Latest update: 16 January 2015 (6th edition)

CASES DECIDED JANUARY – JUNE 2014

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

Administrative law – administrative authority – who is – Commissioner of Revenue Authority – requirement to act in accordance with requirements of Administrative Justice Act – directing garnishee order which would leave taxpayer unable to continue operating – such decision unreasonable

Packers Intl (Pvt) Ltd v *ZRA* HH-328-14 (Chigumba J) (Judgment issued 25 June 2014)

The applicant was a registered operator in terms of the Value Added Tax Act [*Chapter 23:12*]. The revenue collection system is based on a self-assessment system by registered operators. The Act provides a detailed mechanism for vendors to keep certain kinds of records and to calculate, account, and pay VAT to the Taxing Commissioner. The respondent does not have the capacity or manpower to effectively monitor every transaction liable to VAT, which is why registered operators have to assess themselves. In order to ensure compliance, the respondent carries out periodic investigations and audits the operators to ensure full compliance by the operators with their obligation to declare and remit in full any VAT that will be due.

Following an audit by the respondent, the applicant made a declaration to enable tax which was due to be assessed. On realising that there were some significant discrepancies between its self-assessed figures and those of the respondent, the applicant proposed a compromise, undertaking to pay a stated sum per day as a sign of its intention to cooperate fully with the respondent's investigations. This offer was rejected. The applicant noted an appeal to the Fiscal Appeal Court against the respondent's assessment. The respondent's officials then, without any prior notice, garnished the applicant's bank account held for the sum allegedly due. The respondent's officers advised the applicant that officers were due to be posted at all the applicant's branches to man them forthwith. The applicant was told that it could no longer transact as a result of the garnishee order.

The applicant sought an order compelling the respondent to uplift the garnishee order and revoking the appointment of the appellant's bank as the respondent's agent.

It averred that this conduct on the part of the respondent was unlawful, as its net effect was to close down its business, by rendering it inoperable. It argued that the respondent's conduct was unconstitutional as the quantum of the garnishee order was arbitrary, and was imposed without notice. The quantum of the garnishee ought to be in the amount admittedly owing (less than 5% of what was garnisheed) because, at law, the disputed amount is suspended by the noting of the appeal.

The applicant alleged that it faced imminent closure if it remained unable to operate; it could not pay its suppliers, or its workers, and was being forced into liquidation by the respondents. The welfare of its one thousand plus employees was at risk, and is being ignored by the respondent, contrary to the provisions of the Constitution. Finally, the applicant averred that it has no other remedy. The applicant contended that the prevailing economic conditions, where at least ten companies every month are being liquidated, made it irrational and unreasonable of the respondent to order a garnishee of the sum claimed when it was clear that the effect of that directive would be to force the applicant into liquidation. The respondent denied that it acted unlawfully, maliciously, capriciously or unconstitutionally. It averred that it was perfectly lawful for it to impose the garnishee in the way manner that it did, and reiterated that the applicant ought to have exhausted its domestic remedies first by approaching the Commissioner for relief as provided for in the VAT Act, and the Income Tax Act. It was submitted that this court lacked the power to consider the merits of the tax assessment as that was the exclusive purview of the Fiscal Appeal Court.

Held: (1) it was permissible to hear the matter as a matter of urgency. The applicant's commercial interests were at risk, in circumstances where failure to hear the applicant urgently would make it unnecessary or impossible for the applicant to be heard at all in future. Any future application would be a futile exercise, because the harm that the applicant feared would have already befallen it.

(2) The effect of s 36 of the Act is that the liability to pay remains extant until the appeal is finalised or, in the alternative, unless the Commissioner directs that the obligation falls away pending appeal is finalised. The applicant had not argued that the effect of the noting of the appeal was to extinguish its obligation to pay. Section 33 of the VAT Act provides for the circumstances in which an aggrieved person can appeal to the Fiscal Court, against the exercise of discretion by the Commissioner. The right to appeal against the exercise of discretion by the respondent's officers, to the Commissioner, is provided for in terms of s 32 of the Act. This section provides that, when the Commissioner notifies, in writing, a person who is liable to pay tax to the respondent, of any decision or assessment made against that person, then that person may lodge an objection, also in writing, specifying the grounds of the objection, to the Commissioner, within a specified time period.

Here, the Commissioner exercised his discretion and disallowed the objection to the tax assessment, in terms of s 32(4)(c).
(3) Under of s 48 of the Act, the Commissioner has a discretion to declare any person to be his agent, and that once such a declaration is made, the proposed agent has no choice but to pay any amount of money, held on behalf of the tax payer, to the respondent, as long as it is required for purposes of fulfilling tax obligations, and must even pay money that held in an account for wages. However, s 48 does not override the Constitution, and the discretion exercised by the Commissioner is reviewable because of the use of the word "may" which is not peremptory. The intention of the legislature was to protect designated/appointed agents of the respondent from litigation in terms of other laws for the act of forwarding money in their client's accounts to the respondent, even if that results in loss or prejudice to their clients, the account holders. It could not have been the intention of the legislature to put the exercise of discretion by the Commissioner beyond the reach of the law. However, there was no evidence that the discretion exercised by the Commissioner in making the appointment violated any of the tenets by which the exercise of administrative justice ought to be guided.
(4) Under s 14 of the Fiscal Appeal Court Act [*Chapter 23:05*], the applicant should not be required to pay the full sum that the respondent had garnished its accounts for. The noting of the appeal suspended actual payment of only that portion of the sum that applicant was disputing liability for. This interpretation is subject to the rider: "…unless the Commissioner … otherwise directs". By directing that a garnishee order in the full sum be imposed, the Commissioner has directed that the full amount of the tax assessed be paid. However, the Commissioner is required to expressly say this, and to reduce his direction to writing, and notify the applicant of his direction, in writing. This was not done. The obligation or liability to pay was not suspended by the noting of the appeal. The appeal would establish whether the taxpayer was indeed liable to pay the assessed sum. What was suspended is the actual payment of the assessed sum, in full.
(5) The respondent was an administrative authority in terms of the Administrative Justice Act [*Chapter 10:28*]. Any action taken by the respondent, or any of its employees, was an administrative action, and that in exercising discretion in any administrative action, the conduct must be reasonable, and substantively and procedurally fair. Irrationality, in relation to the exercise of discretion by an administrative body, has been defined as a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the issue to be decided would have arrived at it. The imposition of the garnishee order on the applicant's accounts was an exercise of discretion on behalf of the respondent. In view of the provisions of s 14 of the Fiscal Appeal Court Act, the figure garnisheed was not proportionate, or reasonable, and was outrageous in its defiance of logic. Imposing the garnishee order on the applicant's account was not procedurally fair because s 14 of the Fiscal Appeal Court Act stipulates that the disputed amount of the tax assessment be suspended pending the determination of the appeal. It was not substantively fair because there is no provision, in s 32 of the VAT Act, for objection to the Commissioner against the imposition of a garnishee order. The applicant's fear that it would be forced into liquidation if the garnishee order remained in place in its current form constituted irreparable harm to it. By the time damages were ordered to be paid, there would likely be no applicant to receive the damages, because the applicant was not likely to remain in business. The balance of convenience favoured granting an interim order that the directive be suspended.

Administrative law – administrative decisions and acts – decision adverse to applicant – remedies available to person aggrieved – review in terms of Administrative Justice Act [*Chapter 10:28*] – courses open to court – when court may substitute its own decision for that of administrative authority

C J Petrow & Co (Pty) Ltd v *Gwaradzimba NO* HH-175-14 (Mafusire J) (Judgment delivered 16 April 2014)

The respondent was the administrator of a company under a reconstruction order issued by the Minister of Justice in terms of the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*]. Such an order may be issued against a company that is indebted to the State or to a statutory corporation or a State-controlled company through credits or guarantees received by that entity or in its favour and that are payable out of public funds or that impose any liability on the State. The order is issued if it appears to the Minister that by reason of fraud, mismanagement or for any other cause the company is unable or is unlikely to repay and the State has become or is likely to become liable to pay from public funds. The order is issued if it also appears to the Minister that the State-indebted company has not become, or is prevented from becoming a successful concern and that there is a reasonable probability that the company will be able to pay its debts or meet its obligations and become a successful concern if it is placed under reconstruction and that it would be just and equitable to do so.
The company was also admittedly indebted to the applicant, a South African registered company, following two loans advanced by the applicant to the administrator on behalf of the company. These loans had been advanced after the reconstruction order in order to pay the company's suppliers in South Africa. The company was in

breach of the loan terms and despite demand failed to pay. In terms of s 6 of the Act the applicant sought the leave of the respondent to sue the company for the recovery of the loans and the interest accrued. The leave was turned down. The applicant brought proceedings for an order overriding the respondent's decision and granting the leave to sue. It was argued that the applicant's loans should be treated preferentially, as they had been incurred by the administrator himself. The decision had been concerned with self-preservation of the administrator's own position and not with considerations of fairness.

The respondent argued that the application failed to satisfy the requirements for review, whether under the common law or under the Administrative Justice Act [*Chapter 10:28*]. It was also argued that the court was effectively being asked to usurp the functions of an administrative authority by granting the leave that the respondent had turned down, contrary to the principles of administrative law. The respondent's refusal to grant leave had not been grossly unreasonable.

Held: (1) In deciding whether or not to grant leave under s 6(b) of the Reconstruction Act, an administrator of a State-indebted company must consider whether the proposed claim is *bona fide* or is simply intended to harass him or to improperly interfere with his administration of the company. A court reviewing the decision of the administrator will scrutinise it on such broad terms as such decisions are generally scrutinised in the field of administrative law. The administrator must act in accordance with s 3 of the Administrative Justice Act, particularly subs (1)(a). He must act reasonably and in a fair manner. His decision must not be whimsical or capricious. He must not advance self-interests otherwise his decision will be unfair. Whilst his paramount consideration is to turn around the fortunes of the company and bring it out of the financial doldrums so as to free the State from any obligation to pay, that cannot be his singular consideration. He must not be blind to the interests of the other stakeholders in the company, otherwise his efforts may produce unintended results. He must strive to strike a balance. He is, in a sense, being empowered and authorised to be judge over his own cause. All control and management of the company is vested in him. He decides for and on behalf of the company. He is the face of the company. He is the brains and soul of the company. He must know what is good for the company. But in spite of all that he must remain objective.

(2) The Reconstructive Act gives no suggestion as to how an administrator should treat the pre- and post-reconstruction obligations. However, in general, both kinds of obligations should be accorded equal treatment, though circumstances might arise when they may be treated differently. It should not be the date when a particular debt was incurred that must decide preferential treatment or otherwise; rather, it should be the circumstances surrounding the particular debt. Here, when the respondent borrowed from the applicant, the purpose had been to ensure that the company continued to produce and to trade. It should have been able to repay the applicant's loans, and remain with proceeds from its products to utilise for other purposes. However, the company, under the control and management of the respondent, who himself had incurred the debt on behalf of the company, had neither kept the arrangement of supplying the company's products to the applicant nor repaid the loans by due date. The applicant became entitled to sue the company. The respondent himself, not the failed management of the past, had brought about the state of affairs giving rise to the debt due to the applicant. His decision to refuse the leave had been concerned with self-preservation and designed to shield himself from the consequences of his own infractions. That was wrong, unreasonable and unfair, and was in breach of s 3 of the Administrative Justice Act.

(3) In terms of s 4 of the Administrative Justice Act, the courses open to the court are to set aside or confirm the decision, to refer the matter back to the administrative authority or to give appropriate directions to the administrative authority. While in general a court will not substitute its own decision for that of the administrative authority, it will do so in exceptional circumstances. There are four criteria, namely: (a) where the end result is a foregone conclusion and it would be a waste of time to refer the matter back; (b) where further delay could prejudice the applicant; (c) where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction; and (d) where the court is in as good a position as the administrative body to make the decision. All these criteria existed *in casu*.

(4) The application accordingly would be granted.

Administrative law – Administrative Justice Act [*Chapter 10:28*] – applicability – contract between individual and the State – contract providing that State could cancel contract for reasons set out in the contract – not necessary to apply rules of administrative justice if State intends to exercise right to cancel

Chaeruka v *Min of Lands & Anor* HH-75-14 (Mathonsi J) (Judgment delivered 26 February 2014)

See below, under LAND (Acquisition – offer letter).

Appeal – court's powers on appeal – relief sought on appeal different from relief sought in lower court – lower court having power to grant relief sought – appeal court having no jurisdiction to entertain or determine matter

Magodora & Ors v *Care Intl Zimbabwe* S-24-14 (Patel JA, Malaba DCJ & Guvava JA concurring) (Judgment delivered 25 March 2014)

See below, under EMPLOYMENT (Contract – termination – fixed term contract).

Appeal – criminal matter – appeal from magistrates court – appeal by Attorney-General against decision to discharge accused at close of prosecution case – such appeal requiring leave of judge of the High Court – judge refusing leave – no appeal lying to Supreme Court against judge's refusal

A-G v *Muchadehama & Anor* S-23-14 (Malaba DCJ, in chambers) (Judgment delivered 20 March 2014)

The respondents had been charged in the magistrates court with contempt of court. They had been discharged at the end of the prosecution case, the magistrate finding that the respondents could not be found by a reasonable court to have had the intention to impair the dignity, reputation or authority of the judge towards whom they were alleged to have shown contempt and that there was no evidence that the respondents committed the offence charged or any offence of which they might be convicted thereon and returned a verdict of not guilty. Eight months after the magistrate's decision was given, the applicant applied to the High Court, in terms of s 198(4)(b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*], for leave to appeal against the magistrate's decision to discharge the respondents. The section gives the Attorney General a conditional right to appeal to the High Court, if he is dissatisfied with a decision of a magistrate finding an accused not guilty of an offence charged at the close of the case for the prosecution. He must first obtain leave to appeal from a judge of that court. Leave may be granted or refused. The effect of the restriction is that a right of appeal is not available, unless leave to appeal is granted. A judge of the High Court refused leave to appeal, on the ground that there were no prospects of success on appeal. Eleven months after the decision by the judge, the Attorney General made what he called an application for condonation and extension of time within which to appeal against the decision of the judge. He argued that the jurisdiction for entertaining the application was to be found under r 19(1) of the Supreme Court Rules 1964. The respondents argued that the rule applied to cases in which the High Court would have exercised jurisdiction and a right to appeal to the Supreme Court lay with leave of a judge of that court or if refused, with leave of a judge of the Supreme Court.

Held: (1) Rule 19(1) falls under Part IV of the Rules, r 16 of which provides that that Part applies to "criminal appeals from the High Court". Rule 19(1) is limited to the application for leave to appeal in respect of appeals from decisions of the High Court in criminal matters, where that court would have been exercising its own jurisdiction. The right to appeal in respect to which leave must be applied for, is given to the person convicted of a criminal offence by the High Court. Refusal of leave to appeal *to* the High Court cannot be said to be a decision in a criminal matter before the High Court. The refusal of leave has the effect of preventing the proceeding coming into existence in the High Court.

(2) Giving a right to appeal from a decision of a judge of the High Court refusing leave to appeal to that court from a decision of a magistrates court made in terms of s 198(3) would defeat the whole object of giving a judge of the High Court the power to decide on the merits whether to grant or refuse leave to appeal to that court. When a right to appeal is given, subject to the condition that leave to appeal be granted, the intention of the legislature is that some tribunal must have the power to decide whether the right to appeal should be given or not. The object is to protect the process of the appellate court from frivolous and unnecessary appeals by means of an exercise of a screening power. A right to appeal may be given by statute or conditionally as a result of a grant of leave to appeal. Where the granting of leave is the chosen method of acquiring a right to appeal unless leave is granted, the right does not arise. Under s 198(4)(b), the legislature gave the power to consent to or refuse the right to appeal against a decision of the magistrates court under s 198(3) to a judge of the High Court. No other tribunal has that power. The matter was entrusted and intended to be entrusted to his discretion. It is for the judge of the High Court alone to look at the merits of the application for leave to appeal to that court and decide in the proper exercise of his discretion to grant or refuse leave to appeal. The clear intention of the legislature, which the Supreme Court must respect, is that the decision of a judge of the High Court refusing leave to appeal to that court in the exercise of jurisdiction must be final. No enactment provides for an appeal against a decision of a tribunal entrusted with the power to grant or refuse leave to appeal.

(3) It is a principle in our legal system that no right of appeal lies to an ultimate court of appeal against a decision of an intermediate court of appeal refusing leave to appeal to it in the exercise of its jurisdiction on the merits. The object of giving the tribunal power to grant or refuse leave to appeal is to enable it to control what it

should hear and *ipso facto* prevent frivolous and unnecessary appeals that would taint the process of the intermediate appellate court. That object would be defeated if the Supreme Court would also enter the question of whether, on the merits, the case was fit for appeal to the intermediate appellate court. The intention is that there should be one decision to grant or refuse leave in respect of one right of appeal. If a refusal to give leave to appeal is appealable, so too must be the granting of leave, which would result in absurdity.
(4) The application would be struck off the roll.

Appeal – execution – leave to execute pending appeal – when may be granted – principles

Nzara v *Tsanyau & Ors* HH-303-14 (Mathonsi J) (Judgment delivered 4 June 2014)

An appellant has an absolute right to appeal and to test the correctness of the decision of the lower court before he is called upon to satisfy the judgment appealed against. Execution of the judgment of the lower court before the determination of the appeal will negate the absolute right that the appellant has and is generally not permissible. Where, however, the appellant brings the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment notwithstanding the absolute right to appeal vesting in the appellant.
Where an application is made to execute despite the noting of an appeal, the court should determine what is just and equitable in all the circumstances, and in doing so, would normally have regard, *inter alia*, to the following factors:

- the potentiality of irreparable harm or prejudice being sustained by the appellant if leave to execute were to be granted or by the respondent if leave to execute were refused;
- the prospects of success on appeal, including more particularly the question of whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, eg to gain time or harass the other party; and
- where there is the potentiality of irreparable harm or prejudice to both parties, the balance of hardship or convenience, as the case may be.

Where the judgment sounds in money and the successful party offers security *de restituendo* and the appellant has no prospects of success on appeal, the court may exercise its discretion against the appellant's absolute right to appeal.
An application for leave to execute pending appeal cannot be determined solely on the basis that the appellant has no prospect of success on appeal, especially where the whole object of the appeal is defeated if execution were to proceed.

Appeal – interim relief pending appeal – relief sought not relating to a matter to be determined in the appeal – not competent to grant relief in respect of such an issue

Chidawu & Ors v *Shah & Ors* S-10-14 (Chidyausiku CJ, in chambers) (Decision given 2 December 2011; reasons for decision published 19 February 2014, at request of respondents)

The first applicant had entered into a loan agreement with the first respondent. Under that agreement, the first applicant surrendered certain shares to the first respondent in negotiable form. The first applicant was unable to repay the loan by due date. The first respondent called up the loan and threatened to liquidate the security in his possession by selling the shares. In due course, the shares were sold, in spite of abortive attempts by the first applicant to obtain an interdict to prevent the sale. The shares had not been transferred by the time of the present application.
An urgent High Court application by the first applicant was dismissed on the grounds that the supporting papers were fatally defective. An appeal was noted against that ruling, the grounds of appeal being, in essence, that the judge had erred in holding that the certificate of urgency was defective. The relief sought was that the matter be determined by the High Court on the merits.
In the application to the Supreme Court, the first applicant sought an order setting the matter down on an urgent basis and interdicting the fifth respondent (the stockbroker) from transferring the shares.
Held: the relief sought was incompetent. The pending appeal was concerned with procedural issues. The transfer of the shares was not an issue that fell for determination in the appeal. The notice of appeal related entirely to the issue of whether the court *a quo* should have heard the matter on an urgent basis or not. The court *a quo* did not make a determination on the transfer of the shares, in which case there could be no appeal against a non-

existent determination. It would be nonsensical to grant an interdict pending the determination of an issue which the Supreme Court was not going to determine, namely the transfer of the shares.

Editor's note: the Supreme Court's judgment was given in *Chidawu & Ors* v *Shah & Ors* S-12-13 (judgment dated 18 March 2013). The matter was determined on the issue of the validity of a certificate of urgency.

Appeal – leave – application for – should be dealt with summarily – court not required to hear oral argument from both sides, nor to give reasoned judgment

Alagonia Farming (Pvt) Ltd & Ors v *Northern Tobacco (Pvt Ltd & Ors* HH-72-14 (Hungwe J) (Judgment delivered 19 February 2014)

The applicant sought to have an order granting leave to appeal set aside on the grounds that leave had been granted without the judge having given the other side an opportunity to be heard, either orally or through written submissions.
Held: By their very nature applications for leave to appeal ought to be dealt with summarily. It is a procedure by which all superior courts world-wide regulate their case-flow. To require the court to listen to argument and give reasoned judgments in applications for leave to appeal which have no substance, or even to give reasoned judgments in such matters without hearing oral argument, would defeat the purpose of the requirement that "leave" be obtained. Such matters can and should be disposed of summarily. Courts of appeal in many democratic countries have a procedure for applications for leave to appeal. It is not customary for reasons to be furnished for the refusal of leave. In countries such as the United States of America and Canada, one of the reasons for requiring leave to appeal is to enable their courts of final instance to control their dockets. In those jurisdictions, leave may be refused even where there are prospects of success on appeal. This rule of practice also prevails in our jurisdiction. Reliance on a breach of s 69(1) of the Constitution would be misplaced.
In any event, the court was *functus officio*. The Supreme Court was now seized with the matter.

Appeal – leave – when required – interlocutory order – rationale for requiring leave to appeal against such order – distinction between such orders and ruling which are not appealable

Sikona Farm (Pvt) Ltd & Anor v *Carey Farm (Pvt) Ltd & Anor* HH-139-14 (Chigumba J) (Judgment delivered 24 March 2014)

An interlocutory order is one granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such an order may be either purely interlocutory or an interlocutory order having final or definitive effect. In an application for leave to appeal such against an interlocutory order, the court must consider the distinction between "rulings" (such as one of the admissibility of evidence or on which party should begin) and simple interlocutory orders, and consider the rationale behind the restriction of the right of appeal. History shows that it has generally been thought advisable to limit appeals in certain respects. A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. Apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics. Desirable as it would be to ensure that all such orders are properly made, it has been widely felt, in different ages and countries, that a line between appealable and non-appealable orders of this preparatory or procedural character ought to be drawn somewhere, for if they were all appealable, the delay and expense might be excessive, while if none of them were, the injustice resulting from wrong orders might be intolerable.

Arbitration – award – enforcement of – registration with magistrates court or High Court – successful party must apply, on notice to other party, for registration – only a magistrate or judge having power to order registration – no other officer of court having power to register award – award not enforceable unless formally registered – mere submission of award to relevant court not sufficient

Trust Me Security Org v *Mararike & Ors* HH-325-14 (Mangota J) (Judgment delivered 26 June 2014)

An arbitrator's award is enforced by having it registered with the magistrates court or the High Court (depending on the monetary value of the order or award which is intended to be registered for purposes of

enforcement). The arbitrator's award is, by the process of registration, turned into an order of the court in which the order or award is being, or has been, registered. The registration exercise converts the award into a civil judgment of the court in which such award has been registered. Registration is not just an event; it is a process. The process may be by way of action or application. Litigants who want to register awards which arbitrators grant to them do, invariably, employ the application mode of having their awards registered with the magistrates court or the High Court. The application procedure which they adopt places a duty upon them to notify the other party of their intention to register and enforce the order which had been awarded in their favour by the court *a quo*. The aggrieved party has every right to acquiesce in, or to oppose, the registration of the award. The act of registration is the preserve of a magistrate or a judge of the High Court, who is enjoined to entertain the application on notice to the other party. No other official, such as the clerk of court, has the power to register an award.
As soon as the award has been registered with the relevant court, it assumes the meaning and content of a civil judgment of the court in which the award has been registered. Once it has taken that substantive content, the civil judgment becomes executable. It is not enough for the successful party simply to submit the award to the relevant court.

Arbitration – award – registration of – appeal pending – award may nonetheless be registered – remedies open to party seeking to avoid execution of award

Giya v *Ribi Tiger Trading* HH-57-14 (Chigumba J) (Judgment delivered 19 February 2014)

An appeal to the Labour Court against the merits of the decision of an arbitrator does not suspend the operation of the decision appealed against: s 92E of the Labour Act [*Chapter 28:01*]. However, there is a medley of interlocutory remedies that can be employed pending determination of an appeal. The Labour Court, may, pending the determination of the appeal, make interim orders that meet the justice of the case. Stay of execution pending appeal and suspension of the arbitral award are but some of the interim remedies that may be sought before the Labour Court pending determination of an appeal.
It would also be open to the respondent argue that the registration of the arbitral award was contrary to public policy because the making of the award was induced or effected by fraud or corruption or there was a breach in the rules of natural justice in the making of the award: article 36(3) of the Schedule to the Arbitration Act [*Chapter 7:15*].

Arbitration – award – registration of – appeal pending in respect of part of award – applicant entitled to have rest of award registered

Mvududu v *ZBH* HH-122-14 (Makoni J) (Judgment delivered 12 March 2014)

The applicant was employed by the respondent. A dispute between them had been referred to arbitration, and the arbitrator found in the applicant's favour. She appealed against part of the award relating to quantification of the benefits payable, but sought to register the part of the award which related to salary, against which she was not appealing. The respondent argued that she could not do this, as it would amount to approbation and reprobation, as well as being a breach of the "once and for all" rule..
Held: The applicant had not appealed against that part of the award relating to salary, nor had the respondent cross-appealed against it. The amount awarded by the arbitrator therefore stood and was therefore not subject to the universal common law that an appeal suspends the decision appealed against. The principle of the "once and for all" rule that the respondent sought to rely on in countering the applicant's argument did not apply in this situation. The rationale behind the rule is to prevent a multiplicity of actions based on a single cause of action and to ensure that there is an end to litigation. Here, there was a quantified and certified award which the respondent had not appealed against, neither had it settled it. There was no cogent reason why it should not be registered.

Arbitration – award – setting aside of – application – must be filed within three months of applicant receiving award – applicant being notified that award available for collection – such notice not constituting receipt

Willoughby's Invstms (Pvt) Ltd v *Peruke Invstms (Pvt) Ltd & Anor* HH-178-14 (Zhou J) (Judgment delivered 16 April 2014)

See below, under ARBITRATION (Award – setting aside of – grounds – public policy – award resulting in a palpable inequity).

Arbitration – award – setting aside of – grounds – award in conflict with public policy – what must be shown – effect of award in wage negotiation case would be to drive employer into insolvency – such an award in conflict with public policy

Zimbabwe Posts (Pvt) Ltd v *Communication & Allied Svcs Workers' Union* HH-60-14 (Mutema J) (Judgment delivered 19 February 2014)

The applicant was the employer of members of the respondent union. The parties engaged each other in negotiating wage and salary adjustments. The negotiations yielded no positive results and a deadlock was declared. The parties then agreed to submit the dispute for arbitration. A senior legal practitioner was appointed as arbitrator. After hearing submissions, he made an award in which a modest increment was granted to the employees. He did so in spite of also finding that the applicant was operating at a loss and would continue to do so even in the foreseeable future. He agreed that applicant had no ability to pay as it was in a precarious financial position and that any adjustment would simply contribute to the already existing deficit and funding gap.

The applicant sought to have the award set aside on the grounds that it was contrary to the public policy of Zimbabwe. It argued that the arbitrator, despite his findings about the applicant's financial position, made an award which was certain to drive the applicant into insolvency. Such an award would be contrary to public policy.

Held: Article 34(5)(a) and (b) of the Model Law (set out in the Schedule to the Arbitration Act) spells out two instances when an award is in conflict with the public policy of Zimbabwe, but also makes it clear that the two instances are not exhaustive. The determination of other instances as falling under the category of being contrary to the public policy of Zimbabwe is a question of value judgment, for the words "public policy" are a wide and vague concept. Examples from decided cases included situations where the substantive effect of the award, after a consideration of the merits of the dispute endorsed immorality or crime and where there has been a violation of fundamental principles of the forum state's legal order, hurting intolerably the feeling of justice.

The approach to be adopted is to construe the public policy defence restrictively in order to preserve and recognize the basic objective of finality in all arbitrations. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The substantive effect of the arbitral award upon the applicant – never mind that the awarded increments were not substantial – would be to drive it into insolvency, with the inevitable consequence of liquidation with massive loss of jobs for all its employees and mass suffering for their dependants. All these affected people would be rendered destitute, with little or no prospects of getting alternative employment in a tight job market, starvation and school dropouts for their children. Certainly this would constitute a palpable inequity and the conception of justice in Zimbabwe would be intolerably hurt by this substantive effect of the award. That the award would be viewed as being in conflict with the public policy of Zimbabwe would be beyond cavil.

Arbitration – award – setting aside of – grounds – public policy – award resulting in a palpable inequity – such award may be set aside

Willoughby's Invstms (Pvt) Ltd v *Peruke Invstms (Pvt) Ltd & Anor* HH-178-14 (Zhou J) (Judgment delivered 16 April 2014)

The applicant and the first respondent had purchased two adjoining pieces of land of equal size. Both properties had been previously owned by a company. A building had been erected, which straddled the two properties. The greater proportion of the building was on the first respondent's piece of land, though the evidence did not establish what that proportion was. When the company sold the building, the purchase price paid by the applicant was 30% of the value, while the first respondent paid 70%. The parties then let the building to a third party as one unit despite the fact that it sat on the two contiguous stands. The expenses for the building were shared equally between the applicant and first respondent. The first respondent, which received the rentals,

apportioned the net rentals on a ratio of 70% to itself and 30% to the applicant. The ensuing dispute was referred to the second respondent, as arbitrator. The issue for determination was whether the net rental realised from the building should be shared equally by the parties, as contended for by the applicant, or in the proportions of 70% to the first respondent and 30% to the applicant. The arbitrator came to the conclusion that the relationship between the applicant and first respondent in acquiring the two contiguous stands as a single entity was one of co-ownership in proportion to the purchase price each paid. He determined that the share of the income derived from the leasing of the two stands, as one indivisible unit, should be in proportion to the specific contribution made by each party to the purchase price of the single entity. The applicant brought the award on review.

