to the children's court if the juvenile is a child who is in need of care; (b) under s 351(20(b), the court may have the juvenile offender placed or institutionalized in a reformatory or in a training institute; or (c) the court may impose a wholly suspended prison sentence.

Quaere, whether s 53 outlaws the infliction of corporal punishment on children by their parents, guardians or by persons *in loco parentis*.

Editor's note: whether the Constitutional Court will confirm this decision will depend on whether it finds that corporal punishment, even in the home or school environment, is always and necessarily inhuman or degrading. The Supreme Court was split on the issue in *S* v *A Juvenile* 1989 (2) ZLR 61.

Constitutional law B Constitution of Zimbabwe 2013 B Declaration of Rights B right to trial within a reasonable time (s 69) B permanent stay of proceedings B limited circumstances in which may be granted B trial mostly completed except for passing of sentence B lengthy delay caused by disappearance of record and other documents B reconstruction of record possible B stay refused

Mutsinze v *A-G* CC-13-15 (Garwe JCC, Chidyausiku CJ, Malaba DCJ, Ziyambi JCC, Gwaunza JCC, Gowora JCC, Hlatshwayo JCC, Patel JCC & Guvava JCC concurring) (Judgent delivered 1 October 2014)

The applicant sought a permanent stay of the criminal proceedings against him and an order for his release from custody. He alleged that the failure by the State to complete the proceedings constituted a breach of his rights under ss 50 and 69 of the 2013 Constitution.

He had originally been arrested in August 1998 on allegations of murder and armed robbery. The trial had commenced in the High Court in September 2001 and the defence case was closed in 2003 or 3004. The record of the proceedings had thereafter disappeared in unclear circumstances. When the matter came before the Constitutional Court, the court ordered that Registrar of the High Court to file an affidavit, within 30 days, to clarify the status of the record and, if lost, the efforts made to reconstruct the record. The court also ordered the trial judge to furnish, through affidavit, the reasons for the delay in the finalisation of the matter.

The Acting Registrar of the High Court advised that the record as transcribed and the judge=s note books had gone missing. The cassette tapes used to record the proceedings had been erased after the transcription and re-used in other cases. Whilst a number of documents had been availed to assist in the reconstruction, the record on the evidence led was not available. The trial judge stated that after the closure of the defence case and the hearing of closing arguments, he convicted the applicant on two counts of murder and one of robbery. One of the three accused persons had passed on before judgment. He acquitted the remaining accused. After hearing submissions on the question of extenuation, he made a finding that were no such circumstances as both counts of murder had been committed in cold blood and in the course of a planned robbery. The applicant denied that he had been convicted; he said that nothing further had happened since the close of the defence case. However, the trial judge, the trial prosecutor, assessor and transcriber all deposed to the fact that a verdict of guilty had been returned.

The only documents eventually available were the prosecutor=s notebooks, one of which also disappeared after she made them available to be transcribed. Based on the available documents and the affidavits, the Constitutional Court concluded that the trial had indeed proceeded to the stage where the trial court made a finding that there were no extenuating circumstances. For some reason, which remained unclear, the actual sentence of death (which requires certain formalities) had not been passed. The court also concluded that notwithstanding the various difficulties that had been encountered in trying to reconstruct the record, reconstruction was possible. Moreover, the circumstances surrounding the commission of the offences were not seriously in dispute.

The applicant complained to at least three High Court judges about the delay after the year 2008. The first complaint was made to a judge during a prison visit. The other two were made during bail applications in the High Court. All were of the opinion that the issue of the delay was better dealt with by the trial judge. The referral of the complaint by these judges to the trial judge did not produce any results. Thereafter it was discovered that the transcript of the record of the proceedings as well as the judge=s notes had both mysteriously gone missing.

The State urged that the interests of justice would be seriously prejudiced were the applicant to be set free, particularly in light of the fact that the trial judge had indicated that he was in a position to reconstruct the remaining portion of the proceedings. The State further submitted that the totality of the facts suggested that someone had gone to great lengths to ensure that the record was destroyed and that the only person who stood to benefit from the disappearance of the record was the applicant. To release him in these circumstances would set a dangerous precedent as it would encourage persons undergoing trial to arrange for the disappearance of the record of proceedings in the belief that they would ultimately get a permanent stay of the proceedings.

Held: (1) the factors to be considered in an application of this nature are settled. These are (a) the length of the delay (b) the reasons given by the State for such delay (c) whether the applicant asserted his rights to a speedy trial and (d) the prejudice to the accused caused by the delay. In order to determine whether the delay is reasonable or not, a court must endeavour to strike a balance between these factors. In general, no one factor can on its own justify an inference that the delay is unreasonable. The test involves balancing the conduct of both the State and the accused on a scale.

(2) Here the delay was certainly inordinate and both parties to this application agreed that the delay was unprecedented and certainly presumptively prejudicial. While some of the circumstances were not clear, the disappearance of the record largely contributed to the delay.

(3) Whilst, as a general proposition, a person who seeks a permanent stay of the criminal proceedings in which he is an accused, must assert his rights and that failure to do so will make it difficult for him to prove that he was denied a speedy trial, in this case that the applicant was not in a position to do more than complain to the High Court judges. His lawyer, representing him *pro Deo*, never demanded that this matter be determined. After the legal practitioner left the country, no other legal practitioner from the firm pursued the matter. The failure by the applicant to assert his rights in these circumstances is not one that should weigh heavily against him.

(4) The question of prejudice is to be assessed in the light of the interests of the applicant which the speedy trial right was designed to protect. Three such interests have been identified: (a) to prevent oppressive pre-trial incarceration; (b) to minimise anxiety and concern on the part of the accused; and (c) to limit the possibility that the defence will be impaired. Only (b) applied here. It could not be doubted that the applicant must have suffered considerable anxiety for the duration of his incarceration. A court may quite properly infer or presume prejudice, where such is not proven.
(5) Whilst each case must be decided on its merits, the grant of a permanent stay is an exceptional remedy. The test is whether, in all the circumstances, the continuation of the proceedings would involve unacceptable injustice or unfairness, or whether the continuation of the proceedings would be so unfairly and unjustifiably oppressive as to constitute an abuse of process. The power to stay proceedings permanently may be exercised where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual, making it unacceptable for justice to embark on its course. There must be prejudice caused to a defendant which interferes with his right to a fair trial in a way which cannot otherwise be remedied; but in the absence of prejudice of that sort, there is normally no justification for granting a stay. The yardstick is not simply fairness to the particular accused or whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. The focus is on the misuse of the court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the court.
(6) Tthere will also always be the interests of society to be taken into account in any Abalancing@ of the factors to be considered. All crime disturbs the community and serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, effectively and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law.
(7) In considering whether or not a permanent stay is warranted, the court had to take note that the applicant was convicted of murder committed with actual intent in the course of an armed robbery and that no extenuating circumstances were found to exist; that all that remained was the pronouncement of sentence; that the record of the proceedings up to the close of the defence case had, fortuitously, been reconstructed using note books provided by the trial prosecutor; that the disappearance of the record largely contributed to the delay; that the circumstances surrounding the commission of the offence were largely admitted by the applicant during the trial; and finally that the trial judge was in a position to reconstruct the missing part of the record.
(8) The lengthy delay experienced in the completion of this case could not in these circumstances justify the grant of a permanent stay of the proceedings, particularly in light of the fact that such record of proceedings could be reconstructed. This was a proper case for the matter to be referred back to the trial court for the reconstruction of the missing part of the record and thereafter for sentence to be passed.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right not to be tried again in respect of act for which previously convicted or acquitted (s 70(1)(m)) – such right not applicable to civil proceedings arising out of same act

Mpofu v *Delta Beverages (Pvt) Ltd* HB-131-14 (Takuva J) (Judgment delivered 11 September 2014)

The applicant and a fellow employee, who were both employed by the respondent, were alleged by the respondent to have committed fraud and forgery in the course of their duties. They were arrested and prosecuted on those charges but at the end of the trial were acquitted. The applicant returned to work but was served with a notice of suspension from work in terms of the respondent's code of conduct. He was then instructed to attend a disciplinary hearing on the same facts on which he had been acquitted by the magistrate. At the hearing, the applicant's legal practitioner immediately argued that it was incompetent for the disciplinary committee to try the applicant for an offence in respect of an act or omission for which he had been previously acquitted on the merits and that for committee to do so would amount to a violation of s 70(1)(m) of the Constitution of Zimbabwe 2013. That provision states that any person accused of an offence has the right not to be tried for an offence in respect of an act or omission for which he has previously been pardoned or either acquitted or convicted on the merits. The applicant and his legal practitioner then left the hearing and the committee proceeded, in their absence, to find the applicant guilty of the disciplinary offences charged. The applicant then applied for the proceedings to be set aside and the question of whether there had been a breach of s 70(1)(m) referred to the Constitutional Court.

Held: in terms of s 4 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the institution of a criminal action does not preclude a party from instituting a civil action against the same party in the criminal proceedings despite the issues being dealt with in the criminal matter being the same as those in the civil matter. The defences of *autrefois acquit* or *autrefois convict* only apply to a second criminal prosecution and not to civil proceedings based on the same facts. An act or omission can result in numerous causes of action: criminal, civil, delictual etc. The protection afforded in s 70(1)(m) relates to acts or omissions in the same category or of the same nature. Any other interpretation would result in an absurdity, in that it would render civil disputes generally and labour laws specifically dependent on outcomes in criminal prosecutions. This is undesirable in a legal system where the burden of proof is different. A contract of employment arises from the employer/employee relationship. The parties' rights are governed by the Labour Act [*Chapter 28:01*] and a code of conduct. Proceedings in terms of codes of conduct are civil in nature and are totally permissible in terms of s 4 of the Criminal Procedure and Evidence Act. The application was therefore frivolous and vexatious and would not be referred to the Constitutional Court.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to personal liberty (s 49) – detention without trial – permissible where authorised by law and for just reasons – detention of prohibited person in terms of Immigration Act – not a contravention of s 49

Okey v *Chief Immigration Officer & Anor* HH-400-14 (Muremba J) (Judgment delivered 4 August 2014)

See below, under IMMIGRATION (Prohibited person).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to appeal or seek review (s 70) – right only subject to any reasonable restriction – decision of Commissioner-General of Police dismissing appeal of member of police force convicted by a single officer – appeal lying to High Court against such decision

Chatukuta v *Nleya NO & Ors* HH-705-14 (Mawadze J) (Judgment delivered 19 December 2014)

See below, under POLICE (Discipline – trial of member by single officer).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – rights of children (s 81) – application of section in determining what is in best interests of child

Damson v *Ushamba* HH-335-14 (Tsanga J) (Judgment delivered 1 July 2014)

See below, under FAMILY LAW (Child – best interests of)

Constitutional law – Constitution of Zimbabwe 2013 – national objectives – legal aid (s 31) – meaning of section – does not mean provision of counsel in every case – Declaration of Rights – right to equal protection of the law (s 56) – access to basic legal information and advice – one method of ensuring equal protection of the law – how such access may be achieved

Mupapa v *Mandeya* HH-443-14 (Tsanga J) (Judgment delivered 27 August 2014)

The appellant, an elderly widow, lost her appeal against an eviction order. She and her late husband purported to buy a portion of an expropriated farm which had been allocated to the respondent. The court, having found that the sale was unlawful, as would have been any lease, in view of the conditions on which the respondent was given an "offer letter" in respect of the farm, considered the question of whether, with proper legal advice, she and her husband would not have entered into the arrangement at all.
Held: the facts of this case could not escape judicial commentary in so far as they brought to the fore the inadequacies and limitations of the nature of the State's role in the provision of legal assistance to those who most need it. The appellant's problem emanated from a deeper source: the lack of legal information that would protect members of the public from such transactions in the first place. Cases such as this, where an

unrepresented litigant would clearly have benefitted from legal assistance in the form of legal information in making a proper decision regarding their matter in the initial instance, are all too evident from appeals.
Legal aid is constitutionally mandated as a national objective by s 31 of the Constitution – at least more narrowly in the form of legal representation in civil and criminal matters for the needy. Furthermore, the Legal Aid Act [*Chapter 7:16*] has over the years served to regulate what exists in terms of legal aid as provided for by the State. However, it is of limited reach population-wise. In addition, the Magistrates Courts (Civil) Rules 1980 provide in Order 5 that "any person desiring to sue or defend as a pauper may apply to the court *ex parte*, either in writing or *viva voce* for leave to do so". The applicant must lack means and have a *prima facie* case. This provision, however, seems to be severely underutilised, presumably because few members of the public are even aware of its existence. Even though litigants can save time and money through legal assistance, the reality is that this is an area that remains underfunded and severely restricted in terms of reach to the needy. The clerk of court and magistrates have some duty to promote utilisation of the provision.
The obligation to provide legal aid, if understood in its broader sense, does not mean that counsel should be provided in every case. This would be impractical in our context. In terms of s 56(1) of the Constitution, "all persons are equal before the law and have a right to equal protection and benefit of the law". Equal protection and benefit from the law cannot take place where there is lack of knowledge of most laws. Giving meaning to this provision requires that the State thinks "outside the box" and draws on grounded experiences from our own contextual realities to craft sound approaches to addressing obstacles that stand in the path of achieving the goal of "equal protection and benefit of the law". What compounds the need for legal aid in this broader, rather than a narrower sense, in our case is that the bulk of the people, especially in the rural areas, are unfamiliar with the state laws.
Access to legal information and advice centres, as a clearly thought out country-wide initiative, would help to appraise the needy of the legal standing of their cases and would go a considerable way in addressing the right to equal protection before the law through at least the provision of legal information a basic minimum. Organisations that provide knowledge on formal laws through legal information and advice (which include among them NGOs such as the Legal Resources Foundation which work through advice centres and paralegals in selected parts of the country), lack nationwide geographical reach because of the very limited resources at their disposal.
Had legal information and assistance been easily accessible, the appellant's husband in the initial instance would have had an opportunity to fully canvass the legal status of the agreement that he sought to enter into, and its non-legality would have been pointed out and so prevented the fundamental and dire consequences in the form of loss of a home for the widow and her family. If media reports are anything to go by, cases of this nature (subletting of resettlement land and even purported sales) seem to be fairly rampant, despite the legal position relating to resettlement land and the clear content of the conditions that accompany offer letters. Given the significance of agricultural land for rural communities, this could therefore be one of the issues, among a myriad of other critical knowledge areas, where the State can provide input in terms of a nationwide legal information outreach. If the appellant herself had had access to legal advice and legal information on the full import of the offer letter she would have saved herself court battles.

Contract – breach – remedies – cancellation – when court may order cancellation – breach must be serious – cancellation will not be ordered for a trivial breach

Contract – performance – to whom performance may be made – payment by debtor to third party – such third party a creditor of the creditor – debtor discharged if creditor benefits thereby

Matanhire & Anor v *Chapendema & Anor* HH-334-14 (Mafusire J) (Judgment delivered 3 July 2014)

The plaintiffs sold their Marondera property to the first defendant in terms of a written deed of sale drawn up by a firm of legal practitioners and signed by the parties. The purchase price for the property was US$65 000. The defendant paid a deposit of $10 000 and then, after securing a mortgage, paid a further $50 000. The defendant paid the remaining US$5 000, but most not directly to the plaintiffs: part was paid to the Zimbabwe Revenue Authority for the capital gains tax; part was paid to the local authority for outstanding rates as assessed by that local authority; and a smaller part was paid to a firm of lawyers as their bond cancellation fee and collection commission for the release of the title deed which they had been holding. The balance was paid into the second plaintiff's bank account. The property was transferred to the defendant but the plaintiffs refused to vacate.
The plaintiffs claimed that the defendant had breached the contract and sought cancellation. They claimed that she had purported to manage their affairs by herself purporting to meet their capital gains tax and rates obligations. They said the payment to the lawyers, for the bond cancellation, had been a duplication because they themselves had already paid that amount. They claimed that by paying directly to the revenue authority and

by collecting the capital gains tax clearance certificate herself, she had prejudiced them in respect of their entitlement to apply for a roll-over of the purchase proceeds for the purposes of purchasing another property that the second plaintiff was buying from a third party. They also said that by paying for the outstanding rates, the defendant had prejudiced them in their entitlement to a discount on those rates.
The defendant, for her part, sought the eviction of the plaintiffs and holding over damages. She had retrieved the duplicated payment from the lawyers and paid it to the plaintiffs.
Held: (1) The nub of the matter was whether by paying the outstanding $5 000, not directly to the sellers, but to those bodies to which the sellers had direct monetary obligations, the defendant had discharged her own obligations in terms of the deed of sale. In other words, by paying the plaintiffs' creditors for the conveyance of the property, had she discharged her own obligations to them as her creditors for the balance of the purchase price? Generally speaking, the debtor's payment to his creditor's creditor does not discharge him from his obligation. But there are exceptions. If the creditor benefits from the debtor's payment to his own creditor then the debtor is discharged.
(2) In terms of the Capital Gains Tax Act, and subject to the exemptions therein, the seller of an immovable property is obliged to pay capital gains tax on the capital gain received by him on the sale of his property during the year of assessment. The conveyancer of the property is obliged to withhold the capital gains tax from the purchase price and remit it to the revenue authority within three days of the date that he pays out the purchase price to the seller or transfers the property. The conveyancer becomes personally liable for the capital gains tax if he fails to withhold and remit it. In terms of s 30A of the Act, no transfer of land will be registered in the deeds office unless the capital gains tax has been paid. The plaintiffs' claim to a right to a roll-over of the purchase proceeds was a subterfuge. The time for them to have indicated their intention to apply for a roll-over was on the submission of the capital gains tax return and during the interview with the revenue authority. On both instances they had not done so.
(3) Ultimately, the plaintiffs' claim was that they, and not the defendant, should have remitted the capital gains tax. But that was no ground to repudiate the sale. Where there has been a breach of contract by reason of malperformance, rescission of the contract is more burdensome than specific performance. It is a more radical remedy. The court must strike a balance between the competing interests. Ultimately it makes a value judgment. It must decide whether the breach is so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences. Here, the sum involved was a mere 5% of the purchase price. Even if the defendant had not been entitled to pay the tax directly to the revenue authority and was thereby guilty of malperformance, the breach would not have been one going to the root of the contract. It would not have been one so serious as to warrant rescission. At best, the plaintiffs would have to be content with a claim for damages; but *in casu* the defendant's payments were proper and were made in discharge of her obligations to the plaintiffs.
(4) The defendant was entitled to the relief she sought.

Contract – compromise –what is – effect – compromise must be certain – offer not substantially varying conditions of original contract – no compromise formed

ABC Bank v *Pfumojena* HH-546-14 (Mafusire J) (Judgment delivered 8 October 2014)

See below, under SURETYSHIP (Surety – liability).

Contract – mistake – party signing contract in blank and leaving it to other party to complete – when first party may escape liability

FBC Bank Ltd v *Dunleith Entprs (Pvt) Ltd & Ors* HH-568-14 (Zhou J) (Judgment delivered 22 October 2014)

When a party to an agreement signs it in blank and leaves it to the other party to complete the rest, the first party cannot claim that he is not bound by the terms of the agreement. Applying the *caveat subscriptor* principle, the signatory could escape liability only by raising one of the defences that would have availed if the blank spaces had been filled in prior to the signature, that is, the normal defences which would be available to any signatory: misrepresentation, fraud, illegality, duress, undue influence and mistake. In relation to suretyship agreements, blanks in written contracts can sometimes be dealt with either on the basis that they could be filled in from another document, where there is such a document which is incorporated by reference, or that the clause containing the blank was designed solely for the benefit of one party who, by leaving the blank, has elected not to take the proffered benefit.

Editor's note: this decision was upheld on appeal. See *Muzuva* v *FBC Bank Ltd* S-67-15 (Ziyambi JA, Gowora & Mavangira JJA concurring) (judgment delivered 16 November 2015).

Costs – collection commission and costs – not permissible for party to claim both – when collection commission may be recovered from judgment debtor

FBC Bank Ltd v *Dunleith Entprs (Pvt) Ltd & Ors* HH-568-14 (Zhou J) (Judgment delivered 22 October 2014)

Collection commission is a charge that is levied by an attorney or agent when payment of a debt has been recovered through his services prior to judgment. In other words, the commission is for collecting the payment other than through a judgment. Where the payment is recovered in terms of a judgment in terms of which the judgment creditor has been awarded costs on an attorney-client scale, there can be no legal justification for claiming collection commission in addition to such costs. The rationale is that attorney-client costs compensate the judgment creditor in full for the costs paid to the legal practitioner representing him.

Costs – legal practitioner and client scale – unethical conduct on part of legal practitioners – practitioners deliberately failing to advise other party of planned proceeding, result in unnecessary litigation – costs on higher scale awarded

Zuva Petroleum (Pvt) Ltd v *Motsi & Anor* HH-648-14 (Chigumba J) (Judgment delivered 26 November 2014)

See below, under PRACTICE AND PROCEDURE (Judgment – default judgment – rescission)

Court – Administrative Court – status of – not a superior court – decisions subject to review by High Court – application to Administrative Court – application for rescission of judgment granted in error – no provision for such application in rules of Administrative Court – High Court Rules to be followed

Court – High Court – jurisdiction – court of "inherent jurisdiction" – meaning and effect – review jurisdiction – review powers over inferior or subordinate courts – High Court's powers to review decisions of Administrative Court

Derdale Invtsms (Pvt) Ltd v *Econet Wireless (Pvt) Ltd & Ors* HH-656-14 (Dube J) (Judgment delivered 12 November 2014)

The Administrative Court granted leave to the applicant to file an appeal out of time against the second respondent's (the city council) decision granting a permit to the first respondent to establish a cellular base at a place in a suburb in Harare. Twelve days later, the first respondent made a chamber application to the Administrative Court for leave to appeal to the Supreme Court against the interlocutory order. The application was served on the applicant the next day, but the court dealt with and granted the application in chambers before the 10 day period within which the applicant was required to file a response had elapsed. The next day, the applicant filed its notice of opposition. The court, on being advised that it had granted the order in error, accepted its error and requested the parties to appear before it in chambers. The first respondent refused to abandon the order granted in its favour, resulting in the court ruling that it was *functus officio*. On the basis of the ruling in its favour, the first respondent had lodged an appeal with the Supreme Court.

The applicant sought a review of the decision of the Administrative Court granting leave to appeal to the respondent. It argued that the High Court, being a court of original and inherent jurisdiction, had the power to review proceedings of all inferior courts. The Administrative Court was a court inferior to the High Court and thus the High Court had jurisdiction in terms of ss 26 and 27 of the High Court Act [*Chapter 7:06*] to review proceedings of that court. On the merits of the application for review, the applicant contended that the Administrative Court erred when it failed to afford the applicant an opportunity to oppose the application before it, thereby committing a gross irregularity which was subject to review by the High Court.

Opposing the application for review, the first respondent argued that the High Court had no review jurisdiction over the Administrative Court, which was a court of record whose proceedings are subordinate only to the Supreme Court. The question of whether the appeal was properly before the Supreme Court was an issue that should be taken in the Supreme Court.

Held: (1) the applicant could have applied to the Administrative Court for rescission of judgment in terms of r 449 of the High Court Rules 1971. Although the Administrative Court (Miscellaneous Appeals) Rules 1980 do

not make provision for rescission of a judgment or order, particularly where there is an allegation that the order or judgment was erroneously made or granted, in any case where the conduct of proceedings is not covered by those rules, the practice in that court is to apply the High Court Rules: see s 13(3)(a) of the Administrative Court Act [*Chapter 7:01*].
(2) The Supreme Court and the High Court were specifically and directly provided for in the old Constitution. Other courts subordinate to the High Court and Supreme Court could be established under Acts of Parliament. The Administrative Court was so established.
Under s 177 of the 2013 Constitution, the High Court is a superior court of record and has original jurisdiction in all civil and criminal matters. It has unlimited original jurisdiction which it exercises unless its jurisdiction is specifically ousted. It has concurrent jurisdiction and may exercise its jurisdiction over matters which other courts have jurisdiction. It is given the power to supervise the magistrate's court and other subordinate courts and to review their decisions. It also has inherent power conferred upon it by s 176 of the Constitution to protect and regulate its own process and to develop the common law or the customary law.
(3) The "inherent jurisdiction" of the High Court means the unwritten power without which the court is unable to function with justice and good reason. Such powers are enjoyed by the court by virtue of its very nature as a superior court. The concept of inherent jurisdiction has its foundation in common and law is reserved for the highest courts in the land. In this country only the superior courts – the Constitutional Court, the Supreme Court and the High Court – are courts of superior jurisdiction. The power of the High Court to review and supervise the decisions of subordinate and inferior courts enshrined in the Constitution and codified in the enabling act derives from its inherent jurisdiction or power. Inherent power is unwritten power which superior courts are endowed with. Inherent power gives the court wide ranging and all-embracing powers to deal with any matter that may be placed before them. This means that a court of inherent jurisdiction has default powers which it can exercise in the absence of express power and can deal with all areas of the law and all procedural matters involving the administration of justice. The mischief behind the concept is to ensure that justice is done between the parties by ensuring that due process of law is observed, proceedings are fair and are conducted in accordance with real and substantial justice. It is an issue of the interests of justice and access to justice rather that some perceived wrestling match for power and supremacy. Such jurisdiction extends to all matters including those over which other courts have jurisdiction. If a litigant chooses to go to the High Court, the court can assume jurisdiction over that person. It can hear any matter that comes before it. It can also review all proceedings of all inferior courts. The High Court will refrain from exercising its inherent jurisdiction only where its jurisdiction is specifically excluded or ousted by a statute or other law. Because the High Court has inherent jurisdiction, its jurisdiction cannot be excluded by implication.
(4) Under s 26 of the High Court Act, decisions of "inferior courts" are reviewable by the High Court except where the law provides otherwise. "Subordinate court" and "inferior court" mean the same thing. An "inferior court" is a court of limited and specified jurisdiction, one whose jurisdiction is specified and does not apply the common law. It is not a superior court. What governs what an inferior court is the nature of the jurisdiction that it exercises and nothing more. All courts that do not apply the common law, do not have original and inherent jurisdiction, and exercise limited and specified jurisdiction are inferior courts. All courts which are not superior courts are inferior courts. The High Court, being a superior court of original and inherent jurisdiction, is empowered, in the absence of any law that ousts its jurisdiction, to review decisions of inferior courts.
(5) Under the 1980 Constitution, the Administrative Court was a specialist court dealing with review of decisions of administrative and statutory bodies and dealt only with matters of an administrative nature. The court was placed in the category of subordinate courts and was subordinate to the High Court and Supreme Court and was therefore an inferior court. Its decisions and proceedings were in terms reviewable by the High Court. Although the court was now provided for in the 2013 Constitution and was made a court of record, it was not defined as a superior court. It remained a specialist court with limited and specified jurisdiction, dealing with administrative matters only. It does not have original and inherent jurisdiction and does not apply the common law. There was no provision in the Administrative Court Act or its rules that ouster the review jurisdiction of this the High Court in administrative matters. The fact that the Administrative Court was described as a court of record did not mean that the status of the court was raised to that of a superior court.
(6) Although the High Court had the jurisdiction to entertain the review in question it is undesirable for it to usurp the functions of the Supreme Court, with which the appeal had been lodged. The matter should have been dealt with by the Administrative Court but would now have to be dealt with by the Supreme Court.

