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CASES DECIDED JANUARY – JUNE 2016

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

Agent – liability of – contract entered into by agent on behalf of principal – agent not a party to such contract – order for specific performance under contract – can only be brought against party to contract

Musemwa & Ors v *Gwinyai Family Trust & Ors* HH-136-16 (Dube J) (Judgment delivered 14 January 2016)

The plaintiffs, who were the purchasers of various stands in a suburb of Harare, entered into agreements of sale with the first and second defendants. The third and fourth defendants were estate agents who had handled the sales. It was necessary that the original stands be subdivided in order for title to pass. The plaintiffs brought actions, which were consolidated, against the defendants, seeking an order requiring the defendants to subdivide the relevant properties and transfer title, alternatively, to reimburse the purchase price for each stand to the relevant plaintiff.
The defendants excepted to the summons. The third and fourth defendants averred that the plaintiffs failed to allege that the third and fourth defendants were parties to the contract on which the plaintiffs' sue. The allegations made by the plaintiffs established that the third and fourth defendants were at best agents. The plaintiffs' claim for restitution could only be made pursuant to a claim for rescission of the agreement, which claim had not been brought by the plaintiffs. Any claim for specific performance and restitution could only lie against parties to the contract and not against an estate agent.
The defendants also said the three of the plaintiffs were trusts, which had no *locus standi*. Only the trustees of those trusts could sue in the name of the trusts.
Held: (1) The concept of a trust originated in English law over 900 years ago and continues to evolve. A trust is a legal relationship of parties which usually involve the founder, trustees and beneficiaries. The relationship is created by the founder who places assets under the control and administration of the trustee for the benefit of named persons, the beneficiaries. It is created by a trust deed. A trust has no legal personality and the common law does not recognise a trust as having *locus standi* to sue in its own name. If a trust is to be clothed with juristic personality, it would be a *persona* made up of assets and liabilities. In fact, the assets and liabilities in a trust vest with the trustee. When it sues or is being sued, a trust should be represented by its trustees in whom the trust's assets and liabilities vest. However, in Order 2A of the High Court Rules (introduced in 1997), an associate (which includes a trustee) may sue and be sued in the name of their association. Under r 8, a trust is clothed with the power to sue and be sued in its own name. The rules have modified trust law to permit and create *locus standi* for a trust.
(2) An agent is a person authorised to act on behalf of another, being his principal. Where one person tasks another to sell his property on his behalf, an agency is created. The third and fourth defendants were agents of the first and second defendants and facilitated the sales of the stands to the plaintiffs. They were not party to the contracts of sale and remained purely agents of the first defendant. An agent can only be accountable in his personal capacity where he has purported to represent a non-existent principal, where he has pledged responsibility for his actions, where he has no authority to act and or where he has not disclosed his principal or the principal is unidentified. Here, the third and fourth defendants were acting on behalf of their principals, the first and second defendants. There was no privity of contract between them and the plaintiffs. The plaintiffs were suing in contract. The remedy of specific performance is one claimable in contract only and for breach of contract. A claim for specific performance can only be brought against a defendant who was a party to the contract and who can legally perform the acts complained against. There was no basis for such an order against the third and fourth defendants. They did not have title to the properties and this could not transfer it. The claims against the third and fourth defendants must fail.

Appeal – criminal matter – appeal against discharge at close of State case – appeal by Prosecutor-General against – application for leave to appeal – correct procedure to follow – time within which Prosecutor-General must make application – must be time that is reasonable in the circumstances

P-G v *Mtetwa & Anor* HH-82-16 (Mawadze J) (Judgment delivered 27 January 2016)

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

Arbitration – arbitration agreement – requirement to be in writing – when such an agreement may be said to be in writing – not essential that signed and binding contract should be in existence

Tel-One (Pvt) Ltd v *Capital Ins Brokers (Pvt) Ltd* HH-26-16 (Charewa J) (Judgment delivered 13 January 2016)

In terms of art 7(2) of the Model Law (contained in the First Schedule to the Arbitration Act), an arbitration agreement must be in writing. Even in the absence of a signed and binding contract, an arbitration agreement is regarded as being in writing if it is contained in (a) a document signed by the parties; or (b) an exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement; or (c) in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.

Arbitration – arbitration clause – what is – need for such clause to be clear and unequivocal and to require that arbitration must precede litigation – clause cast in permissive terms not ousting inherent jurisdiction of court

Air Duct Fabricators (Pvt) Ltd v *A M Machado & Sons (Pvt) Ltd* HH-54-16 (Chigumba J) (Judgment delivered 22 January 2016)

The arbitration clause in a construction contract provided that "If either the contractor or the subcontractor is unwilling to accept mediation or is dissatisfied with or unwilling to accept the opinion expressed by the mediator, then and in such case either the contractor or the sub-contractor may within 28 days after receiving notice of such proposal or decision require that the matter shall be referred to arbitration …". The applicant, who was defendant in the main case, filed a special plea that the action be stayed pending the final determination of the dispute by arbitration.
Held: language of a predominantly imperative nature is generally taken to be indicative of peremptoriness, and that the verb "shall" is one such word. A court called upon to determine whether a particular provision is peremptory or directory must construe the language of the concerned provision in the context, scope, and object of the act which it forms part. "Peremptory" requires exact compliance whilst "directory" requires substantial compliance, though the distinction between the two has now become blurred. What degree of compliance is necessary and what the consequences are of non- or defective compliance. These must ultimately depend upon the proper construction of the statutory provision, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope and purpose of the enactment as a whole. When the legislature uses the word "may" in a statute by which it confers power on a public official to do a thing, the intention is to confer the power only without a duty to exercise it. The statute must be construed as conferring on the repository of the power a discretion to decide whether or not to do the thing, unless there is something in the subject-matter to which the statute relates which shows that the word "may" is used in an imperative sense to impose a duty on the public official to exercise the power. The meaning attributed to the words "may" and "shall" applies to those words in any context. "May" implies permissiveness, as in a discretion or a choice, while "shall" is an imperative, a duty or obligation to take the prescribed course of action.
Here, mediation or arbitration was not mandatory. The wording is not couched in peremptory as opposed to permissive terms. Referring the matter to arbitration was a choice, not an imperative, as evidenced by the use of the word "may" in relation to the issue of arbitration. The inherent jurisdiction of the court was thus not ousted. It is only when an arbitration clause is clear and unequivocal – that arbitration must proceed at first instance in resolving the dispute – that such a clause can have the effect of staying proceedings.

Arbitration – arbitrator – recusal – application – formal application must be made and valid reasons for seeking recusal must be given

Arbitration – award – appeal against – to Labour Court – does not suspend award – award remains extant – award finding wrongful dismissal but not quantifying damages – award allowing parties to approach arbitrator to determine damages – successful party entitled to do so in spite of noting of appeal

Tendai v *Econet Wireless (Pvt) Ltd* HH-97-16 (Mtshiya J) (Judgment delivered 3 February 2016)

The applicant sought the registration of an arbitral award made in her favour. The arbitrator had found that she had been constructively dismissed and that the respondent was to pay damages. He ruled that if the parties did

not agree on the quantum, they could approach him for quantification. The parties did not discuss the issue of quantum, and the respondent filed an appeal in the Labour Court, as well as an application to that court that the arbitrator should be ordered to suspend any further proceedings. The applicant then filed an application with the arbitrator for quantification. The respondent, in correspondence, objected to this move, saying that the application would prejudice the proceedings in the Labour Court. The arbitrator replied that there was nothing in the law or by way of a court order to prohibit the quantification process. The quantification was heard and attended by both parties. The respondent argued that the arbitrator had no jurisdiction in view of the pending proceedings in the Labour Court. The matter was postponed for further hearing. Before the hearing resumed, the respondent requested the arbitrator to suspend the proceedings, saying that it would be prejudiced. It also asked the arbitrator to recuse himself. It relied on the proviso to s 7(1)(c) to the Labour (Arbitrators) Regulations 2012 SI 173 of 2012) and argued that where a party requests the recusal of an arbitrator, the arbitrator has no choice but to recuse himself. The applicant disagreed with the respondent's views and said that there was no basis for demanding the recusal of the arbitrator. The respondent said it would not take part in any further proceedings before that arbitrator. The quantification hearing was resumed and an award made, which the applicant now sought to register. The respondent opposed the registration, arguing that the arbitrator had no jurisdiction to make the award.
Held: (1) the appeal to the Labour Court did not suspend the original award and the award remained extant. The applicant was entitled to apply for quantification in terms of the award and there was nothing to stop her from registering the award.
(2) Under s 98(9) of the Labour Act [*Chapter 28:01*] the arbitrator is clothed with the same powers as are enjoyed by the Labour Court when determining any labour dispute. An arbitrator in a labour matter operates under certain guidelines and should be able to give directions where necessary. Here, the arbitrator directed that, instead of a mere request through a letter, a formal application for his recusal should have been made. That directive was ignored. That directive having been ignored, the arbitrator was correct in ignoring the letter of request. There must always be valid reasons for a party to request for the recusal of an arbitrator and indeed the section of the regulations relied upon spells out the grounds upon which such a request must stand. If those grounds are met, then the arbitrator must recuse himself. The grounds for recusal are issues for argument by both parties before the arbitrator, hence the need for a formal application.