The respondent objected to the application on the grounds that it was filed out of time, the application having been filed more than three months after the applicant was notified that the award was available for collection. The application was filed less than three months after the award was actually collected.

Held: (1) in terms of article 34(3) of the First Schedule to the Arbitration Act [*Chapter 7:15*], an application for setting aside of an award may not be made after three months have elapsed from the date on which the applicant had received the award. The word "received" means that the award must have been sent or delivered to the recipient. Here, there was an invitation to collect the award. Until the award was delivered to or collected by the applicant one could not say that the applicant had "received" it. The invitation did not amount to *traditio longa manu.*

(2) The parties owned their two properties individually, each in terms of a separate deed of transfer. The building was, however, a part of the two immovable properties, having acceded to them by *inaedificatio* in accordance with the Roman law principle (which has been received in the Roman-Dutch law) that everything which is built on or attached to the soil forms part of the soil. The building, being immovable property, could not be said to be "owned" jointly by the parties in the ordinary sense of the word, as there was no title deed relating to it in which the applicant and the first respondent are stated as the owners. What could be said is that it was indivisible property which had acceded to two separately owned contiguous pieces of land and was now an integral part of the two pieces of land. The parties' undivided shares in the building could not be determined by reference to the proportions 70:30. The two stands were being leased as one unit.

(3) Accepting that this arrangement was a partnership, the parties' contributions were their immovable properties, which were of identical sizes, not the money which they paid as the purchase price for the properties. The purchase price was paid not into the partnership business but to a third party, the seller of the immovable properties. It was immaterial that a larger portion of the building was located on the stand belonging to the respondent. The parties' contribution to their partnership having been equal, in that they had each contributed a stand, and as they shared the expenses equally, the unequal sharing of the net rentals constituted a palpable inequity that affronts the conception of justice in an intolerable manner. The award would therefore be set aside as being in conflict with public policy.

Arbitration – award – setting aside of – grounds – party unable to present its case – arbitrator deciding to receive written rather than oral submissions – not a ground for setting aside award – conduct of proceedings – arbitrator's wide discretion – no requirement to receive oral submissions or evidence

Makonye v *Ramodimoosi & Ors* HH-62-14 (Chigumba J) (Judgment delivered 19 February 2014)

In order to set an arbitral award aside on the basis that it is contrary to public policy, it must be shown that some fundamental principle of law or morality or justice is violated or that the decision is so defiant of logic or accepted moral standards that the concept of justice in Zimbabwe would be intolerably hurt. An award by the arbitrator is not contrary to public policy merely because it wrong in law or in fact in reaching the conclusion arrived at.

The fact that the arbitrator, with the consent of the parties, decides to receive written, rather than oral, submissions does not mean that either of the parties was not able to present its case. The arbitrator has a wide discretion as to how to conduct the proceedings. Article 24 of the Model Law (set out in the Schedule to the Arbitration Act) gives the arbitrator the power to override any agreement between the parties themselves in regards to how the matter should proceed, and stipulates that the arbitral tribunal shall decide whether to hold an oral hearing or whether the proceedings shall be conducted on the basis of documents or other materials. In essence, the conduct of the hearing is entirely at the tribunal's discretion. There is no onus on the tribunal to hear oral submissions. The onus on the tribunal relates to notification of the hearing, and an arbitrator has exclusive jurisdiction, contrary to the parties' wishes, to decide how to collate evidence. There is no provision to compel the arbitrator to hear oral evidence. What is required is for all the parties to be notified of the hearing, to be given an opportunity to present their case as stipulated by the arbitrator, and to have sight of the submissions made by the other parties, if in writing.

Company – administration in terms of Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] – purpose of such administration – duties of administrator – grant of leave to institute proceedings against company – what administrator should consider – debts incurred before or after reconstruction order issued – whether should be treated differently – duties of administrator when application made to bring proceedings against company – must act in accordance with principles of Administrative Justice Act [*Chapter 10:28*]

C J Petrow & Co (Pty) Ltd v *Gwaradzimba NO* HH-175-14 (Mafusire J) (Judgment delivered 16 April 2014)

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

Company – judicial management – purpose of – when should be ordered – principles – directors of company placed under provisional judicial management – no *locus standi* to represent company – return day of order for provisional judicial management – options open to court – may refer matter to opposed court roll

Zimbabwe Textile Workers' Union v *David Whitehead Textiles Ltd & Ors* HH-170-14 (Makoni J) (Judgment delivered 19 March 2014)

Although applications for winding up and judicial management are similar in nature, they are not necessarily identical in terms of the processes involved and their objectives. In the Companies Act [*Chapter 24:03*] there are separate provisions relating to judicial management and liquidation. The provisions relating to liquidation do not provide for a return date, as is the position with provisional judicial management in terms of s 305(1). The provisional judicial manager, in terms of s 303(a), assumes the management of the company upon the granting of the judicial management order. There is no such corresponding provision in relation to liquidation. Further, the matters and reports to which a court shall have consideration to on the return date in terms of s 305(1) do not include anything required from the directors of the company. The directors would have no *locus standi* to appear on behalf of the company on the return day.

In terms of s 305(1), on the return day fixed in the provisional judicial management order, the court has three options open to it: it may grant a final judicial management order; it may discharge the provisional judicial management order; or it make any other that it thinks just. The last option would include referring the matter to the opposed roll where it could be properly ventilated and determined.

Generally, a company should not be permitted to be dissipated by winding up and dissolution because it has suffered a setback with regard to the repayment of its debts or the performance of its obligations, which, if it were to be given time, it would be able to surmount and become successful. The procedure of judicial management is intended to be a means for affording it such time. Judicial management should not be instituted or continued merely on the basis that, while it subsists, the company's assets may be sold more advantageously than they would be in winding-up: judicial management is not intended to be an alternative method of liquidation. Judicial management is a special dispensation which can be granted to a company only in exceptional cases. It implies that there be a temporary reconciliation of conflicting interests – those of the company in being unable, despite its difficulties, to continue its operations in the ordinary course and those of its creditors in not being prevented from enforcing their rights, including the way of winding-up. It is because of these conflicting interests that the Act requires the court to be satisfied both that there is a reasonable probability that, were there to be judicial management, the company would be able to achieve the goals envisaged by s 300(a) (that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern) and that it is just and equitable to afford it the opportunity to attempt to do so. As such, judicial management cannot be instituted merely on the ground that it would improve the efficiency of the company's management or increase the profitability of its operation.

Company – liquidation – powers of liquidator – selling shares belonging to company under liquidation – Securities and Exchange Commission – Commission directing stockbrokers not to sell such shares – Commission having no power to issue such directive – courses open to Commission if aggrieved by act of liquidator

Gwatidzo NO v *First Transfer Secretaries (Pvt) Ltd & Ors* HH-165-14 (Makoni J) (Judgment delivered 3 April 2014)

The applicant was the liquidator of a company. In the process of executing his duties as such, he instructed the second respondent, a firm of stockbrokers, to sell various parcels of shares in the company's name. The stockbrokers sold portion of the shares and deposited the proceeds into a trust account established for that purpose. It later sold the balance of the shares but did not tender the proceeds, as the third respondent, the Securities and Exchange Commission, had issued a directive to the effect that the stockbrokers should stop selling any or all of the company shares and if it had already sold or transferred any such shares, to reverse the sales and cancel the registrations.

The applicant sought a declaratur that the Commission had no power to interfere with a liquidation process in the manner it has done. The basis for seeking the declaratur was that the third respondent's directive was unlawful, in that once a company is under liquidation only two authorities can make decision relating to the process: the liquidator and the court. Any third party should seek leave of the court. It was further averred that even if the third respondent has such powers these cannot be exercised arbitrarily.

The application was challenged on the ground there was no such directive to stop the applicant from dealing with the assets of the company. The Commission had issued a directive to securities companies dealing with shares of firms in distress not to dispose of such shares without obtaining prior approval from the Commission. It was also argued that the Commission was acting in terms of powers conferred on it by s 4 of the Securities and Exchange Act [*Chapter 24:25*]. Under s 4(2), the Commission was empowered to issue guidelines, notices and directives to securities dealing firms, and had acted in terms of that power. It did not issue the directive to the liquidator and therefore did not interfere with the liquidation process. It would be failing in its duties if it did not act where there was systemic risk. The shares that the stockbrokers had been instructed to dispose of were held in nominee accounts.

Held: (1) there was a disagreement between the applicant and the Commission regarding the ownership of the shares that the applicant had instructed the stockbrokers to sell. Instead of the Commission resolving the issue with the applicant, it issued the directive to a third party, but targeted at the applicant. The fact that the directive was not directed to the applicant was irrelevant: the intended result was that the applicant, as liquidator, could not perform his functions in relation to those shares.

(2) Once a company is in liquidation, any process that seeks to regulate the liquidation should be done in terms of s 222(3) of the Companies Act [*Chapter 24:03*], which provides that "any person aggrieved by an act or decision of the liquidator may apply to the court after notice of motion to the liquidator and therein the court may take such order as it thinks". There is nothing in the Securities and Exchange Act to suggest that the term "any person" would not apply to the Commission. The effect of a winding up order is to protect the assets of the company for the benefit of the creditors. Any third party seeking to interfere with the duties of a liquidator regarding the assets of a company has to seek leave of the court.

(3) In terms of its powers under Securities and Exchange Act, the Commission is a regulatory body which has no powers to descend on individual transactions like it was trying to do *in casu.* Where it feels that its regulations have not been complied with, its remedy is to invoke any relevant conditions of the licence of the defaulting party. The Commission exceeded its mandate under the Act.

Company – scheme of arrangement with creditors – sanctioning of scheme by court – objections to scheme – must be heard before court may sanction scheme

Ex p *PG Industries (Zim) Ltd* HH-239-14 (Ndewere J) (Judgment delivered 21 May 2014)

At meetings to sanction a scheme of arrangement between the applicant and its creditors, one creditor objected to the scheme on the ground that it was a secured creditor, not a concurrent one. The chairperson for the scheme meetings determined the issues raised that creditor and made a finding that it was not a secured creditor but a concurrent creditor. Thereafter, the scheme was put to the vote and the majority of concurrent creditors present voted for the scheme arrangement. The applicant then made an *ex parte* application in motion court for the sanctioning of the combined scheme of arrangement by its creditors by the court in terms of s 191 of the Companies Act [*Chapter 24:03*]. The objecting creditor made an oral application for leave to file its opposing papers so that its objections to the sanctioning of the scheme could be heard. The applicant opposed the application for leave to oppose.

Held: if there are objections before the court sanctions the scheme, those objections must be considered by the court and a decision made. The Act requires not only the holding of a meeting, but the submission of even an accepted scheme to the scrutiny of the court thereafter. This scrutiny should not be a mere rubber stamp for the majority decision. The proposer of the scheme has to persuade, not only the meeting of shareholders and creditors, but also the court, that the scheme is a fair one. Conversely, a minority group should be able to ventilate and pursue its protests if so advised at both stages.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 15 (right not to be subjected to inhuman or degrading punishment or treatment) – arrested being women being made to remove shoes and brassieres before being detained in overcrowded cells in conditions not complying with elementary norms of human decency or internationally accepted minimum standards – such treatment a breach of rights set out in s 15 – s 23 (prohibition against discrimination on grounds of gender) – women needing two articles of underwear – requirement to remove brassieres discriminatory

Williams & Ors v *Co-Ministers of Home Affairs & Ors* CC-4-14 (Ziyambi JA, Garwe, Makarau, Gowora JJA * Omerjee AJA concurring) (Judgment delivered 5 June 2014)

The applicants, all women, were members of an organisation called Women of Zimbabwe Arise, a non-profit organisation seeking to advance the rights of women in Zimbabwe. They applicants were arrested during the course of a demonstration against what they alleged to be the appalling service provision from the Zimbabwe Electricity Supply Authority and detained at the Harare Central Police Station for four nights.
On arrival, they were made to remove their brassieres and shoes and to place them in a bag with their other belongings. The bag was dirty, probably by reason of use by other detainees. They were made to walk barefoot to and in the cell. There were sixteen detainees, including the applicants, in the cell which was meant to accommodate six people. Only three blankets were provided for use by the sixteen occupants of the cell. The applicants were provided with no food or drinking water, no toilet paper or soap. The occupants of the cell were unable to flush the toilet after use, having to depend on the pleasure of the police to flush it from outside.
In an application alleging breaches of their rights under the 1980 Constitution (which was then in force), they alleged that they were treated in a discriminatory manner in that firstly, they were subjected to sanitary conditions, restrictions or disabilities that peculiarly isolated them and amounted to inhuman and degrading treatment. The fact that they were made to remove their brassieres was not only inhuman and degrading but discriminatory. The respondents argued that a woman's brassiere is not "necessary wearing apparel" as contemplated by s 61 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. They said that in some places women go about bare breasted. The applicants, averred, on the contrary, that a brassiere was, for them, a necessary piece of intimate wearing apparel.
Held: (1) the blanket application of the requirement that each detainee is allowed one layer of clothing and one undergarment ignored the fact that the applicants, being women, had, by reason of their sex, personal needs which differed from those of men. This resulted in discrimination against the applicants, who by virtue of their biological make-up, had need of two undergarments.
(2) Detention in the conditions in which the applicants were detained constituted a gross violation of the applicants' right not to be subjected to inhuman and degrading treatment. The removal of their brassieres was not only discriminatory, but constituted inhuman and degrading treatment. Detention ought not to reduce the detainee to humiliation and indignity. Every detainee is entitled to be treated with some modicum of decency and respect. The order to the applicants to remove their brassieres caused them great humiliation. The treatment meted out to the applicants could not be said to be reasonably necessary to prevent their escape, which is the only derogation allowed by s 15 of the right enshrined therein. Further, to require the applicants to walk barefoot in such unsanitary conditions was also to subject them to inhuman and degrading treatment.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(1) (right to protection of the law) – s 18(9) – right to a fair trial – not breached by use of word "serious" in definition of crime of criminal defamation – s 20(1) – freedom of expression – permissible derogations from – protection of reputation of other persons – whether such protection by criminalising defamatory statements justifiable in a democratic society – freedom of speech as a cornerstone of a democratic society – adequate protection provided to injured party through civil law – criminalising defamation a disproportionate instrument to protect reputations of other persons

Madanhire & Anor v *A-G* CC-2-14 (Patel JA, Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, & Guvava JA concurring) (Judgment delivered 12 June 2014)

The applicants, the editor of and a reporter for a weekly newspaper, were arrested and charged with criminal defamation, contrary to s 96 of the Criminal Law Code [*Chapter 9:23*]. This followed the publication of an article which suggested that a named medical aid society was insolvent. They applied for an order declaring the offence to be unconstitutional in terms of s 20 of the 1980 Constitution (which protects freedom of expression), and for a permanent stay of proceedings. In terms of s 96 of the Code, the offence is committed when a person, intending to harm the reputation of another, publishes a false statement which causes serious harm to the

reputation of that other person or creates a real risk or possibility of causing serious harm to that other person's reputation.

It was argued for the applicants that the word "serious" was a comparative adjective which was almost impossible of a benchmark or judicial definition. Consequently, the requirement was unduly subjective and its application would depend on the idiosyncratic views of the parties involved, the investigating officer, the prosecutor and, ultimately, the presiding judicial officer. The offence therefore violated not only the right to protection of the law secured by s 18(1) of the former Constitution but also the right to a fair trial guaranteed by s 18(9).

Held: (1) Our law of criminal defamation is essentially an amalgam of Roman-Dutch and English law. The original rationale of the crime of defamation under Roman and Roman-Dutch law is not readily ascertainable, but may have originated from the social insecurity of the patricians, who became increasingly threatened by the mounting power of the plebeians. In 17th and 18th century Holland, the *Groot Placaat Boek* abounds with enactments on the subject, seemingly because of the prevalence of defamatory lampoons, squibs, verses and scurrilous satires, pertaining in particular to persons in authority. The offence has been codified in Zimbabwe.

(2) The use of adjectives to define the constituent elements of criminal offences is commonplace and can hardly be regarded as being remarkable. Examples include possessing an "offensive" or "dangerous" weapon, causing "serious" or "grievous" bodily harm, and committing "aggravated" indecent assault or theft in "aggravating" circumstances. The interpretation and application of any such defining epithet forms part of the daily diet of judicial officers in the lower courts. The offence of criminal defamation was clearly formulated with sufficient precision in the Code so as not to create any ambiguity or vagueness as to the conduct that is proscribed as being punishable. The specific factors that may entail harm of a "serious" nature are succinctly articulated in s 96(2) to afford adequate guidance to the trial court in determining whether or not the alleged harm to a person's reputation is sufficiently serious to constitute criminal defamation. Although these factors were not exhaustive, they tended to enhance rather than diminish the prospect of the accused receiving a fair trial.

(3) Freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. As such, it is prominently recognised and entrenched in virtually every international and regional human rights instrument. The importance of the right to freedom of expression has often been stressed by our courts. It has been said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. The offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in s 20(1) of the former Constitution. On the other hand, the offence falls into the category of permissible derogations contemplated in s 20(2)(b)(i), as being a provision designed to protect the reputations, rights and freedoms of other persons. What had to be determined was whether or not this derogation was reasonably justifiable in a democratic society. What is democratically reasonable and justifiable is not susceptible to precise legal formulation. The test may well vary from one society to another, depending upon its peculiar political organisation and socio-economic underpinnings

(4). There was no conceptual or practical impediment to the criminalisation of defamation. The objective behind s 96 of the Code, *viz.* to protect the reputations, rights and freedoms of other persons, was sufficiently important to warrant the limitation of freedom of expression, and the detailed provisions of s 96 are clearly rationally connected to that objective. What was contentious was the proportionality of the means deployed in this instance. In other words, is it necessary to criminalise defamatory statements in order to accomplish what is otherwise an unquestionably legitimate objective? This question could be answered in two stages: firstly, what are the consequences of criminalising defamation; and, secondly, is there an appropriate and satisfactory alternative remedy to deal with the mischief of defamation? With regard to the first stage, there would be the normal consequences of being charged with a serious offence, bur what was distinctive about criminal defamation was the stifling or chilling effect of its very existence on the right to speak and the right to know. This was the more deleterious consequence of its retention in the Code, particularly in the present context of newspaper reportage. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices. The chilling effect of criminalising defamation was further exacerbated by the maximum punishment of two years' imprisonment imposable for the offence. This penalty was clearly excessive and patently disproportionate for the purpose of suppressing objectionable or opprobrious statements. The accomplishment of that objective certainly cannot countenance the spectre of imprisonment as a measure that is reasonably justifiable in a democratic society. Although false information will not benefit a society, democratic or otherwise, the right to freedom of expression is not restricted to correct or truthful information because errors are bound to be made from time to time and to suppress the publication of erroneous statements on pain of penalty would of necessity have a stifling effect on the free flow of information.

(5) Another very compelling reason for eschewing resort to criminal defamation was the availability of an alternative civil remedy under the *actio injuriarum* in the form of damages for defamation. Although this remedy may not be as expeditious as criminal prosecution, it affords ample compensatory redress for injury to

one's reputation. If this is correct, the invocation of criminal defamation to protect one's reputation would be unnecessary, disproportionate and therefore excessive. The offence could not be compared to offences like assault or malicious damage to property, which, unlike defamation, impinge upon the very fabric of society, *i.e.* by threatening the manner in which citizens are expected to interact in their daily lives without fear of physical violence. In the case of defamation, only the individual rights of the complainant are affected, and he has a clear alternative remedy in civil law. Civil law exists to provide relief and restitution when one person harms or threatens to harm another's private interests. Criminal law exists to ensure retribution and protection of the public, by detaining offenders and deterring others from offending. The very existence of the crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated inconvenience and scandal. These ills can barely be corrected on appeal, and thus the crime could easily be used to cow courageous journalists. It is this brand of public disapproval that criminal law rightly casts on murderers, rapists and thieves, precisely for its deterrent potency. The same objective could not and should not apply to injurious speech, the borders of which are elusive and essentially subjective.
(6) Various international institutions have decried recourse to criminal defamation in order to stifle free speech, finding in particular that the imposition of imprisonment is a contravention of the International Covenant on Civil and Political Rights.
(7) Accordingly, the offence of criminal defamation constituted a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. It was not necessary to criminalise defamatory statements. The offence was not reasonably justifiable in a democratic society within the contemplation of s 20(2) of the former Constitution.
(8) The Minister of Justice should therefore be called upon, if he so wished, to show cause why s 96 of the Code should not be declared to be in contravention of s 20(1) of the former Constitution.

Editor's note: (1) if the applicants had been arrested without a warrant, such arrest would have been unlawful, criminal defamation being one of the offences listed in the First Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] for which an arrest may not be made without a warrant.
(2) The Minister of Justice subsequently advised the court that he had no cause to oppose the intended declaration and through his counsel consented to the confirmation of the rule *nisi*. See *Madanhire & Anor* v *A-G* CC-2-15. This resulted in the proceedings against the applicants being permanently stayed.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – referral of matter to Supreme Court – referral can only be of matter pending, not a matter which has been determined – objection to being placed on remand on grounds that breaches of Declaration of Rights disclosed – no request made to refer alleged breaches to Supreme Court – applicants placed on remand on grounds that reasonable suspicion shown that applicants committed alleged offences – referral by High Court during subsequent trial – not competent

S v *Dhlamini & Ors* CC-1-14 (Malaba DCJ, Chidyausiku CJ, Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 17 March 2014)

The applicants had been abducted from their homes by security agents, kept incommunicado and tortured before they were taken to the magistrates court to be placed on remand on allegations of committing various security-related offences. They challenged the application by the State to have them placed on remand. They raised at that stage the question of their detention as a violation of their fundamental right to personal liberty, but they did not request the magistrate to refer any such question to the Supreme Court for determination. The magistrate placed the applicants on remand on the ground that there was a reasonable suspicion that they had committed the offences with which they were charged. At their subsequent trial, the High Court referred, for determination under s 24(2) of the Constitution of Zimbabwe 1980, the questions of alleged violations of the fundamental rights of the applicants guaranteed under ss 13(1) (right to personal liberty); 15(1) (right not to be subjected to torture or to inhuman or degrading treatment) and 18(1) (right to the protection of the law).
Held: the referral was incompetent. If the applicants were of the view that the decision to place them on remand was a violation of their fundamental right to the protection of the law, they could, before the decision to remand them was made, have requested that the question of violation of their right to personal liberty be referred to the Supreme Court for determination in terms of s 24(2) of the Constitution. If that request had been refused on the ground that the raising of the question was frivolous and vexatious, they could, as an exceptional remedy, have applied to the Supreme Court for redress in terms of s 24(1) of the Constitution. The Supreme Court would then have decided whether the decision to place the applicants on remand was a violation of their right to the protection of the law under s 18(1) of the Constitution. The applicants did not invoke the provisions of s 24(2) of the Constitution at the time they ought to have done. They accepted the legality of the decision to place them on remand.

Prima facie, in finding that there was reasonable suspicion that the applicants committed the offences with which they were charged, the magistrate did not violate the applicants' right to personal liberty. This was confirmed on review by the High Court, which held that the decision of the magistrate to place the applicants on remand was based on a proper application of the principle and finding on the facts that there was a reasonable suspicion that the applicants had committed the offences of which they were charged. Once the decision to remand the applicants was made on the ground that there was a reasonable suspicion of their having committed the offences with which they were charged, and that position still prevailed at the time they appeared in the High Court for trial, the prosecution could not be stopped on the basis that they had been tortured or subjected to inhuman or degrading treatment.
There was no legal basis on which the trial judge could refer the questions of contraventions of ss 13(1), 15(1) and 18(1) of the Constitution to the Supreme Court for determination, because the question of the existence of a reasonable suspicion of the applicants having committed the offences with which they were charged had already been determined justifying their arraignment before the High Court. The High Court could not turn the proceedings before it into an inquiry into the correctness or otherwise of the decision of the magistrates court to place the applicants on remand. It could not seek to have the correctness of that decision impugned through the procedure under s 24(2) of the Constitution because the Supreme Court would no longer be exercising original jurisdiction in the circumstances. The court would not be determining the question of violation of the right to personal liberty but reviewing the decision of the magistrates court.
Section 24(2) of the Constitution clearly precludes a situation where the question is referred to the Supreme Court in respect of a matter which is no longer necessary for resolution by the lower court in the determination of the dispute before it.

Constitutional law – Constitution of Zimbabwe 2013 – citizen – by birth – cannot be deprived of citizenship – rights of citizen – freedom of movement and to enter and leave Zimbabwe – such right cannot be restricted, even if person travelling on a foreign passport – person entitled endorsement on foreign passport stating his right to unrestricted residence

Madzimbamuto v *Registrar-General & Ors* CC-5-14 (Ziyambi JA, Chidyausiku CJ, Malaba DCJ, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, Patel JA & Chiweshe AJA concirring) (Judgment delivered 25 June 2014)

The applicant was a citizen of Zimbabwe by birth. While living outside the country, he obtained a South African passport, by virtue of his mother's birth in that country. When he returned to Zimbabwe and presented his South African passport, he was told that he had to get a residence permit. He obtained one which expired after two years. Some time later, he re-acquired a Zimbabwean passport, but also applied for an endorsement on his South African passport, showing that he had a right to unrestricted and unconditional residence in Zimbabwe. The immigration authorities refused to grant this endorsement, saying that as a South African passport holder, he was an alien and governed by the Immigration Regulations 1998.
Held: a Zimbabwean citizen by birth does not lose his citizenship on acquiring a foreign citizenship. He is entitled to hold foreign citizenship and a foreign passport. Zimbabwean citizenship by birth cannot be lost. The freedom of movement and residence in Zimbabwe is a right guaranteed by s 66 of the Constitution to every Zimbabwean citizen and every person who is legally in Zimbabwe. It includes the right to enter and leave Zimbabwe as well as immunity from expulsion from Zimbabwe. There would be a real danger of expulsion of the applicant by the immigration authorities if the applicant entered Zimbabwe and presented his South African passport endorsed with an expired residence permit, a withdrawn residence permit or no residence permit at all.
It must be emphatically stated that the Regulations are governed by the Constitution and not the Constitution by the Regulations. Any law which is inconsistent with the Constitution is void to the extent of the inconsistency. To say that the applicant, as a citizen by birth, was entitled to dual citizenship and then to deny him the right under s 66 to freely enter and leave Zimbabwe, on the grounds that he has presented a foreign passport, would be to deprive him of the benefits of the enjoyment of two fundamental rights conferred on him by the Constitution of Zimbabwe, namely the right to dual citizenship inherent in his birthright as a Zimbabwe citizen by birth and the right to freedom of movement. His right to enter, remain and leave Zimbabwe could not be restricted even when he presented or travelled on a foreign passport. Because of the attitude taken by the immigration authorities, the order sought would be granted

Constitutional law – Constitution of Zimbabwe 2013 – fundamental human rights – freedom from arbitrary eviction (s 74) – effect on eviction following conviction for unlawfully occupying gazetted land – requirement for court to take all relevant factors into account – need to balance out opposing claims

S v *Munotengwa & Ors* HH-134-14 (Muremba J) (Judgment delivered 12 March 2014)

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

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to water (s 77) – municipal by-law authorising council to cut off water – by-law also allowing council to do so even if bill disputed – such by-law contrary to Constitution

Mushoriwa v *City of Harare* HH-195-14 (Bhunu J) (Judgment delivered 30 April 2014)

See below, under LOCAL GOVERNMENT (Urban council – by-laws).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – s 81 – rights of children – right to be heard – issues of custody and what is in best interests of child – child's right to be heard on such matters

Hale v *Hale* HH-271-14 (Tsanga J) (Judgment delivered 5 June 2014)

See below, under FAMILY LAW (Child – custody).

Constitutional law – Constitution of Zimbabwe 2013 – interpretation – all provisions of Constitution to be considered in interpreting any provision of the Constitution – clothing High Court with original jurisdiction over all civil and criminal matters – legislature not prevented from establishing other courts with either exclusive or concurrent jurisdiction

Chiokoyo v *Ndlovu & Ors* HH-321-14 (Uchena J) (Judgment delivered 12 April 2014)

The applicant sought an order preventing the Electoral Commission from allowing voters to take part in a by-election simply on the basis of their voters' registration slips. The issue arose whether the High Court had jurisdiction to hear the application, in view of the provisions of s 161(2) of the Electoral Act [*Chapter 2:13*], which gives exclusive jurisdiction to the Electoral Court to hear appeals, applications and petitions in terms of the Act and to review any decision of the Commission made or purporting to have been made under the Act. The applicant argued that this provision contravened s 171(1)(a) of the Constitution, which states that the High Court has original jurisdiction over all civil and criminal matters throughout Zimbabwe. It was argued for the Commission that s 174 of the Constitution allows for the creation of other courts subordinate to the High Court.
Held: In terms of s 46(1)(d) as read with s 331 of the Constitution, which provide for the contextual and purposive interpretation of provisions of the Constitution, all provisions of the Constitution must be considered in construing a provision of the Constitution. The purpose for which the Constitution provides for various courts and vests in them concurrent civil and criminal jurisdiction with the High Court should guide the court in establishing whether or not the High Court's original jurisdiction ousts other court's civil and criminal jurisdiction. The fact that the Constitution permits the legislature to create and confer jurisdiction of its choice on such courts must also be taken into consideration. The Constitution vests criminal and civil jurisdiction in courts inferior to the High Court in spite of the High Court having original jurisdiction over such cases. The High Court, though vested with original jurisdiction over all civil and criminal matters, does not have exclusive jurisdiction over all such matters. The fact that the High Court has inherent or original jurisdiction over all civil and criminal cases, does not, therefore, mean that it should exclude other courts established in terms of the laws provided for in the Constitution. These courts lawfully exist alongside it to hear and determine specified cases. Where no exclusive jurisdiction is provided for, a litigant can chose whether to litigate in the High Court or the subordinate court. Where the legislature gives the other court exclusive jurisdiction, as was done by s 161(2) of the Electoral Act, the High Court, though clothed with original jurisdiction, cannot hear such cases. They were lawfully taken away from it and given to another court of competent jurisdiction. This is confirmed by the provisions of s 162 of the Constitution, which specifically vests judicial authority in the courts mentioned there and those established by or under an Act of Parliament. This clearly means it authorises the creation of such courts and their being conferred with jurisdiction of the legislature's choice.
Accordingly, s 161(2) of the Electoral Act is therefore not inconsistent with the Constitution and lawfully allocates exclusive jurisdiction over electoral appeals, applications, petitions and reviews to the Electoral Court.