Court – High Court – jurisdiction – employment matter – arbitral award registered with High Court – award subsequently varied by consent and made an order of the Labour Court – High Court having no jurisdiction to deal with amended award

Windsor Technology (Pvt) Ltd v *Mabuyawa & Anor* HH-377-14 (Chigumba J) (Judgment delivered 23 July 2014)

The applicant and the first respondent were parties to an employment dispute which became the subject of arbitration proceedings, and which culminated in an arbitral award being issued. The applicant noted an appeal against the arbitral award, to the Labour Court. The first respondent caused the arbitral award to be registered as an order of the High Court and instructed the deputy sheriff to attach property in execution. Various movable goods were attached. Subsequently, the parties negotiated a settlement which culminated in the registration of a deed of settlement by the Labour Court. A dispute then arose about whether the applicant was entitled to deduct the sum assessed by the revenue authority as being due in income tax and pay it to the authority. With attachment of its property being imminent, the applicant approached the high Court for a stay of execution pending a determination by the court as to whether the deed of settlement had been breached.
Held: the High Court had no jurisdiction. Where a party has registered an arbitral award for purposes of execution with the High Court, and a deed of settlement is subsequently, by consent, entered into and registered as an order of the Labour Court, which deed significantly alters the terms of the arbitral award, then, in the event of any further dispute, the parties are back in the hands of the Labour Court. Their remedies lie with the Labour Court, unless the arbitral award, as varied, is registered again as an order of the High Court. Section 92C(3) of the Labour Act [*Chapter 28:*01] allows the Labour Court to suspend the execution of its order pending its decision on an application to vary or rescind the order on grounds that it was obtained by a mistake common to both parties.

Court – High Court – jurisdiction – full and original jurisdiction in civil matters – includes appellate jurisdiction from inferior tribunals unless such jurisdiction specifically excluded – decision of Commissioner-General of Police dismissing appeal of member of police force convicted by a single officer – appeal lying to High Court against such decision

Chatukuta v *Nleya NO & Ors* HH-705-14 (Mawadze J) (Judgment delivered 19 December 2014)

See below, under POLICE (Discipline – trial of member by single officer).

Court – High Court – jurisdiction – mining dispute – court having jurisdiction to determine dispute – no requirement to refer dispute first to mining commissioner

Rock Chemical Fillers (Pvt) Ltd v *Bridge Resources (Pvt) Ltd & Ors* HH-339-14 (Mathonsi J) (Judgment delivered 9 July 2014)

While a mining commissioner has judicial powers, conferred upon him by s 346 of the Mines and Minerals Act [*Chapter 212:05*], to hold a court in any part of the mining district to which he is appointed and determine disputes in the simplest, speediest and cheapest manner possible, and also to authorise a survey (s 353), for the purpose of ascertaining whether an encroachment has occurred, the High Court still enjoys jurisdiction over such matters. An application to the High Court arising out of a mining dispute cannot be defeated by a failure to refer the dispute to a mining commissioner. It is, however, important to note that it is within the province of the court to direct the mining commissioner to commission a survey. Indeed the mining commissioner to whom a complaint has been made has a duty to investigate the complaint thoroughly.

Court – High Court – jurisdiction – review – decision of magistrates court to order execution on basis of arbitral award without such award being registered – such order incompetent – applicant should approach magistrates court for stay of execution – High Court not having jurisdiction

Delta Beverages (Pvt) Ltd v *Chimuriwo & Ors* HH-600-14 (Chigumba J) (Judgment delivered 29 October 2014)

The respondent, a former employee of the applicant, had an arbitral award in his favour. The applicant paid the amount awarded, having deducted income tax. The amount of the award being within the monetary jurisdiction of the magistrates court, the respondent instructed the messenger of clerk to execute against the applicant's property for the balance. The applicant brought review proceedings in the High Court, the grounds of review being that the first respondent had instructed the messenger to attach, remove and sell the applicant's movable property acting under an irregularly issued warrant of execution, the warrant having been issued without

registration of the arbitral award; and that the judgment debt had been paid in full and that there was no need to proceed with execution.
Held: what the applicant sought to have reviewed was the procedure adopted by the magistrates court, a court whose procedures are governed by the Magistrates Court Act [*Chapter 7:10*] and Rules. The registration of arbitral awards is provided for by s 98(14) and (15) of the Labour Act [*Chapter 28:01*]. The effect of registration of an arbitral award is to turn the award into a civil judgment of the appropriate court. Without being registered, an arbitral award is not a court order for purposes of enforcement. Under s 20 of the Magistrates Court Act, in order for a writ of execution to be issued, there must be a judgment of the magistrates court, which is founded in money, on which execution will be based. The procedure adopted by the magistrates court in this case, of merely issuing a writ of execution on the basis of an arbitral award, is akin to putting the cart before the horse. The applicant's first port of call in these circumstances should have been the magistrates court itself, as the issuer of a warrant of execution which was not based on its own judgment as provided by its governing Act or its rules. The applicant ought to have applied to the magistrates court for stay of execution, simply because that court had issued the warrant of execution. Any review of the arbitral award should have been brought before the Labour Court. The matter should not have been brought before the High Court, which did not have jurisdiction.

Editor's note: this judgment should be read in conjunction with that in *Nyahora* v *CFI Hldgs (Pvt) Ltd* S-81-14 (see below, under Employment – contract – termination). While any review of the arbitral award itself would certainly be within the exclusive jurisdiction of the Labour Court, a review brought because the wrong procedure was adopted in an inferior court – albeit that the original case was a labour matter – may not itself be a "labour matter".

Court – High Court – officer – sheriff – conduct and ethics – duty to act fairly

Pandhari Lodge (Pvt) Ltd & Ors v *CABS & Anor* HH-720-14 (Mangota J) (judgment delivered 31 December 2014)

See below, under PRACTICE AND PROCEDURE (Execution – sale in execution – duty of sheriff)

Court – judicial officer – recusal – grounds for – when judicial officer may be deemed to be automatically barred – apprehension of bias – need for apprehension to be based on true facts – approach to be taken by judicial officer to application – normal procedure for dealing with application – duties of counsel

Mangenje v *TBIC Invstms (Pvt) Ltd & Anor* HH-510-14 (Mafusire J) (Judgment delivered 24 September 2014)

In the context of judicial proceedings, recusal is the stepping aside, or disqualification of a judicial officer from a case on the ground of personal interest in the matter, bias, prejudice, or conflict of interest, or if he has conducted himself in such a way, that he could be regarded as having become, directly or indirectly, a party to the proceedings. In the latter event, the maxim *nemo judex in sua causa* (no one shall be judge in his own cause) requires that he should recuse himself. He is automatically barred by operation of the law. But even where the judge is not automatically disqualified, he must still recuse himself upon application by a reasonable litigant who reasonably apprehends a possibility of bias on the part of the judge. The apprehension of the reasonable person has to be assessed in the light of the true facts. Incorrect facts which an applicant takes into account have to be ignored. In determining the possibility of bias, there is no difference between whether one does so from the point of view of the court seized of the challenge or from the point of view of the reasonable litigant.
When the recusal of the judicial officer from a case is sought, only that judicial officer can decide that application in the first instance. If recusal is refused and that decision is wrong, it can always be corrected on appeal. In a sense, therefore, and contrary to the general rule, the judicial officer becomes judge in his own cause. It seems an inevitable exception to the general rule.
There are a number of reasons for that.
The first is that judges have a duty to sit and decide cases before them and in which they are not disqualified. They should not too readily accede to suggestions of bias or other interest in the matter, because by doing so they might encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.
Secondly, by reason of their training, experience, conscience and intellectual discipline, it must be assumed that judges are able to administer justice without fear or favour, and capable of judging a particular controversy fairly on the basis of its own circumstances. It must be assumed that they are able to disabuse their minds of any irrelevant personal beliefs and predispositions. Furthermore, on being appointed, every judge takes and subscribes to the judicial oath "… to do right to all manner of people after the laws and usages of Zimbabwe, without fear or favour, affection or ill-will. There is a presumption that judges will carry out their oaths of

office, and that is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high.
Thirdly, it is in the general interest of the judiciary and the public for an individual judicial officer to recuse himself where a litigant perceives a reasonable apprehension of bias. The judicial officer should not unduly take a recusal application as a personal affront. However, while the judicial officer considering the alleged bias must be reasonable, the perception or apprehension of bias must itself also be reasonable. An apprehension of bias that is whimsical or morbid cannot be a ground for seeking recusal.
Fourthly, in all cases of automatic disqualification or of reasonable apprehension of bias, there must be a link, direct or indirect, between the judicial officer and one of the parties to the litigation.
Before an application for recusal is made, the judicial officer should be informed of the fact and the grounds of the application to avoid embarrassment and to give him the time and opportunity to give his side of the story and for facts to be verified before the formal application is made. The usual procedure is that counsel for the applicant seeks a meeting in chambers with the judge in the presence of his opponent. The grounds of recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.
A litigant and his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and that the propriety of their motives should not lightly be questioned. If counsel's duty to his client demands it he must launch the application courageously and without fear of personal consequences. If the thing must be done, it must be done without timidity. Should counsel have a scintilla of doubt whether his application be contempt, he should seek the assistance of experienced counsel, not necessarily at his client's expense.

Court – jurisdiction – concurrent – two courts having jurisdiction over same subject matter – lower court seized with matter – higher court not entitled to deal with matter save by way of appeal or review

Damson v *Ushamba* HH-335-14 (Tsanga J) (Judgment delivered 1 July 2014)

See below, under FAMILY LAW (Child – best interests of)

Court – Labour Court – jurisdiction – limits to jurisdiction – relief sought not specifically set out in Labour Act – right of party to seek relief from High Court

Nyahora v *CFI Hldgs (Pvt) Ltd* S-81-14 (Ziyambi JA, Gwaunza & Patel JJA concurring) (Judgment delivered 23 October 2014)

See below, under EMPLOYMENT (Contract – termination).

Criminal law – general principles – degrees of participation – accomplice – dissociation from common purpose – what steps accused must take before can be held to have dissociated himself from acts of principal perpetrator

S v *Ncube & Anor* S-58-14 (Hlatshwayo JA, Ziyambi & Garwe JJA conciurring) (Judgment delivered 30 July 2014)

In respect of the defence of dissociation from a crime, a last-minute withdrawal on its own is insufficient to exculpate a secondary party from the main charge. That party must do more for the defence of "withdrawal" to succeed. He must "countermand" or "repent" the original instruction or understanding. The withdrawing party must literally "step on the lit fuse" in order to successfully dissociate from a conspiracy to blow up a building with dynamite. The ultimate decision whether a person's dissociation from a common purpose can serve to exculpate him for crimes committed by the group after dissociation is a value judgment, but a number of factors relevant to the inquiry have emerged from the case law. These factors need to be weighed in the balance by the court in reaching an equitable decision on whether dissociation is legally effective or not. Much will depend on the circumstances: on the manner and degree of the accused's participation; on how far the commission of the crime has proceeded; on the manner and timing of the disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. The greater the accused's participation, and the further the commission of the crime has progressed, then much more would be required of an accused to constitute an effective dissociation. He may even be required to take steps to prevent

the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment.
Where a person has merely conspired with others to commit a crime, but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose.
Under s 200 of the Criminal Law Code [*Chapter 9:23*], an accomplice shall not be guilty of a crime committed by an actual perpetrator if, before the crime has been committed, the accomplice voluntarily desists from further incitement of, conspiracy with, or authorization or assistance to the actual perpetrator and either (a) renders wholly ineffective his previous incitement, conspiracy, authorization or assistance; or (b) gives warning of the crime to a police officer or other person with authority to prevent the commission of the crime, in sufficient time to enable the police officer or other person to prevent its commission. In terms of s 199, an accomplice who fails to effectively withdraw is guilty of foreseeable additional crimes committed by the actual perpetrator.

Criminal law – general principles – degrees of participation – accomplice – who is an accomplice – mental and physical elements necessary – person witnessing a crime and doing nothing to prevent it – not *per se* an accomplice

S v *Mumpande & Ors* HB-146-14 (Moyo J) (Judgment delivered 25 September 2014)

An accomplice is a person who, with the necessary mental state, aids, abets, counsels or assists in a crime either before or during its commission. His liability is based on the fact that he gives assistance to the principal offender, knowing or foreseeing the possibility that the principal offender is going to commit a particular crime.
The physical elements of an accomplice's liability are that he gives some form of assistance, either before the crime (e.g. he supplies the means to commit the crime) or at the time of the crime (e.g. standing lookout).
The mental element of the liability of an accomplice is dependent on proof that he rendered assistance and that he had the intention to assist in the commission of the crime which was actually committed by the principal. The extent of the liability of the accomplice hinges upon his intention, actual or legal, in regard to what is done by the principal offender. The accomplice should be liable to be convicted of the same offence with which the principal is charged; facts must be present that show that the accomplice could also be convicted of that offence.
A person does not become an accomplice merely by witnessing an act and taking no steps to prevent it.
Two requirements must therefore be satisfied for a person to be labelled an accomplice: (a) there must be evidence that the person intended to aid or promote the underlying offence and (b) there must be evidence that the person actively participated in the crime by soliciting, aiding or agreeing to aid the principal.

Criminal law – general principles – *mens rea* – offences of strict liability – when strict liability may be imposed – even where such liability is imposed, *actus reus* of the offence must be proved

S v *Meikle* HH-565-14 (Hungwe J, Mangota J concurring) (Judgment delivered 15 October 2014)

See below, under LAND (Occupation).

Criminal law – motoring offences – negligent driving – finding on degree of negligence – need to carry out factual enquiry before making such finding

S v *Manhenga* HH-62-15 (Bere J, Hungwe J concurring) (Judgment delivered 18 November 2014)

The appellant pleaded guilty to a charge of culpable homicide arising out of a motoring accident. The particulars of negligence alleged were (a) turning right upon (*sic*) path of oncoming traffic; (b) fail to keep a proper look out of the road ahead; and (c) fail to stop or act reasonably when accident seemed imminent. In the agreed statement of facts, it was said that she turned right into a residential stand in a suburb in Harare and was hit by the deceased, who was riding a motor cycle and coming from the opposite direction. The magistrate concluded, without further enquiry, that the appellant was grossly negligent and imposed an effective prison sentence.
Held: a finding of gross negligence could not possibly have been made so intuitively on such skeletal allegations. Such a finding has far reaching consequences in a culpable homicide case which is linked to negligence on the part of the appellant. Turning right in front of oncoming traffic *per se* could not possibly have led the magistrate to conclude that the appellant's driving conduct amounted to gross negligence, because such conduct can be a particular of ordinary negligence. The inference of gross negligence drawn by the magistrate

clearly did not exclude any other competing inferences. Any such inference was not sustainable. Apart from the excessive delay in finalising what was a simple plea matter, a prison sentence was inappropriate and would be replaced by a fine.

Criminal law – offences under Criminal Law Code – culpable homicide – foreseeability – test

S v *Mukwambuwe* HH-378-14 (Muremba J) (Judgment delivered 24 July 2014)

For a conviction for culpable homicide to be sustainable there must be two tests. The first test is the test for factual cause: there must be a causal link between the accused's conduct and the consequence. The question is whether, but for the accused's conduct, the consequence would have occurred. This is referred to as *causa sine qua non.* The second test is the test for legal cause. The question is whether it was reasonably foreseeable that accused's conduct would lead to that consequence. The causal link would not be broken by a new cause that supervened after the accused had engaged in the conduct, provided it was reasonably foreseeable that the subsequent event would occur after the accused's conduct.

Criminal law – offences under Criminal Law Code – culpable homicide – liability – accident on boat – master of vessel responsible for ensuring compliance with regulatory provisions and for driving the boat – whether other members of crew can be held liable for deaths caused by master's breaches

S v *Weale & Anor* HH-440-14 (Mathonsi J, Mavangira J concurring) (Judgment delivered 20 August 2014)

The two appellants had been jointly charged, along with two other persons, with culpable homicide, following an accident in which a boat capsized and 11 of the passengers drowned. The boat was overloaded, carrying three times as many passengers as it was allowed to. No life jackets were carried on the boat. The particulars of negligence relied on by the State were that: (a) the passengers were not supplied with life-saving appliances; (b) the boat was carrying more passengers that required (over-loaded); and (c) failure to keep the boat under proper control.

The appellants worked for the owner of the boat, but contended that neither was in command of the boat, and the second appellant was not even on the boat when the accident occurred. The first appellant had, it was found, announced to the passengers that he was the captain, although in fact he was not the driver of the boat. The second appellant was found liable on the basis that he had helped overload the boat.

Held: the simple question was whether, other than the captain or master of a boat or ship, anyone else could be held criminally liable for a boating accident. The principle *nullum crimen sine lege*, which underpins the principle of legality in our criminal law, has gradually crystalized into an immutable principle of law in every civilized society. This principle, which has been adopted in the criminal codes of several countries, is aptly captured in the statement that "a deed can be punished only if its criminality had been lawfully provided prior to its commission." Any decision on whether the appellants are guilty of a crime ought to be made within the strict confines of the applicable law at the time. The State preferred charges of culpable homicide, relying on specific particulars of negligence. The State did not refer to the Inland Waters Shipping Act [*Chapter 13:06*] or the regulations made thereunder.

In terms of s 2 of the Act, the definition of "master" is a person having command or charge of a vessel. A person employed in a vessel, other than a master, is termed "crew". In view of the length of the boat, s 42 of the Inland Shipping Regulation 1971 (RGN 832 of 1971) required one life jacket to be carried for each person legally on board. The responsibility of ensuring compliance with the loading capacity lay with the person in charge, who, in the present case, was the master or captain of the boat. This person was the person sailing or driving the boat. Naturally, he would be liable for any failure to keep it under proper control. The allegation of failure to keep the boat under proper control applied to him, but could not apply to the appellants.

Besides considering the common law concepts on culpable homicide, the magistrate ought to first have regard to the law governing inland shipping vessels. The statutory provisions would have directed him as to who was primarily responsible for what, as set out in the Act and regulations, and then apply, if he had to, the concepts governing negligence against those individuals who bore the legal or criminal responsibility in such situations. Had he carried out this exercise, he would have realised that, as the law stands, only the master or captain or person in charge is criminally liable for any mishap on a water body. The person in charge is legally obliged to ensure that the number of people carried did not exceed the legal limit (s 39 of the Regulations). He decides if there has been compliance with the law before the boat sets sail. He is knowledgeable on the law governing the vessel. Such a vessel would not venture into the water without his permission. If he is not, for any reason, satisfied about the mechanical fitness of the vessel, he has the power to cancel the trip into the water. Therefore

he, and only he, bears all the responsibility for the safety of both the passengers and the crew. The concept of foreseeability in negligence could hardly be applicable where it could be intertwined with the nebulous concept of common purpose. These two concepts have different requirements in respect of *mens rea*. There would have been a requirement to allege common purpose, if all crew were criminally liable, in order to secure a conviction for culpable homicide in a boating accident. This would be near impossible. Even upon a proper application of the concept of foreseeability, the court *a quo* had to be satisfied that it was reasonably foreseeable to both appellants that their conduct would result in the death of the deceased persons. In other words, there had to be a causal connection between the acts or omissions of the appellants and the death of the deceased persons. The evidence was just not there.

Criminal law – offences under Criminal Law Code – engaging in practices commonly associated with witchcraft (s 98) – plea of guilty to – may be accepted by court – no need for expert evidence in event of unequivocal plea

S v *Jochoma* HH-606-14 (Bhunu J) (Judgment delivered 21 October 2014)

The accused pleaded guilty to and was convicted of engaging in an act commonly associated with witchcraft with intention thereby to cause harm to any person, in contravention of s 98(1) of the Criminal Law Code [*Chapter 9:23*]. He was seen early one morning at the Chitungwiza magistrates court breaking an egg at the court gate. When confronted he ran away. The following morning at around the same time he was again observed attempting to break another egg at the same gate. When confronted, he again fled, but was pursued and apprehended. Upon being searched he was found in possession of some red and white cloths. When questioned by the trial magistrate after pleading guilty, he admitted that he engaged in a practice commonly associated with witchcraft and that he intended to cause harm to persons at those premises.
The matter was referred for review by the Chief Magistrate, who took the view that because s 98(4) of the Code precludes a court from taking judicial notice of any practice commonly associated with witchcraft, a court cannot simply convict an accused of this offence without calling expert evidence to determine whether indeed the practice which forms the subject of the charge is a practice commonly associated with witchcraft, even if the accused pleads guilty.
Held: under both common law and s 31 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], what is admitted need not be proved because the admission constitutes evidence of the admitted fact. Section 98(4) of the Code did not preclude an accused person from admitting that a particular conduct he engaged in amounted to "any practice commonly associated with witchcraft."
Under s 271 of the Criminal Procedure and Evidence Act, where an accused person pleads guilty and the plea is accepted by the State (as happened in this case), the court is authorised to convict the accused without hearing any further evidence.
The concept of judicial notice is a rule of evidence that allows a fact to be introduced into evidence where the truth or veracity of that fact is so notorious or well-known such that it needs no proof. A court may also invoke the rule where facts are known either from the judicial officer's general knowledge of them, or from inquiries made by himself for his own information from sources to which it is proper for him to refer. Here, the magistrate did not take judicial notice of the fact that breaking an egg at the gate with the intention of causing harm to the occupants of the premises is a practice commonly associated with witchcraft. He convicted the accused on the basis of proven facts placed before him by virtue of the accused's admission. That being the case, the question of taking judicial notice of any facts in convicting the accused did not arise.

Criminal law – offences under Criminal Law Code – kidnapping (s 93) – elements – private person detaining employee overnight on suspicion of theft – such detention constituting an attack on and an infringement of the personal liberty of the employee – offence committed

S v *Hall* HH-446-14 (Hungwe J, Bere J concurring) (Judgment delivered 27 August 2014)

The appellant, a company director, had left his wallet, which contained a large amount of cash, in the company vehicle he had been driving before an evening meeting at the company premises. Because that vehicle had a problem, he was given a lift home after the meeting by a fellow director. In the meantime, the complainant, who was a security guard employed at the company's premises, had found the wallet and took it into the office for safekeeping. The appellant, realising that his wallet was missing, went back to the premises. Upon his arrival, the complainant announced that he knew what the appellant was looking for. The appellant ordered the complainant into the office, together with two other security guards. Inside, the appellant started to count the

money, before stating how much he expected to find. After the process he announced that US$1 200 was missing. He ordered that complainant be searched immediately. The complainant was stripped, frisked and searched in a most humiliating manner. Everyone present was asked to search everywhere for the money. The complainant protested his innocence and asked to be taken to the police as he proclaimed his innocence. The appellant's co-directors also urged him to report the matter and leave the police to deal with the complainant. The hour long search yielded nothing. The complainant was then ordered to dress. Upon being satisfied that the search would not yield anything, the appellant ordered that the complainant be taken into the workshop and be locked up for the night. The next morning, upon being released from the workshop, the complainant was driven to another part of the premises by the appellant. The appellant later learnt that in fact no money had gone missing in the first place.

The appellant was subsequently charged with and convicted of kidnapping and assault and sentenced to a separate term of imprisonment on each count.

On appeal, it was argued that since the complainant was expected to perform his duties around the premises in which he was confined that night till 8 a.m. the following morning, his detention was not unlawful. In any event, the appellant was entitled to effect a citizen's arrest and take steps to recover his stolen property. As such, the appellant acted under a claim of right in effecting such an arrest.