Arbitration – award – registration of – award sounding in foreign currency – award providing that debtor must seek approval for payment of such debt in foreign currency – not open to debtor to pay in local currency – award registrable with High Court

African Banking Corp Ltd v *Enviro-Solutions (Pvt) Ltd* S-75-15 (Malaba DCJ, Hlatswayo & Guvava JJA concurring) (Decision given 7 November 2013; judgment published 26 January 2016)

The appellant was a bank incorporated in Botswana, with subsidiaries in other countries, including Zimbabwe. The respondent was also incorporated in Botswana, but having business operations in Zimbabwe. In 2002 the appellant and the respondent entered into an agreement, in terms of which the respondent provided the appellant with software necessary to secure its computerised banking and financial systems against viruses. The respondent was to provide the support and maintenance services to ensure the smooth functioning of the software. The appellant undertook to pay the software licence and maintenance fees calculated in terms of the agreement.
A dispute arose over the performance of the contract. The appellant had ceased paying, alleging various irregularities. The respondent claimed for outstanding fees of some US$188 000. The matter was referred to arbitration, and the arbitrator found for the respondent, finding that the appellant had unlawfully terminated the agreement between the parties. The respondent sought to register the award with the High Court, for enforcement in Botswana, on the basis of the arrangement for reciprocal enforcement of judgments existing between the two countries. The arbitrator ordered the appellant to pay the sum claimed or, in the absence of lawful authority for such payment, the equivalent in Zimbabwe dollars at the date of payment.
The court *a quo* decided that the arbitral award was registrable on the grounds that the appellant was a foreign company incorporated in Botswana; the award ordered the payment of the debt which sounded in United States dollars in foreign currency and the indication by the respondent's legal practitioner that they were receiving the payment tendered in local currency at the time "without prejudice to their clients' rights" meant that the respondent had not accepted payment in local currency. The arbitrator had acted on the principle that a creditor must receive his award in the appropriate currency, with a rate of interest appropriate to the currency in the circumstances. The arbitrator held that the money of account and the money of payment was the US dollar.
The issues on appeal were whether the appellant was incorporated in Botswana and not in Zimbabwe; what the currency of payment was and whether the appellant had discharged its obligations; which party had to seek

exchange control approval; and what the effect was of the respondent's legal practitioners endorsing the receipt with the phrase "without prejudice to our client's rights".
Held: (1) the appellant was registered in Botswana. The production of a certificate of incorporation in Zimbabwe of a subsidiary company was an attempt to mislead the court.
(2) The money of account is the currency in which the obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which the obligation has to be discharged. It tells the debtor by what means he has to pay. Here, the appellant had the obligation to pay the money owed to the respondent in designated foreign currency. It was under an obligation to seek the necessary authority from the Reserve Bank to pay the money in foreign currency. It could not pay the money in local currency without producing proof that it had sought and failed to obtain the necessary authority to pay the money in foreign currency. In attempting to pay the money in local currency without having applied for authority to make payment in the currency of payment stipulated in the arbitral award, the appellant did not discharge its obligation under the award. It was not open to the appellant to choose the currency in which it discharged the debt owed to the respondent.
(3) Payment was now to be done as per the arbitral award and not the contract because there was no longer any contract to talk of, the appellant having terminated the contract. There was nothing illegal about the arbitral award. It did not order the appellant to ignore the exchange control regulations and pay the foreign currency to the respondent without the requisite authority from the Reserve Bank. The argument that registration of the arbitral award would be contrary to public policy because it authorised payment of foreign currency without the necessary authority was ill conceived. A holder of an arbitral award has a right to apply to the High Court to have it registered as a judgment of that court for purposes of enforcement. Registration of such an award cannot be contrary to public policy when it is authorised by law.
(4) The duty to seek authorization lay on the appellant. The obligation was not on the respondent to show that it had the authority to recover the money from the appellant in foreign currency.
(5) The appellant knew that the arbitral award forbade the tender of payment of the money of account with the equivalent amount in local currency unless clear proof was produced of authority from the Reserve Bank to pay in the currency of account having been sought and refused. The respondent's legal practitioners could not waive on its behalf rights under the arbitral award, which why they endorsed on the receipt of the money tendered by the appellant that they had received the money "without prejudice to the rights" of their client.

Arbitration – award – setting aside of – grounds – breach of natural justice – arbitrator nominated by one party – lease agreement entitling lessor to nominate arbitrator – lessee bound by agreement – bias – proof of – adverse award – not in itself proof of bias

Oasis Medical Centre (Pvt) Ltd v *Beck & Anor* HH-84-16 (Matanda-Moyo J) (Judgment delivered 27 January 2016)

The first respondent was the owner of a property which she leased to the applicant. Following the applicant's failure to pay rent and various other charges, the first respondent initially applied in the magistrates court for an ejectment order. She withdrew that application and referred the matter to arbitration. The arbitrator (the second respondent) found in her favour and she applied for the registration of the award. The applicant brought a counter-application for the setting aside of the award on the grounds that the arbitrator was biased in favour of the first respondent; that the appointment of the arbitrator by the first respondent in terms of the lease agreement was *contra bonos mores* and offended the principles of natural justice. The lease agreement, which the applicant had signed, provided that in the event of a dispute arising out of the lease, the dispute should be referred to a member of the Real Estate Institute of Zimbabwe who would be nominated by the lessor and "who shall consult both parties and whose decision as to the matter in dispute and the allocation of costs shall be final and binding on both parties". The applicant claimed that this offended against the principle of *nemo iudex in propria causa*.
Held: the lease agreement indeed gave the first respondent the power to appoint an arbitrator without recourse to the applicant. However, the applicant voluntarily signed the agreement which took away his powers. That signature brought into operation the *caveat subscriptor* rule: a party to a contract is bound by his signature whether or not he has read and understood the contract. As for bias, no bias can be found if the facts are against the person alleging bias. The applicant was indeed in breach of the lease agreement. There was ample evidence that the debt alleged was owing. An adverse award in itself can never be proof of bias. There must be some evidence of improper conduct.

Bank – curatorship – bank placed under curatorship – shareholders of bank – powers suspended and exercised by curator – sole shareholder of bank a holding company – holding company not prevented from transacting other business – curator having no power to intervene with such other transactions

Timba & Anor v *Chetsanga & Ors* HH-87-16 (Tagu J) (Judgment delivered 3 February 2016)

The issue in this stated case was: what is the legal effect of s 54 of the Banking Act [*Chapter 24:20*] in respect of any shareholder that may be the shareholder of a banking institution that has been placed under curatorship by the Reserve Bank of Zimbabwe?
The first plaintiff was a shareholder in a holding company which held a 100% shareholding in a bank. The bank was placed under curatorship by the Reserve Bank, and a curator was appointed. The company itself was not placed under curatorship. The three defendants were directors in the company. Well after the bank had been placed under curatorship, the board members of the company held an extraordinary general meeting at which the three defendants were dismissed from the board.
The day before the meeting, the curator had purported to cancel the meeting because he had not sanctioned it. The meeting was held in spite of the curator's action.
The plaintiffs sought a declaratur that the defendants were validly dismissed and that any business purportedly undertaken by them since the general meeting was void, as well as an interdict preventing them from holding themselves out as directors. He defendants claimed that the meeting was invalid for want of compliance with s 54 of the Banking Act.
Held: In terms of s 53 of the Act it is the Reserve Bank that issues a direction that a particular bank be placed under curatorship. Once a curator has been appointed, he exercises all or some of the powers given to him in terms of s 55 of the Act in as far as they affect the operations of the bank that has been placed under curatorship. The effect of s 54 is that the powers of every director, officer and shareholder (who could be an individual or a corporate entity) of a bank placed under curatorship are suspended unless they are told what to do by the curator. The affairs which the curator was to oversee were the affairs of the bank, not of the second plaintiff, which was never placed under curatorship.
The next question was whether the curator was mandated to oversee and control the separate affairs of the shareholders that have nothing to do with the bank under curatorship. The powers of the curator under s 55 are in respect of the banking institution concerned. In this case, it was the bank, not the holding company, which was placed under curatorship. Section 54 suspended the powers of the shareholders of the banking institution. As long as the transactions of the holding company had nothing to do with the bank, the curator could not intervene. The meeting was valid and the defendants were validly dismissed.

Company – judicial management – application for provisional order for judicial management – nature of application – made *ex parte* – no other parties need be notified – only person required to be served with application is the Master – parties opposed to provisional order – not entitled to oppose order before its grant but may seek variation or discharge immediately after its grant

Ex p *Zimasco (Pvt) Ltd* HH-53-16 (Chitapi J) (Judgment delivered 13 January 2016)

The applicant was applying for a provisional order to be placed under judicial management. The matter was on the unopposed roll, but when it was called, counsel for four banks announced that her clients intended to intervene in the matter. The question arose whether they had any *locus standi* to oppose the application at this stage, as opposed to applying, after the grant of a provisional order, for a variation or discharge of the order, in terms of s 302(1) of the Companies Act [*Chapter 24:03*]. It was argued that there was nothing in the Act or the Companies (Winding Up) Rules 1972 to preclude such intervention.
Held: (1) there are no specific rules which govern the procedure to be followed with regards court applications for a provisional order of judicial management. The Winding Up Rules only deal with petitions for the winding up of a company and to judicial management where the court grants a provisional order of judicial management instead. They do not deal with applications brought to court for the grant of a provisional order of judicial management as opposed to a winding up order.
(2) In terms of s 299 of the Act, the filing of a court application for the grant of a provisional judicial management order is preceded by service of the intended application upon the Master. It is a peremptory requirement that the Master be served with the application, together with any supporting affidavits and documents which the applicant seeks to rely upon to move the court to grant the order. The section does not require the applicant to serve or give notice of the application prior to making it upon any other party except the Master. The Master, after service of the application upon him, is expected if not required to go through the application and report to the court on any circumstances which appear to him to justify the court in postponing

or dismissing the application. If he makes such a report, the Master is required to then deliver the report to the applicant. He does not have to prepare a report where he does not identify any circumstance which would justify the court to postpone or dismiss the application.
(3) The application is made *ex parte*. No respondents are cited. The Master is not a respondent but the law requires that he be served because he oversees the process of judicial management by the judicial manager.
(4) Interested or affected persons are given notice *ex post facto* the grant of the provisional order. The logic behind the giving of notice after the grant of a provisional is that the person applying for the provisional order is given the opportunity to make out a case to the satisfaction of the court that cumulatively, the matters referred to in s 300 of the Companies Act, have been proven on a balance of probabilities. The provisional order calls upon all, not only a selected group of interested parties, to oppose the confirmation of the provisional order which will have been issued without hearing them. This allows for an orderly procedure and process. To hear any interested party who may by chance have come to know about the making of the application, and to take into account what such interested person may have to say, would amount to an undue preference to the exclusion of other interested parties who would not have become aware of the application. A holistic and orderly process can therefore only be achieved by not allowing opposition to be filed piecemeal.
(5) Section 301(2) ensures that there is no undue prejudice which an interested party may suffer if it had to wait for the return date. The section allows for creditors, shareholders, the provisional judicial manager, the Master or any person who is entitled to apply for a provisional judicial management order to anticipate the return date seeking a variation or discharge of the order. Where such an application has been made, the court or a judge may at any time and in any manner, as the justice of the matter may appear to the court or judge to be best served, vary or discharge the provisional order. In the present matter, the respondents could have sought a variation or discharge of the provisional order (assuming it was granted) immediately after it had been granted. Their rights would still be protected because no final order is made before they are heard.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – action to enforce rights – who make bring – action said to be in public interest – what must be shown by person bringing action on such grounds – factors to consider