Contract – breach – damages – purpose of damages – to put plaintiff in position he would have been if breach of contract had not occurred – loss of chance to participate in scheme – how damages to be assessed – exact calculation not possible – court nevertheless obliged to attempt to make assessment – nominal damages – when may be awarded – purpose of awarding nominal damages

Wynina (Pvt) Ltd v *MBCA Bank Ltd* S-27-14 (Gowora JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 28 Match 2014)

The appellant was engaged in the business of growing tobacco. During the 2007/2008 tobacco season, the Reserve Bank of Zimbabwe ("the RBZ") embarked on a retention scheme in terms of which tobacco growers would be paid a portion of the proceeds on tobacco sales in foreign currency. Farmers wishing to participate in the scheme had to file applications through their commercial banks, which, in turn would forward the applications, accompanied by the requisite payment in the local currency, to the RBZ. The appellant successfully participated in the scheme and was paid a portion of the proceeds from the sale of tobacco for that season. In September 2008 the appellant submitted an application with the respondent bank for participation in the scheme for the next season and made the necessary deposit into the account held by it with the respondent to meet the local component of the foreign currency to be paid by the RBZ under the scheme. Several months later, the RBZ published a list of farmers entitled to benefit under the scheme. The appellant's name was not on the list. The appellant made enquiries with the respondent, said that during the relevant period the appellant's account had been overdrawn and as a result the application could not be forwarded to the RBZ. Attempts to persuade the RBZ to accept the application even though the deadline had passed proved fruitless and the appellant thereafter sued the respondent for damages in a sum representing the amount in foreign currency that the appellant alleged it would have received from the RBZ, had the application been received and processed by the RBZ.

Although it published the list, the RBZ did not make payments to all the participants under the scheme for the year 2008/2009. It had not fully honoured its obligations for the previous growing season and that the payments for the 2008/2009 season had only been satisfied in respect of small scale growers whose individual claims did not exceed US$1 000. Affected farmers instituted a class action against the RBZ for payment under the 2008 foreign currency scheme. That suit had not yet been determined when the appellant brought the present action. The trial court held that until such time as that matter was finally determined or until the RBZ opted to voluntarily pay out the listed growers, whether fully or partially, it was not possible to quantify the measure of damages due to the appellant by reason of the respondent's breach of contract. The appellant held essentially a contingent right to damages as against the bank, dependent upon the eventual outcome of the claims lodged by the listed growers.

On appeal, the appellant argued, *inter alia*, that the court should quantify and asses the damages due to it arising from the loss of the chance to participate in the scheme. It did not have to prove that it would, on a balance of probabilities, have received any payment from the RBZ. Once it was apparent that the appellant had sustained some loss, then the court was obliged, by making a value judgment, based on the best information it has before it, to assess the value of that loss.

Held: (1) when the breach occurred due to the failure by the bank to meet the deadline in submitting the appellant's application, the appellant's loss of the chance to participate in the scheme occurred and damages immediately became due and payable. It was then that the complete cause of action arose and the period of prescription would have started running as from that date. In view of this, the appellant did not have to prove on a balance of probabilities that it could have received payment from the RBZ, as long as it established that it was deprived of the chance to receive payment as a result of the respondent's breach. The appellant could not now join in the suit against the RBZ and was not in the same situation as the farmers whose applications were duly processed and accepted by the RBZ. It had, though, suffered damages by the failure to have its application placed before the RBZ and was deprived of the chance to benefit under the scheme. Had the respondent performed its contractual obligations, the appellant would have been included in the list published by the RBZ. It could also have instituted a claim for payment under the scheme.

(2) It was not necessary to join the RBZ as a party. The appellant instituted proceedings against the bank premised on a breach of the latter's contractual obligation. No allegations were made against the RBZ and there was no suggestion that the RBZ was in some way responsible for the failure by the respondent bank to perform its obligations. The appellant's suit was not concerned with the obligations of the RBZ but the breach of the respondent's obligations to the appellant.

(3) In a claim for damages arising out of breach of contract, the plaintiff has to be placed in the same position he would have been in had the contract been properly performed. If the bank had submitted the application for the appellant to participate in the 2008 scheme the appellant would at best have a claim pending against the RBZ, as

did all the tobacco farmers who applied to participate in the scheme. The appellant's claim arose from the loss of an expectation to receive payment under the retention scheme.
(4) A plaintiff who sues for damages is required to prove his damages. If he can prove none he is not entitled to any damages. This is not, however, not a strict rule. What the plaintiff must do is to place before the court all the evidence that is reasonably available to him. Before this principle can come into effect it must be established that the plaintiff has suffered some damages and that all that has to be established is the quantum of those damages. Some types of damage are difficult to estimate, but the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty. The decided authorities have gone so far as to state that a court doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess. The existence of a contingency which is dependent upon the volition of a third person does not necessarily render the damages for breach of contract incapable of assessment. The appellant suffered damages but on the facts presented to the court *a quo* it was almost an impossible task for a court to make an assessment of the monetary damages due to the appellant. The court would be virtually pondering the imponderable, but must do the best it can on the material available, even if the result is an informed guess.
(5) There has been much debate within the courts as to when a plaintiff should be awarded nominal damages, and it is not exactly clear, despite the debate both from the courts and jurisprudential authors, as to whether or not nominal damages should be awarded to a plaintiff who has proved breach of contractual obligations and has suffered loss, but has not proved the extent of the damages suffered. A reading of the various South African cases leaves a distinct impression that the courts have accepted that the principle of nominal damages is available to a plaintiff in certain circumstances and that it is not necessarily available to a plaintiff who has proved a technical breach of contract and is unable to prove damages. It is a concept derived from the English law, although its application did not follow the English law, and in the later cases there appears to be an attempt on the part of the courts to adhere to the English law in applying the principle on the awarding of nominal damages. Sometimes nominal damages may appropriately be given to establish a right; nominal damages in the different sense of a token payment of ordinary damages may also be awarded when the plaintiff proves breach causing him loss but is unable to prove the amount of the loss or that it is substantial.
(6) The courts both in this country and in South Africa have recognised the principle of prospective loss in restricted instances. One such instance relates to the loss of a chance, which is a form of prospective loss which has been recognised in England and South Africa. In assessing damages the court must, as one of the aspects, have regard to the events that have occurred from the damage-causing event to the date of the action in order to reach a more realistic assessment of the damage. Here, the appellant appointed the respondent as its agent in the facilitation and implementation of its application under the scheme. When it lodged its application with the respondent and paid the local currency stipulated, it acquired a benefit to participate and at the conclusion of the season receive a value in foreign currency. It thus acquired an advantage to which a value could be attached. It was therefore the duty of the court to estimate the pecuniary value of that advantage. Factors to consider included the possibility that the RBZ might be able to satisfy a trial court that it had no obligation to meet the claims of the tobacco growers who participated in the scheme or that if a court found in favour of the farmers, the RBZ would seek statutory protection to avoid payment under the scheme; the fact that payment was made to farmers with smaller claims would point to a lack of capacity to pay as opposed to reluctance to pay; and finally, even though the applicant funded its account with the required local currency, it was not transmitted to the RBZ. Damages would be awarded in the sum of 25% of that claimed.

Contract – breach – remedies – claim for payment of agreed sum due in terms of contract – nature of such claim – claim one for specific performance, not one for damages – plaintiff entitled to specific performance if payment not made

Brennan's Diesel Svcs (Pvt) Ltd v *Tenda Bus Svcs (Pvt) Ltd* S-13-14 (Gowora JA, Ziyambi JA & Omerjee AJA concurring) (Decision given 16 October 2012; reasons made available 16 April 2014)

The appellant was in the business of providing service in the repair of diesel fuel pumps. The respondent was a public service transport operator. The appellant had on several previous occasions done business with the respondent. On the occasion in question, the respondent's representative took two fuel pumps to the appellant's premises for repair. After inspection, a quotation, expressed in South African currency, was given to the respondent's representative orally. The respondent then requested the appellant to repair the pumps and offered to pay in instalments; the appellant agreed and did the work. The respondent did not challenge the invoices that were generated by the appellant. The respondent paid about a quarter of the total sum but refused to pay the balance. The appellant brought an action for the balance, but the trial judge granted absolution from the instance

on the basis that the value of the spares and the labour costs had not been proved, when such proof is only necessary under the *actio legis Aquiliae* to prove that damages claimed are fair and reasonable.
Held: there was a valid contract between the parties for materials supplied and services rendered in the repair of two diesel pumps and that the contract price was agreed. By failing to pay the outstanding balance, the respondent was in breach of the contract. The appellant, as the injured party, having performed its obligations in terms of the contract, was entitled to demand specific performance thereof by the respondent. The terms of the contract having been established, the trial court had to consider whether or not both parties to the contract had performed in terms of their respective obligations under the agreement. Contrary to the principle that contracts freely entered into should be enforced, the judge found that the appellant had not proved the value of the repairs to the pumps. This finding was irrelevant to the claim before the court. Further, the *actio legis aquiliae* was not the cause of action with which the court was seized. The appellant did not premise its cause of action on it. The appellant's claim was not for damages arising from delict; it was a simple action for an agreed contract price. What the appellant sought in the court *a quo* was an order that the respondent pay a specified sum of money. An order for the payment of a sum of money in terms of a contract is in fact an order for the enforcement of the contract. Judgment should have been given for the appellant.

Contract – duress and undue influence – threats unlawful or *contra bonos mores* – threat of criminal prosecution – whether such threat unlawful – unlawful if creditor exacts something to which not entitled

Mlambo v *Mupfiga* HH-65-14 (Mafusire J) (Judgment delivered 19 February 2014)

Duress or coercion, in jurisprudence, is where someone performs an act as a result of violence or threats of violence or some other pressure. In the law of contract, duress, or *metus*, relates to a situation where someone enters into an agreement as a result of threats. Such a contract is voidable at the instance of the aggrieved party. Consent which is a result of coercion is not true consent. Where a party seeks to avoid a contract on the basis of duress he must establish five elements: (1) that the fear was a reasonable one; (2) that the fear was caused by the threat of some considerable evil to that party or his family or property; (3) that the threat was that of an imminent or inevitable evil; (4) that the threat or intimidation was unlawful or *contra bonos mores*; (5) that the moral pressure used caused damage. These five elements are considered cumulatively.
A contract that is induced by threats of a criminal prosecution may be set aside. The signature on a liquid document that is procured by reason of such threats may render the document unenforceable. Such a threat may be illegitimate. It may be *contra bonos mores*. It may amount to the crime of compounding. A person who is legally entitled to lay a criminal charge against another does no legal wrong in bringing the charge. However, it is *contra bonos mores* for him to resort to a criminal process, or to threaten to resort to it in order to induce a promise for the payment of a private debt.
Compounding is an offence. It refers to an agreement to stifle a prosecution in return for a reward. Such conduct stifles the proper administration of justice. In the context of contracts induced by threats, compounding relates to the linking of one's right to recover one's private debt to the right to bringing a public prosecution for the crime committed by the debtor. The test in determining the validity of an acknowledgement of debt procured under a threat of a criminal prosecution is whether by such a threat the creditor exacted or extorted something to which he was otherwise not entitled. Where the sum which the debtor agrees to pay in fear of arrest is in fact the sum which was due, the creditor does not act *contra bonos mores* in using the threat of criminal prosecution to induce him to acknowledge his true liability. In these circumstances he is doing no more than exercise his legal rights. Where, however, the creditor does not know and probably cannot establish the amount of the debtor's indebtedness, it is an improper use of his rights to threaten to prosecute the debtor unless the debtor undertakes to pay an amount which the creditor more or less arbitrarily estimates to be due. Thus the threat of an arrest or of a criminal prosecution to induce a promise to pay that which was due is not *contra bonos mores*. It is the threat to extort a promise to pay that which was not due or was unknown which is illegal. The argument that ought to be decisive is that although the debtor has worsened his position by signing the promissory note or IOU, he has not worsened it as much as if he had responded to the threat by paying what he owed in cash, and if he had done that he could have had no complaint.
It is often the case that an acknowledgment of debt induced by a threat of an arrest or a criminal prosecution gives the creditor a reward or an advantage to which he may otherwise not have been entitled. Some of the more obvious and common rewards or advantages may be: (1) the creditor removes or minimises the burden of proof on him, in that where previously he would have had to prove liability and quantum, he would now merely have to produce the liquid document which often speaks for itself; (2) with regards to quantum in particular, where there was some doubt or dispute as regards the actual amount allegedly due, whether as capital or as interest and other charges, or both, the liquid document would settle all that, even together with the issue of the costs of suit; (3) a typical acknowledgement of debt would have an acceleration clause where, among other things, in the

event of a default the entire balance of the amount outstanding at the time of the default would become immediately due and payable; (4) the benefits of the legal exceptions such as *non causa debiti* would inevitably be renounced by the debtor; and (5) the liquid document would give the creditor the advantage of proceeding to recovery by way of procedures such as provisional sentences or summary judgment.

Contract – validity – agreement to contract in the future – when may be enforced – evidence showing that parties intended to enter into binding obligation – such agreement enforceable

CAG Farms (Pvt) Ltd v *Hativagone & Ors* HH-157-14 (Dube J) (Judgment delivered 2 April 2014)

The applicant company made a written final offer to the first and second respondents for the acquisition of a farm owned by the first and second respondents. The offer specified the full price offered and the proposed payment terms. The respondents accepted and signed the offer document. Following this offer, the parties signed an irrevocable memorandum of understanding (MOU). The parties agreed that the transaction was irrevocable. They agreed to be bound to carry out in good faith all actions as may be necessary to expedite the transfer and registration of the farm, including the obtaining of a certificate of no present interest from the relevant authority and the transfer of the farm. The MOU was to terminate upon the signature of a sale agreement .In the event of the sale agreement not being entered into within 60 days from the date of signature of the agreement, then the MOU would terminate and all rights and obligations flowing from it would fall away. The parties agreed not to enter into any other discussion or agreement with any other party relating to the farm until the expiry of the MOU, without written consent of the other party. The parties agreed to endeavour to make all efforts to ensure that the sale was concluded and to best advantage. In the event of a dispute, they would attempt to resolve it by discussion and conciliation, failing which the dispute would be referred to arbitration.
The applicant duly obtained the certificate of no interest from the Ministry of Agriculture, the relevant authority, within two weeks of the signing of the MOU, but the respondents did not co-operate in signing the sale agreement. They evaded the applicant and ignored requests to sign the sale agreement. The applicant learned that the respondents were trying to sell the farm to someone else, so brought an action for specific performance, averring that a binding contact was concluded between the parties; that the first and second respondents breached both the agreement concluded in terms of the offer document and the MOU by delaying the signing of the written agreement of sale until after the 60 days had elapsed.
The respondents contended that the parties did not enter into a sale agreement within the 60 days provided for, resulting in the termination of the MOU. Accordingly, all rights and obligations of the parties fell away. The applicant could not seek an order for specific performance as there was no binding contract.
Held: (1) The issue was whether a valid agreement of sale existed between the parties entitling the applicant to specific performance. It was important to determine what type of agreement the parties entered into first. The first document signed by the parties, the final offer, constituted an offer by the applicant and a preliminary agreement where the parties would sign another contract. They had agreed on the key terms of the contract but had not signed the actual contract and agreed to be bound to carry out, in good faith all the actions as, may be necessary to expedite the transfer and registration of the farm. There was a mechanism for resolving any dispute. These facts disclose an agreement to agree in the future and in good faith. The objective, which was to bind the parties to agree to enter into a final contract, did not happen. No agreement of sale was entered into. This scenario was distinguishable from a contract of sale subject to a suspensive condition which comes into effect on fulfilment of a specified condition. In this case, there was no contract of sale entered into as envisaged.
(2) Generally an agreement to agree in the future and enter into a proposed final agreement does not constitute a contract between the parties as they lack legal certainty. The parties still have a discretion over whether to agree or disagree. However, it is possible to conclude an agreement that has an aspect that will be determined in the future. Each case should be determined on its own merits. While the courts require legal certainty and do not enforce an agreement if parties have not sufficiently formulated an intention, where the court is satisfied that that the parties intended to enter into binding obligations it should attempt, so far as is consistent with essential principle and binding precedent, to give effect to the agreement and not be the destroyer of bargains. An agreement to agree or negotiate on a future and final contract is enforceable where the parties have agreed on the essential terms of the contract and the agreement provides for a dispute resolution mechanism to resolve the unresolved issues.
(3) In terms of the MOU and final offer, the final offer was irrevocable. The parties promised to negotiate in good faith. There was a dispute resolution mechanism. The agreement of sale was to be concluded and signed immediately upon the successful completion of the approvals by the authorities of the certificate of no present interest. The offer itself was described as being "final". The MOU was described as an irrevocable sale of the farm. All these factors pointed towards the suggestion that the parties intended to be bound by the final offer and the MOU at least when the regulatory approvals were through. Once the approvals were through the agreement

became enforceable. All the essential elements of a contract were present and all that remained was for the parties to prepare the contract document and sign it. The parties intended to be bound by these agreements. The farm was still available and had not yet been sold to any other party. The applicant was entitled to specific performance.

Costs – contribution towards – matrimonial case – when such costs may be ordered

Chinyamakobvu v *Chinyamakobvu* HH-181-14 (Mawadze J) (Judgment delivered 17 April 2014)

The requirements for an order for contribution towards costs are: (a) there must be a subsisting marriage; (b) the suit in action must be a matrimonial one; (c) the applicant must have reasonable prospects of success; (d) the applicant is not on a financial position to bring or to defend the action without the contribution from the other spouse and (e) the other spouse is able to provide the applicant with this contribution. Items (d) and (e) above should be considered conjunctively: for an award to be made it should not only be shown that the applicant lacks financial means to bring or defend an action without assistance from a spouse, but also that other spouse has the financial means to pay for such contribution.

Court – children's court – a court of record – enquiry in terms of s 18 of Children's Act [*Chapter 5:06*] – duty of court to keep proper record, even if no *viva voce* evidence led – duty of court to forward record for review to High Court within 7 days

In re *Chikombingo & Ors* HH-294-14 (Mawadze J) (Judgment delivered 3 June 2013)

Applications to place a child in a place of safety are brought to the children's court in terms of s 18 of the Children's Act [*Chapter 5:06*]. In terms of s 19(1)(a) of the Act, the court, in dealing with such an application, is enjoined to hold an inquiry in respect of the child or juvenile brought before it. This inquiry is important to verify the facts upon which the application is premised. It is also to assist the court to establish whether the child is in need of care, as defined in the Act. The inquiry also assists the court to exercise any of the powers vested in it in terms of s 20 of the Act. It is therefore as a result of such an inquiry that the court may decide on the proper option to take in terms of s 20.

The children's court is a court of record. This means that all proceedings in this court should be recorded. The inquiry held should be recorded. The inquiry may entail the hearing of *viva voce* evidence or may be based on affidavits and reports admitted in court as exhibits during the inquiry. The record of proceedings should reflect all this. It would be disingenuous to argue that since there was no *viva voce* evidence led there was no need to keep a record of proceedings showing the nature of the inquiry held. The court has a duty to keep a full legible record of proceedings in all matters dealt with. In addition to that there should be brief reasons explaining the decision made by the court. The court should explain the brief circumstances of the child, the nature of the evidence relied upon, findings made on why the child is in need of care and the basis of the particular order granted in terms of s 20. This entails the confirmation of the requisite vacancy at the relevant institution.

In terms of s 27 of the Act, after the holding of the inquiry and the granting of the order, the court is enjoined within 7 days to submit the record of proceedings to the High Court for review. Such a review can only be meaningful where a proper record of proceedings has been kept. The record must include reasons for the court's decision, because the High Court cannot carry out its review powers to determine whether the proceedings were in accordance with real and substantial justice where there is no record of proceedings and no written reasons for the decision made. In the absence of a proper inquiry, the record of proceedings and reasons for the order made, the High Court is hamstrung in deciding whether the children's court has taken into consideration the principles that bear on the child's best interests.

Court – contempt – committal for – what party seeking committal must show – need for order to have been served personally on party in respect of whom committal sought

Mukambirwa & Ors v *Gospel of God Church Intl 1932* S-8-14 (Gowora JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 27 February 2014)

The crime of contempt of court is committed intentionally and in relation to administration of justice in the courts. The object of proceedings for contempt is to punish disobedience so as to enforce an order of court and in particular an order *ad factum praestandum*, that is to say, orders to do or abstain from doing a particular act.

Failure to comply with such order may render the other party without a suitable, or any, remedy, and at the same time constitute disrespect for the court which granted the order. Before holding a party to be in contempt of a court order, a court must be satisfied that there is a court order which is extant, that the order has been served on the individuals concerned and that the individuals in question know what it requires them to do or not do; that knowing what the order dictates, the individuals concerned deliberately and consciously disobeyed the order. In addition to that, the court must be satisfied that, not only was the order not complied with, but also that the non-compliance on the part of the defaulting party was wilful and *mala fide*. An applicant seeking such an order must set out clearly in his application such grounds as will enable the court to conclude that the onus resting upon the applicant of proving the contempt has been discharged. The applicant must also prove that the respondent has failed to comply with the order. Before seeking to enforce an order through contempt proceedings, it is necessary to prove that the judgment or order which is alleged to have been disobeyed has been properly served. The applicant must also show that the order with which the respondent has failed to comply has either been served upon him personally or has come to his personal notice. The general rule is that no judgment or court order will be enforced by process of contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

Court – High Court – jurisdiction – application for relief under Administrative Justice Act [*Chapter 10:28*] – relief constituting review of decision by employers in a labour matter – court having no jurisdiction

Shumba v *Min of Justice & Ors* HB-106-14 (Moyo J) Judgment delivered 10 June 2014)

The applicant filed an application in terms of s 3 of the Administrative Justice Act [*Chapter 10:28*], seeking an order setting aside the decision of the respondent to transfer him without giving him an opportunity to be heard, together with ancillary relief. The respondent opposed the application, on the grounds that the application was one for the review of a labour decision, wherein only the labour court has jurisdiction.
Held: the relief sought by an applicant in terms of s 3 is subject to the provisions of any other law. The relief sought by the applicant was clearly a review of the decision of the respondents in their capacities as the employers of the applicant. His dissatisfaction with the steps taken by his employers and the manner in which these steps were taken, resulting in his transfer and "demotion", were purely a labour issue, which the Labour Court, in terms of s 89(1)(d)(i) of the Labour Act [*Chapter 20:01*] had exclusive jurisdiction over. Section 89 takes away from any other court the powers to determine or hear matters provided for in that section. Powers of review in terms of ss 3 and 4 of the Administrative Justice Act, where labour matters are concerned, fall into the same category.

Court – High Court – jurisdiction – original jurisdiction over all civil and criminal matters – legislature not prevented from establishing other courts with either exclusive or concurrent jurisdiction

Chiokoyo v *Ndlovu & Ors* HH-321-14 (Uchena J) (Judgment delivered 12 April 2014)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – interpretation).

Court – High Court – jurisdiction – review – Labour Court decision – matter one which Labour Court could have dealt with – High Court having no jurisdiction

Zimpapers Group of Companies v *Khupe & Anor* HB-9-14 (Moyo J) (Judgment delivered 23 January 2014)

The applicant sought to bring a decision of the Labour Court on review before the High Court, the grounds for review being (a) that there was a gross irregularity in the proceedings, in that the court entertained the matter when it had not been properly set down in terms of the law; and (b) that the court issued an order that was actually different from the original order sought, which order could only have been granted had new proceedings been instituted. The first respondent raised a point *in limine* that the matter was not properly before the court, as the applicant should have made an application for rescission of the judgment in terms of s 92C of the Labour Act [*Chapter 20:01*] and that s 89 of the Act excluded the High Court's powers of review of matters in the Labour Court.
Held: (1) Section 92C of the Act provided for the rescission or alteration by the Labour Court of its own decisions. The legislature had given the Labour Court the power to revisit all its decisions, including the void

ones. The applicant therefore had a remedy in terms of s 92C, which covered the applicant's very own circumstances.
(2) Section 89 of the Act clearly gave the Labour Court review powers and took away from any other court the powers to determine or hear matters provided for in that section, the power of review being one of them. Section 26 of the High Court Act [*Chapter 7:06*], which gave the High Court power of review over all inferior courts, subjected those power to the provisions of any other law, meaning that if another law already provided otherwise, the High Court would not be in a position to exercise the same powers.

Court – High Court – jurisdiction – labour matter – review of – High Court generally having no jurisdiction

Zimasco (Pvt) Ltd v *Marikano* S-6-14 (Garwe JA, Gowora JA & Omerjee AJA concurring) (judgment delivered 13 January 2014)

In respect of labour matters, the Labour Court shall exercise the same powers of review as does the High Court in other matters. The jurisdiction to exercise these powers of review is in addition, and not subject, to the power the court has to hear and determine applications in terms of the Act. The powers of review exercisable by the High Court are to be found in ss 26 and 27 of the High Court Act [*Chapter 7:06*], but this does not mean that the High Court has review powers in respect of labour matters.
In order for a review to be the subject of a hearing, such review must be brought by way of application: r 256 of the High Court Rules, 1971. Clearly an application for review is not the type of application contemplated in s 89(1)(a) of the Labour Act [*Chapter 28:01*].

Court – High Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of terminated contract of employment – High Court having jurisdiction to determine matter arising from acknowledgment of debt

Homodza v *Chitungwiza Municipality* HH-38-14 (Takuva J) (Judgment delivered 12 February 2014)

The applicant resigned from her employment with the respondent on medical grounds. She was advised in writing of what her terminal benefits were. Portion of those benefits was paid and the applicant then brought legal proceedings for the recovery of the balance. The respondent filed an appearance to defend and subsequently a special plea, to the effect that the high Court had no jurisdiction to determine the matter, as issues relating to non-payment of terminal benefits and arrear salaries were specifically within the purview of the Labour Court, as these matters were provided for in the Labour Act [*Chapter 28:01*]. The applicant argued that that the High Court had inherent jurisdiction to deal with the matter since the Labour Act did not specifically preclude it from determining a claim for non-payment of terminal benefits properly quantified and acknowledged by the employer. Further, there was no employer/employee relationship or dispute that is provided in terms of the Act, as the cause of action was clearly premised on a document acknowledged by the respondent reflecting the quantified amount owed to the applicant. This document amounted to an acknowledgement of debt. By signing it, the respondent signified its intention and willingness to be bound by the terms of the document.
Held: while the matter had its origins in labour law, these had been superseded by the acknowledgement of debt, which formed a separate cause of action based purely on the law of contract. There was no labour dispute, other than the respondent's intransigence in refusing to pay the amount owed. There was no provision in the Labour Act that would allow the applicant to approach the Labour Court directly seeking a similar remedy she was now seeking. Accordingly, the High Court had jurisdiction.

Court – jurisdiction – *peregrinus* – need for defendant to be present or to have property within the jurisdiction – need for attachment order to be issued before summons is issued – existence of claim within Zimbabwe – not enough to satisfy requirements relating to jurisdiction

Fairdrop (Pvt) Ltd v *Capital Bank Corp Ltd & Ors* HH-305-14 (Mathonsi J) (Judgment delivered 18 June 2014)

A person domiciled and resident in a foreign country cannot be sued in this country as the courts have no jurisdiction over that person. For that reason, there is need for an attachment *ad fundandam jurisdictionem* of

that person or his property in order to make him amenable to the jurisdiction of the court. Such person or his property can only be attached while he or it is within the jurisdiction of the court and only after an attachment order has been issued by the court. The attachment order should be issued by the court before the summons is issued against that person. The presence in the country of unspecified and undefined property belonging to the defendant or the debt which is the subject of the dispute is not enough for the court to exercise jurisdiction. The existence of a claim in Zimbabwe, which claim is the subject of the dispute, no matter how substantial that claim is, cannot satisfy the requirement relating to jurisdiction.
Where a *peregrinus* is being sued, even if it has property in Zimbabwe, the plaintiff must first seek and obtain an attachment order to found or confirm jurisdiction, as the case may be. Even if the court were to act in terms of s 15 of the High Court Act [*Chapter 7:06*], which allows the court to direct service of process without an attachment order, it can only do so if satisfied that the person or his property is within Zimbabwe and is capable of attachment or arrest.