Held: Deprivation of free bodily movement is at the heart of the crime of kidnapping or unlawful detention. The crime constitutes an attack on and an infringement of the personal liberty of the individual. By being confined inside a locked workshop overnight, the complainant suffered a serious deprivation of his liberty. Since the complainant was detained on the orders of the appellant, it was the appellant who is legally liable for any infringement of the complainant's liberty. When performing his guard duties, the complainant exercised free will as to his movement on such duties. On the other hand, once confined to the locked workshop against his will, he clearly could not be free to do that. He was virtually held against his will and imprisoned. Ordinarily, an employee is free to exercise the freedom of movement even if it is circumscribed to a certain area of his jurisdiction. The same cannot be said of someone who is locked up against his will inside a workshop which he was guarding prior to losing his freedom. Once the freedom to move was lost, the right to liberty was infringed and the crime of kidnapping was committed.

The appellant's claim that he had acted under a claim of right in effecting a citizen's arrest could not withstand scrutiny. Whatever good faith he may have had when he initially "arrested" the complainant was destroyed and betrayed by his subsequent behaviour. He was not effecting a citizen's arrest so could not rely on the provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The Act permits an arrest by a private person where a First Schedule offence has been committed in that person's presence (s 27); or where the person is involved in an affray (s 28) or such other circumstances as set out in ss 28, 29, 30, 31 and 31A. Where a private person effects an arrest in terms of the Act, he is enjoined to bring the arrested person to a police station as soon as possible (s 32). He is not entitled to detain his suspect unless such detention is closely connected to bringing the suspect to a police station. The factual circumstances will determine whether such detention can be so construed. The complainant's detention was not for the purposes of bringing him to the police station.

A custodial sentence is generally unavoidable for kidnapping, though there is a wide possible variation in seriousness between one instance of kidnapping and another. At the top of the scale comes the carefully planned abductions where the victim is used as a hostage or where ransom money is demanded. Such offences will seldom be met with less than 8 years' imprisonment or thereabouts. Where violence or firearms are used, or there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that. At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often rise as a sequel to family tiffs or lovers' disputes, and seldom require anything more than 18 months' imprisonment, and sometimes a great deal less. Among factors deemed as aggravating are the following; degree of planning or premeditation, number of perpetrators, vulnerability of victim, duration of loss of liberty, using, brandishing, threatening with or possession of weapons, other offence(s) committed, sophisticated concealment, unpleasant circumstances of detention, such as degradation, effect upon victim, effect upon persons other than the person kidnapped, particularly family, other offence(s) committed, sinister motive, such as terrorist background, any ransom involved, threats intended to discourage victim from reporting the offence and so on.

Here, the assault and the kidnapping had been committed during the same time. They were both were committed with one dominant intent, which was to punish the complainant for stealing cash. Although a distinct and separate *mens rea* was required for each of these two offences, the offences were so closely linked as to justify an approach which served to reduce the net effective sentence. The court ought to have ordered the two sentences to run concurrently, to give an effectively sentence of 18 months' imprisonment.

Criminal law – offences under the Criminal Law Code – rape – consent – what constitutes real consent – devotees of religious sect having sexual relations with pastor – meaningful consent vitiated by religious beliefs and acceptance of authority of pastor

S v *Gumbura* S-78-14 (Patel JA) (Judgment delivered 16 October 2014)

The applicant, who was seeking bail pending appeal, had been convicted of four counts of rape. The victims had been members of the church in which he was a pastor. The complainants had been subjected to frequent indoctrination in the notions of total separation and submission to authority. They were not allowed to fraternise with their relatives and were conditioned to believe that matters of church should not be discussed with outsiders. The applicant displayed a pattern of predatory behaviour, characterised by rampant sexual perversion, manipulating and luring the complainants to accept and endure his deceptively benign patriarchal authority. The applicant argued that the complainants had consented to intercourse with him. The complainants had not reported the rapes until a considerable time afterwards.
Held: religious doctrines and beliefs cannot be subjected to the rigours of legal proof. In the circumstances presented by this case, the quasi-mystical force of religious dogma might overwhelm its conscripts and devotees to the point where it operated to vitiate and negate any meaningful consent to sexual abuse and exploitation by their spiritual masters. The complainants, having been enmeshed within the overpowering cocoon woven by the appellant, unwittingly succumbed to his sexual advances and predations. Thereafter, constrained by fear and misconception, they remained taciturn for several years and only reported their respective ordeals after appreciating the full nature of their sexual bondage.

Criminal law – offences under Criminal Law Code – rape – evidence – of complainant – credibility – need to avoid reliance on what "ideal" rape victim would do – need to consider cultural context and inhibitions placed on victim

S v *Musumhiri* HH-404-14 (Tsanga J) (Judgment delivered 5 August 2014)

In assessing the prospects of success on appeal in cases involving rape, it is necessary that such cases are looked at, not just from the perspective of the person who has been convicted of rape, but also from the lens of the complainant who has experienced the rape. This is even more so in cases where the alleged rape has taken place between parties who are known to each other, as it is precisely in such cases that the administration of justice can be hampered. In such situations, applicants for bail more often than not, when convicted, seek to take advantage of the fact that the two were known to each other: the conduct of their victims may generally fall short of the standard that society has so relentlessly crafted in terms of the expected behaviour of its ideal rape victim. She must scream – very loudly. She must show evidence of physical resistance. She must be battered and bruised if she is a genuine victim. If she knows her assailant she instantly loses credibility and the understanding is that she was not raped. It is the duty of the court to assess an application for bail pending appeal in rape cases unfettered by such dangerous myths which can clearly threaten the quest for substantive justice.
Research on cultural inhibitors to reporting gender-based violence and sexual assault indicates that silence cannot be equated with acquiescence. Fear of lack of support from the family, fear of the consequences that might befall the complainant, which may include being totally blamed for the event, being thrown out of the home, or being forced to marry the rapist are some of what keeps many women from not reporting. With women often held culturally as custodians of what is deemed to be appropriate sexual conduct, and with the responsibility for sexual restraint being placed on a woman's shoulder, regardless of her age or power imbalances, it is understandable that a complainant may fail to report even when she was now free of the sexual assault.
The requirements to be met by a rape complainant should therefore not be divorced from the cultural context that might contribute heavily to swift action not being pursued. A young girl who has been raped may not make a voluntary report because her cultural context makes it difficult for her to do so without being re-victimised. She may fail to report without delay as expected by the law, because in her lived reality she has no idea if she will receive support or condemnation, if not eternal damnation. She may not report to the first person she could reasonably be expected to report for fear of being reduced to a liar and a tease. It is these realities that must therefore, with equal measure, inform the scrutiny of the likely prospects of an appeal in a rape case.

Criminal procedure – plea – *autrefois acquit* or *autrefois convict* – applicability – plea only applies to subsequent criminal proceedings arising out of same facts – not applicable to civil proceedings, including disciplinary proceedings in employment cases

Mpofu v *Delta Beverages (Pvt) Ltd* HB-131-14 (Takuva J) (Judgment delivered 11 September 2014)

See above, under CONSTITUTIONAL LAW (Constitutional of Zimbabwe 2013 – Declaration of Rights – right not to be tried again in respect of act for which previously convicted or acquitted).

Criminal procedure – plea – change of plea – change of plea from guilty to not guilty – what accused must show – must give reasonable explanation as to why he pleaded guilty – court not entitled to refuse to change plea unless satisfied beyond reasonable doubt that explanation is false

S v *Chikwashira* HH-282-14 (Hungwe J, Bere J concurring) (Judgment delivered 2 July 2014)

The appellant, who was unrepresented at his trial at the magistrates court, pleaded guilty to a charge of stock theft. After conviction, but before sentencing, he applied to change his plea to one of not guilty. The magistrate rejected the application and sentenced him to the mandatory minimum sentence of 9 years' imprisonment. On appeal:
Held: In terms of s 272 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the court is required to record a plea of not guilty if any of three situations become apparent at any stage before sentence is pronounced: (a) when the court, for any reason, entertains doubt that the accused is in law guilty of any offence to which he has pleaded guilty; (b) where the court is not satisfied that the accused has correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or (c) if the court is not satisfied that the accused has no valid defence to the charge. Where the accused makes an application after verdict to alter his plea to one of not guilty, all that he is required to do is to give a reasonable explanation of why he pleaded guilty to the offence charged in the first place. It is only when the court is satisfied that the explanation tendered by the accused is beyond reasonable doubt false that the court can refuse to alter the guilty plea to one of not guilty. The court is not required to delve into the merits of the accused's case in order to determine whether his application for a change of plea ought to succeed. The question is not whether the accused's case carries with it any prospects of success. The issue is whether he has put forward an explanation for the guilty plea which, in the circumstances, is beyond reasonable doubt false.

Criminal procedure – record – what record must show – plea of guilty – explanation of charge and elements and accused's replies thereto – need to record fully what is said – verdict – failure to give reasons for verdict – a fatal irregularity – sentence – failure to give reasons for – not necessarily a fatal irregularity

Criminal procedure – review – purpose of – High Court's constitutional duty to supervise lower courts – need for review matters to be dealt with expeditiously

S v *Mutero & Ors* HH-424-14 (Uchena J) (Judgment delivered 28 July 2014)

Judges of the High Court have a constitutional duty to supervise the magistrate's courts and other subordinate courts. That supervision is confined to how they should apply substantive and procedural law, and can be done through review and appeal judgments. This ensures that there is no interference with their decision making process. Administrative supervision is the responsibility of the administrative structure within and outside the magistracy. It is imperative to ensure that the review system, which is aimed at providing a curb on any misdirected or arbitrary exercise of power, is administered efficiently and speedily. A magistrate should not live in fear of reviewing judges, constantly looking over his shoulder, but should regard the reviewing judge as the second member of a two man team. The reviewing judge is not there to criticise or nit-pick or show off his knowledge; he is there to assist, as far as he is able, in the administration of justice and to ensure that accused persons receive fair treatment. The review system complies with s 165(3) of the Constitution, as it ensures judicial independence for magistrates by only allowing High Court judges, who are senior judicial officers, to confirm or correct on review or appeal a magistrate's work, at the end of the proceedings, though in exceptional cases a judge can review proceedings before they are finally determined. The judge's supervisory and review powers creates a buffer between a magistrate's judicial work and the supervisory role of purely administrative

supervisory structures. Section 164 ensures that a magistrate's work is only interfered with by a constitutionally designated officer, exercising constitutionally conferred powers.

The High Court and all who deal with the submission of criminal review records from lower courts must always remember that reviews must be dealt with urgently. Section 57 of the Magistrates Court Act requires magistrates to submit reviews for scrutiny or review within one week of the determination of the proceedings. Section 58(3)(b) of the Act requires regional magistrates to refer cases they are in doubt of to the registrar of the High Court as soon as possible. Section 57(4) requires the Registrar to lay the review records before a judge in chambers "with all convenient speed". These requirements apply with equal force to cases which are referred for review in terms of s 29(4) of the High Court Act. Once the need for review is identified, the record of proceedings must urgently be called for by the judge or be urgently referred to the registrar by the referring officer or person. The registrar must, as he should do in the case of normal reviews, "with convenient speed" place the record of proceedings, before a judge for review. Such records call for urgent attention because the convicted persons will already have been prejudiced because their cases will not have been referred for review in terms of s 57. They will already have suffered delays.

The magistrates court is a court of record. Section 5(1) of the Magistrates Court Act provides that every magistrate's court "shall be a court of record." It is therefore imperative that a magistrate must record the proceedings as they progress. Failure to record proceedings is therefore a serious irregularity which affects the integrity of the proceedings. It is not acceptable to rush through trials with a view to record the rest of the proceedings retrospectively in chambers. It is inconceivable that a judicial officer can recall, while in his chambers, the details of each of several rushed trials and accurately record what he failed to record during the proceedings. The integrity of a court record depends on the faithful and diligent record keeping by a judicial officer, if the proceedings are not being recorded mechanically or by a short hand writer. If the judicial officer fails to do this, the trial becomes irregular and irredeemable. It must be set aside.

The recording of proceedings is of critical importance because no decision can be made in the absence of a record. The trial court itself must rely on the record to arrive at a verdict. The scrutiny, review and appeal courts also depend on the record to determine the validity of the trial magistrate's decision.

Where an accused person pleads guilty in the magistrates court, s 271(2)(a) and (b) of the Criminal Procedure and Evidence Act [*Chapter 9:*07] creates two different procedures through which pleas of guilty may be accepted and proceeded with. In terms of s 271(2)(a), the court can convict without putting the facts and elements to the accused. That section can, however, only be used if the court is satisfied that the sentence to be imposed does not include (i) imprisonment without the option of a fine; or (ii) a fine exceeding level three.

Where the court is of the opinion that the offence merits any of those punishments, or if requested thereto by the prosecutor, it proceeds in terms of s 271(2)(b). The court must record all it will have done under that procedure. Section 271(3) requires the court to record the explanation of the charge and the essential elements of the offence; and any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and any statement made to the court by the accused in connection with the offence to which he has pleaded guilty. A failure to record what s 271(3) says should be recorded is a fatal irregularity, because without such a record it cannot be said that the accused understood the charge, the facts on which it is based and its elements. The accused is entitled to respond to the inquiry and to make any statement to the court in connection with the offence. One cannot comply with the provisions of s 271(3) by merely noting "facts read elements explained and canvassed etc". The record must show how this was done and how the accused responded to the reading of the facts, explanation and canvassing of essential elements. It is the accused's responses which determine whether or not the accused's plea should be altered to one of not guilty in terms of s 272

The court must also follow and record the procedure on sentence as provided by subss (4) and (5). This record is what the reviewing judge will use to determine whether or not the sentence is in accordance with real and substantial justice.

Failure to canvass special circumstances is a fatal irregularity as a court cannot impose a mandatory sentence without first complying with that procedure. The provisions of s 3(3) of the Gold Trade Act [*Chapter 21:03*] and s 368(4) of the Mines and Minerals Act [*Chapter 21:05*] are couched in peremptory terms which makes failure to record or canvass special circumstances a fatal irregularity.

Justice cannot be seen to have been done if a judicial officer pronounces his judgment without giving reasons as to how he came to that conclusion. A judgment in the mind of a judicial officer cannot satisfy a litigant. It does not enable a reviewing judge to determine whether or not real and substantial justice was done. Section 70 of the Constitution entitles any person who has been tried for an offence, on payment of a reasonable fee prescribed by law, to be given a copy of the record of the proceedings within a reasonable time after judgment is delivered in the trial. The right to be given the record of proceedings includes the right to be given the court's judgment. The timing of the enforcement of the right to be given the record of proceedings after the delivery of judgment reinforces the importance of giving reasons for judgment.

Failure to give reasons for sentence is a misdirection which warrants interference by the reviewing judge. However, such interference must be carefully considered as the sentence might be appropriate in spite of the magistrate's failure to give reasons for sentence. In some cases it may be necessary to refer the case back to the trial magistrate for him to give reasons for sentence. This must not be taken as an encouragement to magistrates not to give reasons for sentence. Failure to give reasons for sentence is not just a misdirection, it is a deliberately inefficient and negligent performance of duty which judges may refer to the Chief Magistrate's office for disciplinary action to be taken. Sentences above 12 months can only be justified by the circumstances of each case, which must be stated in the reasons for sentences for that case. It will therefore not be acceptable for a judicial officer to not give reasons for sentence on the basis that the reasons for sentence are obvious. Even if they seem obvious to him, they may not be obvious to the accused, society and the reviewing or appeal judges.

Criminal procedure – witness – calling of by court – when court should do so – should not call witnesses to build up case which prosecution has failed to establish

S v *Mukwambuwe* HH-378-14 (Muremba J) (Judgment delivered 24 July 2014)

Instead of leading *viva voce* evidence from its witnesses, the State chose to have its evidence formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. As a result, some contentious issues which went to the root of the case remained unanswered.
Held: In terms of s 232 of the Act the court is empowered to call witnesses *mero motu* for the purpose of reaching a just decision. However, this power should be exercised sparingly. It is not the function of the court to build up a case which the prosecution has failed to establish. In a defended case, the court can only call a witness in exceptional circumstances, such as if there is a conflict in the evidence which can be resolved by a witness who has not been called. To call, *mero motu*, the State witnesses whose evidence was formally admitted would have been tantamount to building up the case which the State had failed to build.

Criminal procedure (sentence) – general principles – young offenders – corporal punishment of male juveniles in terms of s 353(1) of Criminal Procedure and Evidence Act – no longer consistent with Constitution – other sentencing options available

S v *C (a juvenile)* HH-718-14 (Muremba J) (Judgment delivered 31 December 2014)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – right to freedom from torture or cruel, inhuman or degrading treatment or punishment)

Criminal procedure (sentence) – offences under Criminal Law Code – kidnapping – prison sentence almost unavoidable – factors to consider

S v *Hall* HH-446-14 (Hungwe J, Bere J concurring) (Judgment delivered 27 August 2014)

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

Criminal procedure (sentence) – offences under Criminal Law Code – sexual relations with a young person (s 70(1)) – large age disparity between accused and complainant – accused a member of a religious sect which allowed polygamy – need to protect children – heavy term of imprisonment essential

S v *Nyamande* HH-719-14 (Muremba J) (Judgment delivered 31 December 2014)

The accused, who was aged 54 years, pleaded guilty to a charge of having sexual relations with a young person. The girl was aged 14 years and became pregnant as a result of the liaison, which took place over a period of 6 months. He was sentenced to a wholly suspended term of imprisonment. The accused said in mitigation that at his church they are allowed to marry as many wives as they want. He wanted the complainant to be his third wife. He had been shown by the Spirit that the complainant was going to be his third wife.
Held: The offence was so bad that it warranted the imposition of a longer prison term and an effective custodial sentence. In Zimbabwe, there are churches, especially apostolic sects, which have religious practices that

encourage members to marry young girls. They continue to do so regardless of laws which outlaw child sexual abuse such as the section of the Criminal Law Code the accused was charged with. That section attracts a maximum penalty of 10 years' imprisonment. Despite the heavy penalty that is prescribed by statute, these churches continue with their practices. It seems that they listen to the Spirit which leads them more than they listen to the law of the land. There also seems to be a conflict between what the Spirit tells them and what the law says.

Child sexual abuse has effects such as pregnancy, girls dropping out of school and the risk of contracting HIV/AIDS and other sexually transmitted diseases. Early marriages deny girls educational opportunities, lead to poverty and economic insecurity. Because of lack of education, the capacity of these girls to make decisions is negatively affected. Other forms of gender-based violence and problems such as physical and sexual abuse are reinforced against them. Adults who engage in child sexual abuse and marry young girls show a complete disregard of the rights of children in spite of the protection s 81(1) of the Constitution gives to those rights. In addition, Zimbabwe has ratified various international conventions which prohibit child sexual exploitation and abuse and child marriages: the Convention on the Rights of the Child; the Convention on the Elimination of all forms of Discrimination against Women; and the African Charter on the Rights and Welfare of the Child.

What made the complainant *in casu* vulnerable was her young age and her church practice which brain-washed her. Adults who take advantage of such children ought to be seriously punished. They must be sentenced to imprisonment, not only to punish them but also in an endeavour to deter others who might have similar inclinations. Heavy custodial sentences are essential if the courts are to play their role in protecting children or young people from sexual abuse by adults. If the accused had been sentenced to effective imprisonment that would have sent a clear message to his church mates that child sexual abuse and child marriages are not tolerated by the courts and as a result other would be offenders would have been deterred from committing such crimes in future. A sentence in the region of 4-5 years' imprisonment with a portion suspended on condition of good behaviour would have met the justice of the case.

Customary law – marriage – effect – marriage taking place while one party still married to another person under Marriage Act – customary law marriage not valid for purposes of administration of estates

Ncube v *Dube & Ors* HB-132-14 (Takuva J) (Judgment delivered 11 September 2014)

See above, under ADMINISTRATION OF ESTATES (Surviving spouse).

Delict – *actio inuriarum* – adultery – action against third party committing adultery with plaintiff's spouse – delict remains part of law of Zimbabwe – no reason to follow jurisdictions which have abandoned the remedy

Tanyanyiwa v *Huchu* HH-668-14 (Chigumba J) (Judgment delivered 26 November 2014)

Zimbabweans pride themselves on being a conservative nation that upholds the institution of marriage, and traditional family values. Many Zimbabweans are God fearing Christians; others are traditionalists who practice polygamy. Most Zimbabweans of black descent believe in paying *lobola*, or bride price, irrespective of their Christian or traditionalist beliefs. The entitlement to damages as compensation for the commission of adultery in traditional culture in Zimbabwe is recognized in customary law as the right of a man who has paid *lobola* for his wife. The Christian concept of marriage is based on an ideal that both the man and the woman leave their respective parents, appear before God as equals, and "cleave" to each other. They are equals before God. In this modern society, does the law still have a place in regulating what may appear to be, matters of morality, and of the heart? Should these matters not be best left to be regulated by religion, and by the custodians of our culture back in the village?

In other jurisdictions, the question of whether adultery should continue to be regulated by the law has spanned widespread debate. There are proponents for and against the award of damages to the injured spouse. Different countries have adopted different views, based on cultural or religious considerations. The debate appears to be fuelled by the fact that those who are pro-marriage advocate for the compensation of an injured spouse, by an errant spouse, for emotional and mental distress that is accepted to be a by-product of an adulterous relationship. In South Africa, the debate on whether adultery damages should remain an area that is regulated by the law was taken up in *RH* v *DE* 2014 (6) SA 436 (SCA), which was a delictual claim for damages based on adultery between the defendant and the plaintiff's wife on the law as it stands. The court found that the award had been rightly made for *contumelia* but that the award for loss of *consortium* was not justified. The court considered whether the action should be maintained as part of South African law and concluded that its continued existence

was no longer justified. The court acknowledged that the main advantage of the action was that it protects the institution of marriage which our society holds dear as one of the most important bases for family life and which is recognised and protected as such by the Constitution.
In Zimbabwe, before the courts could take the approach adopted by the South African court, they should consider whether our society's views regarding the institution of marriage have changed. They have not changed. If effect is given to our national objectives, as enshrined in our Constitution, one would find that the institution of marriage and family values are protected and enshrined in the Constitution. In South Africa, their Constitution protects and enshrines a myriad other institutions which are not necessarily compatible with marriage. The views of our society are that, unless the courts are prepared to take a strong and principled stand in support of the vital institution of marriage, they will only be party to society's further slide down the slippery slope to the unlicensed promiscuity which scoffs at the spiritual prohibitions against pre-marital and extra-marital sex and which has landed the world in the sexual morass over which the monster of AIDS now presides in all its frightening aspects. Our Constitution, which came about as a result of widespread consultations with grassroots Zimbabweans, declares one of our national objectives to be that the State must take appropriate measures to ensure that there is equality of rights and obligations of spouses during marriage. There is nothing in our Constitution which may be interpreted as precluding a wife from being entitled to damages from a third party who has destabilized her marriage, knowing full well that she was married to her husband in terms of the Marriages Act.

Delict – *actio injuriarum* – wrongful arrest – what must be pleaded – not necessary to plead malice or *animus inuriandi*

Masendeke v *Chalimba & Ors* HH-354-14 (Dube J) (Judgment delivered 14 July 2014)

See below, under PRACTICE AND PROCEDURE (Summons).

Delict – Aquilian action and *actio injuriarum* – distinction between – liability for – single wrongful act causing patrimonial loss and personal harm – need for both causes of action to be pleaded – need to plead wrongfulness and fault – even if defendant's action wrongful, fault must be proved – defendant acting in ignorance of law and on advice of legal practitioner – no fault shown

Ritenote Printers (Pvt) Ltd & Anor v *A Adam & Co (Pvt) Ltd* HH-460-14 (Chigumba J) (Judgment delivered 10 September 2014)

The first plaintiff claimed damages arising from its alleged "unlawful, wrongful and malicious" eviction from two premises that it was leasing from the defendant. It claimed that it suffered damages due to loss of trade. The second plaintiff, a director of the first, claimed that, as a result of the unlawful eviction of the first plaintiff by the defendant, he suffered from chronic depression and was unable to run the affairs of the first plaintiff as he had done since its inception. In previous litigation, the defendant had obtained an eviction order in the magistrates court against the first plaintiff. Not realising that, the first plaintiff having noted an appeal, that leave to execute the eviction order was necessary, the defendant had the plaintiff evicted*.
Held: (1) When the civil law should punish one person for wrongful or blameworthy conduct which causes harm to another question depends on the meaning of "wrongful", "blameworthy conduct" and "harm". The two main types of loss for which compensation can be claimed under the law of delict are wrongs of substance, leading to financial loss, and wrongs to personality, leading to sentimental loss. Wrongs of substance are wrongs which cause tangible harm, such as injury to a person including psychological harm, damage to property and harm to economic interests. Not every harm suffered by a person is actionable in the field of delict. A person can only sue successfully in delict if the law of delict recognizes that there is legal liability for that type of harm. Most delictual actions in our system require proof of fault, either intention or negligence. The Aquilian action requires proof of either intention or negligence. The most important actions in our law of delict include the Aquilian action (*actio legis Aquiliae)* and the *actio injuriarum.* The Aquilian action provides a remedy for what are known as wrongs of substance. The *actio injuriarum* provides a remedy for wrongs to personality, a remedy for sentimental loss or intangible harm.
(2) Part of the difficulty with the plaintiffs' claim was the failure to separate and recognize the differences between these two separate causes of action in the law of delict. Neither the summons nor the declaration expressly separated the Aquilian action from the *actio injuriarum* as causes of action, each of which has different requirements. The first plaintiff's remedies lay in the Aquilian action, and the second plaintiff's in the *actio injuriarum.*

(3) In order to determine the wrongfulness of any given conduct, the court must make a value judgment based on, among other things, the current convictions of the community as to what is fair, just and equitable. Wrongfulness and fault are separate and distinct requirements of the *actio legis Aquiliae.* Both must be pleaded and proved: it must be proved that the defendant caused harm either intentionally or negligently. The requirement of wrongfulness entails proof of a harmful result occasioned in a legally reprehensible or unreasonable manner, while the enquiry into fault focuses on the legal blameworthiness or reprehensible state of mind and conduct of the defendant. While wrongfulness is determined by reference to public policy or the legal convictions of the community, fault is determined by reference to the foreseeability and preventability of harm by the defendant in the circumstances in which he actually was.
(4) It was wrongful of the defendant to evict the first plaintiff unlawfully. The illegality, according to the judgment of the Supreme Court, stemmed from the fact that the defendant ought to have exhausted its remedies before the magistrates court and made an application for execution pending appeal. The defendant's *prima facie* wrongful conduct appeared to be based on ignorance of the law and reliance on the advice of its legal practitioner. Although wrongfulness was specifically pleaded (and there was no need to prove it because the Supreme Court had already pronounced on the issue, and declared the first plaintiff's eviction to have been unlawful), the element of fault was neither specifically pleaded, nor proved. Both the magistrates court and the High Court acted under a misapprehension of the law, and so no blame could be laid at the door of the defendant, which accepted the advice of its legal practitioner. Proof of fault would have required evidence of more than wrongfulness or unlawfulness, or consequential harm; it would have required evidence of intention or negligence to establish a reasonable inference of liability.