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – marriage rights (s 78) and rights of child (s 81) – right to found a family – includes right to marry – no right to marry granted to a child – provision of Marriage Act allowing girl under 18 to marry – such provision invalid

Mudzuru & Anor v *Min of Justice & Ors* CC-12-15 (Malaba DCJ, Chidyausiku CJ, Ziyambi JCC, Gwaunza JCC, Garwe JCC, Gowora JCC, Hlatshwayo JCC, Patel JCC & Guvava JCC concurring) (judgment delivered 20 January 2016)

The applicants, young women of 18 and 19 years of age, applied to the Constitutional Court for a declaratory order that the effect of s 78(1), as read with s 81(1), of the Constitution of Zimbabwe 2013 is to set 18 as the minimum age for marriage; that no person under that age may enter a marriage union; and that the Customary Marriages Act [*Chapter 5:07*] is unconstitutional, in that it does not provide for a minimum age limit of 18 years.
Section 78, headed "Marriage Rights", provides that every person who has attained the age of 18 years has the right to found a family. Section 81 defines a child as a boy or girl under the age of 18 years, and provides, *inter alia*, for equal treatment for every child before the law as well as the right to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse. The protection of the fundamental rights of the child is guaranteed under s 44 of the Constitution, which imposes an obligation on the State and every person, including juristic persons, and every institution and agency of the government at every level to respect, protect, promote and fulfil the rights and freedoms set out in Chapter 4.
The applicants argued that s 78(1) cannot be subjected to a strict, narrow and literal interpretation to determine its meaning, if regard is had to the contents of similar provisions on marriage and family rights found in international human rights instruments from which s 78(1) derives inspiration. They claimed that the issues were being raised "in the public interest", in terms of s 85(1)(d) of the Constitution.
At the time the Constitution came into force, s 22(1) of the Marriage Act [*Chapterv5:11*] provided that a girl who had attained the age of 16 was capable, with her guardians' consent, of contracting a valid marriage. A boy under the age of 18 years and a girl under the age of 16 years had no capacity to contract a valid marriage except with the written permission of the Minister of Justice. A "child" was defined under s 2 of the Child Abduction Act [*Chapter 5:05*] and s 2 of the Children's Protection and Adoption Act [*Chapter 5:06*] to be a person under the age of sixteen years. The applicants contended that, in view of the definition of "child" in s 81(1) of the Constitution, no child has the capacity to enter into a valid marriage in Zimbabwe. They contended that any law

which authorises a girl under the age of 18 years to marry infringes the fundamental right of the girl child to equal treatment before the law enshrined in s 81(1)(a) of the Constitution. They argued that s 22(1) of the Marriage Act exposes the girl child to the horrific consequences of early marriage which are the very injuries against which the fundamental rights are intended to protect every child.

The respondents opposed the application. Their first point *in limine* was that the applicants had no *locus standi* as they did not allege that any of their own interests was adversely affected by the alleged infringement of the fundamental rights of the girl child. The applicants were no longer children protected from the consequences of early marriage by the fundamental rights of the child enshrined in s 81(1) of the Constitution. Further, they had not produced any facts to support their claim to be acting in the public interest.

On the merits, they argued that s 78(1) simply gives a person over the age of 18 the right to found a family. This did not imply the right to marry. The words of d 78(1) were clear and unambiguous and only amendable to a literal interpretation. They argued that any law which authorises a girl child who has attained the age of sixteen years to marry did not contravene s 78(1). A rationale for the difference in the treatment of a girl child and a boy child under s 22(1) of the Marriage Act was that a girl matures physiologically and psychologically earlier than a boy. The difference in the rates of maturity in the growth and development of girls and boys was justification for the legislation.

There were thus four issues: (1) whether the applicants had *locus standi*; (2) whether s 78(1) does set 18 as the minimum age of marriage; (3) if so, did the coming into force of the Constitution render invalid s 22(1) of the Marriage Act or any other law authorising a girl under 16 to marry; and (4) if it did, what relief should be granted.

Held: (1) In claiming *locus standi* under s 85(1) of the Constitution, a person should act in one capacity in approaching a court and not act in two or more capacities in one proceeding. Where a person claims to be acting in his or her own interests, he or she seeks to vindicate his or her own interest adversely affected by an infringement of a fundamental right or freedom. The infringement must be in relation to himself or herself as the victim, or there must be harm or injury to his or her own interests arising directly from the infringement of a fundamental right or freedom of another person. In other words, the person must have a direct relationship with the cause of action. A person could also claim under this head if he or she could be liable to conviction for an offence charged under the law even though the unconstitutional effects were not directed against him or her *per se*. It would be sufficient for a person to show that he or she was directly affected by the unconstitutional legislation. If this was shown it mattered not whether he or she was a victim. Here, as the applicants were not victims of the infringements of the fundamental rights enshrined in s 81(1) as they were not children, they could not benefit personally from a declaration of unconstitutionality of any legislation authorising child marriage.

(2) To argue that the applicants were not entitled to approach the court to vindicate public interest in the well-being of children protected by the fundamental rights of the child overlooked the fact that children are a vulnerable group in society whose interests constitute a category of public interest. Section 85(1)(d) is based on the presumption that the effect of the infringement of a fundamental right impacts upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) is to protect the public interest adversely affected by the infringement of a fundamental right. The effective protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought. Under s 44 of the Constitution, the State is expected to know what is happening to the fundamental rights and freedoms enshrined in Chapter 4. It is under an obligation to account, in the public interest, for any infringement of a fundamental right, even by a private person.

(3) Section 85(1) is a product of the liberalisation of the narrow traditional conception of *locus standi*. The object of s 85(1) is to ensure that cases of infringement of fundamental rights which adversely affect different interests covered by each rule of standing are brought to the attention of a court for redress. The object is to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society. The liberalisation of the narrow traditional conception of standing and the provision of the fundamental right of access to justice compel a court exercising jurisdiction under s 85(1) to adopt a broad and generous approach to standing. The approach must eschew over reliance on procedural technicalities, to afford full protection to the fundamental human rights and freedoms enshrined in Chapter 4, and to ensure that the exercise of the right of access to judicial remedies is not hindered, provided the substantive requirements of the rule under which standing is claimed are satisfied.

(4) As to what is public interest rather than private, personal or parochial interest, the limits and substance are difficult to define precisely. As most violations of fundamental human rights and freedoms are fact and context specific, it is appropriate to keep concepts such as "public interest" broad and flexible, to develop in line with changing times and social conditions reflective of community attitudes. There are many categories or facets of public interest. The task is to ascertain, amongst others, the public interest to be served. The term embraces, among other things, matters of standards of human conduct tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The paramount test should be whether the alleged

infringement of a fundamental right or freedom has the effect of prejudicially affecting or potentially affecting the community at large or a significant section or segment of the community. The test covers cases of marginalised or underprivileged persons in society who because of sufficient reasons such as poverty, disability, socially and economically disadvantaged positions, are unable to approach a court to vindicate their rights.
Because of the elasticity and relativity of the concept of public interest, it is necessary to test the actions of the applicant against a set of factors as an objective standard. It is also necessary to prevent the notion of acting in the public interest being used as a smokescreen to garner support for something that actually is in the applicant's own interest. Factors to consider will include: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. It is not necessary for a person challenging the constitutional validity of legislation to vindicate public interest on the ground that the legislation has infringed or infringes a fundamental human right, to give particulars of a person or persons who suffered legal injury as a result of the alleged unconstitutionality of the legislation.
(5) The constitutional invalidity of existing legislation takes place immediately the constitutional provision with which it is inconsistent comes into force. Constitutional invalidity of legislation enacted after the constitutional provision has come into effect occurs immediately the legislation is enacted. Constitutional invalidity of legislation does not depend on when a fundamental human right is infringed.
(6) The applicants had no personal or financial gain to derive from the proceedings. They were not acting *mala fide* or out of extraneous motives. They were driven by the laudable motive of seeking to vindicate the rule of law and supremacy of the Constitution. It is a high principle of constitutional law that people should be in a position to obey laws which are consistent with constitutional provisions enshrining fundamental human rights and freedoms. They acted altruistically to protect public interest in the enforcement of the constitutional obligation on the State to protect the fundamental rights of girl children enshrined in s 81(1) as read with s 78(1) of the Constitution. Children fall into the category of weak and vulnerable persons in society. They have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty, and socially and economically disadvantaged positions. The law recognises the interests of such vulnerable persons in society as constituting public interest. The proceedings instituted by the applicants and the relief sought were the only reasonable and effective means for enforcement of the fundamental rights of the girl children subjected to early marriages.
(7) Section 46(1)(c) of the Constitution requires a court, when interpreting any provision of the Constitution contained in Chapter 4, to take into account international law and all treaties and conventions to which Zimbabwe is a party. Both s 22(1) of the Marriage Act and s 78(1) of the Constitution were born out of provisions of international human rights law prevailing at the time of their respective enactment. In deciding whether s 22(1) of the Marriage Act, or any other law which authorises child marriage, infringes the fundamental rights of girl children, regard must be had to the contemporary norms and aspirations of the people of Zimbabwe as expressed in the Constitution. Regard must also be had to the emerging consensus of values in the international community, of which Zimbabwe is a party, on how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood. The constitutional provisions should be interpreted so as to resonate with the founding values and principles of a democratic society based on openness, justice, human dignity, equality and freedom set out in s 3 of the Constitution, and regional and international human rights law.
(8) Until 1990, almost all the conventions which contained provisions on marriage avoided specifying a mandatory minimum age of marriage for the States Parties. While many conventions provided that marriage must be freely consented to by the bride and groom, there was no recognition of the special vulnerabilities of children where "consent" could be easily coerced or unduly influenced by adults. The Marriage Act was enacted in that context. Once a girl child got married, either with the Minister's permission or having reach the age of 16, she was treated as a person of full age. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) came into force in 1981, but did not, although prohibiting child marriage, define "child". The Convention on the Rights of the Child (CRC) (1990) did define child as a person under the age of 18. By so doing, it followed that under CEDAW the marriage of a person under 18 was invalid.
(9) Studies showed how child marriage infringed the fundamental rights of the girl child guaranteed by the CRC, particularly the right to education; the right to be protected from all forms of physical or mental violence, injury or abuse, including sexual abuse; the right to be protected from all forms of sexual exploitation; the right to the enjoyment of the highest attainable standard of health; the right to educational and vocational information and guidance; the right to seek, receive and impart information and ideas; the right to rest and leisure and to participate freely in cultural life; the right not to be separated from parents against their will and the right to protection against all forms of exploitation affecting any aspect of the child's welfare.