Court – jurisdiction – *peregrinus* – test of effectiveness – court cannot exercise jurisdiction unless judgment can be enforced

Chiyangwa v *Nehanda Radio & Anor* HH-333-14 (Matanda-Moyo J) (Judgment delivered 24 June 2014)

The test for jurisdiction is mainly whether the court would be able to enforce its judgment. The courts should only determine matters where there is evidence that, at the end, such judgments could be enforced. If there is no proof that the enforcement of these judgments would be carried out, then the courts should not entertain jurisdiction over such matters. The doctrine of effectiveness underpins the rule that a court will not entertain an action against a *peregrinus* unless there has been an arrest of his person or an attachment of his property.

Court – Supreme Court – jurisdiction – power to take any course which may lead to just and speedy settlement – eviction order improperly granted in lower court – Supreme Court ordering reinstatement of evicted party

Streamsleigh Invstms (Pvt) Ltd v *Autoband Invsts (Pvt) Ltd* S-43-14 (Gowora JA, Malaba DCJ and Garwe JA concurring) (Judgment delivered 17 June 2014)

The Supreme Court is a creature of statute and can only do that which its enabling statute permits. The jurisdictional limits and powers of the court are found in ss 21 and 22 of the Supreme Court Act [*Chapter 7:13*]. The Court has extensive powers, which include the power to amend, vary, confirm or set aside a judgment of a lower court or tribunal. It also has the power to take any course which may lead to the just, speedy and inexpensive settlement of the case. Where the appellant was evicted by virtue of an order of eviction which was obtained under circumstances which can only be described as irregular, an order directing the appellant to return to the High Court for appropriate relief in relation to its eviction from the premises would result in the appellant having to institute fresh proceedings for its reinstatement. Such a course would merely serve to delay the process. This would be a proper case where the Supreme Court may issue an order that the appellant be reinstated in the premises.

Criminal law – defences – indemnity for acts committed in good faith for the purpose of or in connection with the suppression of poaching activities – what must be shown for indemnity to attach

S v *Bowa* S-47-14 (Garwe JA, Ziyambi & Hlatshwayo JJA concurring) (Judgment delivered 27 June 2014)

The appellant was employed as a game ranger by the Department of National Parks and Wildlife. Sometime in February 2012 a senior prisons officer was arrested at a road block whilst carrying ivory. On his arrest he implicated two named persons as the source of the ivory. Thereafter further information was received by the Department to the effect that these persons worked with the deceased in the illegal hunting syndicate**.**
About four months later, a group of ten parks rangers, accompanied by two police officers, embarked on an operation to arrest the suspected poachers. Nine of the game rangers were armed with rifles. On arrival at the homestead of one of the suspects, at about 1.00am, the rangers discovered that he was not present. On further questioning the employees present, the rangers formed the impression that the suspect was putting up at his father's place of residence, so went there with the employees. On arrival they split into two groups in order to secure two paths that exited from the homestead. The appellant was in the group that first approached the

homestead. Two persons ran out of the hut – one after the other – and disappeared into the darkness. The deceased also came out of the same hut after which the appellant then fired his firearm, hitting him in the chest and killing him instantly. The gunfire awakened other occupants of the homestead including the mother of the deceased, who, on discovering that the deceased had died, challenged the rangers not to go away and grappled for possession of the firearm with the appellant. The rangers together with the two police officers and the suspect's employees managed to flee from the homestead. They eventually proceeded to a police base where the appellant was arrested the following morning and his weapon confiscated.

The appellant was subsequently charged with murder. The court *a quo* rejected the appellant's claim that he was protected by the provisions of s 3 of the Protection of Wild Life (Indemnity) Act [*Chapter 20.15*], holding that a person in the position of the appellant would be indemnified where "for instance (*sic*) he comes across poachers who resist arrest and threaten to harm him or threaten to kill him." In view of its finding that the deceased was not armed and was not resisting arrest but was simply running out of the house to avoid further assaults by the other rangers inside, the court found that the appellant was not entitled to such indemnity. On the appellant's claim of self defence, the trial court held that the appellant was not defending himself as the deceased was not armed and was running away to avoid further assaults. The court accordingly rejected that defence as well and consequently found the appellant guilty of murder with actual intent, and, upon finding no extenuating circumstances, imposed the death sentence on the appellant.

Held: (1) it was clear from the evidence that the rangers believed they were going after suspects who were armed, which was why a total of ten rangers, nine of whom were armed with rifles, were involved in this operation. The appellant was a senior ranger, having been employed as a ranger for 35 years. If indeed the deceased was not armed, why would the appellant have fired at him in the manner he did? Two of the deceased's younger brothers ran out of the house, but were not shot. Had it been a case of the appellant being trigger happy, he would, in all probability, have fired at the two young men as well. He did not do so. The probabilities were that the deceased must have conducted himself in a manner that made the appellant believe that he was in danger. There could be no other explanation for the events that unfolded. The trial court should, at the very least, have concluded that there was some doubt as to what happened exactly, and, in keeping with the principle applicable in these circumstances, resolved the doubt in favour of the appellant.

(2) On the question of indemnity, it must have been the intention of the legislature to provide indemnity to armed personnel in the employ of the State who are involved in anti-poaching activities in respect of conduct which might otherwise attract criminal sanction, if such conduct is done in good faith for the purpose of or in connection with the suppression of poaching activities. The Act recognizes the fact that such personnel may find themselves in situations in which decisions have to be made in a split second in order to subdue, arrest or contain dangerous persons involved in poaching activities. As long as the conduct is *bona fide* and intended to suppress poaching of wild life, such personnel would be indemnified.

A person claiming indemnity must satisfy two important requirements: (a) such person must have been acting in good faith; and (b) the act done by him must have been for the purposes of or in connection with the suppression of the unlawful hunting of wild life. These two requirements must be present and read in conjunction with each other. If either is lacking such indemnity would not attach to such person. "Good faith" is the subjective state of mind that a certain set of facts genuinely exists, on the basis of which it becomes necessary to act in a manner most right thinking people would consider appropriate given those facts. A disproportionate reaction, given a particular set of facts, may well justify an inference that such reaction was not actuated by good faith. The words "for the purposes of or in connection with the suppression of the unlawful hunting of wild life" must be given a wide interpretation and would include anything linked to, related to or connected with attempts to suppress the unlawful hunting of wild life. The words "for the purpose of" have been interpreted to refer to the main or dominant purpose. The words "in connection with" are wider and can quite properly cover the whole spectrum of relationships from a close and direct relationship, at the one end of the scale, to a remote and indirect relationship, at the other end. The term is an elastic one and the context and purpose of the statutory provision must be considered in order to assess the degree of elasticity appropriate to the case. It should not to be presumed that, when the legislature was trying to be fair to an accused, as it manifestly was in the case of this section, it intended a narrow construction to be put upon these words which could, and probably would, result in unfairness to an accused. In the present matter the killing of the deceased, though unfortunate, was the result of a *bona fide* attempt to apprehend persons who were believed to be armed and involved in poaching activities. The trial court should have found that such indemnity attached to the appellant and entered a verdict of not guilty.

(3) Even on the basis of the facts it found proved, the trial court was clearly in error in finding that no extenuating circumstances existed. The circumstances surrounding the death of the deceased provided mute evidence of extenuation. Against the background that existed, the incident occurred on the spur of the moment during the execution of official duty, in poor visibility and in circumstances in which the appellant may have genuinely believed that harm was likely to befall him.

Criminal law – general principles – possession – what must be shown – physical and mental elements of possession must be proved – prohibited items not on person of suspect – who mental element may be established

S v *Mpa* HH-469-14 (Hungwe J, Bere J concurring) (Judgment delivered 20 May 2014)

The appellant was convicted of unlawful possession of unregistered or unmarked ivory and was sentenced to 9 years' imprisonment. He was arrested after the police got a tip-off that there was, at a named shopping centre, an elderly man of Congolese origin who was driving a pick-up truck in possession of unmarked ivory in respect of which he was looking for buyers. Police details went there and saw a truck fitting the description given, as well as a person who fitted their suspect. He sat in the passenger seat. The police arrested the appellant. They recovered 21 pieces of ivory from the truck. The ivory was concealed under vegetables and would not have been apparent upon a cursory glance inside the loading tray of the truck. When the appellant was arrested, his wallet was found in the glove compartment of the motor vehicle. The informer did not give evidence.
Held: In cases of criminal possession, the State must not only prove physical element of possession but also the mental element. Where, as here, the substance constituting the subject of the charge was not on the person of the suspect, the task for the State becomes even more onerous: unless there is some presumption or reverse onus set out in the offence-creating provision, the State is required to prove either actual or constructive possession. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it. The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession.
A person who has direct physical control of something on or around his person is in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to later take control over something either alone or together with someone else, is in constructive possession of it.
Here, the appellant was not in physical possession of the ivory. The trial court relied on circumstantial evidence to conclude that he had constructive possession. When relying on circumstantial evidence, the inference of guilt must the only one that can fairly and reasonably be drawn from the facts, and the evidence must exclude, beyond reasonable doubt, every reasonable hypothesis of innocence. There was no evidence led to exclude other possible scenarios, including that put forward by the appellant. It was possible, for example, that the driver was the only person acquainted with the cargo. The conviction would be set aside.

Criminal law – offences under Criminal Law Code – criminal defamation – history of offence – criminalising defamation not justifiable in terms of s 20 of Constitution of Zimbabwe 1980

Madhanire & Anor v *A-G* CC-2-14 (Patel JA, Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, & Guvava JA concurring) (Judgment delivered 12 June 2014)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 18)

Criminal law – statutory offences – tampering with electrical apparatus resulting in supply being cut off – Electricity Act [*Chapter 13:19*] – s 60A(3)(a) – reconnecting domestic electricity supply after it had been cut off – not an offence under the subsection

S v *Dzotizei* HH-126-14 (Tsanga J) (Judgment delivered 6 March 2014)

The accused, a man of over 70 years of age, was convicted of contravening s 60A(3)(a) of the Electricity Act [*Chapter 13:19*] (tampering with any apparatus for generating, transmitting, distributing or supplying electricity with the result that any supply of electricity is interrupted or cut off) and sentenced to the mandatory minimum sentence of 10 years' imprisonment. He had re-connected his electricity supply after it had been cut off for non-payment of his bill. He was also convicted of unlawfully abstracting electricity, in contravention of s 60A(1) of the Act for which he received a wholly suspended sentence of 24 months.
Held: (1) the charge under s 60A(3)(a) was inapplicable. By no stretch of the imagination could it be said that the accused's action resulted in any interruption or cut-off of electricity as envisaged by the subsection. The legislature clearly had in mind such conduct as stealing oil from transformers and stealing cables, which have indeed often resulted in massive black outs and cut offs and serious damage to apparatus. The situation where ordinary residents illegally abstract and divert electricity by switching themselves back on or self-connecting is adequately covered by s 60A(1)(a) and (b).

(2) It is imperative that the age of the accused is always accurately captured. It is a vital fact which has a material bearing in most situations. Inaccuracy creates unnecessary confusion on review when a judge is faced with contradictory data. If the accused was a 71 year old pensioner living in a context where assistance from the State for old people is so limited as to be virtually non-existent, then even a suspended sentence of 24 months on count 2 was manifestly excessive. Under s 82 of the Constitution, the State owes some duty of care to persons over the age of 70. In this instance the criminal court, a vital part of the State machinery, can at least play a protective role by ensuring that the elderly are not unduly harshly penalised for electricity self-reconnection offences. The court cannot purport to act in complete oblivion of the real circumstances that some of the disadvantaged elderly find themselves or with complete disregard to the different facets of possible interventions by the State in promoting rights of the elderly. Where needy elderly people are involved in cases of self-reconnections, one role that the criminal courts can play is to ensure that nominal, rather than punitive, sentences are imposed, if they must, only by way of discouraging wanton breaking of the law. The sentence on the second count should be reduced to one of 3 months' imprisonment, wholly suspended.

Criminal procedure – private prosecution – who may prosecute – company which has suffered loss – may bring private prosecution – right not restricted to natural persons – Attorney-General's certificate of *nolle prosequi* – grounds on which such certificate may be withheld – not entitled to withhold certificate where applicant has shown a substantial and peculiar interest in the issue, and attendant criteria

Telecel Zimbabwe (Pvt) Ltd v *A-G* S-1-14 (Patel JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 28 January 2014)

The appellant, a private company, discovered a potentially massive fraud perpetrated against it by certain of its employees. The respondent later withdrew the charges against all the four accused persons before plea, on the grounds that there was insufficient evidence. The appellant decided to mount a private prosecution. However, the respondent refused to issue a certificate of *nolle prosequi*, also on the grounds that there was insufficient evidence. The appellant then applied to the High Court on review for that decision to be set aside as being both unlawful and grossly irrational. The High Court held that a company, as distinct from a private individual, had no *locus standi* to institute a private prosecution. In so doing, the court relied largely on a South African Appellate Division decision. That decision was based on the wording of the South African Criminal Procedure Act 1977, which gave the right to institute private prosecutions to "private persons". The Appellate Division held that this phrase meant "natural persons". Accordingly, the court decided that it was not necessary to determine the further question as to the respondent's discretion to withhold his certificate.

Held: (1) historically, the system of criminal procedure that prevailed in England was predominantly one of private prosecutions. No public official was designated as a public prosecutor, either locally or nationally. In essence, private citizens were responsible for preserving the peace and maintaining law and order. The Prosecution of Offences Act 1879 first introduced the office of Director of Public prosecutions. However, this Act did not fundamentally undermine private prosecutions, because public prosecutors enjoyed very limited authority. The successor Act of 1908 did not substantially increase the powers of public prosecutors. It was only with the enactment of the Prosecution of Offences Act 1985 that England established an effective system of public prosecution through the Crown Prosecution Service. Even then, this Act continued to preserve a limited right of private prosecution.

In the Cape of Good Hope (whose legal system was adopted here), the Roman-Dutch law of criminal procedure and evidence remained in force until the early 19th century. Following various alterations to the structure of the courts in the Cape, this adjectival law was radically anglicised in 1828 and 1830 to form the foundations of our modern law. As regards the institution of prosecutions, the British Government accepted that the conditions prevailing in the Cape did not permit the unmodified adoption of the English system of private prosecution. The right of prosecution was vested in the Attorney-General but, where he declined to prosecute, a private individual might prosecute in respect of an injury to himself or to someone under his care. In principle, therefore, the law governing private prosecutions, both in Zimbabwe and in South Africa, does not originate in the Roman-Dutch law but is derived from the English common law.

(2) The right of private prosecution originates in the reparation of individual injuries and the vindication of individual as opposed to corporate rights. The interests that the right to prosecute is conceived to safeguard are manifold. They are certainly not confined to purely pecuniary loss or the kind of injury that might ordinarily be sustained by corporate entities in the normal course of their business. Permission to prosecute in such circumstances was conceived as a kind of safety-valve. An action for damages may be futile against a man of straw and a private prosecution affords a way of vindicating imponderable interests which cannot be expressed

in monetary terms. The vindication is real: it consoles the victim of the wrong; it protects the imponderable interests involved by the deterrent effect of punishment and it sets at naught the inroad into such inalienable rights by effecting ethical retribution. Finally it effects atonement, which is a social desideratum.
(3) Although the South African Criminal Procedure Act and the Zimbabwean Criminal Procedure and Evidence Act [*Chapter 9:07*] has similarities on the issue of private prosecutions, the most fundamental distinction between the two statutes was the usage of "private person" in the South African Act as contrasted with the references to "private party" in the CP&E Act. A "person", in law, meant "a human being (*natural person*) or body corporate or corporation (*artificial person*), having rights or duties recognised by law". Again, in the legal context, the word "party" meant "each of two or more persons (or bodies of people) that constitute the two sides in an action at law, a contract, etc." While some of the phraseology employed in s 13 of the CP&E Act – in particular, the reference to "some injury which he individually has suffered" – strongly supported the proposition that the right to prosecute is confined to natural as opposed to artificial persons, the references to "public bodies and persons" and "public body or person", in ss 14 and 16 respectively, suggest otherwise. The definition in s 12 of "private party" was plainly tautologous and unhelpful, but in s 2 of the Act and in s 3(3) of the Interpretation Act [*Chapter 1:01*] "person" includes companies.
(4) It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion. The English common law right of private prosecution was not confined to natural persons but extended as well to juristic and artificial entities. That common law right migrated to the Cape Colony and remained intact until 10 June 1891, at which stage it became an integral part of our law (*cf* s 89 of the former Constitution). The provisions of Part III of the CP&E Act should be construed, insofar as is consistent with their language and context, so as to preserve the common law components of the right to prosecute rather than to diminish or extinguish them. In these provisions there was no clear or positive legislative intention to alter pre-existing rights or to constrict the common law position relative to corporations. This interpretation was fortified by the reality that a company is in essence an association of persons and therefore should, albeit subject to its obvious physical limitations, enjoy the same rights and privileges as the individual members comprising it, including the right of prosecution. Accordingly, the right of private prosecution conferred by s 13 vests in natural as well as artificial persons, including private corporations.
(5) The mere possession of the Attorney-General's certificate of *nolle prosequi* does not in itself confer an absolute right of private prosecution. The other requirements must still be met. If they are not, the court will interdict the person proposing to prosecute privately. The court may also, in the exercise of its inherent power to prevent abuse of process, interdict a private prosecution pursuant to such certificate.
(6) The exercise by the Attorney-General of his discretion *vis-à-vis* any intended private prosecution involves a two-stage process. The first stage is for him to decide whether or not to prosecute at the public instance. If he declines to do so, the next stage comes into play, *i.e.* to decide whether or not to grant the requisite certificate. In so doing, he must take into account all the relevant factors prescribed in s 13 of the Act, namely, whether the private party in question "can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence". If he cannot show any such interest, the Attorney-General is entitled to refuse to issue the necessary certificate. However, where the private party is able to demonstrate the required "substantial and peculiar interest" and attendant criteria, the Attorney-General is then bound to grant the certificate. At that stage, his obligation to do so becomes peremptory.
(7) While the Attorney-General's decision not to prosecute at the public instance was not reviewable, it deciding not to issue his certificate, he failed to exercise his statutory powers on a proper legal footing. Having declined to prosecute at the public instance, he should have considered whether or not the appellant satisfied the "substantial and peculiar interest" requirement of s 13 of the Act. He did not do so but proceeded to decline his certificate *nolle prosequi* on the basis that there was insufficient evidence to prosecute. In so doing, he was guilty of an error of law by purporting to exercise a power which in law he did not possess.

Editor's note: decision of Hlatshwayo J (as he then was) in *Telecel Zimbabwe (Pvt) Ltd* v *A-G* 2011 (2) ZLR 310 (H) reversed.

Criminal procedure – trial – judgment – what judgment should contain – need for reasons for decision to be stated and to be clear – failure to give reasons an irregularity – review – request for magistrate to give detailed reasons for conviction – magistrate's duty to comply with such request

S v *Maimba* HH-293-14 (Mawadze J) (Judgment delivered 5 June 2014)

Unless reasons are given for a judgment, it is impossible to determine how the ultimate conclusion was reached and whether it was reached on a proper reasoned basis. The need for this is clear. The trial court cannot just make arbitrary decisions based on mere caprice, whim or casting of lots. A clear thought process, based on evidence adduced, should be evident. A judgment must be reasoned and the reasons for reaching a verdict must not only be stated but clear. Failure to give reasons for judgment is a gross irregularity. What is required is a complete and meaningful judgment touching all material evidence led during the trial. Magistrates should always bear in mind that in criminal trials the giving of reasons for conviction is a very important part of the trial, the purpose of which is to avoid creating the impression that the decision is arbitrary or capricious. For a magistrate not to record what he considered amounts to gross irregularity, which will usually result in a conviction being set aside on appeal or review, although the conviction may still be upheld if the evidence on record supports it.
It would be disingenuous for a trial magistrate, when asked by a reviewing judge to provide detailed reasons for the conviction, to suggest that he had been asked to manufacture another judgment or that he could not comply because he was *functus officio*. The purpose for criminal review is to assess if proceedings are in accordance with real and substantial justice. The judge cannot properly discharge that function where meaningless judgments, devoid of any analysis or assessment of evidence on record, are routinely conveyed to judges who are then expected not to only read the evidence on record but to analyse it as well.

Criminal procedure (sentence) – general principles – factors affecting – age of accused – persons aged over 70 – State's duty of care towards the elderly – need to ensure that elderly not unduly penalised for offences arising out of economic hardships

S v *Dzotizei* HH-126-14 (Tsanga J) (Judgment delivered 6 March 2014)

See above, under CRIMINAL LAW (Statutory offences).

Criminal procedure (sentence) – statutory offences – making false statement in affidavit – statute providing for fine or imprisonment or both – misdirection to impose sentence of imprisonment without considering fine first – trivial lie which was irrelevant to matter in respect of which affidavit made – imprisonment inappropriate

S v *Zuwa* HH-10-14 (Mathonsi J) (Judgment delivered 15 January 2014)

The accused, a 38 year old single mother of five, was charged with lying under oath in contravention of the Justices of the Peace and Commissioners of Oath Act [*Chapter 7:09*]. The false statement was contained in an affidavit she had filed in support of an application for increased maintenance from the father of one of her children. She said the increase was necessary because of the fees at the school to which she wanted to send the child, and that she was sending the child there because two of her other children were going to a comparable private school, which she named. In fact, they were attending a different private school.
Section 10(1) of the Act provides for a sentence of a fine not exceeding level 7, or imprisonment for a period of up to 2 years, or both. The magistrate sentenced the accused to 15 months' imprisonment, of which 6 months was suspended for 5 years on condition of future good behaviour.
Held: Where a statute provides for a penalty of a fine or imprisonment, it is a misdirection on the part of the sentencing court to impose imprisonment without giving serious consideration to a fine, particularly on a first offender. Other than saying that a fine would trivialise the offence – an offence which was trivial anyway – the trial court did not explain why it was departing from the sentencing policy propounded in numerous authorities. Even if one has regard to the circumstances of the offence, there is no way the matter qualified for the imposition of imprisonment. The untruth about what school the other children were attending would not have influenced the maintenance court at all, because consideration of the application for variation hinged on the changed circumstances of the first child and the ability of the father to pay. A small fine or a wholly suspended sentence would have met the justice of the case.

Criminal procedure (sentence) – statutory offences – offence for which mandatory minimum sentence provided unless special circumstances shown – need for court to make specific enquiry into whether such circumstances exist

S v *Makoni* HH-11-14 (Mathonsi J) (Judgment delivered 15 January 2014)

In our jurisdiction, the legislature regularly prescribes minimum sentences for particular offences where it is of the view that deterrent punishment is called for because of the prevalence of the offence or its effect on society. By doing so, the legislature would be interfering with the normal sentencing discretion of the courts. In light of that, in order to balance the harshness of the sentence, the legislature usually adds a rider that the mandatory sentence does not have to be imposed where there are "special reasons" or "special circumstances" which justify a lesser sentence. It is therefore imperative that magistrates understand clearly what special circumstances are in respect of mandatory sentences and that they also appreciate how they affect our sentencing jurisprudence. This is because they are enjoined to explain to unrepresented accused persons what special circumstances are and that if the accused person is able to show their existence they will avoid the rigours of a mandatory minimum sentence. It would be disingenuous for the magistrate to say he inquired into special circumstances by merely asking the accused why he committed the offence. The court would not be entitled to impute the non-existence of special circumstances from the answer given to a question which was not inquiring into special circumstances.

Criminal procedure (sentence) – suspended sentence – sentence suspended on condition of payment of restitution – appeal noted – need for accused to apply for restitution to be suspended pending appeal – failure to pay restitution – options open to court

S v *Chauke* HH-163-14 (Tagu J) (Judgment delivered 19 March 2014)

The accused was convicted of theft and sentenced to a term of imprisonment, wholly suspended on condition that he repaid the sum stolen by a stipulated date. He noted an appeal against the conviction. He failed to pay restitution as required and was brought before the magistrate. It was argued on behalf of the accused that argued that he was not in wilful default because he had noted an appeal to the High Court and thought that the payment of restitution had been automatically suspended. The magistrate held that the accused should have approached the court and make an application to have the court order set aside pending appeal. He ordered that the accused should serve the sentence that had been suspended. A few weeks after the accused had started serving his sentence, his counsel filed a court application for postponement of the sentence and suspension of the payment of restitution in terms of s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The magistrate acceded to this request, extended the time for repayment for just over six months and ordered the accused's liberation. On review at the instigation of the complainant:
Held: in terms of s 358(7) of the Act, the magistrate had two options when the accused was brought before him, not having complied with the conditions of suspension: the first was to commit accused to undergo the sentence which was passed at the end of the trial; the second was to further suspend the sentence for a period not exceeding five years. The magistrate chose the first option. Having done so, he became *functus officio*. The application for further postponement was not proper. It should have been made at the time of the hearing of the default or soon thereafter when the magistrate made his intentions known that he wanted to send him to prison. The decision made was tantamount to the magistrate reviewing his earlier order. The order he subsequently made was therefore incompetent. However, because the matter was the subject of an appeal, it was competent for the High Court, in the exercise of its review powers, to order that the order for restitution be suspended until the appeal was determined.

Customary law – family law – husband and wife – unregistered customary law marriage – when regarded as marriage in law – such marriage not invalidating will executed before marriage

Magedi & Anor v *Samuriwo & Ors* HH-184-14 (Mawadze J) (Judgment delivered 8 May 2014)

See below, under WILL (Validity).

Damages – delictual – assessment – *actio injuriarum* – unlawful arrest and detention – need for exemplary and punitive damages – factors to be considered

Mavhiza & Anor v *Muwambwi & Anor* HH-247-14 (Zhou J) (Judgment delivered 21 May 2014)

The plaintiffs, officers of the Zimbabwe National Water Authority, went to the Zimbabwe Republic Police camp at Chirundu to disconnect water supplies owing to unpaid water charges. They discovered the following day that the water had been reconnected. Having advised their superiors in Harare about the unauthorised reconnections, the plaintiffs were instructed to remove the water meters and plug the pipes so that the water supplies would be disconnected. They did that. A day later they were taken to Chirundu police station where they were kept from about 9 am up to about 4.30 pm, when they were released after they had reinstated the meter and restored the water supply to the police station. While at the police station, they were ordered to sit on a bench behind the counter in the charge office. They were ordered to remove their shoes and to switch off their mobile phones. They had to seek leave to be allowed to ask someone to bring food for them, which they only ate late in the afternoon.

They brought an action for damages for unlawful arrest and detention against the first and second defendants, the responsible officers, and against the responsible Ministers.

Held: (1) on the facts, the delict of unlawful arrest and detention had been established.

(2) An action for unlawful arrest and detention is one that falls under the *actio injuriurum*, and so proof of actual damage is not necessary to support such an action. Even if no pecuniary damage has been suffered, the court will not award a contemptuous figure for the infringement of the right to liberty. Damages for unlawful arrest and detention should be exemplary and punitive in order to deter would-be offenders. The factors to be considered include: the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or "malice" on the part of the defendant; the harsh conduct of the defendants; the duration and nature (e.g. solitary confinement) of the deprivation of liberty; the status, standing, age, and health of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that, in addition to physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to physical liberty; the effects of inflation and the fact that the *actio injuriurum* also has a punitive function. Here, the plaintiffs were not handcuffed, and were allowed to sit on a bench at the police station. They spent eight hours but that was during the day. However, they were deprived of their liberty in circumstances where they had removed the meter in question in the honest performance of their work. There was an abuse by the defendants of their positions to obtain a reconnection of water by arresting and detaining the plaintiffs. An improper motive or malice was clearly established. The fact that the plaintiffs were ordered to remove their shoes amounted to inhuman and degrading treatment. The plaintiffs were ordered to switch off their mobile phones and were denied food at the appropriate time. Damages of US$5 000 for the deprivation of liberty and $1 000 for *contumelia* for each of the plaintiffs would be appropriate.

Damages – delictual – assessment – loss resulting from unwanted pregnancy – losses for which compensation payable

Mapingure v *Min of Home Affairs & Ors* S-22-14 (Patel JA, Garwe & Gowora JJA concurring) (Judgment delivered 25 March 2014)

See below, under DELICT (*Actio legis Aquiliae*).

Delict – *actio injuriarum* – defamation – when words may be held to be defamatory – tests – meaning assigned by ordinary reader of publication on question – defences – fair comment – defence not available when allegations do not amount to opinions – damages – aggravating factors – lack of apology – widespread publication through social media and internet – reckless and unethical conduct on part of journalists

Mugwadi v *Dube & Ors* HH-314-14 (Chigumba J) (Judgment delivered 18 June 2014)

The plaintiff brought an action against the defendants for defamation, following the publication of an article about her in a widely circulated newspaper. The article allegedly dealt with drugs and other problems the plaintiff, an entertainer, was having. The article was headlined "Tererai on drugs", above that headline the following statement appeared in bold underlined type: "She has been sexually abused by several musicians to the extent that nobody really cares about her anymore", "she got pregnant and could not pinpoint the father, several possible fathers of the baby were listed in the fiasco". She was described as "the wild child of Zimbabwean music" and was said to have "gone back to her wayward behaviour". Other statements made about her included: "she has been exhibiting signs and symptoms of alcohol and drug abuse", "she has always been struggling to overcome her addiction to mbanje, alcohol and other hard drugs", "troubled Terry", "she cannot

control her urge to get drunk or high", "has a history of wild behaviour", "…the heartbreak she suffered when she broke up with Liberty has seen her relapse", "we have to raise funds to check her into a private rehabilitation centre", "she is now exposed to several other dangers like sexual abuse", "sometimes goes for days hopping from one friend's place to another", "I think she is losing her marbles", "she was still wearing the same clothes she had been donning the previous night at a local nightclub".