*See *Ritenote Printers (Pvt) Ltd* v *Adam & Co & Anor* 2010 (2) ZLR 544 (H) and *Ritenote Printers (Pvt) Ltd* v *Adam & Co & Anor* 2011 (1) ZLR 521 (S). – *Editor.*

Education – pupil – discipline – application of *audi alteram partem* rule and legitimate expectation doctrine – no requirement for formal trial – pupil entitled to be heard – fairness the overriding consideration

B (a juvenile) v *Min of Primary & Secondary Education & Ors* HH-476-14 (Mafusire J) (Judgment delivered 15 September 2014)

See above, under ADMINISTRATIVE LAW (*Audi alteram partem* rule).

Election – election petition – form of – must following exact requirements of Electoral Act and rules made thereunder – petition not conforming to such requirements fatally defective – trial of election petition – nature of process – disposal of petition on procedural points raised *in limine* – trial nonetheless regarded as having taken place

Moyo v *Nkomo (Tsholotsho North Election Petition appeal)* S-67-14 (Gwaunza JA, Garwe & Guvava JJA concurring) (Judgment delivered 30 July 2014)

The respondent having been declared the winner for the election in which the appellant was also a candidate, the appellant brought a petition before the Electoral Court in terms of s 167 of the Electoral Act [*Chapter 2:13*]. He sought an order declaring that the respondent had not been duly elected and ordering that a by-election be held. At the hearing of the petition the court *a quo* upheld the points *in limine* raised by the respondent and held that the petition filed by the appellant was fatally defective and of no force and effect for want of compliance with r 21(e) and (g) of the Electoral (Application, Appeals and Petitions) Rules 1995. The appellant appealed, on the grounds that (a) the dismissal of the petition without a trial was in contravention of s 171 of the Act, which makes a trial mandatory; and (b) the court *a quo* erred at law in finding that the form of the petition adopted by the appellant was not in compliance with the Act and Rules. He argued that in the court *a quo* a trial neither commenced nor was it concluded, as the matter had been determined on preliminary points and that the order of the court *a quo* was therefore not competently made. He also argued that the petition that he filed in the court *a quo* substantially complied with the relevant provisions of the Act and the Rules, r 21 of which in part states that "An election petition shall be generally in the form of a court application ..." Accordingly, a petition can properly take the form of a court application as set out in form 29 of the High Court Rules.
Held: (1) a trial is a process that consists of pleadings (which are adjectival and procedural) and substance (which is the oral hearing where *viva voce* evidence is led). Further that, as part of any trial, a court is enjoined to hear arguments on points *in limine,* if any, and may dispose of the matter purely on those points. As is evident

from the joint pre-trial conference minute, both parties appreciated this possibility. Indeed at the commencement of the hearing before the court *a quo* the parties made submissions on the preliminary issues raised. The court was, after that, required to make a determination on these issues and properly proceeded to do so.
(2) While an ordinary court application does not require that the petitioner's cause of action or relief be set out within the said document, an election petition is required by r 21 to state the grounds relied on to sustain the petition and the exact relief sought. Rule 21 is not only specific and peremptory but it also clearly and adequately sets out the requirements regarding the form and content of a petition. Specifically, the grounds relied on and the exact relief sought must *all* be apparent *ex facie* the petition**.** There is no provision for these details to be substantiated in supporting affidavits or other attachments to the petition**.** The Electoral Court is a creature of statute. It cannot operate beyond or outside the provisions of the enabling statute and the rules made thereunder. A petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be found in the statute and nowhere else.

Employment – arbitration – award – arbitral award registered with High Court – award subsequently varied by consent and made an order of the Labour Court – High Court having no jurisdiction to deal with amended award

Windsor Technology (Pvt) Ltd v *Mabuyawa & Anor* HH-377-14 (Chigumba J) (Judgment delivered 23 July 2014)

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

Employment – collective bargaining agreement – breach of – procedure to be followed – breach an unfair labour practice – Labour Court having exclusive jurisdiction

NEC, Construction Industry v *Zimbabwe Nantong Intl (Pvt) Ltd* HH-626-14 (Chigumba J) (Judgment delivered 14 November 2014)

Section 79 of the Labour Act [*Chapter 28:01*] provides that, after negotiation, a collective bargaining agreement (CBA) shall be submitted to the Registrar of Labour for registration. The effect of such registration is that the Minister must then publish it as a statutory instrument and thereafter the terms and conditions of the CBA become effective and binding from the date of publication of the SI. Failure to comply with a CBA is an unfair labour practice in terms of s 83(3)(a) of the Act. An unfair labour practice must be resolved in terms of s 93 of the Act, by going through a conciliation process before a labour officer, and possibly arbitration. Failure to comply with a CBA is thus a labour matter, which must be dealt with by the Labour Court, at first instance. The High Court's jurisdiction is expressly ousted in such a matter. It would be an abuse of the High Court's inherent jurisdiction to entertain a purely labour matter, which matter has not been heard by the Labour Court at first instance, simply because a party found it more expedient to approach the High Court and to shun the Labour Court.

Employment – contract – termination – rights of employee after termination of contract – right to retain or buy company car – unless contract specifically gives right to employee, car remains property of employer

Nyahora v *CFI Hldgs (Pvt) Ltd* S-81-14 (Ziyambi JA, Gwaunza & Patel JJA concurring) (Judgment delivered 23 October 2014)

The High Court is a superior court with inherent jurisdiction. There is a presumption against the ouster of the jurisdiction of a court unless this is clearly the intention of the legislature. The exclusive jurisdiction conferred on the Labour Court by s 89(6) of the Labour Act [*Chapter 28:01*] relates only to the hearing and determination, in the first instance, of any application, appeal or matter referred to in subsection (1). Subsection (1)(a) in turn clearly limits that jurisdiction to applications and appeals in terms of the Act or any other enactment. Instances in which applications and appeals may be made in terms of the Act are clearly set out in the Act. These include the applications referred to in ss 92C and 93(7). These being applications in terms of the Act, no other court has jurisdiction to hear or determine such applications at first instance.

Applications or appeals in terms of "any other enactment" would be limited to those pieces of legislation that specifically provide for an application or an appeal to be made to the Labour Court. An example would be the Public Service (General Conditions of Service) Regulations SI 1 of 2000, which makes reference to an appeal to the Labour Court against a decision of the Public Service Commission.
The right of an individual to approach the High Court seeking relief, other than that specifically set out in s 89(1)(a) of the Act, has not been abrogated. Nothing in s 89(6) takes away the right of an employer or employee to seek civil relief based on the application of pure principles of civil law, except in respect of those applications and appeals that are specifically provided for in the Labour Act. Nor is there contained in s 89 any provision expressly authorizing the Labour Court to deal with an application for the common law remedy of *rei vindicatio*. Such applications fall squarely within the jurisdiction of the High Court.
The action *rei vindicatio* is available to an owner of property who seeks to recover it from a person in possession of it without his consent. It is based on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely to allege that he is the owner of the property and that it was in the possession of the defendant/respondent at the time of commencement of the action or application. If he alleges any lawful possession at some earlier date by the defendant then he must also allege that the contract has come to an end. The claim can be defeated by a defendant who pleads a right of retention or some contractual right to retain the property.
In most cases where an employee has the use of a company car, the option granted by the employer to purchase the car after a given time is a privilege accorded to its employees, perhaps in the hope that this will induce loyal service, as well as a culture of caring for the company property or some other reason beneficial to the employer/company. Therefore, unless the contract specifically states so, a court ought to be careful not to read a legal right into a policy matter which is for the discretion of the employer. The question of a right to purchase could only arise after an offer had been made to, and accepted by, the employee to purchase the vehicle and not before. Unless such a contract is formed, the employee has no right to retain the vehicle if his employment with the company ceases.

Employment – disciplinary proceedings – offender already acquitted by criminal court on same facts – not a bar to institution of disciplinary proceedings under code of conduct

Mpofu v *Delta Beverages (Pvt) Ltd* HB-131-14 (Takuva J) (Judgment delivered 11 September 2014)

See above, under CONSTITUTIONAL LAW (Constitutional of Zimbabwe 2013 – Declaration of Rights – right not to be tried again in respect of act for which previously convicted or acquitted).

Employment – dismissal – grounds – conduct inconsistent with express or implied terms of contract of employment – common law right of employer to dismiss employee for such conduct – employer's right to dismiss on such grounds not altered by Labour Act – code of conduct – cannot override common law

DHL Intl (Pvt) Ltd v *Tinofireyi* S-80-14 (Gwaunza JA, Gowora & Patel JJA concurring) (Judgment delivered 17 October 2014)

The respondent was employed by the appellant company. He was convicted of two offences under the company's code of conduct. In respect of one (an act of disobedience), he was issued with a final written warning. In respect of the second (an act of indiscipline), he was dismissed. The code of conduct did not provide for dismissal in respect of acts of indiscipline. After unsuccessful domestic appeals, he appealed to the Labour Court. There, the company argued that the respondent's indiscipline amounted to conduct that was incompatible with the fulfilment of the express terms and conditions of his employment, and that accordingly it was entitled to dismiss him. The Labour Court ordered his reinstatement. Its grounds for doing so were that any unwarranted departures from a code of conduct only serves to undermine the labour standards agreed by employers and employees and risks reviving the old master and servant laws of the common law, which were tilted in favour of the employer. On appeal to the Supreme Court, the issue was whether the provisions of a code of conduct can override, and therefore alter, the common law principles governing an employer's right to dismiss an employee for misconduct that goes to the root of the employment contract.
Held: The common law position is that the commission by an employee of conduct inconsistent with the fulfilment of express or implied conditions of the contract of employment entitles the employer to dismiss him if the circumstances of the commission of the offence show that the continuance of a normal employer and

employee relationship has in effect been terminated. There is a presumption that the legislature did not intend to alter the common law. The Labour Act [*Chapter 28:*01] contains no provision which either expressly or by implication purports to alter the common law principle that an employer has a right to dismiss an employee following conviction for a misconduct of a material nature going to the root of the employer and employee relationship. Section 2A of the Act sets out the objectives of the Act and specifically provides that in the event of a conflict between the Act and any other enactment the Act shall prevail. "Enactment" does not include the common law. The section is thus not a wholesale amendment of the common law. The common law can only be altered by an explicit provision of the Act. A code of conduct cannot alter or abrogate a principle of the common law. It does not matter that the code of conduct is a product of an agreement.
A situation where an employee absents himself from work in defiance of an order to the contrary is untenable in any work situation. This is particularly so where the employer is in business and its success and viability hinge on, among other factors, the discipline of its workforce. The respondent deliberately defied an order from his superiors not to leave work. His defiance had the effect of disrupting the appellant's operations and causing inconvenience to its customers. Such conduct was clearly inconsistent with the fulfilment of the express or implied conditions of his employment. On the basis of common law and numerous authorities in this jurisdiction and beyond, such misconduct justified dismissal.
Not all acts of misconduct that are inconsistent with the express or implied conditions of one's employment warrant the penalty of dismissal. If it is shown that he is guilty of such misconduct, it is up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted.

Employment – employee – injuries sustained during the course of employment – action to recover damages – claim may only be brought in terms of the National Social Security Authority (Accident Prevention and Workers Compensation) Scheme – no claim may be brought against employer unless employer is individually liable, having established his own approved scheme

Musiyiwa v *Shomet Industry Development (Pvt) Ltd* HH-527-14 (Mtshiya J) (Judgment delivered 1 October 2014)

The plaintiff had been injured during the course of his employment. He brought a claim against the defendant, his employer, for damages, although he had already received compensation in terms of the National Social Security Authority (Accident Prevention and Workers Compensation Scheme) Notice (SI 68 of 1990). The defendant filed a special plea in bar, to the effect that, as a result of the introduction of the Scheme, no damages could be awarded against the employer.
Held: the Scheme, which was established in terms of s 2 of the National Social Security Authority Act [*Chapter 17:04*], provides that no action at common law shall lie by a worker or any dependent of a worker against such worker's employer to recover any damages in respect of an injury resulting in the disablement or death of such worker arising out of and in the course of his employment. The only liability for compensation arises under the Scheme. However, in respect of acts of negligence by the employer himself or by other specified employees, the worker may recover from the employer, if the employer is one who is individually liable. Such an employer is one to whom exemption has been granted in terms of s 76 of the Scheme because he has established his own compensation fund to insure against liability in respect of his employees. In this situation, the employee may proceed against his employer. The defendant had not been granted exemption and thus could not be sued for additional compensation.

Editor's note: the case referred to in the judgment is *Sibanda* v *Independence Gold Mining Zimbabwe (Pvt) Ltd & Anor* 2003 (2) ZLR 155 (H). It would appear from that case, and from a reading of s 9(1)(a) of the Scheme, that even if the employer is one who is individually liable, the full right to proceed under the common law has been altered: it is only if the employer himself has, or employees of a specified managerial level have, been negligent that a claim may be brought against the employer. Under the common law, the level of employee would be irrelevant, provided that the negligent act was done during the course of his employment.

Employment – employee – transfer of – when employer entitled to transfer employee – transfer as a punitive measure – only lawful if employee found guilty of misconduct following proper disciplinary proceedings

Sagandira v *Makoni RDC* S-70-14 (Garwe JA, Malaba DCJ & OMerjee AJA concurring) (Judgment delivered 16 September 2014)

The appellant was employed by a rural district council, and was stationed in the town of Rusape, where her family also had a business. She was married and had dependent children. There had been a history of absenteeism on her part, and eventually the council told her that she was to be transferred to a small mining village some 50 km away. Her duties there were not specified. She did not go, and was charged with disobedience to a lawful order and dismissed. Her appeals to an arbitrator and to the Labour Court failed. On appeal to the Supreme Court, she argued that the order to transfer was punitive and therefore not lawful; that she was not consulted before the decision to transfer her was made; and that the council's Chief Executive Officer was an interested party: he was the complainant, charged the appellant, set the matter down, prosecuted and chaired the meeting before finding the appellant guilty of misconduct, in violation of the *nemo judex* principle.
Held: at common law, an employer has the right to unilaterally vary the terms of employment, such as the duties being done by the employee and the location of work or department. This may be necessary, *inter alia*, to re-organise the operations of the employer or to facilitate disciplinary investigations, provided always that such variation is not substantially different from the contract job description or does not result in the substantial downgrading of the status and dignity of the employee or is in breach of a legitimate expectation of the employee. However, an employer, whatever the circumstances, has no right to invoke a transfer as a punitive measure outside of the disciplinary framework, although a transfer can be ordered as part of the penalty imposed on an employee found guilty of misconduct. Once the respondent had formed the opinion that the appellant was misconducting herself, a disciplinary hearing should have been held to determine whether she was in fact guilty. Whilst the appellant admitted being absent on the occasions cited in the correspondence, she never admitted at any stage that she did not have a lawful excuse. If it was found that the appellant had no lawful excuse to be absent, she could have, as part of the penalty, been transferred to any other department of the appellant. In proceeding to transfer the appellant in the manner it did, the respondent fell foul of the *audi alteram* principle. It found the appellant culpable without holding any disciplinary proceedings and in the result imposed, as a penalty, an order that the appellant transfers to a place some fifty kilometres away where transport was difficult. The inference that this transfer was punitive, or intended to be a punishment, is inescapable.
Whilst transfers effected in the ordinary course of operations are appropriate, transfers that are punitive, based purely on perceived misconduct on the part of the employee, are not acceptable as they are unlawful. A punitive measure can only be predicated on a proper finding of culpability following proper disciplinary proceedings.

Employment – Labour Court – decisions by – application of equitable principles – court's duty to secure equity and social justice

Madhatter Mining Co v *Tapfuma* S-51-14 (Gwaunza JA, Gowora & Hlatshwayo JJA concurring) (Judgment delivered 25 July 2014)

See below, under EMPLOYMENT (Wrongful dismissal).

Employment – Labour Court – jurisdiction – limits to jurisdiction – relief sought not specifically set out in Labour Act – right of party to seek relief from High Court

Nyahora v *CFI Hldgs (Pvt) Ltd* S-81-14 (Ziyambi JA, Gwaunza & Patel JJA concurring) (Judgment delivered 23 October 2014)

See above, under EMPLOYMENT (Contract – termination).

Employment – Labour Court – jurisdiction – employer-employee relationship no longer existing – claim for unpaid salary – Labour Court not having exclusive jurisdiction

Employment – salary – claim for unpaid salary – plaintiff having left employment with defendant – employer-employee relationship no longer existing – claim merely a debt collection matter – plaintiff entitled to approach High Court for relief

Chiweshe & Ors v *Air Zimbabwe Hldgs (Pvt) Ltd* HH-688-14 (Mtshiya J) (Judgment delivered 10 December 2014)

The plaintiffs were all former pilots with the defendant airline. Before leaving the employ of the defendant, they were each owed outstanding salaries and allowances. Before they left their employment, two of the plaintiffs

issued summons for the sums due, but by the time the action was dealt with they had all ceased to be employees. The defendant argued that the High Court had no jurisdiction and that the matter should be dealt with by the Labour Court.
Held: Outside the employment arena which is generally governed by the Labour Act [*Chapter 28:01*], this was purely a debt collection matter. In that situation, depending on the amount to be collected, the plaintiffs are free to approach either the High Court or the magistrates court. The plaintiffs *in casu* were already in the right forum. An employer-employee relationship no longer existed: the plaintiffs were no longer performing work or services for the defendant for which they continue to be rewarded. They were claiming payment for services they rendered before terminating their contracts. To strengthen their cases, they provided schedules from the defendant where the existence of arrear salaries and allowances was acknowledged.

Employment – wrongful dismissal – damages – assessment of – date from which damages to be assessed – must be assessed from date of dismissal, not from date of order for reinstatement – losses which may be included in damages – may include allowances and lost opportunities due to failure to complete training

Employment – wrongful dismissal – damages – duty of employee to mitigate loss by seeking other employment

Madhatter Mining Co v *Tapfuma* S-51-14 (Gwaunza JA, Gowora & Hlatshwayo JJA concurring) (Judgment delivered 25 July 2014)

Where a person is wrongfully dismissed and successfully petitions the court for reinstatement or, where that is no longer possible for any reason, damages in lieu of reinstatement, such damages would consist of salary arrears or wages for the relevant period, reckoned from the date of the wrongful dismissal, and may also include compensation for any loss to which he was entitled, which he was deprived of as a result of the wrong termination. Damages in lieu of reinstatement become due and are to be reckoned from the date of an employee's wrongful dismissal, not from the date of reinstatement. Further, in relation to the period from and during which the damages are to be assessed, no distinction is made between the salary arrears and benefits, on the one hand, and damages proper, on the other. All must be assessed within the same period, albeit varying time periods and considerations peculiar to the assessment in question may apply.
The employee is legally obliged to mitigate his loss by looking for a job from the date of his unlawful dismissal. The losses that a wrongfully dismissed employee might suffer would include housing and transport allowances forfeited by virtue of his wrongful dismissal. Where the unlawful termination occurred before the employee could complete skills training, the fact that the training was not completed would constitute a lost opportunity that appropriately qualifies as a "loss" for purposes of damages in lieu of re-instatement. The probabilities are that, had he gone into the employment field armed with a skills-based qualification, the employee would have been able to secure alternative (and better paying) employment within a reasonable time and probably in a shorter time than it might have taken him to secure any unskilled employment.
In casu, the lower court ordered payment of damages in US dollars, although the loss took place during the period of hyper-inflation, when only Zimbabwe dollars were legal tender. The court ordered that the amount of Zimbabwe dollars assessed as damages should be converted at the rate prevailing at the date of reinstatement.
Held: the court failed to consider whether the resultant United States dollar amount would have given true value, to the employee, of the damages that he was entitled to, a value that would neither over compensate him, nor inadequately do so. At the time there were two main Zimbabwe dollar to United States dollar exchange rates in force, the official and the unofficial rates. The former rate had much smaller denominations compared to the latter. Had the official rate been used to convert the Zimbabwe dollar amount awarded to the employee as damages, an inflated amount with no relationship to the appropriate and meaningful compensation due to him would have been the result. Such an outcome would clearly have been both unrealistic and a mockery of justice.
It is the Labour Court, not the Supreme Court, which is endowed with jurisdiction to apply principles of equity in its determination of labour disputes. The Labour Court's jurisdiction to determine labour disputes on the basis, *inter alia,* of equity can be gleaned from the import of s 2A of the Labour Act [*Chapter 28:01*], which states that one of the purposes of the Act is to advance social justice and democracy by, *inter alia*, securing the just, effective and expeditious resolution of disputes and unfair labour practices. The principles of equity and social justice, as well as the imperative for the Labour Court to secure the just and effective resolution of labour disputes, are all called into question when it comes to determining the basis and formula for computing a debt (e.g. damages) suffered in Zimbabwe dollars but claimed in foreign currency. This is particularly so where such damages, being owed to an employee, can no longer be paid in Zimbabwe currency realistically or in a way that gives due value to the employee. The undeniable fact is that a debt is not wiped out by the mere fact that there

has been a change to the realisable currency. Equity would demand that a formula be found to give effect to the employee's entitlement to payment of, and the employer's obligation to pay, the debt in question.
The complexity of the exercise to compute the damages that should be awarded to the respondent in this appeal should not be under-estimated. The Labour Court should consider enlisting the services of an appropriately qualified expert in financial matters, in order to work out a formula for calculating the damages in question. Such formula should give fair value, in USA dollars, to the damages, denominated in Zimbabwe dollars, that were awarded.

Evidence – expert evidence – value to be attached to – should not detract from court's own capabilities and responsibilities – evidence presented in affidavit form – when expert witness should be called to give oral evidence

S v *Ndzombane* S-77-04 (Hlatshwayo JA, Ziyambi JA & Mavangira AJA concurring) (judgment delivered 30 July 2014)

The appellant killed the deceased, his own brother, by decapitation with a sharpened axe. What remained unclear at the close of the defence case was what had motivated the appellant to commit such a gruesome murder. Unconvinced by the appellant's explanation for his conduct, the court ordered an examination of the appellant by two doctors in terms of the Mental Health Act [*Chapter 15:12*]. The two doctors, three months after the commission of the offence, found some evidence of mental defect and recommended that the appellant be referred to a psychiatrist. Some seven months later, the psychiatrist carried out her first of several assessments from which she concluded that the appellant was not labouring under any mental illness at the time of the commission of the offence. Her evidence was admitted in affidavit form. The appellant's mother submitted an affidavit to the psychiatrist, giving information about strange behaviour on the part of the appellant.
Held: The apparently motiveless, odd and bizarre murder should have alerted the defence counsel, prosecution and the court – but more so the defence counsel – to the possibilities of mental or emotional fragility on the part of the appellant. While the court *a quo* did institute the procedures for the mental examination of the appellant, the final consideration of the psychiatric report still left a lot to be desired. However, the defence counsel woefully failed to heed the clanging alarm bells. He should have interviewed the appellant's family, friends, co-workers and former employers, in an attempt to discover whether the appellant had any history of strange behaviour. The appellant's mother's account was effectively a footnote in the psychiatrist's report.
It was necessary to hear *viva voce* evidence from the psychiatrist, from the mother of the appellant and any other relevant person. The psychiatrist would have had to explain to the court the basis for her affirmative finding that from 2010 onwards the appellant no longer suffered from any mental illness, especially in the light of the fact that she accepted that the appellant had suffered from some "psychotic disorder" between 2007 and 2008.
Section 278 of the Criminal Procedure and Evidence Act allows the production of medical reports from doctors in affidavit form. However, the court has the discretion in terms of s 280 to order that the doctor be summoned to give oral evidence at the trial. The court may also send written questions to the expert who is enjoined to reply thereto. The interrogation through oral testimony of expert evidence given on affidavit is necessary to avoid the error of treating such evidence as gospel truth or divine revelation.
Expert opinion evidence is admitted to assist the court to reach a just decision by guiding the court and clarifying issues not within the court's general knowledge. It is not the mere opinion of the expert witness which is decisive but the expert's ability to satisfy the court that, because of the special skill, training and experience, the reasons for the opinion expressed are acceptable. However, in the final analysis, the court itself must draw its own conclusions from the expert opinion and must not be overawed by the proffered opinion, and simply adopt it without questioning or testing it against known parameters. The expertise of a professional witness should not be elevated to such heights that sight is lost of the court's own capabilities and responsibilities in drawing inferences from the evidence. The court can only do this well if it requires the expert witness to give oral evidence in the clarification and elucidation of an affidavit that is otherwise technically dense and incomprehensible, contradictory or inadequate in all respects except the conclusion. A court errs when it merely adopts the conclusions of an expert report without exercising its mind on it by, for example, calling for oral testimony or drawing the necessary inferences from the evidence.