(10) The African Charter on the Rights and the Welfare of the Child (1990) (ACRWC) imposed on States Parties, including Zimbabwe, an obligation to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and to take effective measures, including legislation, to specify the age of 18 years as the minimum age for marriage. They are obliged to abolish child marriage.

(11) The horrific consequences of child marriage have been set out in detail by, among other bodies, UNICEF. Child marriage and lack of access to continued educational opportunities also limit young women's access to employment opportunities. Child marriage is also associated with early widowhood, divorce and abandonment which often results in "feminization of poverty". Girls with higher levels of schooling are less likely to marry as children. Early marriage takes a terrible toll on a girl's physical and emotional health. Because of her age, inexperience and vulnerability, she is likely to be dominated and controlled by her husband, who has the power to keep her a virtual prisoner. Rape, beatings and other forms of sexual and domestic violence are common and early and repeated pregnancies are life threatening. Young mothers also face far greater risks of complications in pregnancy because their bodies are not sufficiently developed and infant mortality is far greater among young mothers.

(12) Section 78(1) of the Constitution was enacted for the purpose of complying with the obligations Zimbabwe had undertaken under article 21(2) of the ACRWC to specify by legislation 18 years as the minimum age for marriage and abolish child marriage. A literal interpretation of s 78(1) would be absurd. It would mean that a family is not founded on marriage; that persons who have attained 18 years have a right to found a family but no right to marry; and that whilst persons under 18 years would have the right to marry, they would not have the right to found a family. A literal interpretation would not give the fundamental right guaranteed and protected under s 78(1) the full measure of protection it deserves. Only a broad, generous and purposive interpretation would give full effect to the right to found a family. For the persons who have attained the age of 18 to enjoy the right to enter into marriage freely and with full consent as intending spouses, they must first have the right to enter into marriage.

(13) Section 81(1) puts the matter of the legal effect of s 78(1) beyond any doubt. It provides that a person aged below 18 years is "a child" entitled to the list of fundamental rights guaranteed and protected thereunder. That means that the enjoyment of the right to enter into marriage and found a family guaranteed to a person who has attained the age of 18 years is legally delayed in respect of a person who has not attained the age of eighteen years. A child cannot found a family. The prohibition is absolute. When read together with s 81(1), s 78(1) has effectively reviewed local traditions and customs on marriage. The legal change is consistent with the goals of social justice at the centre of international human rights standards requiring Zimbabwe to take appropriate legislative measures, including constitutional provisions, to modify or abolish existing laws, regulations, customs and practices inconsistent with the fundamental rights of the child. There was obvious social need to break with the past where a child aged 16 could be turned into a wife. To the extent that it provides that a girl who has attained the age of 16 can marry, s 22(1) of the Marriage Act is inconsistent with the provisions of s 78(1) and therefore invalid.

(14) Section 78(1) has the effect of protecting every child equally regardless of his or her personal condition. Whether or not a girl matures earlier than a boy is of no consequence in the determination of the effect of s 78(1) of the Constitution on the validity of the legislation. Section 78(1) entitles a girl and a boy to equal protection and treatment before the law. The rationale advanced in support of the difference in the treatment of girls and boys formalised by the impugned legislation is the old stereotypical notion that females were destined solely for the home and the rearing of children of the family and that only the males were destined for the market place and the world of ideas and is contrary to the fundamental values of human dignity, gender equality, social justice and freedom which the people of Zimbabwe have committed themselves to uphold and promote through legislation governing the interests of children. Girl children are entitled to effective protection by the court which is the upper guardian of the rights of children and whose duty it is to enforce the fundamental rights designed for their protection. The history of the struggle against child marriage sadly shows that there has been, for a long time, lack of common social consciousness on the problems of girls who became victims of early marriages.

(15) There is a difference between making a man take responsibility for the pregnancy of a girl and the maintenance of the baby once it is born and compelling a girl child to get married because she got pregnant. Pregnancy can no longer be an excuse for child marriage.

(16) While declaring that s 22(1) of the Marriage Act is invalid, it would not be is just and equitable to make the ruling retrospective because of the immense disruption that a retrospective declaration of invalidity may cause on the persons who conducted themselves on the basis that the legislation was valid. The order would be granted to have effect from the date of issue.

(17) (*per* Hlatshwayo JCC) The age of sexual consent which currently stands at 16 years is now seriously misaligned with the new minimum age of marriage of 18 years. This means that, absent legislative intervention and other measures, the scourge of early sexual activity, child pregnancies and related devastating health

complications are likely to continue and even increase. The upside is that the new age of marriage might have the positive effect of delaying sexual activity or child bearing until spouses are nearer the age of 18. The downside is that children between 16 and 18 years may be preyed upon by the sexually irresponsible without such people being called upon to take responsibility and immediately marry them. Thus, there is an urgent need, while respecting children's sexual rights, especially as between age mates as opposed to inter-generational sexual relationships, to extend to the under-eighteens the kind of protection currently existing for under-sixteens with the necessary adjustments and exceptions.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – arrested person – right to be released – onus on State to show why bail should be refused

S v *Munsaka* HB-55-16 (Mathonsi J) (Judgment delivered 25 February 2016)

In terms of s 50(1)(d) of the Constitution of Zimbabwe 2013, an arrested person is entitled as of right to be released either unconditionally or on reasonable conditions pending a charge or trial. It is only where it is shown that there are compelling reasons justifying that person's continued detention that an arrested person can be denied bail. The onus of establishing the existence of compelling reasons why the arrested person should remain in detention lies on the State. Where bail is being opposed without reference to compelling reasons for an arrested person's continued detention, there is no basis for opposition to bail. Simply to say that the applicant for bail will abscond, will endanger the public or will interfere with witnesses, with substantiating such allegations, does not meet the threshold of compelling reasons set by the Constitution.

Editor's note: s 115C(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (inserted by Act 2 of 2016) states that the grounds for refusing bail, set out in s 117(2), "are to be considered as compelling reasons for the denial of bail by a court". Where the offence is specified in the Part I of the Third Schedule to the Act, s 115C(2) places the onus on the accused to show that it is "in the interests of justice" for him to be granted bail. Where the offence is specified in the Part II of the Third Schedule, the accused must show that "exceptional circumstances" exist which would permit his release on bail. These provisions would appear (a) to put the law back to its previous state and (b) to impose a burden on the accused that was not contemplated by the Constitution.

Constitutional law – Declaration of Rights – claims arising out of alleged breaches of Declaration of Rights – prescription period in respect of claims against police – whether constitutional

Mangena v *Min of Home Affairs & Anor* HH-115-16 (Munganati-Manongwa J) (Judgment delivered 10 February 2016)

See below, under POLICE (Claims against).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – right to protection of the law – prosecution of former farm employees for unlawfully remaining on farm after acquisition – legislation creating an offence to do so constitutional – no constitutional issue arising

Yoramu & Ors v *P-G* CC-2-16 (Garwe JCC; Chidyausiku CJ, Malaba DCJ, Ziyambi JCC, Gwaunza JCC, Gowora JCC, Hlatshwayo JCC, Patel JCC & Mavangira AJCC concurring) (Decision given 21 January 2015; reasons published 24 February 2016)

See below, under LAND (Acquisition).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to water (s 77) – legislative measures to ensure supply of potable water – duty of urban council to ensure water distributed fairly

Hopcik Invstm (Pvt) Ltd v *Min of Environment & Anor* HH-137-16 (Dube J) (Judgment delivered 17 February 2016)

The applicant sought an order compelling the respondents to supply water to its premises in a Harare suburb. The first respondent, the Minister responsible for the administration of the Water Act [*Chapter 20:34*], had the

responsibility to regulate the supply of water by the second respondent, the city council, whose mandate was to provide and maintain a supply of water within or outside the council. There had been no supply of water to the applicant's area for over 3 years, although other areas received a regular supply. The applicant conceded that the council had certain difficulties in making water available to all residents of the city but argued that the council was not doing everything necessary to provide an equitable distribution of water to all the inhabitants of the city. It acted in an irresponsible manner, in that it failed to attend to water pipes breaking, which remain unrepaired for long periods of time, depriving citizens of water. The council was not taking its responsibility seriously and had not done enough to ensure adequate supply of water to residents. The council put forward various reasons why it was unable to supply water to the applicant, such as lack of funds, old equipment, a poor rainy season and a rapid expansion of the urban population.
Held: Water is the most basic of all needs. Without it there is no life. Access to water has become a human right in this country and is guaranteed in our Constitution. The responsible authorities have a duty to ensure that they provide residents access to a reliable supply of potable water. The authorities lack the will to accomplish this objective. It is time for the authorities to take reasonable and satisfactory steps to rectify the situation and ensure adequate supplies of water. The authorities cannot be allowed to merely observe and adopt a nonchalant attitude. The realisation of this right will require concerted efforts of all concerned.
The right to water was recognised by the United Nations General Assembly in 2010 as a human right. A number of international treaties, which include the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and the International Covenant on the Economic Social and Cultural Rights, recognise this right. It is an economic, and social right and is recognised as a self-standing human right. The right to water contains an entitlement to access to a minimum amount of safe drinking water to sustain life and health. The supply must be sufficient and continuous to cover personal and domestic uses and meet basic needs. Under s 77 of the Constitution, the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right. Implementation of the right is made possible through the Urban Councils Act and the Water Act. The latter Act places a responsibility on the Minister to ensure the availability of water to all citizens for primary purposes and other uses. The Government must also ensure that organisations such as the first respondent that has a responsibility to supply and distribute water in accordance with the law are afforded the resources to enable them to do so. This has been through s 183 of the Urban Council Act, which places a responsibility on local authorities to ensure adequate supply of water in terms of the power delegated to them. Councils are required to take measures to construct such works for providing and maintaining a supply of water. The word "may" in s 183 was recognises that there are instances when a council may fail to provide and maintain adequate supplies of water. The legislature was alive to the possibility that the institution delegated the power to supply the water may at some stage be unable to comply with the requirement, for one reason or another. Depending on the reasons furnished for the failure, these may constitute good and acceptable reasons. It was not the intention of the legislature that government be held accountable for matters outside its control.
Where a complaint against a failure to supply water has been filed, the relevant authorities are required to account for their actions. The court is required to enquire into the reasons for the failure to comply. The State and the local authority involved may only be absolved where good and sufficient reasons for failing to provide and maintain a safe, clean and potable supply of water have been given. Litigation concerning the realisation of constitutional rights makes government and other responsible authorities accountable for their actions. Although the council had claimed lack of resources, they might be failing to prioritise their needs. The respondents had not taken meaningful and reasonable steps to address the issue at hand. They had been able to supply water to some residents whilst others are starved of it. What the second respondent ought to do is to ration water so that the scarce resource is distributed fairly.