Held: (1) When one's good name and standing is harmed, by lowering the estimation in which it was held by ordinary people, in the course of a publication, then one has been defamed. The law is now settled that where the words are alleged to convey a meaning that is *per ser* defamatory, it is the duty of the court to determine the ordinary meaning of the words – in other words the meaning which an ordinary or reasonable reader would attribute to the words.

(2) The three stage approach in determining whether the words complained of are defamatory is as follows: (a) consider whether the words as specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning alleged is within the ordinary meaning of the words; (b) assess whether that is the meaning according to which the words would probably be reasonably understood, and (c) decide whether the meaning identified is defamatory.

(3) The ordinary meaning of the words complained of was that the plaintiff had a problem with drugs, which led to her being sexually abused to such an extent that she was now regarded as a person of loose morals, who has no qualms about indulging in sexual intercourse with multiple partners, leading to her being unable to tell who fathered her baby. There could be no doubt that a statement which imputes that a person takes drugs, which is a crime, and has loose morals, is defamatory. Similarly, describing a person as "wild" is tantamount to imputing negative qualities to that person's behaviour. It implies behaviour which is unacceptable in polite company. It is clearly capable of being defamatory within the ordinary meaning of those words. Again, calling the plaintiff an "addict" to drugs and alcohol is capable of being defamatory, the normal and ordinary meaning of the word addict depicting negative behaviour, which is repeated despite adverse consequences, and implies the need for others to intervene in order to save the addict from herself. Finally, words which imply that the plaintiff cannot help herself, that she loves drinking and taking drugs and going to nightclubs, that she is a vagabond who doesn't care where she sleeps, and that she has no one to take care of her are capable of defaming the plaintiff.

(4) In determining how an ordinary reader of the newspaper in question would understand the words, it is necessary to strike a balance between subtle analysis and hasty misconception, between cool reserve and excitability. One is entitled to assume of the ordinary reasonable reader that he gets a general impression and one can expect him to look again before coming to a conclusion and acting upon it. The ordinary reasonable reader is not super-intelligent, highly educated or sophisticated. At first glance, such a reader would immediately become aware that the article was a "from grace to grass" story about the plaintiff, who was healthy and robust and lively during her sober days, but was now allegedly shabby, unkempt, disoriented, and addicted to alcohol, *mbanje* and other hard core drugs, and the situation had deteriorated to such an extent that she was now pitiful, and had been sexually abused by her fellow musicians. After formulating this general impression, bolstered by the before and after photographs that accompanied the article, our ordinary reader of average intelligence and average education would have his attention drawn to the statement that the plaintiff was the wild child of Zimbabwean music who was now unable to control her urge to get drunk or high, and who was now a prostitute and a vagabond, who had run away from home and had no one to take care of her, who could not even identify the father of her child, such that an association of young musicians like her, had taken pity on her and was in the process of raising money to check her into a rehabilitation centre.

(5) The final step was to determine whether the meaning assigned by the ordinary reader to the article was one calculated to bring the plaintiff into contempt and undue ridicule, or to diminish the willingness of others to associate with her, or to lower her in the esteem of right thinking or reasonable members of society generally. The inescapable inference alluded to by the article was that the plaintiff was now a spent force, unable to function, an object to be pitied, and ridiculed. The article was calculated to make reasonable members of society loath to associate with the plaintiff.

(6) With regard to defence of justification, the question of plaintiff's moral probity was a matter of public interest. However, where there is evidence that such a defendant was motivated by malice, the defence cannot shield him from a plaintiff who has discharged the onus of proving *animus inuriandi.* The contents of the article exceeded the bounds of privilege because it was based on fabrications. Not only was the article untrue, it was not for the public benefit, it was unsubstantiated and unfounded, and it was calculated to bring plaintiff into disrepute.

The defence of fair comment was also unavailable, because most of the allegations in question did not amount to opinions. The article was unfair to the plaintiff in its implication that she needed rehabilitation to wean her off from alcohol and other drugs, when it had not been proven as a fact that she was actually addicted to these substances, other than by virtue of having been seen at nightclubs.

(7) On the question of damages, the content and the nature of the defamatory publication were sensational and scandalous and largely untrue. The consequences of the defamation touched the plaintiff, whose musical career

has now stagnated. She had become a recluse; she was ridiculed in public at the supermarket and while using public transport, her fans expressed disappointment, and family and friends all felt that they had been brought into disrepute by the contents of the article. Her son had been named as fatherless, and her husband and his family were tainted by their association with her after the article was published. Finally, despite being invited to do so, neither the first nor the third defendants apologized to the plaintiff. This would have mitigated damages. The conduct of both the first and the third defendants was unethical, deplorable, and unconscionable and motivated by malice. The publication was reckless because basic journalistic principles were ignored. In order to keep up with current trends, the court should seriously consider the effect that social media like Facebook, WhatsApp, Twitter and Instagram now has on the extent of the publication, for purposes of assessing the quantum of damages. There was evidence in this case that people as far away as America and the United Kingdom read the article almost at the same time as the plaintiff's family did, because the newspaper was now published online. An award of USD10 000 would be appropriate.

Delict – *actio injuriarum* – malicious institution of legal proceedings – elements – distinction from wrongful arrest – when person making report to police may be liable for wrongful arrest

Zuvarimwe & Anor v *Naran & Anor* HH-161-14 (Dube J) (Judgment delivered 2 April 2014)

The delict of wrongful arrest involves the wrongful deprivation of a person's liberty; it consists of arresting and holding a person without legal justification. Where an arrest is effected by the police, a defendant is only liable if it can be established that the police acted on his directions, orders or command. Liability for wrongful arrest is strict: a party is not required to show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. To succeed in an action based on wrongful arrest, the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty. Where the defendant merely furnishes the police with information on the strength of which the latter decides to arrest the plaintiff, the defendant does not effect the arrest. The first defendant admits that he furnished the police with information leading to the defendant's arrest. If the arrest was not unlawful, the defendant cannot be liable for wrongful arrest and deprivation of liberty, as the discretion lay with the police whether to arrest the plaintiffs.

To succeed in an action for malicious prosecution, on the other hand, the plaintiff must show: (a) that the defendant set the law in motion (instigated or instituted the prosecution) against him; (b) that at the time he instigated or instituted the legal proceedings the defendant had no reasonable and probable cause to do so; (c) that the defendant was actuated by express or implied malice (any indirect and improper motive) to set the law in motion against him; (d) that the prosecution terminated in his favour; and (e) that he suffered damages as a result of the prosecution.

In determining whether the defendant had a reasonable suspicion that the offence complained of was committed by the plaintiff, the court must consider whether the defendant acted as an honest man would act; not merely on wild suspicion, but on suspicion which had a reasonable basis. The suspicion need not be a matter of certainty, or even probability, it must not, at the other extreme, be vague, remote or tenuous. It is, perhaps, a question of a feasible possibility, a matter of likelihood.

Delict – *actio injuriarum* – malicious institution of legal proceedings – elements – making report to police – when making report might constitute malicious institution of proceedings – merely placing information or facts before police not sufficient – not necessary that police or parent Ministry be cited as parties

Munukwi v *Tsanga* HH-113-14 (Chigumba J) (Judgment delivered 12 March 2014)

The malicious institution of legal proceedings, as a cause of action, differs from unlawful arrest and detention. The requirements and elements are different, and it is not necessary, for purposes of a cause of action founded on malicious institution of legal proceedings, that either the police, or the parent Ministry of Home Affairs, be cited as parties to the proceedings. The cause of action is applicable to malicious institution of civil proceedings, and is not confined to malicious institution of criminal proceedings.

The plaintiff must allege and prove that the defendant instituted the proceedings, that the defendant actually instigated or instituted them. The mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient. The test is whether the defendant did more than tell the police the facts and leave them to act on their own judgment. Inherent in the concept of "setting the law in motion" or "instigating or instituting the proceedings", is the causing of a certain result, i.e. a prosecution, which involves the vexed question of causality. This is especially a problem where, as in most instances, the necessary formal

steps to set the law in motion have been taken by the police and it is sought to hold someone else responsible for the prosecution. 'The principle is that where the defendant acts in such a way that a reasonable person would conclude that he is acting clearly with a specific view to a prosecution of the plaintiff and such prosecution is the direct consequence of that action, the defendant is responsible for the prosecution. Similarly, an informer who makes a statement to the police which is wilfully false in a material respect instigates a prosecution and may be personally liable.
The plaintiff must allege and prove that the defendant instituted the proceedings without reasonable or probable cause, which means an honest belief, founded on reasonable grounds, that the institution of proceedings is justified. The concept involves an objective and a subjective element.
This cause of action cannot be used to prejudge the reasonableness of the proceedings that form the subject of the complaint, so the plaintiff must allege and prove that the proceedings were terminated in his favour.

Delict – *actio legis Aquiliae* – liability – omissions – when omissions or failure to act may give rise to liability – police – when duty to protect and assist arises – victim of rape – duty to assist victim to prevent pregnancy arising from rape – negligence – professional negligence – medical practitioner – when may be held liable – failure without good reason to administer drug to prevent pregnancy following rape – practitioner liable for consequent pregnancy

Mapingure v *Min of Home Affairs & Ors* S-22-14 (Patel JA, Garwe & Gowora JJA concurring) (Judgment delivered 25 March 2014)

The appellant was raped by robbers at her home. She immediately lodged a report with the police and requested that she be taken to a doctor to be given medication to prevent pregnancy and any sexually transmitted infection. Later that day, she was taken to hospital and attended to by a doctor. She repeated her request, but the doctor only treated her for an injured knee. He said that he could only attend to her request for preventive medication in the presence of a police officer and that the medication had to be administered within 72 hours of the sexual intercourse having occurred. She went to the police station the following day and was advised that the officer who dealt with her case was not available. She then returned to the hospital, but the doctor insisted that he could only treat her if a police report was made available. Three days after the rape, she attended the hospital with another police officer. At that stage, the doctor informed her that he could not treat her as the prescribed 72 hours had already elapsed. Eventually, a month after the rape, the appellant's pregnancy was formally confirmed.
Thereafter, the appellant went to see the investigating police officer who referred her to a public prosecutor. She told the prosecutor that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. Four months after the rape, acting on the direction of the police, she returned to the prosecutor's office and was advised that she required a pregnancy termination order. The prosecutor then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate nearly six months after the rape, but the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure and declined to do so. Eventually, after the full term of her pregnancy, the appellant gave birth to her child.
The applicant brought an action against the Ministers of Home Affairs, Health and Justice for damages for physical and mental pain, anguish and stress suffered and for maintenance for the child until the child turned 18. The basis of the claim was that the employees of the three Ministries concerned were negligent in their failure to prevent the pregnancy or to expedite its termination. The particulars of negligence were itemised. Her claim was dismissed.
The questions for determination on appeal were whether or not the respondents' employees were negligent in the manner in which they dealt with the appellant's predicament; and if they were, whether the appellant suffered any actionable harm as a result of such negligence and, if so, whether the respondents were liable to the appellant in damages for pain and suffering and for the maintenance of her child.
Held: (1) in respect of the doctor, the principles of Aquilian liability for medical negligence can be summarised thus: *culpa* arises if (a) a reasonable person in the position of the defendant (i) would have foreseen harm of the general kind that actually occurred; (ii) would have foreseen the general kind of causal consequence by which that harm occurred; (iii) would have taken steps to guard against it; and (b) the defendant failed to take those steps.
(2) With respect to the liability of the police, in the context of their prescribed functions and duties, there is no general legal duty on a person to prevent harm to another, even if such person could easily prevent such harm, and even if one could expect, on purely moral grounds, that such person act positively to prevent damage. However, in certain circumstances, there is a legal duty on a person to prevent harm to another. If he fails to comply with that duty, there is an unlawful omission which can give rise to a claim for damages. An omission is

regarded as unlawful conduct when the circumstances of the case are such that the omission not only occasions moral indignation but where the legal convictions of the community require that the omission be regarded as unlawful and that the loss suffered be compensated by the person who failed to act positively. When determining unlawfulness, one is not concerned, in any given case of an omission, with the customary "negligence" of the *bonus paterfamilias*, but with the question whether, all facts considered, there was a legal duty to act reasonably. Just as a duty to rescue can sometimes be a legal duty, so a duty to protect may be a legal duty, and it would depend on all the facts whether such duty is a legal duty or not. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect him to have taken positive measures to prevent the harm. In applying the concept of the legal convictions of the community the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the legislature and judges. The duty of the police to act cannot be confined to their statutorily prescribed functions. In any given case, it may be legally incumbent upon them to act outside and beyond their ordinary mandate, so as to aid and assist citizens in need, in matters unrelated to the detection or prevention of crime. Consequently, where such a legal duty is found to exist, and harm that is foreseeable eventuates from the failure to prevent it, the victim of that harm may be entitled to pursue and obtain appropriate compensation through a claim for damages, having regard in every case to considerations of public policy.

(3) It is proper and necessary for national courts, as part of the judicial process, to have regard to the country's international obligations, whether or not they have been incorporated into domestic law. By the same token, it is perfectly proper in the construction of municipal statutes to take into account the prevailing international human rights jurisprudence. In the present context, relevant international instruments include the Convention on the Elimination of All Forms of Discrimination against Women 1979, ratified by Zimbabwe on 13 May 1991; article 4 of the United Nations Declaration on the Elimination of Violence against Women 1993, which provides that women who are subjected to violence "should be provided with access to the mechanisms of justice and … just and effective remedies for the harm that they have suffered" as well as information on "their rights in seeking redress through such mechanisms"; and articles 4 and 14 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2003.

(4) Notwithstanding what might be accepted as the ordinary functions of the police, the inaction of the police in this case could not be treated in isolation. It had to be seen in conjunction with the conduct of the doctor who treated the appellant after she was raped. The doctor declined to administer the preventive medication requested by the appellant without a police report. When a police officer eventually accompanied the appellant to the hospital, the doctor again refused to administer the drug because 72 hours had already elapsed since the occurrence of the sexual intercourse. There was nothing in the record to show why the doctor insisted on a police report or why he regarded the period of 72 hours as being critical. The only recourse available to the appellant, at the relevant time and in the prevailing circumstances, was the medication that could and should have been administered by the doctor himself.

(5) There was a professional relationship between the appellant and the doctor. His duties required him to attend to all the physical injuries arising from the sexual assault inflicted upon her. Consequently, he was under a special duty to be careful and accurate in everything that he did and said pertaining to his relationship with her. He should have exercised that level of skill and diligence possessed and exercised at the time by the members of his profession. A reasonable person in his position would have foreseen that his failure to administer the contraceptive drug, or his failure to advise the appellant on the alternative means of accessing that drug, would probably result in her falling pregnant. He should have taken reasonable steps to guard against that probability. However, despite the appellant's quandary and persistent pleas for treatment, he stubbornly failed to take any steps to mitigate her condition.

(6) The situation before the police was that of a victim of sexual violence requiring their urgent assistance. They were called upon either to compile a report on the assault or to accompany the appellant to the doctor within a specified period. The circumstances were such as to create a legal duty on the part of the police to assist the appellant in her efforts to prevent her pregnancy. They failed to comply with that duty, which they could have done with relative ease. Their inaction amounted to unlawful conduct by reason of their omission to act positively in the circumstances before them. They were under a legal duty to act reasonably and they dismally failed to do so.

(7) Although the originating cause of the appellant's pregnancy was the rape, its proximate cause was the negligent failure to administer the necessary preventive medication timeously. But for that failure, the appellant would not have fallen pregnant. The police and the doctor failed in their duties. These unlawful omissions took place within the course and scope of their employment with the first and second respondents respectively, who must be held vicariously liable to compensate the appellant in respect of the harm occasioned through the failure to prevent her pregnancy.

(8) In terms of ss 4 and 5 of the Termination of Pregnancy Act [*Chapter 15:10*] permission for the termination of pregnancy pursuant to unlawful intercourse may only be granted by the superintendent of a designated institution. The precondition for that permission is the production of a certificate from a magistrate within the same jurisdiction. The issuance of a magisterial certificate is preceded by a complaint having been lodged with the authorities and the submission of relevant documents by those authorities. The term "authorities" is not defined in the Act but, in the context of unlawful intercourse, *i.e.* rape or incest, it would ordinarily apply to mean the police authorities. The critical question was whether the responsibility for instituting proceedings in the magistrates court lies with the relevant authorities or the victim of the alleged unlawful intercourse. On a correct reading of the Act and the case law, the victim of the alleged rape must depose to an affidavit or make a statement under oath *in addition* to being present for possible interrogation by the magistrate. Given the *ex parte* nature of the procedure, an affidavit on its own may not always suffice to enable the magistrate to make the necessary determination, on a balance of probabilities, that the applicant was raped and that her pregnancy resulted therefrom. However, the applicant's affidavit or statement under oath is essential and required in every case, whether or not the magistrate decides to examine the applicant or any other person as he may deem necessary. It is the responsibility of the victim of the alleged rape to institute proceedings for the issuance of a magisterial certificate allowing the termination of her pregnancy. The role of the police and the prosecutor, upon request by the victim or in response to a directive by the magistrate, is to compile the relevant reports and documentation pertaining to the rape for submission to the magistrate. The role of the magistrate is to issue the requisite certificate upon being duly satisfied in terms of s 5(4), while that of the superintendent of the designated institution is to authorise its medical practitioner, upon production of the certificate, to terminate the unwanted pregnancy.
(9) Even on the broadest interpretation of the Act, taken as a whole, it is not within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy. It was for the appellant to have sought that advice *aliunde*, as soon as possible after she became aware of her pregnancy. The prosecutors and magistrate could not be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate.
(10) With regard to the claim for damages for pain and suffering and maintenance, having regard to the broad principles of delictual liability, there was no conceptual limitation to allowing a claim in general damages for foreseeable harm that eventuates from an unwanted pregnancy. Such a pregnancy could, depending on the circumstances of its occurrence, constitute actionable harm. Accordingly, the appellant was entitled to proven general damages arising from the failure to prevent her pregnancy. Similarly, there could be no objection in principle to a claim for delictual damages flowing from an unwanted pregnancy. This would apply not only to the costs of confinement and the physical pain of delivery but also to the expense of maintaining the child until it becomes self-supporting. However, because the responsibility for taking steps to terminate her pregnancy fell squarely upon the appellant's shoulders and the capacity to do so also lay within her hands, the respondents could not be called to account for any subsequent pain and suffering endured by the appellant, whether arising from her continued pregnancy or the delivery of her child or the period thereafter. The appellant's claim for damages must be limited to the period between the date of her rape and the date of confirmation of her pregnancy. The matter would be remitted to the trial court for assessment of the damages to which the appellant was entitled.

Editor's note: the judgment appealed against was *Mapingure* v *Min of Home Affairs & Ors* HH-452-12, a judgment of Bere J, delivered 12 December 2012 (to be reported in 2012 (2) ZLR).

Election – application – court in which such application should be heard – Electoral Court having exclusive jurisdiction

Chiokoyo v *Ndlovu & Ors* HH-321-14 (Uchena J) (Judgment delivered 12 April 2014)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – interpretation).

Election – election petition – form of petition – must comply strictly with statutory requirements – must state allegations with precision – petition containing vague and general allegations cannot be referred to trial

Moyo v *Nkomo (Tsholotsho North Election Petition)* HB-8-14 (Makonese J) (Judgment delivered 31 January 2014)

The law governing the manner and grounds on which an election may be set aside is to be founded in statute. The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statues which create, confer, or limit those rights. Therefore, in deciding whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing the election. They have to function within the framework of that law and cannot travel beyond it.
The express provisions of the law allow a petitioner to lodge a petition in terms of the laid down procedure. The procedure for the filing and determination of electoral petitions is laid down by the Electoral Act and the Electoral Rules, 1995. An election petition shall be generally in the form of a court application and shall state the grounds relied on to sustain the petition and the relief sought. Whilst it may be convenient for a petitioner to present a petition with brief grounds set out in what the petitioner refers to as the "notice", accompanied by an affidavit and other supporting documents, this is not the format prescribed by statute.
Even if such an affidavit could be accepted, the allegations in it must be precise. Vague and general allegations are not sufficient.
Where the grounds upon which the petition is to be sustained are vague and imprecise, the court cannot cure such defect by referring the matter to trial, as to do so would amount to a fishing expedition.

Elections – special early voting for members of disciplined forces – date set for such voting – substantial proportion of such members unable to do vote for various logistical reasons – Electoral Commission entitled to authorise such persons to vote on date of general election

ZEC & Anor v *Commr-General ZRP & Ors* CC-3-14 (Ziyambi JA, Chidyausiku CJ, Malaba DCJ, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, Patel JA & Chiweshe AJA concirring) (Judgment delivered 26 March 2014)

When the date for the 2013 general election was set, the Electoral Commission was enjoined to set aside two days, at least two weeks earlier than the general election itself, for the holding of the special voting process provided for in Part XIVA of the Electoral Act [*Chapter 2:18*]. This was to enable members of the disciplined forces to cast their votes. Due to certain logistical constraints, the Commission was unable to post the requisite ballot paper to each successful special voter within the time frame fixed for the special vote with the result that 41.3% of the successful applicants for the special vote were unable to cast their special votes. The Commission then advised that those who had not been able to cast their special votes would be able to vote in the general elections on the normal polling day. Objections were raised by the principal opposition party, that s 81B(2) of the Act did not allow for a person authorized to cast a special vote to vote in any other way. The Commission brought an application before the Constitutional Court, arguing that to apply s 81B(2) would deprive those voters of their constitutional right to vote.
Held: While s 81B(2) did so stipulate, the effect would on the face of it be that the special voters in question would be denied their constitutional right to vote, a right given by s 67(3) of the Constitution. The presumption of constitutionality is to the effect that every statute is presumed to be constitutional, that is to say, the legislature is presumed to have acted within the parameters of the Constitution. Where a provision in a statute is capable of two possible interpretations, one contrary to the Constitution and the other in keeping therewith, the court must adopt the meaning which will give effect to the Constitution. Although no challenge had been raised as to the constitutionality of s 81B(2), the need to ascertain the meaning of the provision arose because of the apparent conflict with the Constitution. The interpretation of the section advanced by the respondents, if adopted, would amount to a violation of the constitutional right of the special voters to vote in the general election.
The cardinal rule of interpretation of statutes requires that the words of a statute must be given their ordinary, literal and grammatical meaning. However, where to do so would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other considerations as the court is justified in taking into account, then the court may depart from the ordinary meaning of the words. The right to vote is absolute and no derogation therefrom is provided for by the Constitution. The court must proceed from the premise that Parliament intended to act constitutionally and, *in casu,* to respect the right of the special voters to vote. It could not have intended to deprive special voters of their right to vote should the necessary measures not be put in place by the State to enable them to cast their special votes on the dates prescribed.
The mischief rule can also be called in aid, the 'mischief' that the Act was designed to remedy being the possibility of double voting by persons authorised to cast a special vote.
Section 81B(2) was predicated upon a situation where all measures necessary to enable successful applicants to cast their special votes had been taken by the responsible agents of the State. It did not envisage a state of affairs, such as here, where the State or Commission failed to put in place the necessary measures to ensure that

the special voters would be able to cast their ballots upon presentation of themselves at the polling station for that purpose. There was therefore no impediment to the grant of the order sought by the Commission, so as to cover only those special voters who failed to vote through no fault of their own.

Employment – arbitrator's award – registration of – appeal against award pending in Labour Court – award may nonetheless be registered – remedies open to party seeking to avoid execution of award

Giya v *Ribi Tiger Trading* HH-57-14 (Chigumba J) (Judgment delivered 19 February 2014)

See above, under ARBITRATION (Award – registration).

Employment – arbitration – award – registration of with High Court – what court must consider before registering award – no enquiry into merits – Labour Court's powers to suspend execution ending appeal

Muronzerei v *Petrol Trade (Pvt) Ltd* HH-95-14 MTshiya J) (Judgment delivered 5 March 2014)

The respondent opposed the registration of an arbitral award, granted in a labour matter, on the grounds that an appeal had been noted and an application for suspension of execution of the award was still pending before the Labour Court.
Held: In an application for registration of an award, the court does not inquire into the merits or otherwise of the award. That is the province of the Labour Court upon an application or appeal being made to that court. Registration of an award is only done for enforcement purposes because the labour structures have no enforcement mechanism. The registration of an award in terms of the Labour Act is a matter of course as long as the award remains enforceable or unsatisfied. The focus should be on whether or not the order or award before the court is lawful, sounds in money, and is still valid and competent. If the award meets these requirements, there is nothing that can militate against its registration. Section 92B(4) of the Labour Act [*Cap 28:01*] gives the Labour Court control of its orders even when they have been registered with the High Court. It can alter or amend it despite registration.

Employment – contract – termination – fixed term contract – legitimate expectation of renewal of contract – when arises – need for employee to have legitimate expectation and for employer to engage another person – contract providing that employee should have no legitimate expectation of further employment – employee bound by such term

Magodora & Ors v *Care Intl Zimbabwe* S-24-14 (Patel JA, Malaba DCJ & Guvava JA concurring) (Judgment delivered 25 March 2014)

The appellants were engaged by the respondent on fixed contracts of 9 months' duration. Before the expiry of the last such contract, the respondent purported to terminate the appellants' contracts of employment 3 months early. The appellants were to be paid one month's pay in lieu of notice. The contracts required the application of retrenchment procedures in the event of premature termination. After taking legal advice, the respondent reconsidered its position and accepted that the early termination may have been unlawful. It cancelled the termination and reinstated the contracts of employment with full pay up to the date the fixed term contracts would have expired without being renewed. The matter was then referred to arbitration. The arbitrator held that the appellants had not been retrenched and that the respondent was entitled to act as it did. On appeal to the Labour Court, the arbitrator's decision was upheld.
The contracts expressly provided that there would be no legitimate expectation of further employment beyond the stipulated date of termination.
On appeal to the Supreme Court, the appellants sought an order declaring them to have been unfairly dismissed and deeming them to be permanent employees on contracts without limit of time and without loss of salary and benefits, reckoned from the time of dismissal. Alternatively, they should be deemed to have been re-employed for a further period of 9 months from the date of dismissal, on the same terms of employment and without loss of salary and benefits. At the hearing of the appeal, the additional claim for the payment of retrenchment packages, in the event of reinstatement not being possible, was abandoned on the basis that such relief was not competent as it was inconsistent with the primary relief sought. It was argued that the repeated renewals of the appellants' contracts changed their status to that of permanent employees. They had a legitimate expectation of permanency or renewal of their contracts on similar terms.

Held: (1) the legitimate expectation provisions of s 12B(3) of the Labour Act [*Chapter 28*:01] only apply where another employee is engaged in place of the employee whose fixed term contract is terminated. The plain meaning of the provision is that the employee on a contract of fixed duration must have had a legitimate expectation of being re-engaged upon its termination *and* that he was supplanted by another person who was engaged in his stead. These requirements are patently conjunctive and the mere existence of an expectation without the concomitant engagement of another employee is not enough. In this case, no one else was employed and the appellants' jobs had effectively been abolished.
(2) The express provisions of the contract indisputably undermined and rendered untenable the appellants' contention of having been unfairly dismissed. They were bound by the express terms that they had agreed to and could not then complain, notwithstanding those terms, that they had a legitimate expectation of being re-engaged. It is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms.
(3) The terms of reference before the arbitrator primarily revolved around the question of retrenchment and the relief sought was that the matter be referred to the Retrenchment Board. The grounds of appeal to the Labour Court were also centred on retrenchment, challenging the arbitrator's decision for having declined the application of retrenchment procedures. On appeal to the Supreme Court, the relief that the appellants sought was completely different from what they sought hitherto. They were effectively inviting the court to sit as a court of first instance and to adjudicate a matter that was not ventilated before or determined by the Labour Court. It would be highly irregular and unfair for an appellate court to assume the jurisdiction of a court of first instance and to pronounce on issues which were properly cognisable in a court of first instance but had not been canvassed before that court. The merits of the primary relief sought by the appellants were never debated or considered by the court *a quo* and, consequently, they could not be entertained or determined by the Supreme Court.

Employment – contract – termination – fixed term contract – legitimate expectation of renewal of contract – such expectation only extending to period following expiry of first contract – no claim to have legitimate expectation of renewals indefinitely

UZ-UCSF Collaborative Research Programme v *Husaiwevhu & Ors* HH-260-14 (Mafusire J) (Judgment delivered 2 June 2014)

The applicant applied on an urgent basis for an order suspending the execution of a writ pending the determination of its application for leave to appeal to the Supreme Court that was pending at the Labour Court. The parties had been involved in protracted litigation for some years. The respondents were former employees of the applicant on fixed term contracts, though even this was in dispute. The respondents claimed the applicant was still to formally and properly terminate their contracts of employment. A dispute had arisen as to whether or not the applicant had terminated the respondents' contracts of employment properly. The dispute had been referred to arbitration. The arbitrator had ruled in favour of the respondents. The ruling had been, among other things, that the respondents' contracts of employment had not been terminated properly; that they had a legitimate expectation that their contracts of employment would be renewed; that those contracts of employment would be deemed to have been automatically renewed on the same terms and conditions and that up to the date of the arbitration the respondents would be deemed to be still employed by the applicant. Following various appeals, the question of quantification was referred to another arbitrator, who ordered the applicant to pay each of the respondents various sums of money per month at rates commensurate with their monthly salaries until the date when their contracts of employment would have been lawfully terminated. After further appeals, a writ of execution was issued and the deputy sheriff attached what the applicant claimed was its entire office furniture.
The applicant then filed the current application. Several points were raised *in limine* by the respondents, the first being that the certificate of urgency had been defective, invalid and therefore inadmissible. The second was that the matter was now *res judicata* in that the same application had been dismissed by the Labour Court. Tied to this submission was the argument that that except for applications for the registration of arbitral awards for enforcement purposes in terms of s 98(14) of the Labour Act [*Chapter 28:01*], the High Court lacked jurisdiction in all other employment matters as they were the preserve of the Labour Court in terms of the Labour Act.
Held: (1) A certificate of urgency in terms of r 244 of the High Court Rules 1971 is a condition precedent to an urgent chamber application being heard on an urgent basis. A legal practitioner, as an officer of the court, certifies the matter to be one of urgency. He does so from an informed position having carefully applied his mind to the matter. Even though the judge dealing with the matter will still decide whether or not the matter is

urgent, he is entitled to rely on the opinion of the legal practitioner who certifies the matter to be one of urgency. It is unethical and an abuse of the privilege bestowed on legal practitioners in this regard for a practitioner to mechanically certify a matter as urgent without having properly applied his minds to the question of urgency. The legal practitioner is required to apply his own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He is not supposed to take verbatim what his client says regarding perceived urgency and put it in the certificate of urgency. Such a practitioner actually risks an adverse order of costs against himself personally. However, the duty of the legal practitioner in this regard does not extend to deciding or assessing the merits of the matter. That is the function of the judge. The legal practitioner who had certified the present matter as being one of urgency had properly applied her mind to the matter. Among other things, she had clearly articulated the grounds upon which her own judgment as to urgency had been predicated.