Evidence – inferences – evaluation of – circumstantial evidence – when inferences of guilt may be drawn therefrom – need to exclude any reasonable hypothesis of innocence

S v *Mtetwa* HH-63-15 (Hungwe J, Bere J concurring) (Judgment delivered 15 October 2014)

Even in the most straightforward of cases, a court must ultimately draw inferences. Some evidence requires fewer inferences – direct evidence – whereas other evidence – circumstantial evidence – will require more inferences. The court is never free of drawing inferences and therefore the rules that govern the drawing of inferences govern the court in its ultimate evaluation of all evidence. The question ultimately becomes: how is a court to evaluate the evidence? The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence may be enough to establish guilt beyond a reasonable doubt, depending on the facts of the case. Because circumstantial evidence requires the drawing of inferences, it is incumbent for the court to restate the process involved in analysing that evidence and what a court must do before returning a verdict of guilty based solely on circumstantial evidence. Initially, the court must decide, on the basis of all of the evidence, what facts, if any, have been proved. Any facts upon which an inference of guilt can be drawn must be proved beyond a reasonable doubt. After the court has determined what facts, if any, have been proved beyond a reasonable doubt, then it must decide what inferences, if any, can be drawn from those facts. Before the court may draw an inference of guilt, however, that inference must be the only one that can fairly and reasonably be drawn from the facts; it must be consistent with the proven facts; and it must flow naturally, reasonably and logically from them. The evidence must also exclude, beyond a reasonable doubt, every reasonable hypothesis of innocence. If there is a reasonable hypothesis from the proven facts consistent with the accused's innocence, then the court must find the accused not guilty. If the only reasonable inference the court finds is that the accused is guilty of the crime charged, and that inference is established beyond reasonable doubt, then the court must find the accused guilty of that crime. In the drawing of inferences the court must take into account of the totality of the evidence, and must not consider the evidence on a piecemeal basis.

Evidence – judicial notice – meaning – facts of which court may take judicial notice

S v *Jochoma* HH-606-14 (Bhunu J) (Judgment delivered 21 October 2014)

See above, under CRIMINAL LAW Offences under Criminal Law Code (Engaging in practices commonly associated with witchcraft)

Evidence – sexual cases – child witness – approach to be taken to – unlikelihood of child making serious allegation without any basis – children's fantasies normally coloured by ordinary experiences

S v *Ncube* HB-128-14 (Takuva J, Makonese J concurring) (Judgment delivered 1 September 2014)

The dangers inherent in children's testimony have been said to be the following: (a) children's memories are unreliable particularly for detail; (b) children are egocentric and not likely to consider the effect of their statements on others, particularly school children; (c) children are highly suggestible; (d) children have difficulty in distinguishing fact from fantasy; (e) children make false allegations, particularly of sexual assault; and (f) children do not understand the duty to tell the truth.
While the evidence of child witnesses must accordingly be approached with caution, such caution must be a creative or positive caution, where a judicial officer uses knowledge of psychology or other relevant disciplines in order to maximize the value of such testimony. Psychological research has established that young children do not fantasize about being raped and other unusual horrific occurrences, but that their fantasies and play are characterized by their ordinary daily experiences. It is highly unlikely for very young complainants to make serious allegations without any basis at all. There is certainly no psychological research or medical case study material which suggests that children are in the habit of fantasizing about the sort of incidents that might result in court proceedings; for example, observing road accidents or being indecently assaulted. Unusual fantasies are seen by psychiatrists as highly suspicious: the cognitive and imaginative capacities of three-year-olds do not enable them to describe anal intercourse and spitting out ejaculate, for instance. Such detailed descriptions from small children, in the absence of other factors, should be seen as stemming from the reality of the past abuse rather than from the imagination.

Evidence – single witness – approach to be taken to – cautions to be observed before convicting on the evidence of a single witness

S v *Chingurume* HH-454-14 (Bere J) (Judgment delivered 20 August 2014)

There is need to exercise extreme caution when one has to rely on the evidence of a single witness in order to guard against possible deception in the whole process. The right to convict on the evidence of a single credible witness, stated without qualifying words in s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], should not be regarded as putting the evidence of one witness on the same footing in regard to the cogency as the evidence of more than one. Although the evidence of one witness may in any particular case be more convincing than of a number, it remains true that, given the same apparent quality in the witnesses, the more there are, the more reason there is to accept their story. It is not a mere rule of thumb: if there are two or more witnesses to the same facts their version can be checked against each other to see if they have given honest and accurate evidence. Elements of corroboration may of course appear from the circumstances; the fact that an accused person has given no evidence may be an element. The apparent reluctance to easily accept the evidence of a single witness is demonstrated by the proviso to the s 269, which renders it incompetent for the court to rely on such evidence in respect of certain offences specified therein. Even in other offences like assault, our courts have espoused the need to exercise caution when dealing with the evidence of a single witness. The courts should avoid the "boxing match" approach: the tendency, especially in assault cases, to throw the two protagonists into the ring with the magistrate as referee. At the end of the bout the magistrate awards points for demeanour and probability, and names the winner, who is usually the complainant.

Evidence – single witness – approach to – precautions to be taken – desirability of corroborating evidence – what corroborating evidence may consist of

S v *Mupfumburi* HH-64-15 (Hungwe J, Bere J concurring) (Judgment delivered 21 October 2014)

With crimes other than perjury and treason, the court is entitled to convict an accused on the basis of the uncorroborated evidence of a single competent and credible witness. There is obviously a risk which attaches to convicting the accused on the basis of the uncorroborated testimony of a single witness. There is a paucity of evidence in the case and the testimony of the witness is the sole proof of the accused's guilt. In this situation the danger arises of poor observation, faulty recollection, and reconstruction of evidence after the event, bias and any other risk that the circumstances of the case suggest. Before the court relies on such evidence it must be satisfied that the quality of evidence must make up for the lack of quantity. The uncorroborated evidence of a single witness should only be relied upon if the witness's evidence is clear and satisfactory in every material respect. Slight imperfections would not rule out reliance on that evidence, but material imperfections would. Single witness evidence should not be relied upon where, for example, the witness has an interest adverse to the accused, has made a previous inconsistent statement, has given contradictory evidence or had no proper opportunity for observation. There is no rule of thumb to be applied when deciding upon the credibility of single witness testimony. The court must simply weigh his evidence and consider its merits and demerits. It must then decide whether it is satisfied that it is truthful, despite any shortcomings, defects or contradictions in that testimony. The court must have rational grounds to conclude that the evidence of the single witness is reliable and trustworthy and is a safe basis for convicting the accused.

Corroboration is regarded by many as a cornerstone of the criminal justice system. It is perceived to be an important check which helps to ensure, so far as practicable, that miscarriages of justice are kept to a minimum. Corroboration is biblical in origin, its roots being found in references in both Old and New Testaments to a fact needing to be established by two or more witnesses. The purpose of the requirement is to protect an accused from being convicted on the basis of a single witness, who may be either fallible or dishonest. Where there is a single witness to the crime itself, corroboration may be by facts and circumstances proved by other evidence than that of a single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied.

Proper investigation of criminal cases will usually uncover corroborating evidence and it is seldom necessary to rest the entire State case upon the uncorroborated testimony of a single witness. Police officers and prosecutors should not be content with the production of evidence from a single witness. However, where it appears to a court that there are other witnesses who may be called, it has the power to call these witnesses itself in appropriate cases.

Family law – child – best interests of – determination of – guidance to be obtained from rights of child set out in Constitution – right of support from parents – both parents must play role according to ability

Damson v *Ushamba* HH-335-14 (Tsanga J) (Judgment delivered 1 July 2014)

The applicant sought, on an urgent basis, an upward variation of a maintenance order that had been granted by a magistrates court. The application was occasioned by a need to pay school fees for the child of the former marriage. The maintenance order, having been varied upwards by the magistrates court in a default judgment, had been reduced to what it originally stated when the default judgment was rescinded. The applicant had filed an application for variation at the magistrates court when the present proceedings were brought.

Held: (1) Where there is an existing order by a competent court of jurisdiction, another court cannot make an order competing with or overriding it even if the court making the original order is inferior to the High Court. The issue is not that the magistrates court is an inferior court, but that the courts have to adopt a sensible and practical approach to the matter and avoid dealing with orders that are properly before another court of competent jurisdiction, save as is provided for under the procedure of review or appeal. The applicant's quest to bring an urgent application which would, in effect, vary the maintenance upwards, would in essence amount to interfering with an existing order of a court of competent jurisdiction. To try and reverse maintenance proceedings, which are already under review, by way of an urgent chamber application in the High Court, however temporarily or provisionally, would be tantamount to misapplication of inherent powers to simply muscle out decisions of the lower courts.

(2) Maintenance and its variation are by way of enquiry and cannot be dealt with through an urgent chamber application. While cognisant of the High Court's role as upper guardian of all minor children and whilst alive to the principle of the best interests of the child as one of the vital tenets of our Constitution, these are not principles to be applied in a knee jerk manner. They certainly cannot be read to mean that every order asked for in the name of urgency and the "best interests" of the child should be granted. They equally do not mean that a party can unilaterally create urgency through incurring expenses on behalf of the child that the parent herself cannot afford and expect the courts to endorse her actions thereafter in the face of an existing maintenance order.

(3) Under s 81(1) of the Constitution, every child has the right to family and parental care. With a comprehensive articulation of children's rights in the Constitution, when courts are called upon to make decisions which call into play an interpretation of "best interests", guidance must of necessity come from the constitutional formulation of children's fundamental rights so as to avoid a purely subjective assessment of what comprises those "best interests" of the child. In other words, it is not what a parent has put forth that should guide the courts in making a legal decision, but what our Constitution provides. It is the rights contained in s 81(a) to (h) that must of necessity inform our understanding of the "best interests" principle if we are to avoid a situation where the meaning essentially stems from each according to one's own understanding. In summary, these include the right to be heard; to a name and family name; to family and parental care or appropriate care outside a home environment; to protection from economic and social exploitation; and to education, health and care services nutrition and shelter. They further include the right not to be recruited into a militia; not to be forced to take part in any political activity and the right not be detained save as a measure of last resort. While these rights canvass a broad range of children's experiences, in addition, children as full citizens, equally benefit from the provisions of the Constitution as a whole.

Both parents, constitutionally, have the obligation to provide parental care and the responsibility to take care of their children in terms of education, health care and shelter. While the State also has specific obligations regarding these rights that centre on the duty to respect, protect and fulfil, the fundamental focus of the facts here bring to the fore the obligation of parents specifically with regard to the rights accorded children. With parents in mind, there is no suggestion, either constitutionally or in terms of s 4(d) of the Maintenance Act [*Chapter 5:09*], that only the father is to contribute to the financial upkeep of a child. In fact the opposite is true. Both parents are called upon to play their role. Support which the mother herself can provide is a matter to be taken into account in determining whether the child is without adequate means of support.

Family law – child – maintenance of – person responsible for maintaining child – ability to contribute – duty of court to make full enquiry – fact that such person in a particular job not *per se* absolving him of duty to pay maintenance

Kamuruko v *Mapimbiro & Anor* HB-174-14 (Makonese J) (Judgment delivered 13 November 2014)

The respondent, who was an apprentice, had fathered a child. An application by the mother of the child for maintenance was dismissed by a magistrate on the grounds that the respondent was an apprentice.

Held: a party who is legally liable to maintain a minor child is expected to contribute whatever maintenance he can, according to his means. The fact that a party's disposable income is low does not at law excuse him from contributing towards maintenance. A person who earns income as an apprentice is not absolved from his duty to maintain a minor child merely on the basis that he is an apprentice. A proper inquiry should have been carried out regarding the respondent's income and expenditure.

Family law – husband and wife – divorce – maintenance – approach to – treating parties on equal basis – need to achieve substantive equality – unequal power dynamics that may apply – one party may be at a disadvantage compared to other

Mhlanga v *Mhlanga* HH-574-14 (Tsanga J, Chitakunye J concurring) (Judgment delivered 22 October 2014)

The appellant appealed against the grant of maintenance to his wife and child. The parties were in the process of divorce. The appellant had been employed at an embassy abroad and for a time his wife, the respondent, and their child stayed with him. They returned to Zimbabwe on holiday and when he went back to his foreign posting he told his wife that she would be staying in Zimbabwe. At the time this happened the respondent was pregnant with another child.
The appellant, apart from disputing his financial status, argued that, with the emergence of equality, young women can no longer expect maintenance for life as a result of their marriage, more so where a woman has worked before and is young enough to obtain employment. The appellant argued that the respondent fell squarely into this envisaged bracket where maintenance for herself was not called for and to grant it infringed the concept of equality.
Held: While self-reliance is to be applauded and accords with the principle of equality between men and women as a core constitutional value, the approach to equality must always aim at achieving substantive, rather than merely formal, equality in light of the circumstances of each case. Interpreting equality to always entail a gender neutrality approach that emphasises sameness between men and women can lead to the very inequality which the Constitution enjoins the courts and society to guard against. Such an approach does not distinguish between men and women in any way, neither does it recognise the unequal power dynamics that may be inherent between the parties that may, to a large measure, be largely contributory to the dispute in question.
Whilst an approach to equality founded on women's sameness with men clearly has its uses depending on the circumstances to be addressed, it is, however, not the only approach to achieving equality between the sexes, nor is it always appropriate for all issues. Equality is a fundamental constitutional principle, but the methodological approach to its actual achievement is by no means through a singular constant such as sameness, and the courts should not treat it as if it were. There are other pertinent approaches that the court can embrace in giving effect to equality, such as the "difference approach". There is also the "disadvantage approach". These two approaches were equally manifest in the matter in the court below. Equality may be achieved by recognising the differential effects of power between men and women that arise within a particular context and that may place a woman at a disadvantage compared to a man. In this case, the respondent was at a relative disadvantage at having joined him abroad as a spouse, temporarily forgoing the opportunity to advance her own career. When she returned, she was unemployed and pregnant and without an income. To seek to deny her even bridging support on the pretext that she could work would be to miss the point that is manifested by real life situations that can lead to inequality. In the face of lack of meaningful gains for women as a marginalised group, using sameness as the standard of equality (*de jure* equality), the reality is that increasing emphasis is being placed the role of power play and power dynamics between the sexes in understanding the failure to achieve equality in real life settings (*de facto* equality). The respondent presently had no earning capacity and therefore was in a considerably weaker and disadvantaged economic position compared to the appellant.

Family law – husband and wife – matrimonial property – matrimonial home – registration of in name of husband – not a bar to wife seeking to claim ownership

Deputy Sheriff, Harare v *Kingsley & Anor* HH-507-14 (Bere J) (Judgment delivered 24 September 2014)

See above, under CONSTITUTIONAL LAW (Declaration of Rights – referral of alleged breach)

Immigration – prohibited person – who is – person in Zimbabwe in contravention of Immigration Act – such person a prohibited person and not entitled to stay in Zimbabwe – detention of such person pending

removal from Zimbabwe – no need for him to have committed any offence before being detained – such detention not in contravention of s 49(1) of Constitution

Okey v *Chief Immigration Officer & Anor* HH-400-14 (Muremba J) (Judgment delivered 4 August 2014)

The applicant, a Nigerian citizen, had been detained by the immigration authorities pending deportation from Zimbabwe. He had been in Zimbabwe since March 2004. He got married to a Zimbabwean citizen, the marriage being solemnised in terms of the Marriage Act [*Chapter 5:11*]. Following the marriage, the applicant's wife made an application for the applicant to be granted a residence permit. He was issued with a residence permit for one year; when it expired, it was extended for another two years. However, the applicant's wife died almost a year before the expiration of his residence permit.

After the death of his wife and when his residence permit was about to expire, the applicant made an application to the first respondent to renew his residence permit. Instead of the applicant being granted 2 year permits, the first respondent started to grant him 30 day or 60 day permits. After about a year the application to renew his residence permit was completely refused by the first respondent, who did not furnish him with the reasons for the refusal. After the expiry of the residence permit, the applicant married his late wife's sister, again in terms of the Marriage Act.

The applicant argued that by virtue of being married to a Zimbabwean citizen he had the right to remain in Zimbabwe. He further argued that the first respondent had no right to refuse the application for a residence permit without furnishing him with the reasons for refusal. As a result, the applicant challenged the refusal to grant him the permit by the first respondent. He sought an order setting aside the refusal to renew the residence permit, his application being granted in default. The respondents applied for rescission of the order, but that application was still to be heard.

It was argued that the applicant's arrest was arbitrary, contemptuous and in violation of the existing court order. There is no basis for the first respondent to declare the applicant a prohibited person as he had not committed any offence. It was further submitted that by virtue of being married to a Zimbabwean citizen, the applicant now fell in the bracket of persons who are not prohibited persons in terms of s 15(1) of the Immigration Act [*Chapter* 4:02]. By virtue of his second marriage, the applicant was protected by s 12(1)(a) of the Immigration Regulations, 1988 and the provisions of the Immigration Act.

The first respondent argued that the permit which was issued to the applicant following his first marriage was one issued to an alien on the strength of a marriage to a Zimbabwean citizen. Such a permit is terminated by a decree of divorce, death of the citizen spouse or in situations where the alien becomes prohibited. When the applicant applied for a permit following the death of his first wife but before his second marriage, here was no basis whatsoever for the renewal of the permit. The applicant now became a prohibited person and had done nothing to regularise his status, even after his second marriage. He had not formally been declared a prohibited person by the Minister of Home Affairs.

Held: although the applicant had not formally been declared a prohibited person, he became one by remaining in Zimbabwe without a permit in contravention of s 29(1)(a) of the Immigration Act . Under s 14(1)(i) of the Act, any person who has entered or remained in Zimbabwe in contravention of the Act is a prohibited person. Upon becoming a prohibited person, the applicant should have left Zimbabwe. Section 17(1)(a) of the same Act disentitled him from remaining in Zimbabwe. Although under s 15(2)(d) a person who is married to a Zimbabwean citizen shall not be a prohibited person, in this case his status of being a prohibited person preceded his second marriage. The subsequent marriage did not reverse the status of a person who had become a prohibited person before the marriage.

If, as here, a person becomes a prohibited person by operation of law, the court has no power to reverse that status. Even the Minister of Home Affairs is not empowered by s 14(7) of the Act to revoke a prohibited person's status which is acquired in terms of s 14(1)(i). In any event, the court order obtained earlier did not give any instructions to the respondents, either to issue the applicant with a permit to enable him to remain in Zimbabwe or to interdict the first and second respondents from removing the applicant from Zimbabwe while he regularised his stay. Nor did the order mean that the first respondent was obliged to issue a permit, irrespective of whether or not the applicant met the requirements for one.

The power under s 8(2) of the Act to detain a person pending removal did not depend on the person having been convicted of any offence, nor did it violate s 49(1) of the Constitution. That section does not make it a requirement that in every case where a person is deprived of his liberty he ought to have been charged with a criminal offence and that there ought to be a trial. There can be instances where a person is deprived of his liberty without trial in terms of s 49(1)(b), but such deprivation should not be arbitrary or without just cause. Where there is deprivation of personal liberty without a criminal charge having been preferred, the deprivation should be authorised by law or be in compliance with the law or it should be for reasons that are just in their substance. This means that the substantive validity of a decision to detain a person must be considered.

Here, there was just cause in depriving the applicant of his personal liberty. His detention was not arbitrary because it was done in terms of s 8(2)(a) and (b) of the Immigration Act. He was a prohibited person who refused to leave Zimbabwe after the expiration of his spousal residence permit. When the decision to refuse him the permit was set aside by the court, he did not, for nearly two years, regularise his position.

Insurance – cover note – effect of – whether insured is protected when cover note issued – premium – payment of – failure to pay premium in part or in full – does not necessarily relieve insurer of obligation to protect insured – depends on wording of contract

Guardian Security (Pvt) Ltd v *Global Ins Co Ltd* HH-434-14 (Mafusire J) (Judgment delivered 20 August 2014)

In insurance law a cover note, or certificate of insurance, is part of the contract of insurance. It provides temporary cover until a detailed proposal has been accepted or until the insurer has accepted the insured's proposal. The general practice is that the cover note is issued by the insurer's agent. A cover note records the receipt of a premium from the insured. In consideration the insurer agrees to insure him for the period stated in the note. Once a cover note has been issued, it creates a binding insurance for the period of time specified in it. The temporary cover invariably takes effect at once, since its object is to give immediate protection pending the decision of the insurer and the issue of the policy. Where an insurer issues cover notes and releases them to the insured, it assumes risk. It would be liable to third party claims in terms of Part IV of the Road Traffic Act [*Chapter 13:11*].
Generally, a contract of insurance is vitiated by the non-payment of the premium. A premium is generally a condition precedent to the existence of the contract. *Prima facie*, the *quid pro quo* for a premium is an indemnity. The reverse is also true: *prima facie*, the *quid pro quo* for an indemnity is the premium which has been paid. The premium is the consideration required of the insured in return for which the insurer undertakes his obligations under the contract of insurance. There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid. It has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment, though whether or not a contract of insurance will attach only upon payment will depend on the exact terms of the parties' agreement. Where the agreement clearly states that the prior payment of the premium is a condition precedent to the protection or cover sought by the insured, then, until such payment is made, the policy will be of no effect in protecting the insured.

Insurance – subrogation – meaning – when plaintiff's right to claim damages may be removed – need for plaintiff to have been compensated by insurer – in absence of such compensation, plaintiff has *locus standi* to pursue claim against defendant

Cargo Carriers Intl Hauliers (Pvt) Ltd v *Shereni & Anor* HH-679-14 (Matanda-Moyo J) (Judgment delivered 1 September 2014)

The plaintiff sued the defendants for the costs of repairs to one its vehicles which had been damaged in a motoring accident, which it said was caused by the negligence of the defendants. Apart from disputing the allegation of negligence, the defendants argued that the plaintiff had no *locus standi* as its vehicle was insured and that because by the plaintiff failed to produce evidence that its vehicle was insured, and because it failed to produce the insurance policy and a letter from the insurance company that they would not compensate the plaintiff for such damages, the plaintiff had no authority to bring such a claim.
Held: the law of subrogation meant, in relationship to this matter, the right of an insurer to pursue a third party that caused an insurance loss to the insured. This is done as a means of recovering the amount of the claim paid to the insured for the loss. Subrogation has been defined as the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. For the principle of subrogation to take away the plaintiff's *locus standi*, there must be proof that the insured received money from the insurers. Here, the plaintiff did not receive any payment from the insurance company. No basis had been laid for subrogation, which only arises when the insurer has paid monies to the insured.

Interpretation of statutes – tax laws – *contra fiscum* rule – limits to – where meaning of statute unambiguous, no need to use ancillary aids to interpretation

S (Pvt||) Ltd v *ZRA* FA-5-13 (Kudya J) (Judgment delivered 22 October 2014)

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

Land B gazetted land B occupation of B lawful authority to occupy B what constitutes B need for occupier to hold offer letter, permit or land settlement lease issued by acquiring authority

Taylor-Freeme v *Senior Magistrate, Chinhoyi, & Ors* CC-10-14 (Chidyausiku CJ; Malaba DCJ, Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 8 October 2014)

The applicant had been charged in the magistrates court with contravening s 3(2)(a), as read with ss 3(3) and 3(5), of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], it being alleged that he, without lawful authority to occupy, hold or use gazetted land (the farm he formerly owned), did not cease to occupy, hold or use that land after the expiry of the forty-five day period stipulated in s 3(2)(a) of the Act and had not ceased to occupy, hold or use that land to date. He raised various defences, among which was the averment that he had authority to occupy, hold or use the gazetted land from the late Vice-President Msika and officials from the Ministry of Lands, Land Reform and Resettlement. A letter from the Vice-President stated that the Vice-President had granted the applicant permission to continue farming the farm.
At the conclusion of the State case, the applicant applied for discharge on the grounds that none of the six essential elements of the offence charged had been proved or alleged to justify his being put on his defence. The magistrate dismissed the application, and the applicant sought a referral of the matter to the Supreme Court under s 24(2) of the 1980 Constitution, which was then in force. He contended that his rights under s 18 of the Constitution to the protection of the law and to a fair trial had been infringed. It was also argued that the definition of **A**lawful authority**@** in s 2 of the Act was *ultra vires* s 16B(6) of the Constitution insofar as it sought to limit the meaning of **A**lawful authority**@** to an offer letter, a permit or a land settlement lease. The magistrate rejected the application as being frivolous and vexatious.
The applicant then approached the Supreme Court in terms of s 24(1) of the Constitution, contending that the dismissal of his application for referral violated his right to protection of the law guaranteed by s 18(1) of the Constitution, and his right to a fair trial guaranteed by s 18(2) of the Constitution. He argued that his application was neither frivolous nor vexatious.
Held: (1) the contention that the definition of **A**lawful authority**@** was *ultra vires* s 16B was neither frivolous nor vexatious and the magistrate**=**s failure to refer the constitutional issue raised to the Supreme Court constituted a violation of the applicant**=**s constitutional right to protection of the law guaranteed in terms of s 18(1) of the Constitution.
(2) Placing an accused person on remand, trial or on his defence at the close of the State case, when the allegations and/or the evidence led by the State do not constitute an offence, was a violation of an accused person**=**s right to the protection of the law, guaranteed by s 18(1) of the Constitution.
(3) The essential elements of the offence the applicant was charged with were that (a) the accused must be a former owner or occupier; (b) of gazetted land; (c) who had not ceased to occupy, hold or use that land; (d) after the expiry of the appropriate period referred to, which in the present case was 45 days after the fixed date, being 4 February 2007; and (e) had no lawful authority to occupy or use that land.
(4) The elements were established sufficiently to put the applicant on his defence.
(5) The clear and unambiguous meaning of s 2(1) of the Act was that **A**lawful authority**@** meant an offer letter, a permit and a land settlement lease. The documents produced by the applicant were not offer letters, permits or land settlement leases issued by the acquiring authority. A letter from the late Vice President, the Presidium or any other member of the Executive did not constitute **A**lawful authority**@** in terms of the Act.
(6) Section 16B of the Constitution, which allowed an Act of Parliament to make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in the section or other State land, did not define the concept of **A**lawful authority**@**, nor did it confer on the courts the power to determine what constitutes **A**lawful authority**@**. That was left to Parliament to define.