Constitutional law – Constitution of Zimbabwe 2013 – High Court – powers of – original jurisdiction over all civil and criminal matters – High Court not thereby given jurisdiction over labour matters falling within competence of Labour Court

Triangle Ltd & Ors v *Zim Sugar Milling Industry Workers' Union & Ors* HH-74-16 (Makoni J) (Judgment delivered 21 January 2016)

See below, under COURT (Jurisdiction – High Court).

Constitutional law – Constitution of Zimbabwe 2013 – local government – removal from office of mayor or councillors – procedure which must be followed – independent tribunal must be established – power to remove mayor and councillors not vested in Minister for Local Government

Kombayi & Ors v *Min of Local Govt & Ors* HB-57-16 (Bere J) (Judgment delivered 22 February 2016)

See below, under LOCAL GOVERNMENT (Urban council – suspension and dismissal of councillors).

Constitutional law – Constitution of Zimbabwe 2013 – national objectives – protection of children – paramountcy given by Constitution to best interests of children – rights of children enunciated in Declaration of Rights – requirement to take account of international instruments to which Zimbabwe is a party – court's duty to give weight to such considerations – sexual offences against young children – need for severe sentences to give effect to constitutional objectives and protections

S v *Banda & Anor* HH-47-16 (Charewa J) (Judgment delivered 20 January 2016)

See below, under CRIMINAL PROCEDURE (SENTENCE) Offences under Criminal Law Code (Having sexual relations with a young person).

Constitutional law – Constitution of Zimbabwe 2013 – societal values reflected in Constitution – marriage – recognition and protection given to marriage – effect on delict of adultery

Njodzi v *Matione* HH-37-16 (Mwayera J) (Judgment delivered 14 January 2016)

See below, under DELICT (*Actio injuriarum* – adultery).

Contract – formation – relational contract theory – distinction from classical form of contract – how such contracts may be formed

Contract – sale – instalment sale – no time specified for payment of outstanding instalment – courses open to innocent party

Vuya Resources (Pvt) Ltd v *Mahachi & Ors* HH-107-16 (Tsanga J) (Judgment delivered 10 February 2016)

In an instalment sale, the buyer is entitled to immediate possession and to retain possession pending the full payment of the purchase price. In the event of default in payment, the innocent party may insist on performance or cancel the agreement. Where the contract does not stipulate when performance should be due, the creditor has an obligation to place the debtor in *mora* by way of a demand or an *interpellatio*. An *interpellatio* is a demand calling upon a debtor to perform on a particular day failing which the debtor will be *in mora*. A demand must be made (whether by way of summons or extra judicially, by means of a letter of demand or even orally) to be valid. A reasonable opportunity to perform must be granted and, upon failure to comply, the contract can be cancelled by serving notice of rescission, in which a second reasonable time limit is stipulated.

A contract can be formed in terms of relational contract theory as opposed to the classical framework of contract law. This theory is to the effect that relational contracts are situated at the intersection of law and society, and relational contract theory constitute an important paradigm shift within the law of contract. Not individualism, but the interdependence of individuals in social and economic relationships, is the guiding principle of relational contract theory. Intricate linkings of habit, custom and rules are found in such relational contracts.

The relational rules may be summarised thus: (a) the object of contracting is not primarily the allocation of risk, but the commitment to co-operate; (b) obligations in the long term agreements change as circumstances change; (c) in bad times, parties are expected to support one another, rather than standing on their respective rights; (d) insistence on literal performance will be considered wilful obstructionism; (e) in the event of unexpected contingencies causing severe losses the parties are to search for equitable ways of dividing the losses; and (f) the sanction for bad behaviour is refusing to contract in the future. The modern law of contract, which is founded on realism, puts emphasis on contextualising the facts of a particular case in order to keep law real and achieve substantive as opposed to formal equality. Formalism or the classical approach, on the other hand, is based on strict and logical adherence to legal doctrines and principles and rules.

Whilst rules often settle disputes in the face of agreements, a rigid approach to rules for the sake of rules may not result in justice within the context of the facts in a particular case. Moreover, as illustrated in the description of the key characteristics of relational contract theory, formalism has not been a changeless essence. To return to a set of formalist contractual rules to resuscitate the matter, when the facts speak for themselves that the parties had renegotiated otherwise, would not yield a fair and reasonable result. It would also not be in keeping with what the parties intended.

Contract – illegal – *par delictum* rule – relaxation of – considerations – unjust enrichment of one party – party should not be allowed to profit from illegality

Value Chain Trading (Pvt) Ltd v *Pentecostal Assemblies of Zimbabwe* HH-148-16 (Charewa J) (Judgment delivered 24 February 2016)

See below, under LANDLORD AND TENANT (Lease –commercial premises).

Costs – claim for collection commission and costs – agreement in contract that defaulting party would pay both – party bound by such agreement unless penalty out of proportion to prejudice suffered by creditor

CBZ Bank Ltd v *Chelsy Auto (Pvt) Ltd & Ors* HH-67-16 (Tagu J) (Judgment delivered 27 January 2016)

Where the parties to a loan agreement have agreed that the borrower will, in case of default, pay costs on a legal practitioner and client scale as well as collection charges, that provision is a penalty clause and *prima facie* unenforceable. However, under s 4(1) of the Contractual Penalties Act [*Chapter 8:04*], penalty stipulations are enforceable provided that the penalty is not out of proportion to the prejudice suffered by the creditor. Where parties have agreed on certain terms the court should not readily interfere with that agreement, unless good cause is shown why the court should interfere.

Editor's note: see also *United Africa Technologies (Pvt) Ltd* v *Twenty Third Century Systems (Pvt) Ltd* HH-118-16 (below), where the opposite conclusion was reached.

Costs – claim for collection commission and costs – collection commission payable only where payment obtained before judgment – where matter proceeds to judgment, collection commission not payable

United Africa Technologies (Pvt) Ltd v *Twenty Third Century Systems (Pvt) Ltd* HH-118-16 (Muremba J) (Judgment delivered 20 January 2016)

It is not permissible to claim both collection commission and costs, even where there is an acknowledgment of debt or other document from the debtor agreeing to do so. Collection commission is essentially a charge made by a legal practitioner or a commission agent when payment has been obtained through his services prior to judgment. If the matter has to proceed to judgment, then what is recovered is not recovered as a result of a collection by the legal practitioner, but as a result of the judgment of the court and the process that follows thereafter.

Costs – legal practitioner and client scale – agreement to pay – limited circumstances in which court may depart from specific terms of contract

First Mutual Invstm (Pvt) Ltd v *Jonsput Trading (Pvt) Ltd & Ors* HH-1-16 (Mushore J) (Judgment delivered 6 January 2016)

In this dispute arising out of a lease agreement, the parties agreed to settle the matter. The plaintiff sought costs on the higher scale. The tenant argued that such costs were not warranted and that both parties should bear their own costs. However, the lease agreement specifically provided that where the landlord was required to take legal proceedings against the tenant, the tenant would be responsible for costs on the legal practitioner and client scale.
Held: where the parties enter into a contract freely and voluntarily, the court which interprets the contract must treat the contract as sacrosanct when enforcing it. The court cannot and is not allowed to create another contract

for the contracting parties. However, even though a court is generally bound to give effect to a contract as it stands, in special circumstances the court still retains a residual discretion to refuse to enforce the costs the way they appear in the agreement. A special circumstance may be where the claimant is guilty of conduct which justifies the court in depriving the claimant of the costs agreed upon in the contract. To that end, where necessary the court has the means available to it to reward or penalise the claimant and therefore deviate from the strictures of a dogmatic approach of enforcement. However, those circumstances should not only be special, but more or less exceptional, as the courts are reluctant to stray too far from ensuring that the sanctity of a contract be preserved and the agreement enforced. No such circumstances existed here.

Costs – liability for – party withdrawing action or application – normally should tender costs – where withdrawing party can nonetheless be regarded as the successful party, costs may be awarded in its favour

Manica Zimbabwe Ltd v *Grindsberg Invstms (Pvt) Ltd & Ors* HH-95-16 (Dube J) (Judgment delivered 3 February 2016)

A court assessing the question of costs is required to take into account all the relevant factors. The subject of costs is always in the discretion of the court. If it decides to make an award of costs, it is usually guided by the general rule that the unsuccessful party pays the costs of the successful party. The court will not allow costs that have been unreasonably incurred. The court also has to be satisfied that the costs sought are payable by one party to another. In determining which party to award costs to and what is the appropriate scale of costs to impose the court will have regard to (a) the conduct of the parties before and during the proceedings; (b) whether a party has been wholly or partly successful in his case; (c) whether the other party has offered to settle the matter; and (d) any other pertinent circumstances.
With regards costs following a withdrawal, the general rule is that a party may withdraw any proceedings before they have been set down; and where he does so after set down of the matter, he may do so with the consent of the other side or with the leave of the court. He is expected to file a formal notice of withdrawal and make a tender of costs. If no consent to pay costs is embodied in the notice of withdrawal, the other side may apply to court for an order of costs. A party who withdraws his action or application is in the same position as an unsuccessful litigant, because his claim or application is futile and the defendant or respondent is entitled to all costs caused by the institution of proceedings by the withdrawing party. However, in exceptional circumstances a respondent will be deprived of costs. A party withdrawing an action or application may only be entitled to costs where very strong reasons have been shown to exist. Where that party has been wholly or partly successful in its claim, this fact may constitute very good reasons for an entitlement to costs. An example would be where the respondent belatedly, after the proceedings had begun, advised the court of circumstances which obviated the need for the hearing, leaving the applicant in effect the successful party, albeit that it withdrew the application.