(2) Section 92B(3) of the Labour Act entitles a party, to whom a decision, order or determination by the Labour Court relates, to register it for enforcement purposes with either the magistrates court or the High Court, depending on the jurisdictional limits. The law on this aspect is obviously unsatisfactory in that, among other things, the Labour Court, whose status the legislature undoubtedly elevated to that of a court of first instance in practically all labour matters, withheld from it the power to enforce its own judgments. Successful litigants in that court and the other judicial structures created under it have to be shunted from that court to the magistrates court or the High Court for the purposes of enforcing any orders or decisions made in their favour. However, it is now settled law that the superior courts have the power to regulate their own processes. Section 98(15) of the Labour Act provides that where an arbitral award has been registered with the magistrates court or the High Court, it shall have, for enforcement purposes, the effect of a civil judgment of the appropriate court. The High Court has an inherent jurisdiction to order a stay of execution of its judgment. There is nothing in the Labour Act or the regulations made under it that has ousted that jurisdiction. Execution is a process of the court and every court has the power to control its own process subject to the rules of court. In the High Court that power is inherent.

(3) On the merits, the writ issued by the three respondents on the basis of which the sheriff had attached the applicant's entire furniture was for a very large amount, which was computed by the respondents themselves. That computation was allegedly on the basis of the second arbitrator's quantification, which was itself allegedly on the basis of the first arbitrator's award. It had been wrong for the second arbitrator to have assumed that the respondents' legitimate expectation to be re-employed had applied to every year thereafter in perpetuity. The legitimate expectation must have been only in relation to the year following the expiry of the respondents' contracts of employment by effluxion of time and in which the first arbitrator had sat in judgment. Any period thereafter had not been determined. The extreme absurdity of the respondents' position was that there would be no end to what they would perceive to be their continued entitlement in terms of the contracts of employment. It would mean that even after recovering the large sum in terms of the writ they would still come back for more *ad infinitum*.

(4) A party that is entitled to claim damages for any wrong done to him is obliged to mitigate his damages. An employee who has been dismissed, wrongly or otherwise, should not just sit back and watch the clock tick as he waits to claim damages. He must look for alternative employment. His entitlement to damages will be limited to the period he would be expected to have found alternative employment. What that period is depends on the circumstances of each case. The purported quantification of the first arbitrator's award took no account of the respondents' obligation to mitigate their damages.

Editor's note: earlier reported judgments in this matter are *UZ-UCSF Collaborative Research Programme in Women's Health* v *Shamuyarira* 2010 (1) ZLR 127 (S) and *Husaihwevhu & Ors* v *UZ-UCSF Collaborative Research Programme* 2010 (2) ZLR 448 (H).

Employment – contract – termination – retention of assets forming part of conditions of service – right of employee to retain such assets until contract conclusively terminated – need for employee to show that possession of assets was part of conditions of service

Arundel School Trust v *Pettigrew* HH-242-14 (Chigumba J) (Judgment delivered 21 May 2014)

The respondent was employed as the sick-bay matron at a private girls' school. Her contract of employment stated that she was required to live on campus during the term time. The contract also stated that the post was a full time position, although during the school holidays her services were not normally required. The rooms allocated to her were a stone's throw away from the girls' dormitory bathrooms. She occupied the rooms continually during the time she was employed at the school, not just during the term time. She was suspended from employment for disciplinary reasons and after a hearing was dismissed from her employment. The school

sought an order for her eviction from the rooms, from which she refused to move, on the grounds that she was disputing her dismissal in the Labour Court and that the provision of accommodation was part of her conditions of service.
Held: (1) this was a vindicatory action. An owner of property is at liberty to repossess his property at any time that he desires, because it is the nature of ownership that possession of the property should repose in its owner at all times unless the possessor is vested with some right enforceable against the owner. The onus is on the defendant to prove a right of retention. A claim of right, in general, is a valid claim, which is enforceable at law against the registered owner of the property sought to be vindicated. Where vindication is sought in the context of a labour dispute, a claim of right is a right which is vested in an employee, and which is enforceable against the employer who owns the property sought to be vindicated. The existence of this right may be derived from the contract of employment. Where the parties reduced a contract of employment to writing, evidence of the terms of the contract is usually derived from examining that written document. In the absence of a written contract of employment, it will be necessary to adduce other cogent evidence of the terms of the contract of employment.
(2) Assets which form part of conditions of service may be retained until the contract of employment is conclusively terminated. As long as the contract of employment remains extant, the employee's rights remain vested in the employee. However, the employee's rights must be recognized and understood by both employer and employee as rights conferred by the contract of employment. Here, the letter of appointment stated that respondent was required to reside on the premises during term time. She was not expected to remain on the school grounds during half term. The premises belonged to the applicant. If it was the applicant's intention to provide the respondent with accommodation forming part of her conditions of service, then her letter of appointment would have said so expressly. The requirement to live on campus during term time could not be interpreted as conferring on the respondent an enforceable right to accommodation on the premises.

Employment – Labour Court – judgment of – registration of with High Court for enforcement – once registered, becomes a judgment of the High Court – High Court entitled to order stay of execution

UZ-UCSF Collaborative Research Programme v *Husaiwevhu & Ors* HH-260-14 (Mafusire J) (Judgment delivered 2 June 2014)

See above, under EMPLOYMENT (Contract – termination – fixed term contract).

Employment – Labour Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of terminated contract of employment – High Court having jurisdiction to determine matter arising from acknowledgment of debt

Homodza v *Chitungwiza Municipality* HH-38-14 (Takuva J) (Judgment delivered 12 February 2014)

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

Employment – Labour Court – jurisdiction – review – court having review powers – High Court's powers of review over Labour Court – matter one which Labour Court could have dealt with – High Court having no jurisdiction

Zimpapers Group of Companies v *Khupe & Anor* HB-9-14 (Moyo J) (Judgment delivered 23 January 2014)

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

Employment – Labour Court – jurisdiction – review – relief sought under Administrative Justice Act [*Chapter 10:28*] – relief constituting review of decision by employers in a labour matter – court having jurisdiction

Shumba v *Min of Justice & Ors* HB-106-14 (Moyo J) Judgment delivered 10 June 2014)

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

Employment – Labour Court – jurisdiction – review – court having same review powers as High Court in respect of labour matters

Zimasco (Pvt) Ltd v *Marikano* S-6-14 (Garwe JA, Gowora JA & Omerjee AJA concurring) (Judgment delivered 13 January 2014)

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

Employment – Labour Court – jurisdiction – vindicatory action for return of vehicle issued to former employee – court having no jurisdiction to deal with such an action

Surface Invstms (Pvt) Ltd v *Chinyani* HH-295-14 (Dube J) (Judgment delivered 3 June 2014)

The applicant sought the return of a motor vehicle that had been issued to the respondent. He had been engaged on a five year contract, which was not renewed when it expired. He lodged a complaint of unfair labour practice with the Ministry of Labour and that matter was still pending at the time the present application was filed. He resisted the claim for vindication of the vehicle on the grounds that the application was a pure labour issue and that, as he was challenging his dismissal at the Labour Court, the matter was solely in the hands of the Labour Court. On the merits, his argument was that he was entitled to purchase the vehicle in terms of the motor vehicle scheme and contract of employment.
Held: (1) The Labour Court is a creature of statute and is only empowered to deal with matters brought to it in terms of s 89 of the Labour Act [*Chapter 28:01*]. It can only deal with disputes that are provided for in terms of the Act in terms of both the cause of action and the remedy sought. The *actio rei vindicatio* is a common law remedy and the Labour Court has no jurisdiction to deal with common law remedies.. The High Court could deal with this application, as it is a court of inherent jurisdiction and it could do so regardless of the stage at which proceedings had reached at the Labour Court are. What was before the court was not a labour dispute. Clearly the Labour Court was not conferred with the jurisdiction to deal with claims of *rei vindicatio.*
(2) The vehicle was owned by the applicant and the respondent possessed the vehicle without its consent. The respondent' term of employment had been terminated. He was only entitled to hold onto the vehicle upon establishing a defence that entitled him to continue holding onto the vehicle. The onus was on him to allege and establish the right to continue holding onto the vehicle. He contended that he was entitled to purchase the vehicle in terms of the motor vehicle scheme negotiated at the time he was employed. That scheme stated, firstly, that the employee was entitled to purchase the vehicle at the end of five years. The clause presupposed that the employee would be required to have driven the vehicle for 5 years before he could purchase it. As the respondent had only had the use of the vehicle for two years, he was not entitled to purchase it. He therefore had no claim of right in respect of the vehicle.

Employment – suspension from duty – suspension pending holding of disciplinary proceedings – public servant – suspension not a pre-requisite to holding of such proceedings – termination of suspension – does not prevent disciplinary proceedings from being held – extension of period of suspension – suspension may only be extended if period of suspension has not expired

Shumbayaonda v *Ministry of Justice & Anor* S-11-14 (Garwe JA, Ziyambi & Hlatshwayo JJA concurring) (Judgment delivered 25 February 2014)

The appellant was a public prosecutor at a magistrates court. Disciplinary proceedings were brought against him, alleging that he had solicited and received a bribe. He was suspended from duty by the Public Service Commission pending disciplinary proceedings being held. The suspension was for a period of three months. By the end of the three month period, the allegation of misconduct had not been heard or determined. Well after the initial period of suspension had expired, the Public Service Commission, purporting to act in terms of s 49(3)(b)(ii) of the Public Service Regulations (SI 1 of 2000), extended the order of suspension for a further period of three months but back dated the commencement of such extension to the day after the first period expired. The disciplinary hearing eventually took place, following which the appellant was found guilty and dismissed from the Public Service. Dissatisfied with the decision of the disciplinary committee, the appellant filed an application for review with the Labour Court. The Labour Court set aside the disciplinary proceedings and directed that the matter be heard *de novo* before a different committee within 30 days or such extended

period as may, on good cause shown, be granted, failing which the appellant was to be reinstated without loss of salary and benefits. On appeal, the issues were whether, after the appellant's suspension had lapsed, it was competent for the respondents to continue with the disciplinary proceedings and whether, in remitting the matter for a rehearing, the Labour Court erred in granting relief that had not been sought by either party and in respect of which neither party had been heard.
Held: (1) Suspension is not a prerequisite to the holding of disciplinary proceedings and a disciplinary hearing does not have to take place during the period of suspension. The fact that a suspension has expired cannot prevent the holding of disciplinary proceedings. The Regulations clearly empowered the disciplinary authority to not only prefer charges of misconduct but also to decide whether a suspension order should be made, the two being separate though related exercises. The Regulations prescribed different procedures for preferring charges and suspension from duty.
(2) Whilst an order of suspension can only be imposed on a member who is suspected of having committed a misconduct, it is not a requirement that such suspension must be imposed in all cases. Indeed, s 48 provides that the disciplinary committee *may*, not must, suspend a member from service. The powers to suspend are not without limitation. A suspension is only warranted in a situation where the continued presence at the workplace of a member is undesirable for the reasons given in s 48(1) of the Regulations. An order of suspension in the ordinary course results in the member not being entitled to his salary and prevented from attending at his workplace. It is an order that can have dire implications for the employee. It is for this reason that s 49 obliges the disciplinary authority to determine any allegations of misconduct levelled against a suspended employee within three months from the date of its imposition and, where that does not happen, the order of suspension automatically falls away unless a directive is given by the Commission that it be extended for a further specified period.
(3) The corollary to this is that it is quite competent for a disciplinary authority to prefer charges of misconduct against a member without simultaneously suspending such member from work. In other words, a charge of misconduct stands on its own, although a suspension may be imposed taking into account the circumstances surrounding the allegation of misconduct. The contention that once a suspension falls away the entire proceedings also fall away could not possibly be correct. When the order of suspension falls away, only the suspension falls away, and not the charge that may have given rise to the order of suspension.
(4) The suspension had expired and the attempt to extend it by the Commission was null and void as it was executed well after the initial order of suspension had terminated. At that stage the suspension had been terminated by operation of law. There was therefore no suspension that the Commission could have extended.
(5) The order by the court *a quo* that the entire proceedings be set aside was therefore irregular. The disciplinary authority had the power to continue hearing the matter, notwithstanding the fact that the suspension had terminated. The order remitting the matter for a hearing *de novo* was improper and must also be set aside.

Employment – suspension from duty without pay or benefits – accommodation provided as part of terms of contract of employment – contract not yet terminated – employee entitled to retain possession of accommodation until contract terminated

Zimbabwe Posts (Pvt) Ltd v *Chizura* HH-63-14 (Chigumba J) (Judgment delivered 19 February 2014)

The applicant sought the eviction of the respondent from the house he had been occupying in terms of his contract of employment. The respondent had been suspended from duty without pay or benefits. After protracted proceedings, the issue of whether the respondent's contract of employment should be terminated was still undetermined and was waiting to be decided by an arbitrator. The issue for determination in the current proceedings was whether an employee, whose contract of employment has not been set aside, can be evicted from a house occupied in terms of that contract, whilst he is on suspension from employment without pay or benefits. It was common cause that the applicant was the registered owner of the property in question. What the court had to determine was whether the respondent could retain possession of the *res* on the basis that his contractual rights, which had not yet been determined, were not suspended when he was suspended from employment without pay or benefits. If he had a claim of right, then he could resist an application for vindication of the property.
Held: until 1999, the labour regulations provided that where an employee had been suspended from employment, pending determination of misconduct hearings, all benefits were lost until a labour relations officer decided whether to terminate the contract of employment. That is no longer the law. Accommodation is not one of those benefits that is capable of suspension, because it is a benefit that goes to the root of the contract of employment. It is either there, or it falls away when the contract falls away. It constitutes a claim of right, by the respondent, capable of defeating the *actio rei vindicatio*. Once the fate of the contract of employment is determined, the parties are at liberty to re-assess their attendant rights. If the contract of employment is

terminated, the respondent will no longer have a claim of right, and the applicant will meet the full requirements of the *actio rei vindicatio*.

Employment – termination – grounds – excessive sick leave taken – duty of employer to notify employee of intention to terminate employment – where employment contract contains specific procedures to terminate, such procedures must be followed

Zimasco (Pvt) Ltd v *Marikano* S-6-14 (Garwe JA, Gowora JA & OMerjee AJA concurring) (Judgment delivered 13 January 2014)

Where employment is terminated on the grounds of excessive sick leave in terms of s 14(4) of the Labour Act, the employer would be obliged, at the very least, to advise the employee of the fact that he has taken the sick leave contemplated in s 14(4) and that for that reason it is intended to terminate his contract of employment in terms of that section on a date specified in such notice unless the employee returns to work before the expiration of the specified period. It would not be proper for an employer to invoke the provisions of s 14(4) and, without notice to the employee, proceed to terminate his contract of employment. The *audi alteram* principle would still need to be respected and failure to do so would render any such termination null and void.
Where the contract of employment provides favourable conditions than those in s 14, those conditions will take precedence over the periods provided for in s 14(4) and will need to be complied with before any termination is contemplated by the employer.

Employment – wrongful dismissal – damages for – assessment of – requirement to take into account employee's obligation to mitigate damages

UZ-UCSF Collaborative Research Programme v *Husaiwevhu & Ors* HH-260-14 (Mafusire J) (Judgment delivered 2 June 2014)

See above, under EMPLOYMENT (Contract – termination – fixed term contract).

Enrichment – unjust enrichment – fees payable to deputy sheriff – fees demanded in excess of applicable tariff – payer entitled to recover excess – allegation that payment made voluntarily – payment made under colour of office – parties not on equal footing – payer entitled to recover

Matipano NO v *Gold Driven Invstms (Pvt) Ltd* S-19-14 (Gowora JA, Malaba DCJ and Ziyambi JA concurring) (judgment delivered 24 March 2014)

The High Court granted an order of provisional sentence against the respondent in favour of a bank, the respondent (the defendant in those proceedings) being in default of entry of appearance to defend. Pursuant to that judgment, the judgment creditor caused a writ to be issued for the payment of the debt. The appellant, the Deputy Sheriff for Harare, attached tobacco at the premises of the respondent and had it sold in execution. The proceeds of the sale were insufficient to settle the judgment debt and consequently the appellant attached more tobacco stocks in a bid to raise the sum required. A sale by public auction of the attached stocks was scheduled, but, before the scheduled date of the sale, the respondent and the judgment creditor agreed that the stocks should to be sold by private treaty in order to realise a better price. This was duly held and payment was effected. In anticipation of the successful conclusion of the sale, the judgment creditor instructed the appellant to cancel the sale in execution. The sale was cancelled. Subsequently, the appellant demanded payment from the respondent of a stated sum as commission. The respondent queried the amount being demanded. When the amount remained unpaid, the appellant gave instructions to an auctioneer to sell tobacco stocks in its possession for recovery of the alleged commission. The respondent then paid what was demanded. It later instituted an application in the High Court against the appellant in which it demanded a partial refund of the sum paid as commission. The High Court ruled that the payment of commission under the previous statutory instrument (the High Court (Fees and Allowances) Rules 2009) was unlawful and that any payments over what were allowed by the successor rules of 2011 should be refunded. The earlier rules had been in force when the tobacco was attached, but were replaced before the sale in execution took place. The percentage commission payable under the new rules was lower than under the repealed rules.
The appellant argued, firstly, that the matter was not properly before the High Court because that court was not the forum in which disputes concerning the quantum of a fee payable to a deputy sheriff are decided in the first

instance. Under r 457 of the High Court Rules, he argued, and question as to the tariff of fees was to be determined by the Sheriff. The respondent should have insisted on a taxation of the fees due to the deputy sheriff before paying, alternatively, that the respondent should have paid under protest and sought taxation. Having failed to do either, the respondent had been left without remedy. He also argued that the respondent lacked *locus standi* to seek a declaratory order with regard to the correct tariff on which the fees were chargeable, and that it was the judgment creditor that was entitled to challenge the fees payable. The appellant also submitted that the only basis upon which a refund could found a cause of action of action was unjust enrichment and only the judgment creditor had the locus standi to claim on that basis. The *onus* was on the respondent to prove unjust enrichment and there was no such averment anywhere in the papers. Even if it was accepted that the sum was not wholly due, the appellant could not have been unjustly enriched if the money was paid voluntarily.

The respondent argued that the money was not due. Further, since the legislation under which the commission was levied had been repealed, the demand under the repealed legislation was unlawful and wrongful and thus a legal nullity.

Held: (1) Once it was accepted that the issue before the court *a quo* was to do with the applicable tariff to be applied in the calculation of the commission, then it stood to reason that the issue was one of law and firmly within the purview of the High Court. The Sheriff was not empowered to decide issues relating to the applicable law that the deputy sheriff is entitled to rely on in levying fees and charges. What r 457 provided for was for the Sheriff to determine the accuracy or otherwise of charges raised by his deputy. He could not, and was not empowered to, determine the applicable statutory instrument. That was an issue which is solely within the purview of a court.

(2) The respondent was seeking a declaratur, something that the High Court has jurisdiction to grant.

(3) Charges relating to execution are due and payable by the party whose property is subject to execution. Although the execution was instructed by the judgment creditor, any fees and commission due from and arising out of execution were claimed from the judgment debtor, which had an interest in the recovery of fees paid by it in excess of what was lawfully due and payable.

(4) From the facts set out in the founding and replying affidavits the respondent was able to state that that the fee charged was not wholly due. The cause of action was the unjust enrichment of the appellant by the payment of a claim that he was not legally entitled to receive. Extortion by colour of office occurs when a public officer demands, and is paid money that he is not entitled to, or more than he is entitled to, for the performance of his public duty. Examples of such exactions include excessive fees demanded by sheriffs.

(5) The parties were not on an equal footing. If one party has the power to say to another, "what you require will not be done except upon the conditions that I choose to impose", that party should not be allowed to contend that the parties acted on an equal footing. Such a situation does not fall within the category of payments made voluntarily. Money which a party has been wrongfully made to pay, whether under compulsion, or in circumstances in which he is unable to resist the imposition, may be recovered. Money paid as a result of actual or threatened duress to the person, or actual or threatened seizure of a person's goods, is recoverable. Money paid to a person in a public or quasi-public position to obtain the performance by him of a duty he is bound to perform for nothing or for less than the sum demanded is recoverable to the extent that he is not entitled to it.

(6) There is a general right to restitution of monies paid following upon an *ultra vires* and illegal demand, and so a right to the recovery of interest thereon. Once it is established that the monies were paid under an *ultra vires* law, then the payer has a right to recover. Such payments would constitute illegal payments and on that basis they can be recovered.

(7) Rule 327 does create an entitlement by the deputy sheriff to payment of fees based on the mere attachment of goods, whether movable or immovable. The rule seeks to protect the payment of fees to the deputy sheriff for any work done in connection with the writ. It does not set out the manner in which the deputy sheriff is obliged to levy and calculate his fees. The applicable law in calculating the commission is the tariff of fees set out in the High Court (Fees and Allowances) (Amendment) Rules. The fee accrues after the occurrence of any of the following events; on a sale in execution, payment by the debtor upon presentation of the writ, or withdrawal or suspension of the writ by the judgment creditor. In this case the writ was withdrawn by the judgment creditor which event triggered the calculation of the fees due. This occurred after the replacement rules came into effect, and those rules therefore governed the amount of the fees.

Environment – prevention of activities which pollute the environment – closure of premises where activities which pollute the environment are carried out – need for such activities to be occurring before closure may be ordered – closure to have preventive measure taken not permissible

Forbes & Thompson (Bulawayo) Pvt Ltd v *Musasiwa NO & Anor* HB-54-14 (Moyo J) (Judgment delivered 10 April 2014)

An officer of the Environmental Management Agency inspected the applicant's mine and subsequently issued an order, purportedly in terms of s 37(4) of the Environmental Management Act [*Chapter 20:27*], closing the mine indefinitely and directing that certain measures be taken to prevent several possible cause of pollution. The applicant sought an urgent order declaring the order to close the mine to be invalid.
Held: the section provides that the Agency may order the closure of premises for a period not exceeding three weeks where an activity which pollutes the environment is carried out; or it can serve an order requiring that the owner or occupier takes such measures as may be specified for the prevention of harm to the environment; or it can take both such steps. However, it is not entitled to close premises so as to protect the environment and have preventive measures taken unless some activity is taking place that is actually polluting the environment. Further, any closure in terms of the section may only be for up to three weeks.

Estate agent – commission – entitlement to – entitlement arises when agent introduces potential buyer to principal – agent entitled to commission on subsequent sale, even if price lower than originally demanded

Stohill Invstm Properties (Pvt) Ltd v *Mahachi & Ors* HH-213-14 (Mathonsi J) (Judgment delivered 14 May 2014)

The plaintiff, a registered estate agent, sued the first and second defendants, the former being the beneficial owner of an immovable property in Harare registered in the name of the latter, a duly incorporated company owned and directed by the first defendant, for payment of a sum of representing agent's commission together with interest at the prescribed rate, collection commission and costs of suit. The plaintiff had secured a mandate from the first defendant to sell the property, initially by sectional title and subsequently as an entire block. It duly searched for a buyer, finding the Ministry of Justice, which was interested in the property, and duly introduced the buyer to the seller. When a valuation of the property was requested to be undertaken by the Government valuator, as is the norm in Government purchases, the plaintiff was side-lined and a sale concluded through another estate agent to the exclusion of the plaintiff. The plaintiff claimed that it was entitled to commission equal to 7.5% of the purchase price of the property.
Held: An estate agent is an agent who is authorised to negotiate the sale or purchase of immovable property and the service expected of him is the introduction of a person who is willing and able to purchase the property. Where the estate agent achieves a specified event he should be remunerated. The contract between an estate agent and a principal can either be express or implied. Where a person conducts himself in a manner that, from his conduct and from the surrounding circumstances, it can be inferred that he has authorised the agent to act on his behalf, then the existence of a contract between them can be implied. The estate agent is not obliged to try to find a purchaser, but if he is given a mandate by the principal to sell property the principal is entitled to claim an exact performance of the terms of the mandate. However, if the agent fails to find a person who will purchase in terms of the mandate but introduces a person who negotiates with the principal and the seller agrees to accept a lower price, the agent is entitled to commission, even though he has not performed the original mandate.
If a person deliberately, intentionally, and in order to escape an obligation, prevents an event from taking place, that event may, by a fiction of law (the doctrine of fictional fulfilment), be deemed to have taken place. In agency cases the doctrine operates when the principal intends to escape either the obligation to pay commission or the obligation between himself and the third person.
The fact that the seller elected to side-line the applicant, and accepted a lower price than that given in the mandate, did not disentitle the applicant to its commission on the lower price accepted by the seller, who deliberately prevented the agent from negotiating the price.
Where an estate agent introduces a person who subsequently purchases, then he has earned his commission and it is immaterial that the first negotiations led to nothing and are afterwards renewed without further introduction. There is nothing to stop the principal from negotiating direct with the seller and selling the property for a smaller amount, but the agent is nevertheless entitled to his commission.

Evidence – civil case – onus – proof on balance of probabilities – meaning – when onus is discharged

City of Gweru v *Mbaluka* HH-93-14 (Chigumba J) (Judgment delivered 12 March 2014)

In a civil case, the standard of proof is never anything other than proof on a balance of probabilities. The reason for the difference in onus between civil and criminal cases is that, in civil cases, the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. The degree of proof required by the civil

standard is easier to express in words than the criminal standard, because it involves a comparative rather than a quantitative test. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not. What is being weighed in the balance is not quantities of evidence but the probabilities arising from that evidence and all the circumstances of the case. The preponderance of probability in favour of the party bearing the onus must be strong. It is not a mere conjecture or slight probability that will suffice. The probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to shift the onus onto the other side to rebut it.

Evidence – identification – precautions to be taken by court – honesty of witness not sufficient – when evidence of identification needs corroboration

S v *Kambarami & Anor* HH-273-14 (Hungwe J, Bere J concurring) (Judgment delivered 28 May 2014)

Questions of identification are always difficult. This is why extreme care should always be exercised when it is proposed to carry out identification parades, to prevent the slightest hint reaching the witness of the identity of the suspect. People often resemble each other and it is not uncommon that strangers are sometimes mistaken for old acquaintances. The positive assurance of identification by a single honest witness may not be enough. The possibility of a mistake occurring in the identification, especially where the witness has not known the person previously, demands that the greatest circumspection should be employed. The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration and suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive.
Good identification does not need corroboration or support, but poor identification does. Examples of good identification include: (1) A kidnapped person kept for many days in the company of his kidnapper, who identifies him without hesitation months later. (2) A suspect person kept under observation and seen by two policemen several times, identified by them six months later. (3) A colleague, known from work for several years, seen clearly stealing a wallet from a locker. On the other hand, identification is poor when it depends solely on a fleeting glance or on a longer observation made in difficult conditions.

Family law – child – child in need of care – application to put child in place of safety – nature of proceedings – duty of court to keep proper record of proceedings

In re *Chikombingo & Ors* HH-294-14 (Mawadze J) (Judgment delivered 3 June 2013)

See above, under COURT (Children's court)

Family law – child – custody – parents separated pending divorce – to whom custody should be granted – may be granted to father or other appropriate person if in the best interests of the child – whether courts should necessarily favour mother being given custody – child's best interests – right of child to be heard – right to be part of decisions affecting them

Hale v *Hale* HH-271-14 (Tsanga J) (Judgment delivered 5 June 2014)

In terms s 5(1) of the Guardianship of Minors Act [*Chapter 5:08*], the applicant initially had custody of the two minor children from her marriage to the respondent, pending divorce, since the parties were living separately. Additionally, she had full custody over her oldest child, born from a prior union. However, as a result of her problems of addiction that necessitated a period of treatment at a rehabilitation clinic, the respondent stepped in as the custodial parent. Upon the applicant's return from her rehabilitation, she insisted on resuming custody on learning that the respondent had launched an application for full custody. The respondent's application for custody of all three children was on the strength of a negative letter from the addiction counsellor. He obtained an order of custody of the children through an order of the juvenile court, the applicant being in default.

Subsequently, the parties signed an agreement, which recognised the applicant's rights as custodian. The respondent, though admitting having signed the document, claimed he did so out of desperation. It was when the applicant proposed to move all the children, from the schools they were attending in or near Harare to one near the town she resided in, that trouble flared again. The applicant sought an order compelling the respondent to place the children in her sole custody and to allow the children to attend the school near her home. It was argued that the oldest child could only be removed from her mother's custody where there was harm or danger to her welfare. It is not for the applicant to show grounds that she be awarded custody but for the respondent to show grounds for her to be refused such custody.