Editor=s note: This matter was a **A**pending constitutional case**@** as defined in para 18(1)(a) of the Sixth Schedule to the Constitution of Zimbabwe 2013. It had been referred to the Supreme Court in terms of the former Constitution.

Land – occupation of – meaning – occupation of gazetted land by former owner – not an offence of strict liability

S v *Meikle* HH-565-14 (Hungwe J, Mangota J concurring) (Judgment delivered 15 October 2014)

The appellant had been convicted by a magistrate of contravening s 3(2)(a) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], which makes it a criminal offence for a former owner of land which has been gazetted to continue in occupation of such land 45 days after the fixed date without lawful authority. He did not live on the farm in question, nor did he exercise control over it. A company in which he was a minority shareholder enjoyed control of the farm. That company had acquired a controlling interest in the company which owned the farm before the farm was gazetted. The latter company had ceased to exist. The grounds on which the magistrate convicted the appellant were that (1) offences under the Act were strict liability offences; (2) that the appellant occupied the farm; (3) criminal liability should be imputed to the appellant, rather than the company; and (4) the acquisition of the controlling interest in the company which owned the farm was tantamount to a sale of the land.

Held: (1) in construing prohibitions or injunctions, the legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. Whether or not an offence is one of strict liability depends on the express or implied intention of the legislature. In the majority of statutory offences, no express indication is given, one way or the other, regarding *mens rea*. The statute merely provides that any person who does a particular act is guilty of an offence. In this country, all of the cases where the courts have decided that strict liability was impliedly imposed relate to public welfare offences that involve prohibitions or duties designed to prevent grave potential danger to the welfare of the State generally or to public amenities. These offences include such things as public health legislation, safety regulations, legislation aimed at preventing contamination of drugs and foodstuffs which are being processed and manufactured, motor carriage and transportation regulations, and so on. Strict liability is imposed where the maintenance of these standards would seriously be impaired if the defence of mistake or blamelessness were to be generally admitted. Even where a case relates to the public welfare offence, though, the courts are generally reluctant to imply that the legislature intended strict liability, because strict liability is directly contrary to the basic principle that there should be no liability without fault. The offences under the Act did not fall into the category of public welfare offences and there was no justification for departing from the general rule that *mens rea* was required.

(2) Even if the offence were one of strict liability, the *actus reus* also had to be proved, that is, occupation. "Occupation" has been defined as "Possession; control; tenure; use. The act or process by which real property is possessed and enjoyed. Where a person exercises physical control over land." The appellant did not possess or enjoy the farm, nor did he exercise control over it. Control was exercised by a company in which he was a minority shareholder.

(3) Shareholders of a company are not owners of the company's property, so the appellant could not be said to occupy the farm through his shareholding in the company.

(4) Criminal liability can be attributed to a company in respect of the acts of persons who control the company. When a company is prosecuted, a director or servant of the corporate body is cited as a representative of the company, not its shareholders. The company should be been prosecuted, if any criminal liability arose under the Act.

(5) The sale of the shares in the company which first owned the farm was not tantamount to a sale of shares in the farm. The compulsory acquisition was of the farm, not of the company.

Legal aid – meaning of – limits to State's duty to provide legal aid – basic legal advice and assistance – one method of achieving equal protection of the law – how such advice and assistance may be obtained

Mupapa v *Mandeya* HH-443-14 (Tsanga J) (Judgment delivered 27 August 2014)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – national objectives – legal aid).

Legal practitioner – conduct and ethics – affidavits – practitioner signing affidavit in absence of purported deponent – dishonourable and dishonest conduct

Rock Chemical Fillers (Pvt) Ltd v *Bridge Resources (Pvt) Ltd & Ors* HH-339-14 (Mathonsi J) (Judgment delivered 9 July 2014)

Quite often legal practitioners indulge in the unfortunate and unbecoming behaviour of signing "affidavits" in their capacities as *ex officio* commissioners of oath, not only without satisfying themselves that an oath is taken but also in the absence of the "deponent". They do this as a favour to colleagues racing against time. Not only is

such conduct disdainful, it is clearly dishonourable. It is the height of dishonesty for a commissioner to authenticate a signature he has not seen the signatory sign, but even worse for him to sign a blank document, hoping that the intended deponent's signature would be appended later. It is a serious dereliction of duty on the part of the commissioner of oaths. The deponent must always appear before the commissioner and be duly sworn. His signature must be appended in the presence of the commissioner whose signature is an assurance to the court that all these procedures have been compiled with.

Legal practitioner – conduct and ethics – citation of document, statute or authority – knowingly misstating contents – breach of ethics

Mashonganyika & Anor v *Pfute & Ors* HH-492-14 (Uchena J) (Judgment delivered 18 September 2014)

See below, under WILL (Interpretation).

Legal practitioner – conduct and ethics – duty to other legal practitioners – duty to advise other party's legal practitioners of planned proceedings – deliberately failing to do so, resulting in unnecessary litigation – costs on higher scale awarded

Zuva Petroleum (Pvt) Ltd v *Motsi & Anor* HH-648-14 (Chigumba J) (Judgment delivered 26 November 2014)

See below, under PRACTICE AND PROCEDURE (Judgment – default judgment – rescission)

Legal practitioner – conduct and ethics – practitioner a witness to events forming subject matter of subsequent proceedings – not automatically disbarred from acting in such proceedings – inadvisability of acting

Trustees, SOS Children's Village Assn v *Bindura University & Ors* HH-349-14 (Mafusire J) (Judgment delivered 10 July 2014)

There is no rule that says a lawyer is automatically disbarred from representing his client in court proceedings where he was a witness to the events that subsequently form the subject matter of those proceedings, or where he has filed an affidavit confirming his involvement and supporting his client's version of events. Every case must depend on its own set of circumstances. Nonetheless, and in my view, a lawyer who finds himself in that situation must consider seriously the wisdom of wearing two hats; that of being counsel for the client and that of being a witness for the client. It would be more prudent to let someone else conduct the court proceedings where the lawyer has been seriously involved in the affairs of the client giving rise to the litigation. This is so to avoid a conflict situation. The lawyer should at all times avoid clouding his sense of judgment.

Local government – urban council – an administrative authority in terms of Administrative Justice Act – duty to comply with Act – requirement to give reasons for actions – relief which may be granted

Mhete & Ors v *City of Harare & Anor* HH-649-14 (Chigumba J) (Judgment delivered 26 November 2014)

See above, under ADMINISTRATIVE LAW (Administrative authority – who is)

Mines and minerals – mining claim – mine situated in area subsequently designated as a national park – work carried out on such claim and ore extracted – whether Parks and Wildlife Authority entitled to levy fees for continued operation on such mine

Come Again Mines (Pvt) Ltd v *Parks & Wildlife Mgmt Authority & Anor* HH-392-14 (Chigumba J) (Judgment delivered 30 July 2014)

The applicant had been carrying out mining operations for several years in an area north-east of Harare, before that area was designated as a national park. The Parks and Wildlife Authority then demanded fees from the applicant for it to be allowed to continue its mining activities. It claimed that it was entitled to do so in terms of

the Parks and Wildlife Management Authority (Tariff of Fees) By-Laws SI 5 of 2013. The applicant sought an order declaring that the fees were *ultra vires* the enabling legislation, being inconsistent with the provisions of ss 119 and 129A of the Parks and Wildlife Act [*Cap 20:14*]. Section 119(2) prohibits mining within a national park except in terms of a permit issued by the Minister of Environment or in accordance with any prospecting rights lawfully acquired in respect of the area before the date when such area became a national park.
Held: Section 119(2)(b) applies to the applicant's mining permits, which conferred mining rights on it and which were issued before the area was designated as a national park. Very wide discretion is placed in the hands of the Authority in enacting the by-laws. The Authority may make by-laws fixing the fees to be paid for any authority, permit or licence issued or supplied in terms of the Act. There was no evidence as to what the terms and conditions of these registered claims were, or what the fact of registration of the claims conferred on the applicant in terms of mining rights. The application would be refused.

Editor's note: Section 119(1) of the Act prohibits prospecting or mining within a national park except (a) in terms of a permit issued by the Minister [of Environment] with the consent of the Minister of Mines or (b) in accordance with any prospecting rights lawfully acquired in respect of the area of the national park before the date when such area became a national park. Subsection (2) prohibits the acquisition or working of any mining location within a national park except (a) in terms of a written agreement between the Minister and the person concerned which has been approved by the President or (b) in accordance with any mining rights lawfully acquired in respect of the area of the national park before the date when such area became a national park.
Section 129A(a) allows fees to be fixed for "any authority [or] permit … granted, issued or supplied in terms of *this Act*" (my emphasis), while para (b) allows the Authority to fix "a tariff of fees payable by persons prospecting, or working any mining location within the park area under a permit or agreement referred to in section 119".
As the applicant's rights were granted under the Mines and Minerals Act before the area was designated as a national park, its rights were not granted under the Parks and Wildlife Act, nor was it mining in terms of a permit or agreement referred to in s 119.

Mines and minerals – mining dispute – mining commissioner – referral of dispute to – whether such dispute must be referred to mining commissioner – right of complainant to approach High Court for relief

Rock Chemical Fillers (Pvt) Ltd v *Bridge Resources (Pvt) Ltd & Ors* HH-339-14 (Mathonsi J) (Judgment delivered 9 July 2014)

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

Police – discipline – punishment under Police Act [*Chapter11:10*] – informal punishment following punishment meted out under Act – *ultra vires* the Act

Tichivanhu & Ors v *Officer in charge, Morris Depot, & Ors* HH-690-14 (Bere J) (Judgment delivered 4 December 2014)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – duty of State organs)

Police – discipline – trial of member by single officer for disciplinary offence in terms of s 34 of Police Act [*Chapter 11:10*] – appeal to Commissioner-General in terms of s 34(7) of Act – Commissioner-General dismissing such appeal – whether appeal lies to High Court against Commissioner-General's decision

Chatukuta v *Nleya NO & Ors* HH-705-14 (Mawadze J) (Judgment delivered 19 December 2014)

The applicant, a police officer, was tried by a single officer in terms of s 34 of the Police Act [*Chapter 11:10*] on a disciplinary charge. He was convicted and sentenced to nine days' detention. He appealed to the Commissioner-General of the Police in terms of s 34(7) of the Act. On appeal the conviction was confirmed and the sentence of nine days' imprisonment was altered to four days' imprisonment. Reasons for the dismissal of the appeal were not given to the applicant. When he was informed that he was to be detained to serve the four days' imprisonment, he approached the High Court on an urgent basis, averring that the first respondent had virtually barred him from filing an appeal with the High Court against the decision of the Commissioner-General. He contended that his constitutional rights under s 49 of the Constitution (the right to personal liberty) and s 70(5)(b) of the Constitution (the right to appeal against conviction and sentence) were being violated by

the respondents. The respondents averred that no further appeal lies to the High Court against the decision of the Commissioner-General once he has dismissed an appeal in terms of s 34(7) of the Act. The Commissioner-General is the highest and final court of appeal in as disciplinary matters presided over by a single trial officer in terms of s 34 of the Act, unlike the situation of a trial by a board of officers or by a magistrates court, where a right of appeal to the High Court is specifically provided for. They further argued that such a member could only approach the High Court on review, but not by way of appeal. The question was thus whether a member tried by a single officer in terms of s 34 and has unsuccessfully appealed to the Commissioner-General in terms of s 34(7) should be denied the right to appeal to the High Court and consequently to the Supreme Court, a right enjoyed by members of the Police Force tried by either a board of officers or the Magistrates Court.
Held: the right to appeal or to seek review is now enshrined in s 70(5) of the Constitution. The courts would therefore not deprive any person of such a right unless there are reasonable restrictions prescribed by the law. The Police Act does not provide for such reasonable restrictions, but is simply silent on the right of appeal by an aggrieved member against the decision of the Commissioner-General made in terms of s 34(7) of the Act. Under s 171 of the Constitution, the High Court, being a superior court of record, has original jurisdiction in all civil and criminal matters in Zimbabwe. The inherent jurisdiction conferred upon the High Court is exercised unless it is specifically ousted. In terms of s 171(d) the appellate jurisdiction of the High Court may be limited by a statute; this led to the question as to whether there is indeed a statute which limits the appellate jurisdiction of the High Court in the circumstances of this case. In terms of 13 of the High Court Act [*Chapter 7:06*], the High Court has full original civil jurisdiction over all persons and over all matters within Zimbabwe. The jurisdiction of the High Court, whether appellate jurisdiction or otherwise, cannot be ousted by implication; it must be expressly excluded. The High Court, unlike other, inferior, courts (which may only do what the law permits), may do everything which the law does not forbid.
Disciplinary proceedings held in terms of the Police Act are of a civil rather than criminal nature, despite the fact that convicted members of the Force may be sentenced to terms of imprisonment. In terms of s 30 of the High Court Act, the High Court can, firstly, exercise its appellate jurisdiction in respect of any proceedings of any tribunal if the relevant Act governing those proceedings provides for an appeal to the High Court. The second instance where the High Court will exercise its appellate jurisdiction is where the relevant Act governing the proceedings of such a tribunal does not oust the jurisdiction of the High Court. The Police Act does not oust the appellate jurisdiction of the High Court in relation to proceedings held in terms of s 34 of the Police Act. While an appeal lies to the Commissioner-General against the decision of a single trial officer in terms of s 34(7) of the Act, there is no provision in the Act which states that no appeal lies against the decision of the Commissioner General made in terms of s 34(7), nor is there a provision which bars an aggrieved member from approaching the High Court on appeal against the decision of the Commissioner-General. The appellate jurisdiction of the High Court is not specifically ousted and there was therefore no legal bar to the applicant appealing to the High Court against the decision of the Commissioner-General made in terms of s 34(7) of the Police Act.

Practice and procedure – affidavit – swearing of by commissioner of oaths – need for deponent to be sworn and to be present when commissioner of oaths signs document – "affidavit" not complying with such requirements a nullity

Rock Chemical Fillers (Pvt) Ltd v *Bridge Resources (Pvt) Ltd & Ors* HH-339-14 (Mathonsi J) (Judgment delivered 9 July 2014)

See above, under LEGAL PRACTITIONER (Conduct and ethics – affidavits).

Practice and procedure – appearance to defend – when may be made – summons and declaration served together – defendant has 20 working days within which to enter appearance

Finwood Invsts (Pvt) Ltd & Anor v *Tetrad Invstm Bank Ltd & Anor* HH-669-14 (Chigumba J) (Judgment delivered 26 November 2014)

In terms of r 17 of the High Court Rules 1971, once summons is served, the *dies induciae* for the defendant to enter appearance to defend expire after ten working days, excluding the date of service. The proviso to r 119 makes it clear that, where a summons has been served together with a declaration, a further ten day period is added onto the normal *dies induciae* provided by r 17, within which to enter appearance to defend.

Practice and procedure – application – urgent – certificate of urgency – validity of – fact of urgency must appear from founding affidavit – affidavit making no such averment – no basis for issue of certificate – issue of certificate without seeing founding affidavit – certifying practitioner seeing only a draft of such affidavit – issue of certificate not competent – certificate not valid

Econet Wireless (Pvt) Ltd v *POTRAZ* HH-635-14 (Dube J) (Judgment delivered 17 November 2014)

It is not competent for a legal practitioner who is requested to certify a matter as urgent to see the founding affidavit in draft form, before it is signed, in order to ensure that the affidavit discloses urgency before he agrees to certify the matter. It is not his duty to ensure that the affidavit discloses urgency. He is required to see a signed and commissioned affidavit and either agree or disagree on the urgency of the matter. It is not his function to amend or suggest amendments to the affidavit so that it complies with the requirements of urgency. The practice of legal practitioners who insist on seeing founding affidavits in draft form is undoubtedly wrong. This sort of conduct is most inappropriate and ought to be discouraged.

A certificate of urgency is required to be premised on a founding affidavit. A statement only becomes an affidavit when it is signed by the maker and sworn to and signed before a commissioner of oaths. Where there is no founding affidavit when the matter is certified urgent (because the affidavit was in draft form) there can be no valid certificate of urgency.

A legal practitioner cannot certify a matter as being urgent where the applicant itself does not hold the view that the matter is urgent. The founding affidavit must disclose urgency. The deponent to the founding affidavit should therefore be alive to the fact that he is bringing a matter to court on an urgent basis. It is incumbent upon him to articulate fully, in his affidavit, why he is bringing the matter on an urgent basis and why he cannot wait and enrol the matter on the ordinary roll. He cannot simply regurgitate the history of the matter and expect that he may persuade the court to find the matter urgent by merely outlining the irreparable harm likely to ensue. He must make specific averments on the allegation that the matter is urgent and cannot wait. Where there has been a delay in bringing the application, such delay should be explained in the founding affidavit. This role should not be left entirely to the person who certifies the founding affidavit as urgent. Nor can the deponent to the founding affidavit leave it to his counsel to address the issue of urgency of the matter at the hearing either, because that opportunity might never arise. A court dealing with an urgent matter is required to consider the urgency of the matter when the matter is placed before it and on the basis of papers placed before it. Before a court sets down an urgent application for hearing, it must be of the preliminary view that the matter is urgent. The court has not had the benefit at this stage of hearing the applicant's counsel; hence the need for the certificate of urgency and founding affidavit themselves to adequately address the issue of urgency.

Practice and procedure – execution – sale – sale by private treaty – price reasonable and sale confirmed by Sheriff – judgment debtor subsequently paying off debt – sale not thereby cancelled

Nanhanga v *Chalmers & Ors* HH-545-14 (Dube J) (Judgment delivered 8 October 2014)

The first respondent was the registered owner of a property which was sold at a public auction in execution of a judgment granted against the first respondent. The applicant was the highest bidder. The first respondent objected to the sale on various grounds, including the price obtained. The Sheriff did not determine the objections, but put the property up for sale by private treaty. The applicant once more was the highest bidder and his bid was accepted. The Sheriff confirmed the sale and the transfer of the property into the applicant's name was ordered. About a month after the Sheriff had confirmed the sale, the first respondent's legal practitioners wrote to the applicant advising that the first respondent had managed to satisfy the judgment debt and notifying him that the transfer of the property had been reversed. The Sheriff then wrote to the first respondent and indicated that the confirmation of the sale was done in error. The applicant sought an order setting aside the cancellation of the sale and for the transfer of the property to him.

Held: (1) Sales in execution by private treaty are governed by r 358 of the High Court Rules 1971. Under r 358(1) the Sheriff may at the outset sell a property by private treaty if he is satisfied that the price offered is fair and reasonable. He requires the consent of all interested parties, including the judgment debtor. The court may also sanction the sale. The provision was inserted with the judgment debtor in mind. The debtor has an interest in ensuring that the sale has maximum benefit and fetches the highest possible price as the residue will be paid to him. He is required to be consulted so that his interests are secured. He may bring a buyer with a better offer if he is in a position to do so. His consent must be express.

The second situation is where a sale by public auction has taken place and the Sheriff is not satisfied that the price offered is fair and reasonable. The Sheriff has an option to sell the property by private treaty so that he ensures that the sale realizes the best price possible. The Sheriff may opt for a private sale at any stage. He does

not have to be requested by anyone to resort to a private treaty sale, nor does he need the consent of the judgment debtor or any other interested persons. Where the Sheriff is not satisfied with the price offered at the private treaty sale, he may put the property up for sale by public auction again.
(2) Where a sale by public auction is held and is subsequently aborted and a sale by private treaty takes place and is confirmed, the objections to the public sale fall away and cannot stand in the way of confirmation of the sale by private treaty sale simply because the earlier objections were not determined at the time the public sale was in existence. The Sheriff had no grounds for cancelling his confirmation of the private sale. In any case, once the sale was confirmed, the Sheriff was *functus officio*.
(3) Where a debtor manages to settle the debt after the sale but before confirmation of the sale by the Sheriff, he may apply to court to have the debt cancelled. The odds are in his favour at that stage and this is a good ground for having the sale set aside. Where the sale has been confirmed by the Sheriff, the sale is no longer conditional. The transaction becomes *perfecta* and the sale is sealed. The purchaser acquires rights which can only be upset by a court of law. The approach of the courts is that judicial sales are not to be readily interfered with after they have been confirmed. The fact that the judgment debtor has subsequently satisfied the judgment debt does not automatically invalidate the sale. Here, the price was reasonable in the circumstances and there was no basis for cancelling the sale.

Practice and procedure – execution – sale in execution – duty of sheriff to attach moveable property before attaching immoveable property – attachment of immoveable property – obtaining of valuation before attachment – sheriff's discretion – duty to act fairly

Practice and procedure – execution – writ – amount stated in writ no longer reflecting amount of debt – writ not amendable – duty of sheriff when true size of debt made known

Pandhari Lodge (Pvt) Ltd & Ors v *CABS & Anor* HH-720-14 (Mangota J) (judgment delivered 31 December 2014)

The applicants, in a deed of consent to judgment, acknowledged themselves indebted to the first respondent in the sum of a little over US$2 million, including interest. Three immoveable properties belonging to the applicants were identified as being specially executable. The first respondent caused a writ of execution in the acknowledged sum, and the second respondent (the sheriff) proceeded to attach the properties, as well as some moveable property belonging to one of the applicants. However, by the time he did so, the debt had been reduced to just under half, though no fresh writ was issued. The applicants brought an application to prevent the impending sale in execution, on the grounds that such a sale would be wrong at law and would invariably cause harm to be visited upon them in a manner that could not be rectified. They stated that it was their intention to obtain a declarator, on the return date, to the effect that the current attachment and execution of their property on the writ which the first respondent issued was illegal and defective at law. They stated that, being void, the writ which was issued had to be cancelled as, in their view, no valid execution could be based on it. They also argued that the sheriff violated the proviso to r 326 of the High Court Rules and that he should have attached their movable goods before proceedings to attach their three immovable properties. They produced evidence to show that they had sufficient movable property which the sheriff could have attached and sold in execution with a view of either liquidating their indebtedness to the first respondent or, at the very least, reducing it in a very substantial manner.
Held: (1) that the conduct of the respondents, the first respondent in particular, prejudiced the applicants' case in a material way could not be controverted. There was no doubt that the sum inserted in the writ persuaded the sheriff to attach three immovable properties of the applicants. The probabilities were that he would not have attached all the three properties if he had properly been informed to recover from the applicants the sum actually outstanding. He would have proceeded to attach one or two, but not all three, of the applicants' properties.
(2) The proviso to r 326 places a mandatory obligation on the sheriff to always execute court orders in the manner that the applicants stated: the sheriff's duty is to attach and sell in execution the judgment debtor's movable goods. Only when the attached goods cannot, after the sale, satisfy the entire debt that he is is allowed to proceed against the judgment debtor's immovable property. There was no evidence that the sheriff satisfied himself that the applicants did not have movable property which he could have attached for sale in execution to satisfy, to a greater or lesser degree, the debt owed to the first respondent.
(3) The importance of the rule cannot be over-emphasised. It is aimed at safeguarding the immovable property or properties of a debtor. An immovable property is, by its nature, acquired after a person's effort to save his hard-earned money. That type of property which confers what are termed real rights on the title holder of the property is more difficult to acquire than movable goods which, more often than not, fall into the hands of the holder and go away from him as quickly as they come. The amount of money which a person requires to purchase those is a lot less than what he requires to purchase an immovable property, let alone more of such properties. It is for this reason, if for no other, that the courts insist that a party who is owed a debt by another

must, as a matter of course, start by disposing of the other party's movable goods before he proceeds to dispose of his immovable goods. Forced sales do not, by their nature, allow the debtor to recover meaningfully, in monetary terms, for his property which is being sold in execution of a judgement debt.
(4) Rule 324 states that a writ of execution, once issued, remains of force until such time as the judgment has been satisfied. The rule is peremptory and offers no discretion to the parties, or to one of them, to alter or amend the writ. Had the sheriff's attention been drawn to what the outstanding debt was, the probabilities were that he would not have attached all three properties, but only one or two of them. For this reason, if for no other, the court would invoke r 4C to depart from the peremptory nature of r 324. That departure was required in the interests of justice as between the parties. Equity and fairness, which are the hallmark of a court's work, demanded that the process be set aside in the interests of justice.
(5) Rule 351, which relates to valuation of property which is due for attachment, is not peremptory but discretionary. It confers on the sheriff a discretion, for purposes of equity and fairness, to appoint a fit and proper person who has no interest on either side of the divide to place a value on the property. The value so obtained will offer a guide to the sheriff when he puts the property under the hammer as a sale in execution. The Sheriff is, after all, an officer of the court who must not only act, but must also be seen to be acting, fairly in the manner that he carries out the duties which the court and the law impose upon him. The execution of court orders is a necessary corollary of the work of the courts which are enjoined to dispense real and substantial justice to all manner of people without fear or favour. Where, therefore, the sheriff misuses the discretion which the rules of court confer upon him, he tarnishes the image of the court in an unforgivable manner and brings both the court and his office into serious disrepute.