Court – jurisdiction – High Court – original jurisdiction over all civil and criminal matters – High Court not thereby given jurisdiction over labour matters falling within competence of Labour Court

Triangle Ltd & Ors v *Zim Sugar Milling Industry Workers' Union & Ors* HH-74-16 (Makoni J) (Judgment delivered 21 January2016)

The applicants, owners of sugar mills, sought an order interdicting the first respondent, a trade union, from embarking on collective job action. The union had embarked on such action shortly before this application was brought, but was terminated or at least suspended following the intervention of the second respondent, the Minister of Labour. Negotiations failed and the union advised that it would resume the collective job action. The applicants argued that the threatened and purported resumption of the collective job action was defective and would be unlawful for want of compliance with the provisions of the Labour Act [*Chapter 28:01*] on collective job action.
The first respondent argued *in limine* that the High Court had no jurisdiction to entertain labour disputes, the Labour Court having been granted exclusive jurisdiction by s 89(6) of the Act. In terms of s 104 of the Act, employees are entitled to go on strike. If the employer regards the job action as illegal, he will be entitled to act in terms of s 106 to apply for a show cause order, returnable to the Labour Court, which then disposes of the matter in terms of s 107. In terms of s 106(2)(b), the Minister can issue interim orders which include suspension of the collective job action. The applicants had not exhausted their available domestic remedies. They could appeal to the Labour Court in terms of s 110(1). They had since filed an application in the Labour Court for the

determination of the substantive dispute between the parties. While declaraturs and interdicts can be granted by the High Court, show cause orders are specifically provided for in the Act.
The applicants argued that the Labour Court had no power to grant interdicts and, because the show cause order had not been determined, the Minister could not offer effective alternative remedies.
Held: (1) Until the enactment of the 2013 Constitution, it was settled law that neither the High Court nor any other court had jurisdiction to hear and determine labour disputes which are subject to resolution in terms of the Act. It had been opined in one High Court judgment that s 171(1) of the Constitution reinstated the High Court's jurisdiction in labour matters, but in another the judge took the view that whilst s 171(1)(a) does confer upon the High Court original jurisdiction over all civil and criminal matters throughout Zimbabwe, this overall authority also has to take into account other applicable constitutional provisions, as well as legislation force that in reality places some breaks or limits on its exercise of original jurisdiction in specific instances. Section 172(2) of the Constitution gives the Labour Court "jurisdiction over labour matters as conferred by an Act of Parliament", the applicable Act of Parliament in labour matters being the Labour Act. Section 89(6) of the Act clearly confers on the Labour Court jurisdiction in the first instance to hear and determine any applications, appeals or other matters stipulated in the Act. This view was the preferable one: provisions of the Constitution cannot be read in isolation. If s 171(1) is read with s 172, it becomes clear that "all matters" in s 171(1) excludes matters over which a specialized court, such as the Labour Court, is established. The absurdity that would arise is that while the Labour Court is set up with elaborate mechanisms to deal with labour disputes, litigants would be able to by-pass it and approach the High Court. This would render the establishment of specialized courts nugatory, which could not have been the intention of the drafters of the law.
(2) This matter was a labour dispute which could be dealt with by the Labour Court. Under s 106, if any collective job action is threatened or begun, the Minister, *meru moto* or on the application of any person who may be affected by the action, may issue an order calling upon the responsible person to show cause why a disposal order should not be made. Such an order requires that the person should appear before the Labour Court to show cause why a disposal order should not be made. The order is returnable to the Labour Court, which after an inquiry issues an order in terms of s 107. Here, the applicants approached the Minister, who made no determination. As a result, the applicants could not appeal in terms of s 110 of the Act, there being no disposal order.
(3) Under s 4 of the Administrative Justice Act [*Chapter 10:28*], where an administrative authority, among other things, has failed to act within a reasonable period, an aggrieved person can apply to the High Court for an order directing the administrative authority to take action. The court may also give directions necessary to ensure compliance by the administrative authority with the requirements of s 3. This was the course of action that the applicants should have adopted when they realised that the Minister was refusing or neglecting to determine their show cause. The matter could have then proceeded in terms of s 106 of the Act. In terms of s 106(2)(b), the Minister has power to issue interim measures such as the termination, postponement and suspension of the collective job action. The applicants chose to go along with the parallel process adopted by the Minister and abandon the show cause order application. Whilst the High Court has residual powers to grant declaraturs and interdicts, show cause orders are specifically provided for in the Act and could provide the same remedies that the applicants sought. To ask the court to interdict a collective job action would amount to usurping the powers given to the Minister in terms of s 104.

Court – jurisdiction – High Court – labour matters – exclusive power given to Labour Court by Labour Act to deal with labour matters at first instance – such power not diminished by s 171(1)(a) of 2013 Constitution

Court – jurisdiction – High Court – labour matters – what are – indebtedness of employer to employee after employment terminated – when High Court has jurisdiction – need for document equivalent to acknowledgment of debt

Nyanzara v *Mbada Diamonds (Pvt) Ltd* HH-63-16 (Chitapi J) (Judgment delivered 13 January 2016)

The respondent dismissed the applicant on notice and sent him a letter setting out what it acknowledged that it owed the applicant. The letter stated that the amounts were gross and subject to statutory deductions. The applicant did not, as requested, sign the letter. He later brought an application to the High Court claiming the payment of a larger amount, as he claimed that certain allowances had been omitted from the respondent's letter. The respondent raised the issue of the jurisdiction of the High Court to deal with a labour matter, as well as (a) whether the applicant could rely on a document that he did not sign; and (b) the fact that the computations presented by the applicant were disputed. The applicant claimed that the respondent had by the letter acknowledged its debt to the applicant and that this removed the claim from being a labour dispute.

Held: (1) there have been High Court rulings that the jurisdiction of the court has not been ousted in matters involving an admitted indebtedness by the employer to an employee, even if such indebtedness arises from a labour relationship. Here, however, there was no valid acknowledgment of debt, that is, a document containing an unequivocal admission of liability by the debtor. The amount owed by the debtor must be specified and so should the manner and time of payment. In essence, an acknowledgment of debt must pass the test of a liquid document, i.e a document which proves the debtor's indebtedness without extraneous or outside evidence. The letter stated that the sum was a gross figure from which statutory deductions, loans and advances would have to be calculated and deducted. The applicant was claiming the whole amount, plus other amounts which were disputed.
(2) Section 13(1) of the Labour Act provides that where an employee's employment is terminated, he is entitled to his benefits as soon as reasonably practicable. Failure to do so is an unfair labour practice. The employee's remedy lies in what the Act provides as the corrective remedy to be followed and implemented when an unfair labour practice has been committed, and the matter must be dealt with by the Labour Court. The fact that the employer may have acknowledged its obligations arising from its statutory obligations to an ex-employee in a separate document which may be in the form of an acknowledgment of debt does not detract from the fact that what is acknowledged to be owing are the terminal benefits. The relationship of employer/employee can loosely be said to continue after termination of employment but only for the purposes of giving effect to or enforcement of payment of terminal benefits.
Section 13(2) of the Act criminalises failure to pay terminal benefits and an employee should consider using this provision.
(3) Section 171(1)(a) of the Constitution, which provides for original jurisdiction of the High Court over all civil matters, does not conflict with s 89(6) of the Labour Act. An exercise of original jurisdiction over a matter does not mean that such jurisdiction, "original" as it may be called, is to be exercised in a manner which usurps or defeats the intention of the legislature where the legislature has passed a law by virtue of powers given to it by the same Constitution. The Constitution does not limit the powers which the legislature can give to the Labour Court and the giving of exclusive jurisdiction to the Labour Court in specified matters by the legislature, thus excluding other courts from exercising such exclusive powers, is proper.
(4) Jurisdiction would be declined and the application dismissed.

Court – officer – Sheriff and his assistants – duties – returns of service of process – court's entitlement to rely on such returns – assistants rendering false returns of service – need for severe punishment

Regional Manager, Beitbridge, & Anor v *Maramba & Anor* HB-21-16 (Mathonsi J) (Judgment delivered 11 February 2016)

The office of the sheriff, which only recently was clothed with wider responsibility to serve virtually all processes of this court, including those which previously could be served by legal practitioners or their employees, should be reformed pretty fast before the administration of justice grinds to a halt. Accusations of false service, fake returns of service and no service at all until the date of hearing are becoming louder by the day in this part of the country where, perhaps owing to lack of supervision, representatives of the sheriff think they are holiday making. It must be said now, in an effort to nip the rot in the bud, that the court transacts very serious business whose outcome affects the lives of members of the public as well as public institutions. In doing so, the court relies heavily on the goodwill, diligence and trustworthiness of the assistants of the sheriff tasked with the responsibility of serving court process and submitting returns of service which the court uses to determine matters. After all, the sheriff is an officer of the court and his return of service is *prima facie* evidence of service. The submission of a false return of service is not only a travesty of justice but an affront to the dignity of the court. It must, where proved, be severely punished in order to discourage those among the assistants of the sheriff who are too lazy to deliver process and think they can hoodwink the court by submitting fake returns. What is even worse is that such a rogue officer would still levy a fee for lying which litigants have to cough up their hard earned money to settle.

Criminal procedure – bail – arrested person's entitlement to – need for State to show compelling reasons why bail should not be granted

S v *Munsaka* HB-55-16 (Mathonsi J) (Judgment delivered 25 February 2016)

See above, under CNSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – arrested person).