Held: (1) under s 5(1) of the Guardianship of Minors Act, the mother would normally have custody when parents commence living apart, but custody may be awarded to the father if it is shown that it is detrimental to the interests of the minors for them to be in her custody. This is what happened *in casu*. Under s 4(1)(b) of the Act, the High Court may, on application of either of the estranged parents of a minor, make an order granting one of them sole custody of the minor.

Despite the fairly common occurrence of children being looked after persons other than the biological parents, our legislature has still not seen fit to extend parental rights to *de facto* or psychological parents as in this case. Whilst the legal relationship between the respondent and the eldest child excluded him as parent, it would be very pedantic to ignore the circumstances that triggered the application for custody of all three children into respondent's care, as what motivated the application for modification of custody was the fear of harm and neglect of the children in light of the experience that had led to the applicant's rehabilitation, stimulated by the rather grim prognosis given by her counsellor.

(2) Protection of children from harm or neglect is a constitutional guarantee: s 81(e) of the Constitution. It is also expressed in legislation such as s 7 of the Children's Act [*Chapter 5:06*]. This was not a case of a stranger seeking to impose himself as custodian inclusive of one of the children who is not his. There was a parent like relationship with the child, who had been living with the respondent since she was three years and eight months. That a parental bond exists between him and the child was not disputed. The custody order was issued on the basis of the best interest of the child to be protected from potential neglect. It would have been undesirable to try and separate the children, who are siblings. It was even more important not to add any further stress to the children's lives by introducing a "yours and ours" approach.

(3) With regard to the applicant's averment that it was necessary for her to play her maternal role, given the children's tender ages, while it remains the reality that women still find themselves saddled with the child caring and roles, child rearing is no longer seen as a naturally exclusive domain for women only. Indeed our Constitution espouses equality and non-discrimination as the guiding standard in parental roles. Breaking down stereotypes about gendered roles is also what State parties undertake to work towards in terms of article 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Zimbabwe is a party. In more recent cases, the value systems and societal beliefs underpinning "maternal preference" or "tender years" principle have been challenged and the courts have emphasised that parenting is a gender neutral function and that the assumption that the mother is necessarily in a better position to care for a child than the father belongs to a past era. In determining what custody arrangement will best serve the children's interest in, a court is not looking for the "perfect parent", but for the least detrimental available alternative for safe guarding the child's growth and development. *In casu* the court could not make a determination on the applicant's suitability or otherwise on all the pertinent matters raised, outside of a professional report on her recovery.

(4) The issue regarding the children's schooling could not be dealt with satisfactorily without hearing the views of the children themselves, especially the two older children who were already at the boarding school in question. A particularly noteworthy aspect of the new Constitution is that it grants both parents and children rights. Parents, for instance, can expect in terms of s 25 that the State and all its institutions will protect and foster the institution of the family. This provision can be said to protect parents in the upbringing of children within the family context. They can also expect the State to take measures to ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution in terms of s 26(b). For women in particular, s 80(2) guarantees women the same rights as men regarding custody and guardianship, although an Act of Parliament may regulate the exercise of those rights. The right to privacy is guaranteed through s 57. Yet all these rights that undoubtedly impact on parents now have to be balanced against those which our Constitution also gives to children. This is even more so where parents, as in this case, are not in agreement as to what is best for the child. Constitutionally, as of right, children are no longer at the margins and periphery of decisions affecting them. They effectively have a right to be part of those decisions. This is provided by s 81(1)(a), which effectively incorporates in our domestic setting the spirit of article 12 of the UN Convention the Rights of the Child. That article advances this notion of their participation and inclusion.

The best interest principle which has also been the criterion used by our courts in matters concerning children now not only finds constitutional expression but also exists amidst certain rights given to children by the Constitution. Thus the principle of the best interests of the child, said to be paramount in every matter concerning the child under s 81(2) of the Constitution, is now also better placed to take its specific character and

meaning from the rights that are accorded children by our Constitution. In this case, it is their best interests that the children be heard, especially the older children who are in boarding school and have an appreciation of the issue. Their views are necessary to obtain in order for the court to make an informed decision that takes into account their experiences with boarding school.
(5) The decision of the children's court was still extant. There had been no appeal, and the "agreement" did not amount to an abandonment by the respondent of the judgment in his favour. The applicant had applied for rescission of the default judgment. The magistrate ordered a dismissal of the application for rescission and for stay of execution. The applicant's noting of an appeal against that dismissal did not suspend execution of the judgment.

Family law – child – divorce of parents – division of property and other consequences of divorce – effect on children – need for court to ensure that best interests of children taken fully into account – constitutional imperatives to so ensure

Family law – husband and wife – divorce – division of property following divorce – effect of such division on children – need for court to ensure that best interests of children taken fully into account – constitutional imperatives to so ensure

Katsamba v *Katsamba* HH-77-14 (Tsanga J) (Judgment delivered 26 February 2014)

The primary issue in this divorce action was the disposal of the matrimonial home. The husband had left the home, while the wife remained there with their two minor children. The husband wished to dispose of the house immediately, with the parties sharing 50-50, while the wife sought to delay the disposal of the house until the youngest of the children reached the age of majority, or became self-supporting.
Held: The approach to division of property on divorce in s 7(4) of the Matrimonial Causes Act [*Chapter 5:*13] is essentially evaluative. The considerations to be taken into account are both adult and child centred. Among the check list of factors to be examined by the court in exercising its evaluative discretion, are issues such as income earning capacity, financial needs, obligations and responsibilities, as they are likely to affect each spouse and child for the foreseeable future. Section 7(4)(b), on future financial obligations and responsibilities, especially aims at ensuring that arrangements take into account children's future needs before a divorce is finalised.
Child rearing and caring duties and responsibilities continue to be experienced differently by men and women in the face of rather laboured progress towards dismantling stereotypical gender roles. On divorce, more often than not, the parties to a marriage are left in the very same personal situation in terms of the roles and responsibilities that the marriage assigned to them. Thus, where a wife, as in this case, has performed the child rearing and caring role, relying largely on financial support from her husband, the reality of continuing such obligations post separation, without adequate support, can be particularly detrimental for the physical and mental wellbeing of the spouse and children. The responsibilities that a divorced custodial parent can expect to face in relation to the children primarily include ensuring that their needs for shelter, food, clothing education and health care are met. In addition to time and emotional devotion that these responsibilities require, the bottom line is that they need an assured source of income.
Whilst an immediate partnership approach in the division of the matrimonial home especially as pressed for by the plaintiff, with each spouse getting 50% of the value of the house, may appear just and equitable as between the spouses, the very nature of the obligations and responsibilities that the custodial parent is likely to face may in fact place her at a greater disadvantage compared to the husband.
The best interests of the child as a principle permeates our laws as they relate to children. Our new Constitution specifically incorporates children's rights within the thematic framework of the three pillars of protection, provision and participation that characterises the UN Convention on Children's Rights, to which Zimbabwe is a party. Devoting separate provisions to children's rights is a clear indication of the role that the observation of children's rights is expected to have in building a just society. Section 81(1), (2) & (3) of the Constitution is an example of a protective provision within our Constitution, This section is an inherent part of the Declaration of Rights in the Constitution and is binding and non-negotiable in every respect. Moreover, in terms of s 44 of the Constitution, the duty to respect fundamental rights rests not just on the State and its institutions but on every individual person as well. It is the duty of parents as much as the State to ensure that children have adequate education, health care, nutrition and shelter. In terms of s 81(3), what is in the interests of the children is clearly not entirely in the private domain of the parents. Where there is cause for the court to intercede, it will. The non-payment of maintenance and the clear difficulties that the defendant had encountered in terms of enforcing the maintenance order required the court to exercise its discretion with regards to what would be in the best interests of the children and whether the best interests of the children would lie in delaying the sale of the house.

In addition to the fundamental rights contained in the Declaration of Rights, s 19(1) and (2) of the Constitution, which falls under National Objectives, is also another protective provisions in terms of children's rights. Thus the legal system, in addition to other mechanisms, is to be utilised in realisation of National Objectives. In particular the State, through the courts, is required to interpret laws and policies taking into account these National Objectives.
Financial arrangements and needs cannot be looked at outside existing circumstances and challenges that have already manifested themselves. Given the difficulties the defendant had encountered in getting the plaintiff to pay maintenance, the sale of the house at this point would make the children's position extremely insecure. It is the role of the courts to minimise eventualities such as increased risks of poverty from inadequate post-divorce support arrangements that can often be brought to bear upon children as a result of their parents' divorce. The sale should thus be delayed as prayed for.

Family law – husband and wife – divorce – division of property following – factors to consider – requirements of Constitution and relevant international instruments – need for such to guide court in exercise of its discretion

Nezandonyi v *Nezandonyi* HH-115-14 (Tsanga J) (Judgment delivered 12 March 2014)

When a court makes an order with regard to the division of property following divorce, in addition to the exhortations of s 7(4)(e) of the Matrimonial Causes Act [*Chapter 5:13*], it is also vital to be guided by the new Constitution and international instruments that speak to women's standing in marriage and family life. This is especially necessary in light of the often less than equal role with which unpaid work in the home is often accorded. Settling such disputes in light of an understanding of constitutional and human rights values is likely to result in a more equitable outcome for both parties.
Section 56 (3) of the Constitution clearly prohibits the treatment of any person in a discriminatory matter on grounds such as culture, sex, gender, or economic or social status, among others. Pitting the breadwinner's role against that of the homemaker is gender discrimination, given the difficulty of placing a monetary value on domestic contributions. To accord a wife a lesser standing in allocation of property on divorce because she was "merely a housewife" would offend the letter and spirit of the Constitution in terms of non-discrimination. It would amount to discriminating against the wife on account of her social and economic status. Furthermore, given that in most instances it is women who find themselves, as a result of gender roles, saddled with unpaid work in the home, regarding women's gender-driven roles as inferior would also amount to discrimination. Section 26(c) of the Constitution which articulates that the State should take measures to ensure there is *equality of rights* and *obligations* of spouses *during marriage* and at its *dissolution*.
In addition to these provisions, Zimbabwe is also party to several international instruments that are of relevance in articulating standards to be exercised in granting a divorce. These yardsticks essentially embody the values of equality or equity. Article 169(c) of the Convention on The Elimination of All Forms of Discrimination Against Women, for example, accords women the same rights and responsibilities during marriage and at its dissolution. Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa similarly states that on separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property deriving from marriage. Zimbabwe is party to both these instruments. Although, in terms of s 327(2)(b) of the Constitution, international treaties do not automatically form part of Zimbabwean law unless incorporated into law through an Act of Parliament (subject to some exceptions), s 327(6) clearly imposes a duty on the courts, in interpreting legislation, to be guided by international instruments to which Zimbabwe is a party. The values of equality and equity that are enshrined in the international instruments referred to are therefore essential guiding beams for the court in the exercise of its discretion that is accorded by s 7(4) of the Matrimonial Causes Act.

Family law – husband and wife – maintenance order – variation – good cause for variation – what constitutes – maintenance of children – subsequent re-marriage of person paying maintenance – whether priority should be given to children of first marriage – tertiary education – whether should be included in maintenance order even though child above age of majority

Kok v *Maxwell* HH-236-14 (Tsanga J) Judgment delivered 21 May 2014)

An appropriate court may on good cause shown vary suspend or rescind an order for maintenance made in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. As to what constitutes "good cause", the two cardinal

points which must guide courts in dealing with applications for alterations of maintenance are (a) a change in financial circumstances and (b) the ability of the person being ordered to provide maintenance to pay the increment sought. A change in needs and obligations brought on by a spouse's remarriage amounts to good cause. Where a divorced man with maintenance obligations towards his first family remarries, it is superficial and unrealistic to suggest that the first family must continue to be maintained at the same standard regardless of her former husband's subsequent commitments. The obligations owed to the first wife and children are properly regarded as a first charge, but subsequent commitments will possibly reduce the husband's capacity to maintain the first wife to the extent originally decreed. In order to accommodate both needs, the standards of living of all parties may possibly have to be reduced, with the second family playing a subordinate role to the first. In assessing the needs of all concerned, a variety of considerations would obviously have to be examined, and the ultimate decision would be based on an evaluation of all these considerations.
The 2013 Constitution appears to lend interpretative support in favour of an "equalisation" as opposed to a "first family" approach in assessing any child's needs. Non-discrimination in general is the ethos underlying the Constitution. Section 81(1), which deals with the rights of children, accords rights equally to every child.
With regard to tertiary education, although child support can be terminated on grounds such as majority status or emancipation, among others, it is now generally the reality that parents can reasonably expect that their obligations towards their child support obligations will go beyond the children's majority status. Where parties have express agreements in their divorce orders, such an obligation would at most extend up to the first degree. In an increasingly competitive world, college education is frequently an indispensable stepping stone.

Human rights – rights of women – elimination of violence against women – international instruments to which Zimbabwe a party – application of – police failing to assist victim of rape – use of such instruments in deciding whether police under a duty to act

Mapingure v *Min of Home Affairs & Ors* S-22-14 (Patel JA, Garwe & Gowora JJA concurring) (Judgment delivered 25 March 2014)

See above, under DELICT (*Actio legis Aquiliae*).

Human rights – right to water – right to water protected by s 77 of Constitution of Zimbabwe 2013 – municipal by-law authorising council to cut off water – by-law also allowing council to do so even if bill disputed – such by-law contrary to Constitution

Mushoriwa v *City of Harare* HH-195-14 (Bhunu J) (Judgment delivered 30 April 2014)

See below, under LOCAL GOVERNMENT (Urban council – by-laws).

Immovable property – transfer – conveyancer – representative and agent of seller – purchaser not entitled to nominate conveyancer

Scapelox Trading (Pvt) Ltd v *Mashangwa Family Trust & Ors* HH-91-14 (Mathonsi J) (Judgment delivered 5 March 2014)

The applicant sold a property to the first respondent. As the seller, it nominated the conveyancer, a firm of legal practitioners. Part of the purchase price was to be paid immediately. The conveyancer would retain the title deed until the conveyancing was complete. When the conveyancer rendered an account for the transfer and conveyancing fees, the second and third respondents, representing the first respondent, went to the conveyancer's firm and forcibly removed the title deed, making it clear that a conveyancer of their choice would do the conveyancing for a lower fee. The applicant sought an order for the return of the title deed and ancillary relief.
Held: (1) a conveyancer represents the seller and as such the practice in this jurisdiction is that the seller chooses a conveyancer of his choice to transfer the property from the seller to the purchaser. It is for this simple reason that it is the seller who gives a power of attorney to the conveyancer to pass transfer to the purchaser. The preamble to a deed of transfer generally states that the property has been sold and that the conveyancer, as the attorney of the seller, transfers the property to the new owner, the purchaser. If the purchaser could choose the conveyancer, the conveyancer could not transfer the property from the seller, not being an attorney of the seller.

(2) Undercutting in conveyancing has become a thorny problem in this jurisdiction. Quite often legal practitioners find themselves having to undercut in conveyancing fees because of the cut-throat competitive nature of this country's conveyancing practice, usually pitting established law firms, who have enjoyed a monopoly in that field, against small and upcoming firms. The latter firms usually fall into the temptation of accepting to undertake transfers at far less than the tariff prescribed by the Law Society of Zimbabwe, in order to attract clients. This is a shameful practise which has no place in our legal system. The legal profession in this country is self-regulating, meaning that legal practitioners regulate themselves through the Law Society of Zimbabwe which is established in terms of the Legal Practitioners Act [*Chapter 27:07*]. In exercising its regulating authority, the Society is enjoined by s 53 of the Act to represent the views of the legal profession, maintain its integrity and status as well as "to define and enforce correct and uniform practice." As well as fixing the hourly rate of fees to be charged by legal practitioners, the Society also sets the conveyancing tariff to be uniformly followed by conveyancers undertaking transfers. The tariff relevant to this matter was published in the Law Society of Zimbabwe (Conveyancing Fees) By-laws SI 24 of 2013. It is the tariff that was employed by the applicant's conveyancers to determine transfer fees to be paid by the respondents in this matter. It is clear, from the criminal manner with which the second and third respondents conducted themselves when they seized the title deed from the conveyancer, that another law firm had promised them service at far less than that offered by the applicant's chosen firm in terms of the tariff. Such conduct by legal practitioners is called undercutting. It is unlawful, because when the Society sets a conveyancing tariff, it is acting in accordance with power given to it by the Act and the regulations made under it. There must be uniform application of conveyancing fees. Anything else is unlawful and represents dishonourable and unworthy conduct by a legal practitioner, which should be punishable. Members of the legal profession who have elected to sacrifice the values of the noble profession for pieces of silver are bringing the name of the profession into disrepute.
(3) The first three respondents would be ordered to return the title deed. The relevant State authorities would be ordered not to effect any transfer or other related matters other than through the applicant's chosen conveyancers.

Interpretation of statutes – presumption of constitutionality – need to interpret statute in such a way as to give effect to Constitution – interpretation that would result in a violation of Constitutional right not permissible

ZEC & Anor v *Commr-General ZRP & Ors* CC-3-14 (Ziyambi JA, Chidyausiku CJ, Malaba DCJ, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, Patel JA & Chiweshe AJA concirring) (Judgment delivered 26 March 2014)

See above, under ELECTIONS (Special early voting for members of disciplined forces).

Land – acquisition – offer letter – nature of letter – constitutes contract between State and recipient – cancellation or withdrawal of offer letter – lawful if done in accordance with offer letter

Chaeruka v *Min of Lands & Anor* HH-75-14 (Mathonsi J) (Judgment delivered 26 February 2014)

The applicant had been given an "offer letter" in respect of a farm which had been compulsorily acquitted by the State. The farm had previously been owned by a company of which the second respondent was a director. The applicant cultivated only about 1 hectare of the farm's 498 hectares and about 8 months after he received the offer letter he was verbally notified by the then Vice-President that his offer letter was to be withdrawn and the farm re-allocated to the second respondent, who was also at the meeting. The second respondent was, nearly three years later, given an offer letter in respect of the farm. The applicant sought an order setting aside the withdrawal of his offer letter. He maintained that there was no provision in the contract entitling the Minister to terminate it. In addition, he argued that the withdrawal of the offer letter was in violation of s 3 of the Administrative Justice Act [*Chapter 10:28*] which enjoins the Minister to act lawfully, reasonably and in a fair manner. Specifically, he argued, the Minister should have given him notice of the intention to terminate, giving him adequate time to make representations.
Clause 7 of the offer letter stated that "The Minister reserves the right to withdraw or change this offer letter if he deems it necessary, or if you are found in breach of any of the set conditions. In the event of a withdrawal or change of this offer, no compensation arising from this offer shall be claimable or payable whatsoever." Among the conditions referred to was one to the effect that the recipient of land was required to undertake and initiate development on the farm in accordance with the 5 year development plan submitted, and another that the offer may be cancelled or withdrawn for breach of any of the conditions set out.

Held: (1) For the applicant to enforce a contract arising out of an offer letter, he had to bring himself within the provisions of that contract. If he accepted the offer letter, he accepted it on the basis of its terms, including the clause which gave the Minister unfettered power to cancel or withdraw the land as a result of a breach or "if he deems it necessary". The Minister was entitled to withdraw the offer letter if he deemed that to be necessary or where the applicant was in breach of the terms of the offer letter, which he was, because of the under-utilisation of the land. The government policy on land reform is not recreational, neither is it designed to accord beneficiaries some pastime. It is meant to benefit those willing and able to utilise land. One cannot be allowed to hold on to large tracts of land simply to baby sit an inflated ego. If a beneficiary is not using the land, that is a breach of the conditions upon which that land is offered. It should therefore be withdrawn and given to more deserving candidates. For the applicant to utilise less than a hectare, while leaving the remaining 497 hectares fallow, was scandalous. It entitled the first respondent to withdraw the offer as he did.
(2) Once it was accepted that an offer letter gave rise to a valid contract binding on the parties, the court was applying contract law and could not, at the same time, apply administrative law rules. The contract was the covenant governing the relationship of the parties. By appending their signatures to the written contract, the parties accepted that their relationship was to be governed by that contract and nothing else. The applicant could therefore not seek refuge outside the four corners of that written contract. The contract binding on the parties gave the Minister unfettered power to withdraw the offer letter. The applicant could not, therefore, seek to defeat the imperatives of a contract he entered into, by importing rules of administrative law alien to the contract of the parties. When the State concludes a contract, it is bound by its terms and not by rules of administrative law which apply when it is exercising state power over the subject.
(3) In any event, the applicant was notified of the intention to withdraw the offer letter and had ample time to make representations.

Land – gazetted land – occupation – eviction following conviction for unlawfully occupying gazetted land – no time limit specified in legislation – requirement for court to take all factors into account when ordering eviction – such factors including Constitutional requirements to protect persons from being evicted from homes – eviction order giving accused time to harvest crops and relocate

S v *Munotengwa & Ors* HH-134-14 (Muremba J) (Judgment delivered 12 March 2014)

The accused were unlawfully occupying farming land which had been allocated to another person. They were charged with and convicted of contravening s 3(4) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. The magistrate sentenced them to a period of imprisonment, suspended on condition that they vacate the farm by a stipulated date, "failure of which the State is hereby granted eviction order against the accused and all those claiming occupation through them. Accused to foot the cost of such eviction". The scrutinising regional magistrate queried the form of the sentence.
Held: the effect of s 3(4) and (5) is that, upon convicting an accused, the court should impose a sentence in terms of s 3(4). The sentence can be a fine, community service or imprisonment. Over and above the sentence imposed in terms of s 3(4), the court is mandated in terms of s 3(5) to evict the accused from the land. The reason is to stop the perpetuation of the criminal offence. So the eviction order is in addition to the sentence imposed in terms of s 3(4). It should not be combined. Section 3(5) does not stipulate the time limit within which the eviction order should be effected. This means that the time limit should vary from case to case. By not stipulating a time limit, the legislature gave the trial court a discretion to consider the surrounding circumstances of each case. This discretion should be exercised judiciously taking all factors into serious consideration.
Section 74 of the Constitution requires a court to consider all relevant circumstances before ordering the eviction of a person from his him. Even if the accused stand convicted of breaching the law, the law still regards them as persons in need of considerate treatment within the parameters allowed by the law. The court retains the power to regulate when, where and how its judgment may be carried into execution. It has the task of ensuring that justice and equity prevail in relation to all concerned and to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in the particular case. These would include the interests of the accused person (who should be allowed to harvest their crops and relocate themselves) and the holder of the offer letter, who would eventually take up unimpeded occupation of the land.

Legal practitioner – conduct and ethics – duties to court and client – failure to adhere to time limits laid down in rules – need for credible explanation for failure before court should exercise discretion in favour of litigant

Ndlovu v *Guardforce Invstms (Pvt) Ltd & Ors* HB-3-14 (Makonese J) (Judgment delivered 16 January 2014)

Legal practitioners must always be aware that they operate within time limits and in terms of laid down procedures. The purpose of such time limits is for litigants to know when they are expected to act. Where a legal practitioner fails to act, he has a duty to the court to give a credible and convincing explanation why he failed to act timeously. The time has come for legal practitioners to adhere to the time limits set in the Rules. The approach ought to be that the court may only excuse failure to act where the explanation given is credible. A litigant who chooses a legal practitioner to act on his behalf expects the legal practitioner to adhere to time limits set in the rules. The courts should decline to exercise judicial discretion where the explanation proffered is not credible, even where the fault of the legal practitioner will have adverse consequences on the litigant.

Legal practitioner – conduct and ethics – practitioner appearing after withdrawal of agency – not a ground for appeal by other party against any judgment arising from proceedings – courses open to dissatisfied party

Sikona Farm (Pvt) Ltd & Anor v *Carey Farm (Pvt) Ltd & Anor* HH-139-14 (Chigumba J) (Judgment delivered 24 March 2014)

Where a legal practitioner who had no right to be heard has been heard, deliberately and intentionally and in contravention of Order 2 r 5 of the High Court Rules 1971 (which deals with change of legal practitioner by a party), the remedy is to report the legal practitioner to the Law Society for violations of the Legal Practitioners Act [*Chapter 27:07*], and of the rules of ethics, and or to cause disciplinary proceedings to be instituted. The legal practitioner's lack of right of audience, after audience has already been given, cannot be used in an appeal as a ground for overturning any judgment arising from those proceedings, unless the complaint emanated from the client which was wrongly represented.

Legal practitioner – conduct and ethics – tardy and chaotic conduct of practice – such conduct not acceptable to courts – costs *de bonis propriis* may be appropriate

Hughber Petroleum (Pvt) Ltd & Anor v *Brent Oil Africa (Pty) Ltd* HH-78-14 (Mathonsi J) (Judgment delivered 26 February 2014)

The courts will never accept legal practitioners who elect to conduct their practices tardily and in a chaotic manner to extend such tardiness and chaos to the doorsteps of the court. Courts of law have a duty, not only to conduct their affairs in a dignified and transparent manner in dispensing justice, but also to protect their integrity against the machinations of the bad elements in the profession. Legal practitioners who take the court for granted in this manner run the risk of having costs granted against them *de bonis propriis* in order to discourage egregious departures from proper standards of professional behaviour.

Legal practitioner – fees – tariff of fees set by Law Society – obligation of practitioners to adhere to tariff – undercutting unlawful and dishonourable

Scapelox Trading (Pvt) Ltd v *Mashangwa Family Trust & Ors* HH-91-14 (Mathonsi J) (Judgment delivered 5 March 2014)

See above, under IMMOVABLE PROPERTY (Transfer).

Local government – urban council – by-laws – validity – supply of water – cutting off supply of water to customer who fails to pay for water – by-law authorising council to cut off water even if water bill disputed – such by-law *ultra vires* Urban Councils Act [*Chapter 29:15*] and Constitution

Mushoriwa v *City of Harare* HH-195-14 (Bhunu J) (Judgment delivered 30 April 2014)

The respondent council sent the applicant a bill for water supplied. The applicant flatly disputed owing the amount claimed or indeed any other amount. He maintained that he had always paid his bills in full and on time and provided proof of payment. He argued that the amount claimed pertained to a bulk meter not connected to

his premises. Nonetheless, the council without any further ado disconnected water supplies to the applicant's premises prompting him to file an urgent chamber application for an order directing the council to restore water services pending resolution of the dispute by the courts. The order was granted by consent, but in spite of the order the council again disconnected the applicant's supply. It took the intervention of the court and threats of imprisonment for contempt of court for the council authorities to restore water to the applicant's premises.
The issue arose whether the disconnection was lawful and what should happen if that there is a dispute regarding payment: would the council be entitled to self-help and to unilaterally cut off water supplies to a citizen without recourse to law? The council claimed that it was, in terms of s 8 of the city's Water Regulations 1913 (GN 164 of 1913) as read with s 198(3) of the Urban Councils Act [*Chapter 29:15*] and para 69 of the Third Schedule to the Urban Councils Act, clothed with unfettered discretion to disconnect water supplies to a citizen at will without recourse to the courts of law. Section 8 of the Regulations provides that "the council may, by giving 24 hours' notice, in writing without paying compensation and without prejudicing its rights to obtain payment for water supply to the consumer, discontinue supplies to the consumer if he shall have failed to pay any sum which in the opinion of the council is due under the conditions or the water by-law".
Held: (1) para 69(2)(e) of the Third Schedule, which sets out the matters in respect of which a council may make by-laws about water, omits the words "in the opinion of the council". The effect of that omission was to divest the council of the unfettered discretion upon which it seeks to rely on in justifying its conduct. The council's opinion does not matter; it can only disconnect water supplies on not less than 24 hours' notice, upon proof that the consumer has failed to pay any charges which are due. The council cannot lawfully disconnect water from a consumer unless it has established that the amount claimed is actually due.
(2) The right to water is a fundamental right enshrined in s 77 of the Constitution of Zimbabwe. Under s 44 of the Constitution, the State and every institution and agency of the government at every level must respect, protect and fulfil the rights and freedoms set out in the Declaration of Rights. The council, as a public body and institution of local government, cannot deny a citizen water without just cause. Section 8 of the Water Regulations contradicts both the Constitution and the enabling statute in more respects than one: firstly, it authorises the council to arbitrarily deprive citizens of their fundamental right to water without compensation, contrary to s 85 of the Constitution, which entitles an aggrieved person to appropriate compensation whenever his fundamental human rights have been violated; and secondly, in the event of a disputed bill it unlawfully confers the respondent with the sole jurisdiction to arbitrarily determine the dispute without recourse to the courts of law, contrary to para 69 of the third schedule to the Act, as read with s 165(1)(c) of the Constitution. By so doing the by-law allows the council to be the sole arbiter in its own case, contrary to the well-established common law maxim that no one should be a judge in his own case. While the council has a right to collect its debts, it cannot do so by resorting to unlawful means: for every person, including the council, is subject to the law.

Police – discipline – offences – disobedience to lawful written order – need for order to be extant when alleged disobedience occurred – conduct complained of subsequently becoming proscribed in written orders – no offence committed

Manyoni v *Ndlovu NO & Anor* HB-40-14 (Kamocha J) (Judgment delivered 20 February 2014)

The applicant, a member of the police force, had been charged before a single officer with contravening para 11 of the Schedule to the Police Act [*Chapter 11:10*], it being alleged that he had disobeyed a written order. He had, in 2010, enrolled in a course of higher education without having sought the authority of his superiors. The requirement to seek authority had been published in a written order, issued in 2012, requiring members of the force to seek authority before enrolling in educational courses.
Held: the lawful order which is disobeyed or refused or neglected to be carried out must be in existence at the time a member is alleged to contravene the paragraph, which makes no reference at all to future lawful orders, written or otherwise. The proceedings would be set aside and no further proceedings should be brought out of the same facts.