Practice and procedure – interdict – "anti-dissipation" interdict – nature and purpose of interdict – requirements for grant of – same as any other interim interdict – reasons to grant interdict – matters which court should consider

Shabtai v *Bar & Ors* HH-707-14 (Mafusire J) (Judgment delivered 24 December 2014)

An anti-dissipation interdict is just an ordinary interdict to restrain the disposal of assets. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. The usual requirements for the grant of an interdict must be met, that is: (1) a *prima facie* right, even if it be open to some doubt; (2) a well-grounded apprehension of irreparable harm if the relief is not granted; (3) that the balance of convenience favours the granting of an interim interdict; and (4) that there is no other satisfactory remedy.
In deciding whether to grant this type of interdict, one of the major considerations is whether the respondent would still have sufficient property to satisfy any judgment that may eventually be given against him and whether his continued disposal of his assets is deliberately intended to frustrate any such judgment. Justice may require that a restriction be placed on the respondent's ability to deal with his own assets where it has been shown that he has been acting *mala fide*, with the intention of rendering ineffective the judgment that the court may grant against him. This is so even where it would not normally be justified to compel him to regulate his *bona fide* expenditure so as to retain sufficient funds in his patrimony for the payment of claims. The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it – to render it more effective. And the question whether the claim is a satisfactory remedy in the absence of an interdict would normally answer itself. Except where the respondent is a Croesus, a claim for damages buttressed by an interdict of this sort is always more satisfactory for the plaintiff/applicant than one standing on its own feet. The question of an alternative remedy accordingly does not arise in this sort of case.

Practice and procedure – interpleader proceedings – attached goods claimed by party other than judgment creditor – what Sheriff should do – must consult judgment creditor and seek directions from registrar – not entitled unilaterally to remove such goods

Chihota v *Munyariwa & Ors* HH-418-14 (Mathonsi J) (Judgment delivered 31 July 2014)

The first respondent obtained judgement against the third respondent and issued a writ against the third respondent's property. The first respondent instructed the Sheriff to execute against the third respondent's property, whereupon the Sheriff placed under attachment certain items of property at a certain stand in Gweru. Those goods were later claimed by the applicant who had visited that stand, which was where he kept his equipment, and found that the locks had been changed. He also found the writ of execution and the notice of attachment showing that his equipment had been attached. At the instance of the Sheriff, the applicant instituted

interpleader proceedings which he expected the Sheriff to issue out of the court in order to resolve the conflicting claims. He delivered the process to the Sheriff and paid the requisite fee to enable the issuance of the interpleader application. He was laying a claim on all the property that had been attached. Instead of staying execution, the Sheriff telephoned the messenger of court and instructed him to forthwith remove the property and put it in storage. This was duly done.
Held: Where goods are claimed by a party who is not the judgment debtor, such claim must first be investigated before execution proceeds. Ideally the Sheriff should refer the claim to the judgment creditor and enquire whether the judgment creditor is prepared to admit the claim or not. If the judgment creditor admits the claim, the matter should end there and the goods should be released from judicial attachment. If the judgment creditor does not admit the claim, then the provisions of Order 30 of the High Court of Zimbabwe Rules 1971 come into play. That Order sets out the procedure to be followed in interpleader proceedings. In terms of r 205A(2), in regard to conflicting claims with respect to property attached in execution, the Sheriff has the right of an applicant and the execution creditor has the right of a claimant. In terms of r 206(2), where the claim relates to a thing capable of delivery, the applicant must tender the subject matter to the registrar when delivering the interpleader notice or take such steps to secure the availability of the thing in question as the registrar may direct. It is for the registrar, perhaps after taking into account the exigencies of a particular matter, to give directions as to how the goods should be dealt with. It is wrong for the Sheriff to proceed *mero motu* to remove goods that are being claimed without even seeking an input from the judgment creditor and without the specific directions of the registrar.

Practice and procedure – judgment – default judgment – rescission – applicant unaware of proceedings – whether in wilful default – legal practitioner failing to advise applicant of proceedings – good prospects of success in main action – rescission granted

Zuva Petroleum (Pvt) Ltd v *Motsi & Anor* HH-648-14 (Chigumba J) (Judgment delivered 26 November 2014)

The applicant was the plaintiff in an action brought against the respondents. They had sought an order for further particulars within a stated period, failing which the applicant's claim would be deemed to have been dismissed. The order was granted in default. The applicant sought rescission of the order on the grounds that there was good and sufficient cause for rescission. It was argued that default was not wilful, that it had shown that it had good prospects of success in the main matter, and that it has a genuine and unassailable claim against the respondents.
The order obtained by the respondents had not been served on the applicant, who thus did not know when the period within which to supply further particulars began to run. The applicant admitted that the order did not stipulate that it be served on the applicant. The applicant had not been advised by its legal practitioners that an application had been made to compel the delivery of further particulars. The legal practitioner had taken the view that the particulars requested were matters of evidence which were not required to enable the respondents to plead, so decided not to oppose the application to compel delivery of further particulars. He expected to be served with a copy of the order to compel delivery so that he could comply with it, but this was not done. He admittedly failed to apply his mind to the effect of the draft order sought in the application to compel delivery of further particulars.
The applicant submitted that it should not be punished for the tardiness of its legal practitioner, because its explanation was sufficient, and its conduct is not blameworthy to the extent that it exceeded the limit beyond which a litigant cannot escape the result of his attorney's lack of diligence. It should escape the consequences of its legal practitioners conduct because he misled it, gave it wrong advice, and failed to follow up progress in the matter. There was an understandable oversight, because it could have been presumed that the other party would serve the proposed order upon it. A convention has arisen in the practice of law that an order of court which requires a party to perform an act must be served on that party.
It argued that it had good prospects of success in the main matter, and that the respondents should pay costs on the higher scale because they had displayed unethical and deplorable conduct by failing to serve the court order on the applicants and by tenaciously defending the application for rescission of default judgment when they knew full well that they had not paid what is due and owing to the applicant.
Held: (1) The applicant clearly did not have full knowledge of the service or the set down of the matter. It did not possess knowledge of the risks attendant upon default, and did not freely take a decision to refrain from appearing. For the application to be refused, there must be an element of wrongdoing on the part of the applicant and such wrongdoing must be solely and wholly attributable to the applicant, after being given competent legal advice. There should be *prima facie* evidence of a deliberate failure to act in the manner that such an the applicant ought to have acted, with full knowledge of the consequences of acting or failing to act in the prescribed manner, for a charge of lack of *bona fides* in bringing an application for rescission, to be sustainable.

(2) The respondents had not shown any defence on the merits.
(3) Although the respondents were not obliged at law to serve a copy of the order on the applicant, there is a convention, a rule of practice, ethics and professionalism that binds all officers of the court to be courteous and respectful towards each other. This is a noble and honourable profession, and the respondent's counsel ought to have done the honourable thing and advised counsel for the applicant of the existence of the order before the time stipulated had expired. If that courtesy had been extended, the multiplicity of actions that resulted would have been avoided. Costs would be awarded on a punitive scale to discourage such conduct in future.

Practice and procedure – judgment – default judgment – rescission of – default due to faulty service – judgment void, irrespective of merits

Nyamhuka v *Hove & Anor* HH-425-14 (Tsanga J) (Judgment delivered 18 August 2014)

At the core of its nature, a default judgement is granted on the basis of failure to plead or failure to defend. It is a result of non-observance of procedural considerations. The facts of the matter will not have been properly contested in a default judgment. Simply put, it is a judgment which is not on the merits. Consequently, it operates on shaky ground should the defendant seek to challenge it on the basis of it having been improperly obtained, as a case may ultimately have to be heard on its full merits. Among the reasons that can form the basis of challenging a default judgment is that it has been improperly obtained, because service in terms of the rules is faulty. Proof of proper service is obviously necessary in averting such a claim. Also, if the reason for challenging the regularity of a default judgment is that it was improperly taken due to defective service, then such a judgment would ultimately be considered void in an application for its rescission and would of necessity, be set aside. Its contents would be immaterial.

Practice and procedure – judgment – judgment sounding in foreign currency – losses suffered in local currency – how damages to be calculated

Madhatter Mining Co v *Tapfuma* S-51-14 (Gwaunza JA, Gowora & Hlatshwayo JJA concurring) (Judgment delivered 25 July 2014)

See above, under EMPLOYMENT (Wrongful dismissal – damages – assessment of).

Practice and procedure – pre-trial conference – purpose of – no disputed issues remaining after conference – no need for judge to refer matter to trial – may enter judgment immediately

KM Insurance v *Marumahoko* HH-678-14 (Matanda-Moyo J) (Judgment delivered 25 November 2014)

The duties of a judge in a pre-trial conference include: (a) identification of issues to be resolved at trial; (b) identifying common cause areas; (c) eliminating frivolous claims or defences; (d) identifying witnesses and documents; and (e) discussing possibilities of a settlement. After the conference the judge either issues an order reflecting the results of the conference or refers the matter for trial on identified issues. The judge cannot simply refer a matter to trial where there are no disputed issues to be resolved at trial. To do so would defeat the real purpose for which a trial court is constituted. When it is clear that a litigant simply refuses to settle but concedes that there are no issues for determination at trial, it is permissible for the pre-trial judge to enter judgment at that stage.

Practice and procedure – process – service of – on body corporate – delivery to a "responsible person" – who such person may be – delivery to security guard at business premises sufficient

Smethwick Trading (Pvt) Ltd v *Mangwende & Anor* HH-603-14 (Mwayera J) (Judgment delivered 5 November 2014)

Under r 39(2)(d) of the High Court Rules 1971, process on a body corporate may be served, among other ways, by delivery to a responsible person at the body corporate place of business or registered office. A "responsible person" is one who is able to act without guidance and this description would not exclude a security guard who served at the company's business premises. It would not only be unreasonable but illogical to hold that a man

charged with responsibility of security of premises should be viewed as not fit or responsible enough to be served with process, given that under r 40 affixing process at place of residence, business or employment or placing in a letter box is deemed sufficient service may be regarded as sufficient service.

Practice and procedure – provisional sentence – defences – allegation of "material disputes of fact" requiring oral evidence – approach court should take in deciding whether material disputes exist

Gumbi v *Majoni* HH-654-14 (Chigumba J) (Judgment delivered 26 November 2014)

Provisional sentence may be granted to a creditor who is in possession of a duly signed and witnessed liquid document, where, *inter alia*, the defendant has very poor prospects of success in the main matter because the defence proffered is weak and not likely to be accepted by the court. Only a *bona fide* defence can defeat an application for provisional sentence. A *bona fide* defence has been held to be a plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. The defendant must allege facts which if established, would entitle him to succeed. To avoid the grant of provisional sentence, the defendant may show that there are material disputes of fact. In deciding whether there are "material" disputes of fact, the court should follow the following principles:

(a) If it is possible to take a bold and rational approach, which is not overly exacting or picky, and there is no real possibility of being unfair to the other party concerned, the dispute may be resolved on the papers.
(b) If it appears that the submission that there is a material dispute of fact is a deliberate and transparent ploy, calculated to delay the resolution of the matter by making it appear to be difficult to do so on the papers, the court must be careful not to allow such a strategy to hamper its effectiveness, or to defeat or delay the resolution of the matter.
(c) If the dispute of fact appears to be one that can confidently be relied on as being genuine, authentic, true and above board, and it is not merely deceptive or false, it is a material dispute of fact which may require *viva voce* evidence for it to be resolved.
(d) If the dispute of fact is one of substance, and has a bearing on the issue to be determined, it is a material dispute of fact which may require *viva voce* evidence for it to be resolved.

Practice and procedure – summary judgment – when may be granted – claim for damages for breach of contract – such a claim never unarguable – summary judgment should not be granted for damages

Superbake Bakries (Pvt) Ltd v *Rumtowers Security (Pvt) Ltd* S-74-14 (Guvava JA, Garwe & Gwaunza JJA concurring) (Judgment delivered 30 July 2014)

The respondent obtained summary judgment against the appellant after the latter cancelled a contract under which the respondent provided security services for the appellant. The sum claimed fell into two parts: half was for the charges for the three months immediately before the cancellation, and the balance was for damages in lieu of 3 months' notice of termination. The appellant appealed against the order for summary judgment.
Held: Summary judgment is an extraordinary remedy which is granted to a party so that a matter may be determined expeditiously where a defendant has entered appearance to defend for the purpose of delaying the proceedings. The special procedure was conceived so that a *mala fide* defendant might be summarily denied, except under onerous conditions, the benefit of the fundamental principle of the *audi alteram partem* rule. So extraordinary is the invasion of the basic principle of natural justice that it will not be lightly resorted to. It will only be granted in circumstances where it is established that the plaintiff's claim is clearly unarguable both in fact and in law. In respect of the first half of the claim, the appellant acknowledged its indebtedness, expect for a portion which it had already paid, so summary judgment in the reduced sum would be granted. However, damages for breach of contract could not properly be awarded in an application for summary judgment, because, in terms of the contract, the precise amount of damages must be proved. In addition to what was stated in the agreement, it is part of our law that a plaintiff who seeks damages must take into account any necessary expenditure he would have incurred pursuant to the contract. It should be pointed out that damages by their nature do not easily lend themselves to determination in a summary judgment. Damages are never "unarguable". Leave to defend in respect of that portion of the claim should have been granted.

Practice and procedure – summons – what summons should contain – need to outline grounds for claim and branch of law under claim is made – failure to do so – when different cause of action may be

extracted from pleaded cause of action – need for facts pleaded to contain averments necessary to prove such other cause of action

Masendeke v *Chalimba & Ors* HH-354-14 (Dube J) (Judgment deeleivered 14 July 2014)

The plaintiff claimed for damages arising out of her arrest and detention by the police. The second, third, fourth and fifth defendants were the arresting details. The first defendant was alleged to have made a false report to the police that the plaintiff had kidnapped his minor daughters. The arresting details arrested the plaintiff in Bulawayo and drove her to a police station in Harare where she was detained for 24 hours. The plaintiff claims that the police acted on a false and unlawful report made by the first defendant and arrested her without good cause, that the arrest and subsequent were unlawful and that whilst under detention she was subjected to threats, insults and general humiliation. The plaintiff claimed damages for unlawful deprivation of liberty, pain, suffering, *contumelia* and humiliation.

The first defendant filed a request for further particulars, requesting clarity on the plaintiff's cause of action against him. The plaintiff replied that her cause of action was the "false, wrongful and unlawful report" by the first respondent to the police. The first defendant excepted to the summons on the basis that the summons and declaration as read with the further particulars was bad at law and did not disclose a true and concise statement of the nature, extent and grounds of the cause of action as required by law. He also averred that the making of a report to the police, whether false or otherwise, did not in itself lead to a civil action, and did not cause any harm or prejudice to the person reported against. Accordingly, the cause of action was not valid at law and did not exist in law. The first defendant also took issue with the plaintiff's reference in her heads of argument for the exception to her cause of action being "malicious deprivation of liberty". The first defendant submitted that, as a result, he did not know what case he had to meet.

The plaintiff argued that she had set out the entire set of facts which formed the basis of the claim and that there was no obligation that the precise *actio* under which the claim was brought be set out in the pleadings. She further submitted the delict of malicious deprivation of liberty existed, and committed where the result complained of must have been caused without justification by the defendant himself or some person acting as his agent or servant under a valid judicial process. The plaintiff further contended that the plaintiff made improper use of state machinery through the police by making a false report.

Held: (1) Rule 11(c) of the High Court Rules requires that a summons should contain a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action. The "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim.

The object of a summons is not merely to bring the defendant before the court; it must also intimate to the defendant the nature of the claim or demand that the defendant is required to meet. It is insufficient to state in the summons merely the relief claimed. The summons must clearly outline the grounds on which the claim is brought and the branch of the law under which the cause of action arises, as well as the basis for the relief sought. Different branches of the law require different matters to be specifically pleaded for a claim to be sustainable under that action.

(2) The delict of "false, wrongful and unlawful report" does not exist in our jurisdiction. Malicious deprivation of liberty is a delict recognisable in our law. This cause of action was mentioned for the first time in the plaintiff's heads of argument for the exception. The pleaded case was based on an unlawful deprivation of liberty; there was no reference to malicious deprivation of liberty. It was not pleaded in the summons and declaration or further particulars. The plaintiff did not plead malice in the making of the report and subsequent detention of the plaintiff but simply that the arrest was unlawful.

(3) The practice of extracting a possible claim from a pleaded cause of action which is sufficient to support a different cause of action is contrary to the principles guiding pleadings, which require that a litigant bringing an action state concisely its cause of action. A party seeking such an indulgence is required to show the existence of special circumstances justifying such departure from the rule of practice. Such departure from the rules may also be permitted if the applicant can show that the other party is unlikely to be prejudiced by such a request or at the cost of proper investigation into the emerging issue. This practice creates an exception to the rule that a litigant is required to state concisely the nature of its claim in the summons and declaration. In determining whether there were special circumstances justifying the indulgence sought, the court had to consider whether the facts pleaded contained the averments necessary to prove a claim for malicious deprivation of liberty and whether the first defendant would suffer any prejudice were the court to grant the indulgence sought.

(4) It is not necessary in cases involving arrests to plead malice and the fact that the instigation was without reasonable and probable cause. The arrest itself is *prima facie* such an odious interference with the liberty of the citizen that *animus injuriandi* is thereby presumed, and no allegation of actual subjective *animus injuriandi* is necessary. In such an action the plaintiff need only prove the arrest itself and the onus will then lie on the person responsible to establish that it was legally justified. Accordingly, although the delict was introduced at the heads

of argument stage, the facts as outlined in the declaration were sufficient for the first defendant to plead. There was no need for the plaintiff to amend her summons and declaration. The first defendant would not suffer any prejudice from this course of action as he had not yet pleaded. He could plead on the basis of the cause of action proposed.

Property and real rights – spoliation order – purpose of – temporary disturbance of possession – such disturbance having ceased – remedy not available

Trustees, SOS Children's Village Assn v *Bindura University & Ors* HH-349-14 (Mafusire J) (Judgment delivered 10 July 2014)

The remedy of spoliation or *mandament van spolie* is designed to restore at once possession that has been deprived unlawfully. The applicant must show that he was in peaceful and undisturbed possession of the thing and that he was unlawfully deprived of such possession. Spoliation is a quick remedy. Its rationale is to prevent anarchy in society. People must not resort to self-help each time they want to recover things they feel belong to them and which may be in the possession of another. Spoliation is aimed only at the recovery of lost possession. An illicit dispossession of a right, whether corporeal or incorporeal, can be protected by a *mandament van spolie*. What is protected is the quasi-possession of a movable or immovable incorporeal. The remedy does not lie where there has been a temporary disturbance of possession or a threat that possession will be disturbed.

Property and real rights – spoliation order – requirements for – need for applicant to show he was present on or otherwise in possession of property at time of alleged dispossession

Banga & Anor v *Zawe & Ors* S-54-14 (Gwaunza JA, Malaba DCJ & Gowora JA concurring) (Judgment delivered 8 September 2014)

The legal requirements for a *mandament van spolie*, which the applicant must prove on a balance of probabilities, are that (a) the applicant was in peaceful and undisturbed possession of the thing; and (b) he was unlawfully deprived of such possession. "Unlawful deprivation" means that the respondent deprived the applicant of possession forcibly and wrongfully, against his consent. The valid defences against a spoliation claim include: (a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession, and (b) the dispossession was not unlawful and therefore did not constitute spoliation.
"Possession" has been described as a compound of a physical situation and of a mental state involving the physical control or *detentio* of a thing by a person and a person's mental attitude towards the thing. Whether or not a person has physical control of a thing, and what his mental attitude is towards the thing, are both questions of fact. In spoliation proceedings the lawfulness or otherwise of the possession challenged is not an issue. Spoliation simply requires the restoration of the *status quo ante* pending the determination of the dispute between the parties. A lease agreement or an alleged "caretakership" agreement do not constitute a valid basis to establish possession. It is necessary for the applicant to establish that he was present on or otherwise in possession of the premises in question on the day of the alleged spoliation. If he was not in possession of the premises at the relevant time, he could not be unlawfully dispossessed.

Regulations – validity – citation of wrong Act – regulations otherwise in order – regulations valid – unreasonableness – averment that fees charged under regulations unreasonably high – what person averring unreasonableness must show

ZLHR v *Min of Tpt & Ors* HH-353-14 (Mafusire J) Judgment delivered 14 July 2014)

See below, under ROAD TRAFFIC (Toll roads).

Revenue and public finance – income tax – appeal – against decision of Commissioner of Revenue Authority – nature of appeal – appeal a broad appeal, with rehearing of evidence – court not restricted to evidence provided to Commissioner – court entitled to exercise its own discretion

Revenue and public finance – income tax – deductions allowable – doubtful and bad debts – what constitute such debts – debtor issuing acknowledgment of debt – debtor's inability to pay established – deductions allowed

Revenue and public finance – Reserve Bank – powers of – issue of bonds in lieu of repayment of debt – no lawful authority for Bank to issue such bonds – bonds merely having effect of acknowledgment of debt

BT (Pvt) Ltd v *ZRA* HH-617-14 (Kudya J) (Judgment delivered 12 November 2014)

The ZRA had disallowed deductions claimed by the appellant in respect of doubtful debts (for the year 2009) and bad debts (for the year 2010). The appellant was a gold mining company. The production of and trading in gold in Zimbabwe is strictly controlled by and regulated under the Gold Trade Act [*Chapter 21:03*]. The appellant came into the local mining scene in 2006 and became one of the largest three producers of gold in the country. At various dates during the 2008 calendar year, the appellant sold the gold bullion it produced to a company wholly owned by the Reserve Bank (RBZ). The law, contract and practice obliged the RBZ to pay appellant for all the gold bullion delivered to the company.

Before the onset of the multi-currency monetary regime in the country, one component of the payment was in local currency, while the other was in United States dollars. Payment in local currency was on delivery and through bank transfer based on an implied exchange rate set unilaterally by the RBZ. Payment in foreign currency was slow and lethargic and was done through transfer into foreign currency denominated bank accounts of the appellant, usually after a monetary policy statement. The foreign currency component was set against the price of gold on the London afternoon fix. The RBZ always unilaterally fixed the gold support price from time to time in local currency. The appellant was not paid the foreign currency component for any of the deliveries it made in 2008. In January 2009 the governor of the RBZ unilaterally converted all outstanding amounts to the gold sector into tradable "Special Gold-backed Foreign Exchange Bonds" with a tenor of 12 months. The bank undertook to honour the full principal plus interest on maturity to the holders of the bonds. The appellant found that if it wanted to trade the bonds on the market, there would be a discount of 40-50% on the face value. It decided to wait until the maturity date. When that date arrived, the bonds were not redeemed. The RBZ unilaterally rolled over the bonds for a further 6 months. After that, it issue replacement bonds, but up to the date of the appeal, the bonds had not been redeemable, further roll overs being unilaterally declared by the RBZ.

There being no prospect of payment by the RBZ, the appellant wrote off approximately half of the value of the bonds for the year 2009 as doubtful debts and the balance, for the following year, as a bad debt. The respondent treated the bonds in the hands of the appellant as investment and not debt. It took the view, firstly, that the debt was converted into an investment by the issue of the bonds and, secondly, that the acceptance of the conversion constituted a full repayment of the debt.

Held: (1) all appeals in tax matters brought in the High Court or Special Court against the decisions of the Commissioner of the ZRA, whether on substantive issues or against penalties, are appeals in the broad rather than in the narrow sense. This principle is unaffected by the choice of forum exercised in terms of s 65(1) of the Income Tax Act [*Chapter 23:06*]. After all, these two courts hold concurrent jurisdiction in income tax appeal cases. In an appeal against a decision where the Commissioner exercised a discretion, the Special Court is called upon to exercise its own original discretion. It is not restricted to the evidence which the Commissioner had before him. The appeal to the Special Court is not only a rehearing but can involve the leading of evidence and the submission of facts and arguments of which the Commissioner was unaware. The appeal was not a mere review of the correctness of the Commissioner's determination. The court was required to exercise its own independent and unfettered discretion unaffected by imputed wrong motives or errors of fact and law of the Commissioner.

(2) The bonds issued by the RBZ had no legal standing. Under s 4(2)(a) of the State Loans and Guarantees Act [*Chapter 22:13*], the power to issue bonds was vested in the Minister of Finance. When the Act was repealed by the Public Finance Management Act [*Chapter 22:19*], that power remained with the Minister. No Act gave the RBZ the power to issue bonds in order to meet its financial obligations. While s 13(1)(b) of the Reserve Bank Act [*Chapter 22:15*] allows the bank to discount bills, notes and other debt securities issued by it, these must be in respect of a banking institution that holds an account with it. The bonds issued by the RBZ were little different from a bill of exchange or a promissory note or even a post-dated cheque to pay an outstanding debt, but the RBZ would be precluded from issuing such instruments as the appellant was not a banking institution. The RBZ was not empowered to issue bills, notes or other debt securities to the appellant. In the absence of statutory authority to issue bonds, the bonds were not lawful tender and could not discharge a debt. They remained at best acknowledgments of debt.