Criminal procedure – discharge at close of State case – appeal by Prosecutor-General against – application for leave to appeal – correct procedure to follow – time within which Prosecutor-General must make application – must be time that is reasonable in the circumstances

P-G v *Mtetwa & Anor* HH-82-16 (Mawadze J) (Judgment delivered 27 January 2016)

The first respondent, a well-known legal practitioner, was arrested and detained before being granted bail. She was charged with defeating and obstructing the course of justice, following her intervention on behalf of a client whose premises were being searched by the police. She pleaded not guilty and at the end of the prosecution case successfully applied for her discharge. The Prosecutor-General brought an application for leave to appeal against the magistrate's decision. The application was brought in terms of s 61 of the Magistrates Court Act [*Chapter 7:10*]. At the hearing, the first respondent raised three points *in limine*: (a) the application was a nullity, as it should have been brought in terms of s 198(4) of the Criminal Procedure and Evidence Act; (b) the founding affidavit was irregular, having been commissioned by a police officer, the police having a substantial interest in the matter; and (c) there was an inordinate and unexplained delay in bringing the application.
Held: (1) An appeal against the decision of a magistrate to discharge at the end of the State case must be brought under s 198(4) of the Criminal Procedure and Evidence Act. The Prosecutor-General may appeal under s 61 of the Magistrates Court Act against the decision of a magistrates court on a point of law or because it acquitted on a view of the facts which could not reasonably be entertained. The latter procedure applies a situation where all the proceedings are terminated or a full trial has been completed, whereas the former applies during the course of the trial at the close of the State case. There being no application for condonation of the use of the wrong procedure, the first point would be upheld.
(2) An affidavit tendered in evidence should be attested by a commissioner of oaths who is impartial and independent in relation to the subject matter of those affidavits. However, there is a clear distinction between the Prosecutor-General's Office and the police force. It would be far-fetched to allege that the commissioner of oaths in the circumstances of this case was partial and biased.
(3) The application for leave to appeal was filed a little over five months after the discharge. While no time limit is prescribed in s 198(4), such an application must be made in a reasonable time, in view of the need for finality in litigation and to ensure that the interests of justice are safeguarded. The right to a fair hearing within a reasonable time is enshrined in s 69 of the Constitution. What constitutes a reasonable time is a matter of fact and depends on the circumstances of the case. In the circumstances of this case, the delay was inordinate and unexplained.

Criminal procedure (sentence) – offences under the Criminal Law Code – having sexual relations with a young person – constitutional protections given to children – need to impose deterrent sentences where older male has relations with young girl – other factors to take into account in aggravation

S v *Banda & Anor* HH-47-16 (Charewa J) (Judgment delivered 20 January 2016)

The two accused, who were both aged over 30 years, were convicted, in unrelated trials, of having sexual relations with a young person. In both matters the girls were aged 15. They both impregnated the young girls. Fortunately, neither of the girls contracted a STI or HIV. The only difference was that one accused took the young girl for his wife. The other gave the young girl two small sums of money after he had had his way with her. In each case, the accused was sentenced to 24 months' imprisonment, half of which was suspended.
On review:
Held: the sentences handed down trivialized the protective measures for young persons prescribed in our law and in the current international framework for safeguarding young persons. Judicial officers seem not to be aware that s 327(6) of the 2013 Constitution requires them, in interpreting legislation, to adopt any reasonable interpretation that is consistent with international conventions, treaties, agreements that are binding on Zimbabwe. In passing sentences for these kinds of offences, therefore, in addition to the usual reasons for sentencing that have evolved in our jurisdiction, judicial officers ought also to take into consideration the following:

- domestic law prescribes extensive provisions for the protection of children, for which judicial officers must not be seen to be giving mere lip service. Chapter 2 of the Constitution sets out national objectives, one of which is the protection of children. Section 19(1) requires the State to adopt policies and take measures to ensure the paramountcy of the best interests of children. Children must be protected from maltreatment, neglect or any form of abuse. The Declaration of Rights, in s 81(1)(e), provides that children must be

protected from economic and sexual exploitation and from maltreatment, neglect or any form of abuse. Section 81(1)(f) guarantees children's rights to education and health care while subs (2) declares that the best interest of children are paramount.

- judicial officers should ensure the paramountcy of children's interests in all proceedings before them, including handing down appropriate sentences that deter those preying on children to refrain from doing so in order to give the maximum protection accorded to children by law. Judicial officers must always ask themselves in sentencing predatory adults who sexually exploit young persons: what message is the judicial service sending, when a person more than twice the age of a child, is sentenced to serve a mere 12 months in jail? Is it in the paramount best interests of young persons to hand down such a sentence? The specific obligation placed on the courts, and the High Court in particular, by s 81(3), makes it high time that the courts had a serious relook at the sentencing regime for sexual offences, so that the message is clearly sent that the courts, in the discharge of their protective mandate for young persons, find that it is totally unacceptable to sexually exploit young persons. This is especially pertinent for offences committed against those young victims aged between 12 and 16 who were directly or impliedly assumed to have "consented" to the sexual violations. The courts must be seen to apply the law in a manner that achieves the intended aim of the legislature in these cases: that is, to effectively protect children from predatory older persons and ensure the eradication, or seriously attempt to eradicate the problem.
- Zimbabwe is part of the international consensus that effective and full protection must be accorded to children to ensure their health, education and consequent full realisation of their potential as participants in socio-economic and political development. She is signatory to the African Charter on the Rights and Welfare of the Child, which defines anyone under 18 as a child. The Charter notes that children require special safeguards and care on account of their physical and mental immaturity. It reinforces the need for legal protection of children to ensure particular care with regard to their health, physical, mental, moral and social development. Article 4 echoes our Constitution in directing that, in all processes, it is the best interests of children that are paramount. Other provisions emphasise children's rights to education to promote development of a child's personality, talents and mental and physical abilities to the fullest potential; the child's right to physical, mental and spiritual health; and protection against sexual abuse. Article 21 goes to the extent of requiring member States to pass legislation specifying the minimum age of marriage as 18 in order to enhance the protection of children. Zimbabwe has ratified the UN Convention on the Rights of the Child, thus subjecting itself to the rigours of regular examination and review of its child protection record by the United Nations Committee on the Rights of the Child. The review process focuses, among other issues, on the prevalence of sexual exploitation and abuse of children and forced or early marriages of young girls. In our jurisdiction therefore, judicial officers must, in the discharge of their mandate, take into account the norms and standards that Zimbabwe has subscribed to in the treaties and conventions it has ratified.

Gone are the days when it was enough for a judicial officer to be insular in his jurisprudence: attention must be paid to international best practices, particularly on matters that impinge on the rights of vulnerable groups, such as children. The current position that Zimbabwe holds on the African continent requires judicial officers to rise to the responsibility that go with it and help, if not lead, in setting judicial standards and benchmarks for the protection of children. Sentencing man of over 30 to an effective 12 months imprisonment for having sexual intercourse with a young person of 15 can hardly be aimed at deterring other older men from preying on young and immature persons, who are swayed by the offer of $1 or $2, in these harsh economic times. The very fact that a young person "agrees" to sexual intercourse with a much older men for such a paltry amount is clear evidence of her immaturity and incapacity to make an informed choice or decision. Nor can a promise to marry, or even eventual marriage of the child be mitigating. This is because, firstly, s 70(1)(a) of the Criminal Law Code penalises extra marital intercourse with a young person and, at the time of the commission of the offence, the accused was certainly not married to the complainant. Judicial officers should not, when assessing sentence, look with favour on these much older men who "marry" or intend to marry these children, as this attitude from the bench would seem to be promoting child marriages, which our Constitution and the international instruments which Zimbabwe has ratified frown on.

An effective sentence of not less than three years should be imposed in these cases, on an incremental basis for those accused who are twice the victims' ages, are married with children of their own, and impregnate the young persons or infect them with sexually transmitted diseases other than HIV.

Criminal procedure – indictment – lodged with Registrar – effect – matter now in hands of court – cannot be struck off roll at instance of prosecutor without explanation

S v *Chimhau* HH-58-16 (Chitapi J) (Judgment delivered 12 January 2016)

Once an indictment in a criminal matter has been lodged with the Registrar of the High Court, the case concerned is deemed to be pending before the court for hearing or determination by the court. The accused, once indicted for trial, will be in the hands of the court awaiting trial. Neither the State nor defence counsel has authority to discharge or liberate the accused. If the State is unable to proceed due to the unavailability of its witnesses, its counsel should not just apply for the matter to be struck off from the court roll, even if defence counsel agrees with such a course. An explanation should be given as to why the matter should not proceed.

Criminal procedure (sentence) – general principles – community service – requirement to consider – where court considers prison sentence of 24 months or less, must consider whether community service is appropriate – must give sounds reasons for holding otherwise

S v *Silume* HB-12-16 (Mathonsi J, Bere J concurring) (Judgment delivered 4 February 2016)

It is a misdirection for a trial magistrate not to inquire into the suitability of community service where he or she settles for effective imprisonment of 24 months or less. It is not enough to simply pay lip service to the question of community service by merely saying, with more, that it is inappropriate or that it will trivialize the offence. Where the trial magistrate is of the view, after making a real inquiry into it, that community service is inappropriate, cogent or sound reasons for arriving at that conclusion must be given. This is especially so where what is regarded as aggravation is nothing out of the ordinary, but the usual consequence of theft, like the convenience to the complainant.
It is extremely difficult to understand why there is this visible readiness on the part of magistrates to send convicted persons to prison, even where an alternative and indeed appropriate sentence exists. Petty crimes are being visited with imprisonment without due regard to existing guidelines. This occurs even when the penalty section of the infringed statute enjoins the sentencing court to first give regard to a fine. This attitude defeats logic, especially at a time when prisons are overcrowded and the State is reeling under the yoke of an economic crunch which incapacitates it leaving it scarcely able to sustain the upkeep and maintenance of prisoners.

Criminal procedure (sentence) – offences under Criminal Law Code – theft – what fine may be imposed – provision that fine may be up to twice the value of the property stolen – no minimum fine thereby stipulated

S v *Mamvura* HH-50-16 (Tsanga J) (Judgment delivered 15 January 2016)

Section 113 of the Criminal Law Code [*Chapter 9:23*] provides that where a fine is imposed for theft, the fine can be one "not exceeding level fourteen or twice the value of the property, whichever is the greater". This does not mean that the minimum fine must be twice the value of the property stolen, simply that where twice the value of the property exceeds level fourteen, the court may impose a fine of up to that value. Where the facts do not call for a maximum penalty, the fine that the court can choose to impose could be anything starting from level one ($5) to a maximum of level fourteen ($5000) or twice the value of the property, if that figure is above $5000.