Practice and procedure – absolution from the instance – meaning – effect of grant of absolution – not equivalent to finding in favour of defendant – not a bar to re-institution by plaintiff of action

Sibanda v *Chikumba & Anor* HH-92-14 (Chigumba J) (Judgment delivered 27 February 2014)

After a party has closed its case, the defendant, before commencing his own case, may apply for the dismissal of the plaintiff's claim. Should the court accede to this, the judgment will be one of absolution from the instance.

The term "absolution from the instance" is used to describe the finding that may be made at either of two distinct phases of the trial. In both cases, it means that the evidence is insufficient for a finding to be made against the defendant. At the close of the plaintiff's case, when both parties have had opportunity to present whatever they consider to be relevant, the defendant will be absolved from the instance, if upon an evaluation of the evidence as a whole, the plaintiff's burden of proof has not been discharged. It is not a bar to the plaintiff re-instituting the action (provided the claim has not by then prescribed) and in that respect it is to be distinguished from a positive finding that no claim exists against the defendant. Absolution is the proper order when, after all the evidence, the plaintiff has failed to discharge the normal burden of proof. Absolution from the instance, in effect, brings the proceedings to an end at that stage because there is no prospect that the plaintiff's claim might succeed, and in those circumstances the defendant should be spared the trouble and expense of continuing to mount a defence to a hopeless claim. Its other use is an extension to civil actions of the rules for withdrawing a case. If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution.

Practice and procedure – affidavit – attestation – legal practitioner – has interest in any matter in which he is professionally involved – not entitled to attest affidavit of client

Hughber Petroleum (Pvt) Ltd & Anor v *Brent Oil Africa (Pty) Ltd* HH-78-14 (Mathonsi J) (Judgment delivered 26 February 2014)

No justice of the peace or commissioner of oaths shall attest any affidavit relating to a matter in which he has any interest. A legal practitioner, even if acting *pro amico* or *pro Deo*, has an interest in any matter in which he is professionally involved. The reason for the rule is, historically, that it is the duty of a commissioner of oaths, before he administers the oath, to satisfy himself that the witness thoroughly understands what he is about to swear to and this duty is not likely to be effectively discharged by the person who prepared the affidavit, who may well explain it in the sense he himself attached to it. Any purported affidavit executed in contravention of this rule is invalid.

Practice and procedure – application – chamber application – processing and set down of – duties imposed on registrar and judge – applicant's responsibilities to follow up on application

van Rooyen & Anor v *Antunes & Ors* HH-240-14 (Mafusire J) (Judgment delivered 20 May 2014)

A chamber application commences by way of an entry in the chamber book in terms of r 241(1) of the High Court Rules, using Form 29B. The basis of the application has to be set out on the face of the application. Those chamber applications that need to be served on interested parties have to be in Form 29 with appropriate modifications relating to the issue of the time limits given to the other party to file opposing papers, if any.
The chamber application has to be served on the interested party unless the exceptions in paras (a) to (e) of r 241(1) apply. Rule 243 provides that a chamber application *may* be accompanied by heads of argument. Once the chamber application has been entered into the chamber book, the registrar is required in terms of r 245 to submit it to a judge in the normal course of events, but without undue delay. Once the registrar has submitted the papers to him, the judge in chambers must consider the papers without undue delay. In terms of r 245 chamber applications, even though not urgent, must be dealt with expeditiously. Unlike court applications, which are party driven, chamber applications are system driven. Where a party has filed a chamber application, the application must automatically proceed to determination.
In terms of r 246, the judge before whom the chamber application has been placed can proceed in a number of ways. He may proceed to determine the matter on the papers. He may seek further information from any person *viva voce*. He may call for argument from the parties' legal practitioners. It is the practice of the High Court, where argument is required from one side, that the other side also be present.
The rules have no specific provisions for set down of a chamber application that has become opposed. It is up to the judge before whom the application has been placed to direct how he wants it determined. If he is not prepared to determine it solely on the papers filed of record he may arrange for oral submissions. He may require heads of argument to be filed where these have not been filed. He may require that the chamber application be heard in open court as an opposed matter. Whatever he eventually decides, it seems that the parties can only act on his directions.
However, even though the rules cast the duty on the registrar and the judge to ensure that the chamber application, once filed, is determined without undue delay, this does not mean that the applicant can just file the application and go to sleep. Human systems are not infallible. Documents can go missing or become misplaced.

It remains the applicant's duty to be vigilant. He must follow up on his application. The law helps the vigilant, not the sluggard.

Practice and procedure – application – counter-application – how counter-application should be filed – failure to comply with required format for counter-application – counter-application invalid

Mukambirwa & Ors v *Gospel of God Church Intl 1932* S-8-14 (Gowora JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 27 February 2014)

Applications, both chamber and court applications, are provided for under Order 32 of the High Court Rules 1971. The format for an application is set out in r 227, which provides that every written application, notice of opposition and supporting and answering affidavit shall contain the documents specified therein and the form that it shall be in. Rule 229A on the other hand specifies how a respondent, in addition to filing a notice of opposition and opposing affidavit, may file a counter application, and the rule provides how this should be done. Where a respondent wishes to file a counter-application in addition to filing an opposing affidavit, the rules require that that a separate application be filed in the requisite form. Subrule (2), which provides for the format to be followed in filing a counter-application, is peremptory in its terms and in the absence of compliance with the form required there can be no valid counter-application. This rule is, like other procedural rules, subject to the overriding discretion of the court. In the exercise of such discretion, the court would obviously only sanction a departure from the general rule on good cause shown. Further, and in any event, in terms of r 229A, both applications must be heard together unless an order for the hearing of the counter-application has been granted by a judge. The rules require that good cause be shown for an order for the counter-application to be heard separately from the main application. Good cause can only be established upon application to a judge or the court.

Practice and procedure – application – disputes of fact – procedure to adopt – when application procedure may be adopted despite existence of disputes of fact

Francis R Fernandes & Sons v *Mudzingwa & Ors* HH-22-14 (Mafusire J) (Judgment delivered 21 January 2014)

The overriding consideration on the method of procedure to adopt in any given case is whether or not there is a likelihood of a real dispute of fact emerging from the papers which will be incapable of resolution on those papers. A dispute of fact must be real and not fanciful. It is not enough for a respondent just to make bare denials in the hope of creating a dispute of fact. He must produce *positive* evidence to the contrary.

In motion court proceedings, where there is a genuine dispute of fact on the papers, the court can proceed in one of several ways:

(1) The court can take a robust view of the facts and resolve the dispute on the papers, if the facts stated by the applicant, together with the admitted facts in the respondent's affidavit, justify such an order;
(2) The court can permit or require any person to give oral evidence in terms of r 229B of the High Court Rules if it is in the interests of justice to hear such evidence;
(3) The court can refer the matter to trial, with the application standing as the summons or the papers already filed of record standing as pleadings;
(4) The court can dismiss the application altogether if the applicant should have realised the dispute when launching the application.

Practice and procedure – applicant – urgent – certificate of urgency – basis on which such certificate may be issued – duties of certifying legal practitioner

UZ-UCSF Collaborative Research Programme v *Husaiwevhu & Ors* HH-260-14 (Mafusire J) (Judgment delivered 2 June 2014)

See above, under EMPLOYMENT (Contract – termination – fixed term contract).

Practice and procedure – declaratory order – requirements for issue of – who may seek such order

Streamsleigh Invstms (Pvt) Ltd v *Autoband Invsts (Pvt) Ltd* S-43-14 (Gowora JA, Malaba DCJ and Garwe JA concurring) (Judgment delivered 17 June 2014)

A declaratory order under s 14 of the High Court Act [*Chapter 7:06*] is appropriate to determine any existing, future or contingent right or obligation. An applicant for a declaratory order must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. In addition, an applicant must establish that some tangible and justifiable advantage in relation to its position with reference to an existing, future or contingent legal right or obligation may appear to flow from the grant of the declaratory order sought.

Practice and procedure – exception – when must be filed – must be filed and disposed of before pleading to the merits – may not be combined with plea to the merits

Ritenote Printers (Pvt) Ltd & Anor v *A Adam & Co (Pvt) Ltd & Ors* HH-83-14 (Chigumba J) (Judgment delivered 20 February 2014)

When an action was brought against it for damages arising out an allegedly unlawful eviction, the defendant entered appearance to defend, and subsequently filed a combined exception and plea.
Held: the exception was not properly before the court. Under r 137 of the High Court Rules 1971, there are four alternatives to pleading to the merits: a plea in bar; an exception; an application to strike out; or an application for a further and better statement of the nature of the claim or for further and better particulars. Those alternatives cannot be combined with a plea to the merits. Once the defendant had filed its exception, it had ten days within which to engage the plaintiffs and agree to set the exception down for hearing by using the application procedure provided by r 223. If the parties failed to set the exception down for hearing by consent, then defendant had a further four days to itself set the exception down for hearing. If neither course is followed, after a further four days, the defendant must plead over to merits. After pleading over to merits, the special plea, exception or application may not be set down for hearing before the trial.
An exception therefore can only be properly filed before the excipient pleads to the merits of the matter. It is an alternative to pleading to the merits. Once the excipient pleads before filing the exception, he is in fact telling the other party that its declaration discloses a cause of action and is neither vague nor embarrassing. After the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action.

Practice and procedure – heads of argument – further heads – matter reserved for judgment – party entitled to apply to file further heads

Zimasco (Pvt) Ltd v *Marikano* S-6-14 (Garwe JA, Gowora JA & OMerjee AJA concurring) (Judgment delivered 13 January 2014)

In general, once judgment has been reserved, the parties have no right to file further heads of argument. However a party has the right to apply to file such heads of argument. When that happens, it is incumbent upon the judicial officer seized with the matter to hear both sides and thereafter to make a decision on whether or not to allow such filing. Where an issue of law, particularly one of jurisdiction, is raised, a court should be slow to refuse to allow such further argument unless the court is satisfied that such further argument would not take the matter any further or that it amounts to an abuse of court process. A question of law can be raised at any time, even for the first time on appeal, as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed. The rationale for allowing issues of law to be raised at any time is to enable a court to have all the information, even at a very late stage, so that it is enabled to make a proper decision. If a court has no jurisdiction that would be the end of the matter and any determination made thereafter would be null and void.

Practice and procedure – judgment – currency in which judgment may be expressed – local currency ceasing to be used – claim amended so as to express sum claimed in currency in actual use

Stuart v *NRZ* HB-7-14 (Ndou J) (Judgment delivered 23 January 2014)

The applicant issued summons against the respondent before the introduction of the multi-currency system in the country. He sought to amend his claim to express it in "the currency currently in use in Zimbabwe and as particularized in his founding affidavit and annexures".
Held: the amendment would be allowed. In February, 2009, the Zimbabwe dollar ceased to be used in trade when the Government introduced a system of multi-currency. The court could safely take judicial notice of this fact. It was not necessary to deal with the theoretical argument raised by the respondent that the Zimbabwe dollar was never demonetized, nor did it cease to be legal tender. The bottom line was that no one, including the respondent, was currently using the Zimbabwe dollar as means of trade. The contention that the Zimbabwe dollar was in use was not premised on practical considerations. As far as the law was concerned, our courts have accepted the competency to grant judgment in foreign currency, long before the multi-currency regime was introduced in February 2009. To award the damages in Zimbabwe dollars, which had been rendered valueless by the Government's action in February 2009, might deny the applicant, as plaintiff in the main matter, the redress that he sought. The applicant was not the author of the demise of the Zimbabwe dollar and it would not be in the interests of justice to punish him for that fact. There was no prejudice to the respondent that could not be cured by affording it the opportunity to challenge the evidence adduced by the applicant on the rating of the Zimbabwe dollar vis-à-vis the United States dollar.

Practice and procedure – parties – citation of – party operating under a trade name – entitled to sue or be sued under that name, as though it were an association

Gloar Design Team v *Zinara* HH-319-14 (Mtshiya J) (Judgment delivered 25 June 2014)

The plaintiff brought an action against the defendant for payment for services rendered. The declaration stated that the plaintiff was a company duly incorporated under the laws of Zimbabwe. The defendant filed a special plea, stating that, as there was no company registered under the plaintiff's name, the summons was a nullity. The plaintiff's response was that, in terms of r 8C of the High Court Rules, the citation of the plaintiff by a trading name was not fatal. It was averred that the plaintiff was an architect who traded as Gloar Design Team.
Held: in terms of r 8C, a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and the rules relating to proceedings by associations would apply. It could not therefore be argued that there was no plaintiff. The question of a nullity was removed by r 8C. That being the case, there was a summons and declaration that the plaintiff could amend. The issue of substitution did not arise. There had always been a plaintiff.

Practice and procedure – provisional sentence – purpose of procedure – remedies open to defendant after provisional sentence has been granted – writ of execution issued – defendant not having satisfied judgment – not open to defendant to obtain stay of execution

Air Zambezi (Pvt) Ltd & Anor v *OAFC Aviation Eighteen Ltd & Ors* HH-263-14 (Mathonsi J) (Judgment delivered 4 June 2014)

Provisional sentence had been obtained against the applicants following judgments against them in a foreign court. Security *de restituendo* was furnished by the respondents, the amount of the security being fixed by consent. When writs of execution were issued against the applicants, the applicants sought a stay of execution and an order that the registrar should accept a guarantee issued by a bank (which was itself financially unstable) as security for the debt.
Held: Provisional sentence is a speedy remedy available to a party who is equipped with a document acknowledging indebtedness. It accords such party the opportunity to obtain payment of what is owed without the unnecessary delay and expense of a trial. The procedure is not designed to disarm prospective defendants but it enables the plaintiff to receive prompt payment without having to wait for the final determination of the dispute between the parties. It is provided for in the rules of court and, while it may be true that other jurisdictions are moving away from it for one reason or the other, provisional sentence remains firmly recognised in this country as a remedy available to a party with an unassailable case.
The remedies open to a defendant when provisional sentence has been granted are set out in r 28 of the High Court Rules. This provides that the defendant may, within one month after the attachment, or if he has satisfied the judgment without an attachment, then within one month after having done so, cause an appearance to be entered with the registrar to defend the action, and shall notify the plaintiff of such entry. If he fails to do so

within the stipulated time, the provisional sentence immediately becomes a final judgment. By granting provisional sentence, the court would have recognised that the plaintiff was entitled to the judgment. The defendant is entitled to demand security *de restituendo* from the plaintiff where he satisfies the judgment. The plaintiff is required to give security *de restituendo* if he wishes to issue a writ of execution against the defendant's property. The court, having granted that judgment, cannot be expected to contradict itself by granting an interdict staying execution of that judgment when the defendant would have failed to satisfy the judgment.
It is not for a defendant who has not satisfied the judgment to say that the judgment should not be carried into execution and that the defendant should be allowed to defend the action when payment has not been made. If that were to be allowed, it would render nugatory the entire remedy of provisional sentence. While r 28 allows a defendant whose property has been attached to enter appearance and defend the action, it does not prevent execution. The defendant can only be allowed to defend where he has satisfied the judgment on his own or the judgment would be satisfied by a sale of the property attached.

Practice and procedure – rescission – application – may be referred to trial where not capable of resolution on the papers

Earthmoving & Construction Co (Pvt) Ltd v *Gurupira & Ors* HH-128-14 (Mafusire J) (Judgment delivered 19 March 2014)

Even though, in terms of r 63 and r 449 of the High Court Rules, rescission of judgment is by way of an application, these rules do not take away the court's unfettered discretion to refer such an application to trial where it is faced with serious disputes of facts which it is not capable of resolution on the papers. It may well be desirable to err on the side of caution, so that where such an application gets bogged down in such disputes of fact as to render the court incapable of determining whether or not the applicant has shown "good and sufficient cause" (as r 63 requires), rescission should be granted so as to enable the matter to be canvassed more fully at the trial of the main matter. However, that does not detract from the discretion that the court always has to refer that particular application to trial for the determination through *viva voce* evidence of whether good and sufficient cause. At any rate, under r 449, "good and sufficient cause" is not a requirement for rescission.
An application for rescission of judgment, whether made under r 63 or under r 449, is, in the words of r 226(1), an application "… made for whatever purpose in terms of these rules…" It is in the nature of an application under r 226(1)(a) that where a dispute of fact arises which is incapable of resolution on the papers the court can proceed in one of four ways: (a) it can take a robust view of the facts and resolve the dispute on the papers; (b) it can permit or require any person to give oral evidence in terms of r 229B if it is in the interests of justice to hear such evidence; (c) it can refer the matter to trial with the application standing as the summons or the papers already filed of record standing as pleadings; or (d) it can dismiss the application altogether if the applicant should have realised the dispute when launching the application. A court application in terms of r 63 is no different from the court application whose procedure is outlined in r 226. In the exercise of its discretion, the court can refer such an application to trial.

Practice and procedure – sale in execution – fees due to deputy sheriff – applicable tariff – tariff in force at time of relevant transaction governs fees due – by whom fees payable – owner of goods attached – fees payable by such person, not by judgment creditor

Matipano NO v *Gold Driven Invstms (Pvt) Ltd* S-19-14 (Gowora JA, Malaba DCJ and Ziyambi JA concurring) (judgment delivered 24 March 2014)

See above,under ENRICHMENT (Unjust enrichment).

Practice and procedure – summary judgment – requirements – what plaintiff must aver and establish – what defendant must show to resist claim for summary judgment

Zimplastics (Pvt) Ltd v *Corbett* HH-32-14 (Chigumba J) (Judgment delivered 29 January 2014)

The purpose of the relief of summary judgment is to enable a plaintiff with a clear case to obtain swift enforcement of its claim against a defendant who has no real defence against the claim. A plaintiff seeking

summary judgment must bring itself squarely within the ambit of r 64 of the High Court Rules. The plaintiff's claim must be clear and unassailable as it is set out in the summons and declaration, and verified in the founding affidavit. Summary judgment should usually not be granted when any real difficulty as to matters of law arises, although, however difficult the point of law is, once the court is satisfied that it is really unarguable, judgment will be granted.
The plaintiff's claim in the pleadings (summons, declaration, founding affidavit) must be unanswerable. The founding affidavit must confirm the facts of the case and confirm the cause of action and contain an averment that the respondent has no *bona fide* defence and has entered appearance to defend solely for purposes of delaying the finalization of the matter.
For the defendant to resist the claim for summary judgment, he must establish that he has a good *prima facie* defence. Vague generalities and inconclusive allegations are not enough. While the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence with sufficient clarity and completeness to enable the court to decide whether a *bona fide* defence exists. Such a defence exists if the defendant can show that there is a mere possibility of success; that he has a plausible case; or that there is a real possibility that an injustice may be done if summary judgment is granted.

Property and real rights – possession – what must be shown to establish possession – actual or constructive possession –distinction between

S v *Mpa* HH-469-14 (Hungwe J, Bere J concurring) (Judgment delivered 20 May 2014)

See above, under CRIMINAL LAW (General principles – possession)

Property and real rights – vindication – owner entitled to repossess property at any time unless possessor can establish claim of right – claim of right arising from employment – need to show that contract of employment conferred such right

Arundel School Trust v *Pettigrew* HH-242-14 (Chigumba J) (Judgment delivered 21 May 2014)

See above, under EMPLOYMENT (Contract – termination).

Public service – disciplinary proceedings – suspension from duty pending holding of disciplinary proceedings – suspension not a pre-requisite to holding of such proceedings – termination of suspension – does not prevent disciplinary proceedings from being held – extension of period of suspension – suspension may only be extended if period of suspension has not expired

Shumbayaonda v *Ministry of Justice & Anor* S-11-14 (Garwe JA, Ziyambi & Hlatshwayo JJA concurring) (Judgment delivered 25 February 2014)

See above, under EMPLOYMENT (Suspension from duty – suspension pending holding of disciplinary proceedings).

Revenue and public finance – appeal to Fiscal Appeal Court – effect – suspends payment of disputed amount unless Commissioner directs otherwise – need to notify taxpayer in writing of any such direction

Revenue and public finance – Commissioner of Revenue Authority – requirement to act in accordance with requirements of Administrative Justice Act – directing garnishee order which would leave taxpayer unable to continue operating – such decision unreasonable

Packers Intl (Pvt) Ltd v *ZRA* HH-328-14 (Chigumba J) (Judgment issued 25 June 2014)

See above, under ADMINISTRATIVE LAW (Administrative authority).

Statutes – Environmental Management Act [*Chapter 20:27*] – s 37(4) – power of inspector of Environmental Management Agency to close premises – need for activity which is actually polluting the environment to be occurring – no power to close premises to have preventive measures taken

Forbes & Thompson (Bulawayo) Pvt Ltd v *Musasiwa NO & Anor* HB-54-14 (Moyo J) (Judgment delivered 10 April 2014)

See above, under ENVIRONMENT.

Statutes – Protection of Wild Life (Indemnity) Act [*Chapter 20.15*] – s 3 – indemnity for acts committed in good faith for the purpose of or in connection with the suppression of poaching activities – what must be shown for indemnity to attach to accused

S v *Bowa* S-47-13 (Garwe JA, Ziyambi & Hlatshwayo JJA concurring) (Judgment delivered 27 June 2014)

See above, under CRIMINAL LAW (Defences)

Statutes – Public Order and Security Act [*Chapter 11:17*] – s 25 – notifying police of public meeting – failure to do so – offence committed by convenor – meeting itself not unlawful – no offence to address such meeting – police permission not required for meeting

S v *Karenyi* HH-281-14 (Hungwe J, Bere J concurring) (Judgment delivered 29 May 2014)

The appellant, a member of Parliament, addressed a meeting convened in a rural village within her constituency. The police arrived and asked her whether the meeting she was addressing had been sanctioned by the police. She said she thought that a local party official had given notice to the police of the meeting. The official, when contacted, advised that he had forgotten to notify the police. The appellant was charged with and convicted of contravening s 25(5) of the Public Order and Security Act [*Chapter 11:17*], which makes it an offence for the convenor of a public meeting or procession to fail to give the notice to the police specified in subs (1). The averments in the charge related to lack of authorisation to hold a political meeting rather than failure to notify the regulating authority.
Held: (1) only the convenor of a meeting is required to give the notice to the police. The trial court had laboured under the assumption that the appellant was the convener because she was addressing the meeting, although the evidence was that the local official was the convenor.
(2) Nothing renders a meeting called without notice in terms of s 25 unlawful. Even if appellant had known that police had not been notified of this meeting, her addressing it did not constitute an offence in terms of the Act.
(3) Whatever powers the police wielded prior to the 2007 amendment to the principal Act, the power to sanction a political gathering was no longer one of the powers which police had when the meeting in question was held. Consequently, if political parties did not require permission from the police to hold their meetings, it was vexatious, when charging the accused with contravening s 25(5) of the Act, to aver that the accused "unlawfully and intentionally held an unsanctioned political meeting." Section 25(5) of the Act does not create such an offence, but that of failure to notify the regulating authority.

Statutes – Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] – reconstruction order under Act – purpose of – duties of administrator – grant of leave to institute proceedings against company – what administrator should consider – debts incurred before or after reconstruction order issued – whether should be treated differently – duties of administrator when application made to bring proceedings against company – must act in accordance with principles of Administrative Justice Act [*Chapter 10:28*]

C J Petrow & Co (Pty) Ltd v *Gwaradzimba NO* HH-175-14 (Mafusire J) (Judgment delivered 16 April 2014)

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

Statutes – Termination of Pregnancy Act [*Chapter 15:10*] – pregnancy resulting from unlawful intercourse – procedure to be followed by woman concerned – need for her to initiate proceedings by lodging complaint – subsequent roles of prosecutor, police and magistrate

Mapingure v *Min of Home Affairs & Ors* S-22-14 (Patel JA, Garwe & Gowora JJA concurring) (Judgment delivered 25 March 2014)

See above, under DELICT (*Actio legis Aquiliae*).

Stock exchange – Securities and Exchange Commission – powers – directive to stockbrokers not to dispose of shares of company in distress – such company already under liquidation and liquidator having ordered sale of such shares – Commission having no power to interfere with liquidator's decision

Gwatidzo NO v *First Transfer Secretaries (Pvt) Ltd & Ors* HH-165-14 (Makoni J) (Judgment delivered 3 April 2014)

See above, under COMPANY (Liquidation).

Trust – status of – not a separate legal *persona* – representation in legal proceedings – must be represented by trustee – need for trustee to aver his capacity and how he was appointed

Mafirambudzi Family Trust v *Madzingira & Ors* HH-338-14 (Takuva J) (Judgment delivered 28 May 2014)

According to the law of persons, a trust is not a separate legal *persona*. It follows naturally that the principles applicable to corporate bodies do not necessarily apply to trusts. A trust, in the wide sense, is any legal arrangement by which one person is to administer property, whether as an officer holder or not, for another or for some impersonal object. In the narrow sense, a "trust" exists when the creator of the trust hands over or is bound to hand over the control of an asset which is to be administered by another for the benefit of some person other than the trustee or for some impersonal object. It is a legal relationship, not a separate legal entity such as a corporation or *universitas*, even though the trustees may together form a board akin to a board of a company or of a voluntary association. Our law of trusts has not sufficiently grown to recognise a limited separate personality of a trust, even though some trusts operate more or less on the same lines as a voluntary organisation or incorporated company. In such cases, the trust has evolved a personality of sorts that appears separate from the personality of the trustees.
A person who is *de facto* administering a trust as trustee has *locus standi* in any matter relating to the trust, so has a person who claims to be the rightful trustee and seeks confirmation of his status. An action relating to trust affairs, for example, for damage to trust property must be brought by the trustee in his capacity as such and not in his private capacity. A trustee bringing an action or application should aver his capacity and that he was properly appointed by a given instrument, or order of court. The source of the authority of a trustee must be averred (e.g. will, deed *inter vivos*, appointment to an insolvent estate).

Will – validity – subsequent marriage of testator – unregistered customary law marriage – such marriage not invalidating will

Magedi & Anor v *Samuriwo & Ors* HH-184-14 (Mawadze J) (Judgment delivered 8 May 2014)

After he had made a will in favour of the children of his marriage, the testator was widowed. He married the first applicant in an unregistered customary law union. No children resulted from this union. The testator died, and the applicant, relying on s 16(1) of the Wills Act [*Chapter 6:06*], sought to have the will declared invalid on the grounds of the subsequent marriage. Section 2 of the Act defines a marriage as including a marriage solemnised in terms of the Customary Marriages Act [*Chapter 5:07*].
Held: a civil marriage contracted after the execution of a will invalidates that will. The object of the legislation to that effect is to afford some measure of protection to the new spouse of the testator who had been previously married, and to any issue whether born to the parties or adopted by them. The provision contemplates more than the mere conversion of an existing polygamous matrimonial union to one of monogamy. It envisages a necessary change, brought about by the subsequent marriage, to the status of both the spouse and testator to that of a married person – from a bachelor, divorcé or widower, in the case of a man, and from spinster, divorcée or

widow, in the case of a woman. It is designed to avoid a situation in which a will which predated the subsequent marriage makes no provision for the new spouse. The position in law currently is that an unregistered customary marriage is generally not a marriage in the eyes of the law except when such specific recognition is given by a particular enactment. This is made clear by s 3 of the Customary Marriages Act. Such a union is not a valid marriage in terms of the section, but, for the purposes of customary law and custom relating to status, guardianship, custody and rights of succession of the children of such marriage, is regarded as a valid marriage. Section 16(1) of the Wills Act only extended the fore-mentioned protection to those spouses married in terms of registered customary law marriages. The will was therefore valid.

Will – validity – will making no provision for former wife under customary law – only spouse under marriage to which Matrimonial Causes Act applies entitled to be provided for in will – marriage must still subsist at time of testator's death

Munyukwi v *Est Nduna & Anor* HH-229-14 (Chitakunya J) (Judgment delivered 15 May 2014)

The applicant and the testator were married for several years in terms of an unregistered customary law union, but had divorced in terms of that law some years before his death. In his will, he made no provision for the applicant. She sought to have the will set aside in terms of s 5(3) of the Wills Act [*Chapter 6:06*], which provides that no provision in a will shall operate so as to vary or prejudice the rights of any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married persons.
Held: (1) for one party to be a surviving spouse the parties must have been married as at the time of the deceased's death. The parties in this matter were no longer living as husband and wife even under customary law. Whatever relationship had existed between them had ceased. The nature of the applicant's claim showed that she was alleging the existence of a tacit universal partnership for duration of their union. Her claim was thus based on her contribution during the subsistence of that tacit universal partnership and not a share of assets of the spouses in terms of the Matrimonial Causes Act [*Chapter 5:03*].
(2) The phrase in s 5(3) of the Wills Act "in terms of any law governing the property rights of married persons" refers to the Matrimonial Causes Act, which Act is not applicable to parties in unregistered customary law unions.
(3) The parties' unregistered union had long ceased. The applicant was thus not a surviving spouse. As a consequence, the will could not be nullified on the ground that the testator left the applicant out of his will.

Words and phrases – "good faith" – "for the purposes of" – "in connection with" – Protection of Wild Life (Indemnity) Act [*Chapter 20.15*] – s 3

S v *Bowa* S-47-13 (Garwe JA, Ziyambi & Hlatshwayo JJA concurring) (Judgment delivered 27 June 2014)

See above, under CRIMINAL LAW (Defences)

Words and phrases – "received" – party to arbitration having "received" the award – award must have been sent or delivered to such party – not enough to notify party that award available for collection

Willoughby's Invstms (Pvt) Ltd v *Peruke Invstms (Pvt) Ltd & Anor* HH-178-14 (Zhou J) (Judgment delivered 16 April 2014)

See above, under ARBITRATION (Award – setting aside of – grounds – public policy – award resulting in a palpable inequity).