(3) For the year 2009, it was permissible, under s 15(2)(g)(ii) of the Income Tax Act, to deduct "doubtful" debts. The section was amended, and from the following year onwards, only "bad" debts could be deducted. The essential factors for a claim for both doubtful debts and bad debts that the appellant must prove on a balance of probability are that (a) the amount claimed must be due and payable; (b) the ZRA considers (is satisfied that) the amount is unlikely

to have been recovered at the end of the financial year; (c) the amount must have been included in the taxable income of the taxpayer in the current or any previous year of assessment; and (d) once the claim was allowed it would have to be added back to income in the following year of assessment. The debt here was "due and payable", in the sense of "accrual" or "entitled to". Payment was due immediately on delivery of the gold. The creation of the bonds merely constituted a unilateral rescheduling of the debt. The purported gold bonds were null and void. They were of no force or effect and, in law, did not exist. They could not therefore constitute a payment for the debt. Even if they were valid, they would be akin to mere rescheduled acknowledgments of debt. An acknowledgement of debt is a document which confirms the existence of a debt, but does not constitute payment of the debt.
(4) A "doubtful" debt can be equated with uncertainty of the likelihood by a creditor of receiving the amount owed. This uncertainty was borne out by events. The RBZ had demonstrated inability to pay and was in poor standing in the local market. It was also failing to settle re-occurring obligations to its workers. Any reasonable person submitting the return to the respondent would doubt the likelihood of the debt being paid, even though he might recognise an outside and remote possibility that such payment might take place. There was no reasonable probability of payment occurring, but this did not completely exclude that payment might happen. A likelihood of lack of collectability existed. It was a doubt, as opposed to a certainty.
(5) The Act does not define a "bad" debt. It is, however, defined in ordinary commercial and accounting practice as an amount that is unlikely to be paid. The appellant had established that, by the end of 2010, the claimed amount had been outstanding for more than 26 months. The accounts for that year end were compiled on 31 March 2011. The purported gold bonds had been issued and rolled over time without number. It was clear that the RBZ was unable to pay. It had no funds to pay. Suing the RBZ would be fruitless, as its assets could not be attached to satisfy the debt. The respondent should have allowed the deductions.

Revenue and public finance – income tax – income – deductions allowable – loss incurred for the purposes of trade or in the production of income – money paid to the Reserve Bank as part of normal method of carrying on trade – money not returned by Reserve Bank – such money should be regarded as a loss and deducted from taxable income

Z (Pvt) Ltd v *ZRA* HH-575-14 (Kudya J) (Judgment delivered 22 October 2014)

The appellant company was a tobacco merchant. During the years before the introduction of the multi-currency system, growers of tobacco would be paid in local currency but the purchasers had to pay in foreign currency. Merchants like the appellant had to deposit foreign currency with the Reserve Bank. The tobacco merchant purchased the tobacco in foreign currency but paid for it in local currency. The foreign currency was sold to the Reserve Bank which converted the amount into local currency for transmission to the tobacco grower by the appellant through the on-shore bank.
The currency of account for all purchases of local tobacco, whether from contract growers or auction floors, was denominated in United States dollars. These had to be sourced off-shore and transmitted through the on-shore bank to the Special Tobacco Foreign Currency Account for the appellant in the Reserve Bank. The account in the Reserve Bank represented a pre-payment of the anticipated tobacco purchases during each calendar year trading season. The on-shore bank kept a mirror account of the funds. The appellant would participate on the auction floor only after confirmation by the Reserve Bank of the deposit of off-shore funds into the Special Tobacco Foreign Currency Account.
On purchasing the tobacco, the appellant would be invoiced in the currency of account. It would transmit the invoice to the on-shore bank which would in turn dispatch it to the Reserve Bank, which would transfer the local currency equivalent of the invoiced amount to the on-shore bank. The amount would be deposited in the appellant's Zimbabwe dollar tobacco special account of the appellant held in the on-shore bank. The local currency would be paid over to the tobacco grower at the auction floor or to the contract farmer. The on-shore bank would make a corresponding debit in the mirror United States dollar special tobacco account it held for the appellant.
During the tax year in question, some US$5 million, on instruction of the appellant, was remitted to the on shore bank and deposited with the Reserve Bank for the purchase of tobacco by the appellant in August 2008 for that year's tobacco purchases. There were inadequate supplies of tobacco on the market to exhaust the amount and a balance of about US$2.3 million remained outstanding. The Reserve Bank and the appellant agreed to roll over the amount to the 2009 tobacco season. Of that, just over US$1 million was not converted by the Reserve Bank into local currency in the 2009 tobacco trading season. The Reserve Bank failed to avail these funds to the on-shore bank for payment of the appellant's obligations to the tobacco sellers.
The missing money did not constitute planned voluntary expenditure. The appellant did not spend the money before it was lost. The funds were sitting in readiness to purchase tobacco and awaiting draw down. The amount remained outstanding. Liability had been acknowledged, but the Reserve Bank was unable to pay.

The appellant sought to have the missing money classed as a deduction in terms of s 15(2)(a) of the Income Tax Act [*Chapter 23:06*], as being an expenditure or loss incurred for the purposes of trade or in the production of the income.
Held: the general principle is to allow as deductions all expenses attached to the performance of a business operation *bona fide* performed for the purpose of earning income, whether such expenses are necessary for its performance or attached to it by chance or are *bona fide* incurred for the more efficient performance of such operation, provided they are so closely connected with it that it would be proper, natural or reasonable to regard the expenses as part of the cost of performing the operation. In this case, the issue was whether the expense was one attached to the performance of the business operation by chance. The loss was integrated in and an adjunct of the ordinary trading of the appellant. The system followed was the way the appellant had to carry on business. The payment was not one of a capital nature. The effect of the failure to avail the amount in question was that other funds were used to pay for tobacco purchases and pay the off-shore financier. The loss of the money thus constituted fortuitous expenditure that was closely linked to the appellant's business operations and should have been allowed as a deduction.

Revenue and public finance – value added tax – deductions allowed – input tax – when may be claimed – need for operator to submit claim timeously

Revenue and public finance – value added tax – tax on goods or services supplied – meaning of "supply" – wide meaning to be given to – supply of goods by operator in lieu of payment of cash for goods supplied to operator – supply treated as sale in operator's books of account – not a settlement in kind

S (Pvt) Ltd v *ZRA* FA-5-13 (Kudya J) (Judgment delivered 22 October 2014)

The appellant company in these two appeals was a manufacturer of steel and steel products.
In the first matter, the facts were that in 2008, another company in the business of making steel products, supplied at the request of the appellant, fuel and groceries imported from South Africa. The appellant did not settle the debt on delivery of the goods. At the commencement of the multicurrency regime in February 2009, the appellant created a liability in its books of accounts in favour of the other company for the indebtedness. In due course it settled the debt by providing steel of equivalent value to the debt. It issued invoices and delivery notes for the transaction. The appellant's tax agents, a firm of chartered accountants, in a letter to the respondent, described the transaction as barter trade and further treated it as a sale in a subsequent letter. The appellant initially treated the transaction as a sale, but later altered it to "cost of sales". It did not collect or remit VAT on the transaction. The respondent treated it as a barter trade and assessed the appellant for VAT. The issue on appeal was whether the provision of the steel constituted a "supply" of the steel or a payment by means of steel.
In the second appeal, the appellant and a third company concluded an agreement in terms of which that company, a scrap metal supplier, supplied scrap metal which the appellant converted into finished products for the scrap metal supplier's use. In return for the processing, the appellant would receive 1 tonne of finished steel products for every 5 tonnes of scrap processed. Both companies raised debit notes, showing the value of the metal supplied and the VAT owing. The amounts in each debit note were identical.
The appellant submitted VAT return for other transactions but did not declare the supplies of finished steel products supplied. It also failed to claim for input tax for the scrap it received. When the respondent audited the appellant's tax returns, it directed the appellant to submit amended VAT returns. The appellant did so, and claimed input tax for the scrap it received. The claim for input tax was disallowed. The issue was whether the claim was validly made in terms of s 15(2)(a) of the Value Added Tax Act [*Chapter 23:12*].
Held: (1) Under s 6(1)(a) of the Act, VAT is charged on the supply, on or after 1 January 2004, by any registered operator of goods and services in the course or furtherance of any trade carried on by him. All these elements were present, the only issue being the nature of the transaction. The word supply is not defined in the Act, other than as including "all forms of supply". It thus has a wider connotation than its usual and ordinary meaning. The appellant received goods from the other company and set off the debt through the supply of steel of equivalent value. The contention that the appellant treated the set off as a payment was not borne out by the facts. Before VAT was assessed, the appellant treated the transaction as a sale of steel in its books of accounts. It issued invoices to the other company, as well as delivery notes. The transaction was a sale. It was a sale for which the appellant did not receive cash but offset the cash due against the debt owing. It was not a settlement in kind.
(2) The *contra fiscum* rule of construction of tax laws entails interpreting the law so as to impose the smaller burden on the taxpayer. However, there is little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation. Ultimately, the true intention of the legislature is of paramount importance, indeed decisive. If the language of an enactment is unambiguous, that is the end of the matter. Where the meaning is unequivocally expressed, there is neither need nor room for ancillary aids to interpretation.

(3) The essential factors on which a deduction of input tax is based are (a) a tax invoice, debit note or debit note must have been provided in accordance with s 20 or 21; (b) the tax invoice, debit note or credit note must be provided within the period in which the registered operator is required to furnish a return in terms of 2 27 or s 28, or 12 months, whichever is the longer; (c) the tax invoice, debit note or credit note must be held by the operator; and (d) the tax invoice, debit note or credit note must be held at the time any return in respect of that supply was furnished. Items (a), (c) and (d) applied to the appellant. The appellant fell into category C as a registered operator, which meant that it had to furnish its return within 10 days of the end of its taxable period. Like every other registered operator it had a grace period to do so of 12 months from the last day of the month from which it was supposed to furnish the return. It did not do so, either during the ordinary period or during the grace period. It only did so two years later, after receiving a directive in terms of s 30 from the respondent. Accordingly, the respondent was correct in disallowing the claim for input tax.

Editor's note: The judgment number is given as FA-5-13 (fiscal appeal judgment 5 of 2013). At the time of preparing this summary, the HH (High Court, Harare) number for the judgment was not available.

Review – court's powers – review of executive functions – limits to court's powers to review such functions – public fund raising and expenditure – matters within province of executive

Road traffic – toll roads – increase in toll fees – validity of such increase – requirement for Minister to consult Minister of Finance – not requirement to consult stakeholders

ZLHR v *Min of Tpt & Ors* HH-353-14 (Mafusire J) Judgment delivered 14 July 2014)

The Toll Roads Act [*Chapter 13:13*] empowers the Minister of Transport to declare, by regulation, any road to be a toll-road. By SI 39 of 2009 the Minister declared every route along the city to city trunk road network to be a toll road. Section 3 of the Act empowers the Minister to specify any person and to authorise such person to levy and collect tolls on vehicles using any toll-road. The authorised person is empowered to establish and erect on such roads toll-bars, toll-gates and other structures to facilitate the levying and collection of tolls. The Minister may fix the amount of any toll after consulting the Minister of Finance.
On 4 July 2014 the Minister published the Toll Roads (Regional Trunk Road Network) (Amendment) Regulations, 2014 (No. 5) (SI 106 of 2014), which increased the toll fees across the board, in some cases by 100%. The applicant, a human rights organisation, applied for an interdict for the setting aside of the statutory instrument. Its grounds for doing so were primarily that the margin of the increase in the toll fees was so unreasonable that no reasonable decision maker, properly applying his mind, could have arrived at such margin. The applicant also argued that the statutory instrument was invalid, because it purported to have been made in terms of s 6 of the Road Motor Transportation Act (which was cited as *Chapter 13:13*, although the correct chapter number for that Act is 13:15). Finally, the applicant argued, the Minister had failed to consult the Minister of Finance in fixing the new toll tariff and also failed to consult all the stakeholders.
The respondents argued that, whilst the court had the power to review the legislative function of the executive arm of government, the court was being asked to impugn something that was squarely within the exclusive domain of the executive. The court lacked the knowledge, training, expertise or the information necessary to challenge or judge such a function. The Minister's action in fixing or raising toll tariffs was an executive and polycentric function. It was more than a mere administrative action of the type contemplated by the Administrative Justice Act [*Chapter 10:28*]. It was a legislative function, and it was debatable whether the court's traditional function of judicial review extended to the legislative function of the legislature.
Held: (1) the exercise of an executive prerogative is not necessarily an act the validity of which is beyond the jurisdiction of the court. It is only those acts of State in respect of which the jurisdiction of the court is ousted that the court may not review. Such executive prerogatives are now very few and far between. Whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectation of the citizens, the jurisdiction of the courts is not ousted. Certain acts of state that may be exercised by the President in terms of the Constitution are beyond the jurisdiction of the court, but even then, should the exercise of these prerogatives be done under unlawful conditions or be performed outside the law, the courts have a duty to review them. Section 68 of the Constitution and the Administrative Justice Act were in most ways a mere codification of the traditional powers of the courts to review the exercise of the functions of the executive. The Act was merely an elaborate restatement of the rules of natural justice.
(2) The citation of the wrong Act was an error that was so infinitesimal as to be inconsequential. It was practically a typing error, a slip of the pen by the typist, or of the tongue by whoever may have dictated the contents. A law cannot be knocked down for such a minor mistake. There was no question that the Minister does

have the power under s 6 of the Tolls Roads Act to fix toll tariffs. All the other provisions of the SI seem in order except for the erroneous reference to the Road Motor Transportation Act.
(3) On the alleged failure to consult the Minister of Finance, the applicant produced no proof of such failure. He who alleges must prove. Further, the presumption of validity operated. An act regular on the face of it is valid until the contrary is proved. As to the failure to consult "stakeholders", the law did not make it obligatory for the Minister to consult anyone other than the Minister of Finance.
(4) On the argument that the increase was unreasonable, the obvious question was: unreasonable compared to what? Without some kind of empirical evidence, how could a court quantify unreasonableness?
(5) The duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament.

Statutes – Inland Waters Shipping Act [*Chapter 13:06*] – master of vessel – responsibility for loading of vessel and ensuring compliance with regulatory requirements – accident resulting in deaths of passengers – deaths due to failure to comply with requirements – master liable

S v *Weale & Anor* HH-440-14 (Mathonsi J, Mavangira J concurring) (Judgment delivered 20 August 2014)

See above, under CRIMINAL LAW Offences under Criminal Law Code (Culpable homicide – liability – accident on boat)

Stock exchange – discipline of dealers in securities – powers of Securities Commission to cancel licences of alleged offenders – procedures provided for in ss 48 and 105 – difference between such procedures – requirement under s 105 to investigate offence and to give offender opportunity to make representations – cancellation under s 48 not necessarily requiring that offender be given opportunity to make representations

Remo Invstm Brokers (Pvt) Ltd & Ors v *Securities Commission of Zimbabwe* S-85-14 (Gowora JA, Garwe & Patel JJA concurring) (Judgment delivered 5 December 2014)

Following upon turbulence within the securities sector, the Securities Commission suspended the first appellant (REMO) from trading for a period of six months. This was done in terms of s 49 of the Securities and Exchange Act [*Chapter 24:25*]. This provision allows for the suspension of a licence in order to facilitate investigations. Such suspension may not be for more than six months. After the suspension, the Commission instituted investigations under s 103 of the Act through an inspector, Proctor and Associates, who compiled a report and in terms of s 104 forwarded it to the Commission. On the basis of that report, the Commission charged REMO and the second appellant with contravening certain sections of the Act. The appellants were invited in terms of s 104(2) to make representations to the charges. Ultimately, the Commission convicted the appellants and cancelled their licences for a period of five years after which they could re-apply for registration. The appellants appealed to the Administrative Court, which dismissed the appeal and confirmed both the conviction and sanctions imposed by the Commission.
On appeal to the Supreme Court, it was argued that the Administrative Court had erred in finding that the cancellation was effected in terms of s 105 of the Act. The suspension having been effected in terms of 49, the cancellation should have been effected in terms of s 48(1), and was premature, in that the Commission was not empowered to cancel a licence under s 48(1) until a period of 30 days allowing for an appeal to the Administrative Court in terms of s 108 had elapsed. The appellants also contended that the Commission had, contrary to the provisions of s 105(2), not provided them an adequate opportunity to make representations as to why their licences should not be cancelled. They contended that the court *a quo* did not address that issue.
Held: (1) the powers of the Commission to cancel a licence are contained in ss 48 and 105 of the Act. Under the latter, the Commission may, after considering an inspector's report and any representations made by the person concerned and if satisfied that the person is guilty of a condition of his licence or of a breach of the Act, cancel the person's licence. The process of cancellation under s 105 is preceded by an investigation of the licence holder. Any report from the investigator is availed to the licence holder for comment and in addition, the Commission is obliged to call upon the holder to make representations to it before any sanction is imposed. There is no provision for the suspension of a licence under s 48 prior to its cancellation. The provisions of s 48 do not contemplate a situation where the holder has been the subject of an investigation under s 49. Where a licence is cancelled under s 48(1), such cancellation is made subject to the provisions of subss (2) and (3).

Subsection (2) enjoins the Commission to notify the holder in writing that it proposes to cancel the licence and the reasons for proposing to do so. The Commission is also obliged to afford the holder of the licence an adequate opportunity to make representations. In the event that the Commission believes on reasonable grounds that it is not possible to notify the holder personally, the Commission is permitted to publish a notice in the *Gazette* and a newspaper circulating in the area in which the licence resides or is situate, stating that the licence shall be cancelled unless the holder lodges an appeal with the Administrative Court in terms of s 108 of the Act.
(2) All the actions by the Commission after receipt of the inspector's report were consistent with the provisions of s 104. All the appellants were availed the opportunities afforded to a registered person or a licence holder to be heard in terms of that section prior to the Commission taking any action subsequent to an investigation. The procedure adopted by the Commission in its dealings with the applicants was more consistent with the provisions of s 105 as opposed to s 48. The latter section envisages a situation where the licence holder is informed of the sanction that the Commission intends to impose and then is given an opportunity to make representations. Under s 105 the licensee is investigated and a report of the investigation is availed to the licence holder for comment. Over and above this the licence holder is provided with an opportunity to be heard by the Commission. A cancellation effected under s 48 is summary and the licensee is not assured of an opportunity to make representation before the cancellation. Thus, there is need for the cancellation not to be effected before the appeal process provided for under s 108 has been exhausted. There is no such requirement under s 105.
(4) An appeal to the Administrative Court is an appeal in the wide sense and the appellants could have, if they had chosen to do so, led evidence before that court in order to ensure that whatever irregularities the Commission may have been guilty of were corrected. They did not avail themselves of that opportunity, leaving the appeal court in as good a position as the court *a quo* to determine the issue raised by the appellants. On the evidence, all the appellants were given an adequate opportunity to be heard before the cancellation of the two licences and the Commission complied fully with its obligations under the Act.
(5) On the evidence, the findings of guilt were unassailable and the penalties, though harsh, were not irrational.

Succession – intestate – spouse – entitlement to matrimonial home – descendants of deceased – only entitled to specified portion of remainder of estate – agreement between heirs on alternative distribution – only applicable to remainder of estate

Dzomonda & Ors v *Chipanda & Ors* HH-535-14 (Tsanga J) (Judgment delivered 2 October 2014)

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

Suretyship – surety – discharge of – extension of time granted to principal debtor after due date – surety not thereby released unless he can demonstrate prejudice

ABC Bank v *Pfumojena* HH-546-14 (Mafusire J) (Judgment delivered 8 October 2014)

Along with two other persons, the defendant had bound himself as a surety and co-principal debtor in respect of a loan granted by the plaintiff bank to a company. The company had defaulted and the bank obtained summary judgment against the company and the other sureties. The bank had not proceeded against the defendant at that stage.
On the same day as it obtained the summary judgment, the bank, in a letter to the company, extended the loan repayment period, allowing for repayment in specified instalments. The letter stated that litigation against the company and the guarantors would be held in abeyance, but in the event of default on the repayment plan, litigation against the company and the guarantor would resume without any further notice.
The company defaulted again and the bank then proceeded against the defendant. His defence was that he had been absolved from liability by operation of law, the surety agreement allegedly having fallen away by reason of two compromise agreements: one where the bank had granted an extension of time to the company, and the other allegedly between the bank and himself personally: when the bank had originally started proceedings, the defendant had been excluded and had been granted the benefit of excussion.
Held: (1) the grant of time by the creditor to the principal debtor does not always release the surety. Apart from cases of novation, a surety would be released by reason of an extension of time granted after due date if, in addition, he can show that he himself had been prejudiced thereby. The onus would be on the surety to particularise how that extension of time had prejudiced him. A person who becomes a surety and co-principal debtor promises the creditor to assume the responsibility for the debt obligation of the borrower if he defaults. It is the surety's business to see that the borrower pays. Suretyships are the lifeblood of the world of finance. Their value lies in granting additional security to the lender. Even though a suretyship is an agreement ancillary

to the principal creditor–debtor relationship and cannot exist alone, it is so important to the principal relationship that it cannot be set aside without upsetting the equilibrium under the principal relationship. In the world of commerce, it is probably largely on account of the availability and willingness of the surety and also his creditworthiness that the creditor will part with his money in the first place. Therefore, a surety should be bound to the letter and spirit of his undertaking. Part of the agreement here was that defendant's liability under the guarantee, or the plaintiff's rights thereunder, would not be prejudiced if the plaintiff, without consulting the defendant, *inter alia*, varied in any way whatsoever, or determined or novated any contract or relationship with the company, or granted it an extension of time for payment, whether before or after due date, or delayed enforcement or granted any other indulgence to the company or any other person.
(2) An agreement of compromise is a contract like any other. There must be an offer and acceptance. The terms must be certain. If the contract is formed, it extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless there was reserved the right to go back thereto. The conduct from which the defendant tried to infer compromise did not at all fit in with the definition of that term. What he sought to achieve was not to extinguish *ipso jure* the previous cause of action, but a mere softening up of the terms of one or other of the conditions of the suretyship, particularly the restoration to him of the benefit of the legal exception of excussion. But even in its extension letter, the plaintiff reserved its right to revert to the original cause of action.

Trust – trustee – continuing in office after period of appointment has expired – effect – steps which may be taken to regularise his position

Ruzengwe NO & Ors v *Zvinavashe* HH-356-14 (Chitakunye J) (Judgment delivered 24 July 2014)

Where a trustee of a trust purports to stay in office beyond the period for which he was appointed, any decision made by him may be challenged and may indeed be invalid. This does not mean that he has no *locus standi* in any matter brought on behalf of the trust: a person who is *de facto* administering a trust as trustee has *locus standi* in any matter relating to the trusts; so has a person who claims to be the rightful trust*ee* and seeks confirmation of his status. However, his capacity to make valid decisions is limited by the fact that he has overstayed. He ought to regularise his stay in terms of the deed of trust. Alternatively, where trustees have overstayed and legally cannot make legally valid decisions, the option is to have the trustees appointed or re-appointed by the High Court in terms of ss 7 and 9 of the Companies and Association Trustees Act [*Chapter 24:04*].

Will – interpretation – general principles to be followed – rectification – when will may be rectified in terms of statutory and common law -- principles

Mashonganyika & Anor v *Pfute & Ors* HH-492-14 (Uchena J) (Judgment delivered 18 September 2014)

In interpreting a will, the court must look at all the provisions of the will in order to arrive at the testator's intention. Any particular clause must be interpreted in conformity with the testator's intention as a whole for the court to understand the clause in light of the general scheme or idea underlying the will as a whole. The testator's will should not be rectified or varied, if his intention can be implemented without rectification or variation. The court is not there to write a will for the testator but to interpret and give effect to the testator's intention. The purpose of interpreting a will is to ascertain the intention of the testator from the words he used in the will. In the interpretation of a will, if a word or expression is capable of bearing more than one meaning, the court must attach to it the meaning which will make it valid rather than invalid, or will make sense instead of nonsense, or according to which the beneficiaries will benefit rather than be placed under an obligation or prejudiced.
In interpreting a will the court must bear in mind the dominant provisions and clauses which must be given full effect, unless it appears from the rest of the will that the testator wished to qualify it.
In terms of s 20(1) of the Wills Act [*Chapter 6:06*], a testator's will can be rectified in consequence of (a) a clerical error, which must clearly be identified as such. The court should not lightly impute an error where it cannot be identified with certainty; or (b) a failure to understand the testator's instructions, which failure must be based on the will being so worded as to be too difficult or impossible to understand. Minor difficulties must be overcome by giving effect to the testator's apparent intention gleaned from the scheme or idea underlying the will as a whole; or (c) a failure on the part of the testator to appreciate the effect of the words he used in the will. The testator must have used words which the context of the will proves to have not been intended. In addition to these specific statutory powers, s 20(2) allows the court to have regard to the common law. Under the common

law, the courts would be prepared to sanction a departure from the terms of a will in exceptional circumstances. It is not possible to draw up an exhaustive list of the circumstances in which the courts would be prepared to so, but they have been prepared to do so where one or more of the following circumstances existed: (a) where the circumstances rendered the fulfilment of the testator's intentions practically impossible or utterly unreasonable; (b) where the strict enforcement of the testator's directions would have resulted in a failure of the testator's bequests or otherwise resulted in the testator's intentions being defeated; (c) where the machinery detailed in the will for carrying out the testator's intentions had failed or was likely to fail, or the his directions could be carried out only with serious loss to the estate; (d) where the necessities of a case demand a departure from the will; or (e) where the testator had based the dispositions on mistaken assumptions about the his assets or liabilities.

A legal practitioner has a duty to give correct and accurate information to the court, and should never knowingly give it incorrect information or advice or knowingly misstate the contents of a document, statute or like authority.