Damages – claim for – future loss – loss of business – such claim recognised in our law – assessment and mode of proof – same as for loss of contractual or professional profits

Graphlink Invstms (Pvt) Ltd v *Puzey & Payne (Pvt) Ltd* HH-123-16 (Tagu J) (Judgment delivered 17 February 2016)

The plaintiff and the defendant entered into an agreement under which the defendant was to sell a bus to the plaintiff. The initial deposit was paid, but the bus was not delivered. The plaintiff claimed, *inter alia*, for "loss of business" and for a sum representing the difference the plaintiff would have to pay for a bus of a similar model. Other claims were either admitted by the defendant or abandoned by the plaintiff. The defendant excepting to these claims, argued that there was no claim in Roman Dutch law of "loss of business"; and that, under our law of contract, damages are claimable for two forms of loss, namely *damnum emergens*, or loss actually incurred, which is termed actual damages, and *lucrum cessans*, or loss of profit. Loss of business, it was argued, was not a genus of *lucrum cessans*. A claim predicted on *lucrum cessans* could only be couched as a claim for loss of profits and not loss of business. On the price difference, it was argued that the figure represented a tax obligation on the purchase price of any bus.

Held: (1) five categories or forms of prospective loss are recognised in practice: (a) future expenses on account of a damage-causing event, such as future medical costs; (b) loss of future income, such as where an injured person is prevented form earning income; (c) loss of business; contractual and professional profit, as where the wrong goods are delivered; (d) loss of prospective support from a breadwinner who has been killed; and (e) loss of a chance. A claim styled "loss of business" is available in our law and its assessment and mode of proof is the same as loss of contractual or professional profits. The onus is on the plaintiff to prove such loss of business.
(2) With regard to the claim for the price difference, a purchaser is entitled to claim as damages the difference between the purchase price and such higher price as he is obliged to pay for the article in the market. The onus would lie on the plaintiff to prove whether the difference was as a result of tax or not.

Delict – *actio iniuriarum* – adultery – *contumelia* and loss of *consortium* – purpose of delict – constitutionality of delict – constitutional recognition and protection of marriage institution – society's views of marriage and adultery – delict not unconstitutional

Njodzi v *Matione* HH-37-16 (Mwayera J) (Judgment delivered 14 January 2016)

The plaintiff claimed delictual damages from the defendant for the latter's adultery with the plaintiff's husband. The adultery resulted in a child. The plaintiff claimed damages for *contumelia* and loss of *consortium*. At the trial the defendant made an application on the constitutionality or otherwise of the plaintiff's claim. It was argued that it was improper to sue the defendant to the exclusion of the plaintiff's spouse, although he was the main architect of the relationship. This was discriminatory and therefore contrary to the constitutional provisions of equality before the law. It was further argued that the claim amounted to infringement into privacy of the defendant's sexual life, thus violating not only the right to privacy, but also the right to freedom of association. She argued that the claim by the plaintiff was archaic and unconstitutional. The plaintiff argued that the institution of marriage was recognised by the Constitution and adultery was a threat to the existence of a marriage.
Held: (1) adultery is an injury occasioned to the innocent spouse because of the adulterous relationship. The spouse can recover damages for loss of a spouse's *consortium* as well as any patrimonial loss suffered and also personal injury or *contumelia* suffered by the innocent spouse, inclusive of loss of comfort, society and services. *Contumelia* is the injury, hurt, insult and indignity that occurs to an innocent spouse where the other commits adultery. Once there is evidence of such injury, hurt, insult and indignity having been occasioned by the adulterous relationship, then the innocent spouse is entitled to damages for c*ontumelia*. Once *contumelia* is established, then the next issue would be whether or not there is loss of *consortium*, that is, loss of comfort and society. Adultery damages, whether classified as falling under *contumelia* or consortium, are delictual damages arising from a delictual wrong occasioned to an innocent married party. To this extent, the distinction is fallacious.
(2) Marriage is a contract *sui generis* entered into by two willing parties. The sanctity of this contract is what an adultery damages claim seeks to protect. The claim should not be viewed in isolation but from the view point of its purpose, being to protect the sanctity of marriage. In suing the third party, the claimant will be seeking a personal remedy for hurt, injury, iniquity of company and comfort occasioned by the third party's association with the claimant's spouse.
(3) While the courts in South Africa, following rulings in other jurisdictions, have held that an award of damages for loss of *consortium* is no longer justified, the issue was whether such reasoning was applicable in Zimbabwe in the light of the Constitution's normative framework and our social context. In our case law, adultery damages are underpinned on the preservation of the sanctity of marriage. Adultery may, in terms of the Matrimonial Causes Act [*Chapter 5:13*], be evidence of the irretrievable breakdown of a marriage. Similarly, it may, in terms of s 10 of the Maintenance Act [*Chapter 5:09*], affect whether maintenance should be granted or continued.
(4) Adultery claims are very much in sync with the present day social and legal reality in Zimbabwe. Public policy is now infused with constitutional values and norms. It is apparent that public policy often represents the legal convictions of the community. It reflects those values that are held dearly by a society. To that extent, therefore, in deciding whether a delictual claim of adultery damages is constitutional or otherwise, while appreciating and respecting foreign jurisdictions' decisions, the decision should be contextualised to reflect the legal convictions and societal values of this country. Section 3 of the Constitution outlines the values and principles on which the Constitution is founded, and shows that the Constitution recognizes and accepts that the Zimbabwean moral fabric is engraved in the country's culture, religion and traditional values. Any development of the common law therefore ought to be underpinned on the interests of justice, and of course, in conformity with the Constitution. The institution of marriage is entrenched deeply in the country's culture, tradition and

religion, and its protection has been in unambiguous language propagated by the courts. Adultery is still regarded as a threat to marriage.
Marriage is recognised and protected by s 78 of the Constitution.
(5) The purpose of adultery damages is protection of the marriage institution and to compensate the innocent party for the loss of *consortium* and *contumelia*. This does not preclude the innocent party from either suing for divorce or condoning the wrong and continuing with the marriage. Marriage and family are social institutions of vital importance. They have more than personal significance: the Constitution would not seek to protect the institution of marriage if the sustenance of the institution was wholly for the parties, at least in the Zimbabwean context, given the importance placed by society on the institution.
(6) The argument that the delict brings about indignity on the third party and that it infringes on the rights of the third party cannot be sustained when from the perspective of its invasion of the marriage institution. The invasion of a marriage by a third party in the Zimbabwean context is an attack on the dignity of the innocent party. The dignity of the adulterer ought not to be more important than that of an innocent party to a marriage. Rights have to be exercised reasonably and with due regard for the rights and freedoms of other persons. The defendant's rights in this matter are the same as the plaintiff's; the potential infringement of her dignity and privacy should not be viewed in disregard of the rights of the innocent spouse in a marriage.
(7) While other jurisdictions have in part or fully done away with the delict or tort of adultery, the protection of the family and marriage institutions is encapsulated in the Constitution. Society, which was involved in the constitution-making process, still views adultery negatively. A third party who, with knowledge, intrudes into the marriage institution, ought to compensate the innocent spouse for the injury occasioned. Adultery is almost always debilitating for the innocent spouse who suffers indignity and hurt because of the adultery.

Employment – disciplinary proceedings – disciplinary authority in terms of Labour (National Employment Code of Conduct) Regulations – when properly constituted – employer's discretion in determining make up of such authority

National Eng Workers' Union v *Dube* S-1-16 (Gwaunza JA, Hlatshwayo JA & Mavangira AJA concurring) (Judgment delivered 15 February 2016)

The respondent was suspended from her employment with the appellant on various disciplinary grounds. A disciplinary hearing was conducted, following a letter addressed to the respondent. The respondent was found guilty of four acts of misconduct falling under s 4 of the Labour (National Employment Code of Conduct) Regulations 2006 (SI 15 of 2006) and dismissed. The matter was referred to a labour officer and eventually to an arbitrator, whose sole term of reference was to determine whether or not the respondent was unfairly dismissed. He found that the labour dispute emanated from sour working relations between the parties; that the disciplinary committee was improperly constituted; and that the committee failed to consider mitigating factors before imposing the penalty of dismissal. The arbitrator ordered reinstatement, or damages in lieu thereof. The Labour Court dismissed the appellant's appeal against this decision and substituted an order that the appellant pay the respondent damages calculated from the date of her dismissal to the date on which the respondent commenced employment with another employer. The court found that although the disciplinary proceedings were conducted in terms of the National Code, this was done before an improperly constituted disciplinary committee.
On appeal to the Supreme Court, the issues were (a) whether the disciplinary hearing was conducted by a disciplinary authority or by a disciplinary committee; (b) whether the adjudicating authority was properly constituted; and (c) if it was, whether or not the Labour Court erred in ordering that the respondent be paid damages in the absence of any evidence before, and without the parties addressing, the court on that issue.
Held: (1) there are two definitions of "disciplinary committee" in the definitions section of the Code, one being a "stand alone" definition, and the other being subsumed under the definition of "disciplinary authority". This means that a disciplinary committee as so subsumed, is one of the "bodies" that may constitute a disciplinary authority, just like the "person" or "authority" mentioned in the definition in question. However, while both definitions are in the definitions section of the Code, only "disciplinary authority" is referred to in the body of the Code, in s 6(4)(b), which confers on a disciplinary authority powers to conduct a disciplinary hearing at the workplace. By contrast, there is no provision in the Code that confers similar powers on a disciplinary committee or for an employee to appear before a disciplinary committee unless such committee is constituted as part of a disciplinary authority. It was clear from the letter to the respondent that the appellant intended to set up a disciplinary authority, and invited her to bring a person of her choice to represent her. The hearing was conducted in accordance with the requirements of s 6(4)(b). The Code does not impose any limitation as to the number of persons who should constitute a disciplinary authority, nor is the designation of such persons

stipulated. It is all left to the employer's discretion. The authority which conducted the hearing was thus properly constituted.
(2) Having resolved not to remit the matter to the appellant for a hearing *de novo*, it behoved the Labour Court to hear evidence on the matter of the respondent's culpability and damages, if any. Instead it simply set aside the arbitrator's award of damages and fell into the same error as the arbitrator, by substituting the award in the absence of any evidence having been led on the issue. Apart from finding a specific figure of damages, the court should have heard evidence on how long it might have reasonably taken the respondent to secure alternative employment, as well as evidence on what steps, if any, she took to mitigate her loss.
(3) The matter would be remitted to the Labour Court, for it to determine the lawfulness or otherwise of the respondent's dismissal and the damages, if any, to be paid.

Employment – disciplinary proceedings – representation at – code of conduct providing that employee may be represented by trade union representative or member of workers' committee – provision in breach of constitutional right to legal representation before any court, tribunal or forum

Chanakira v *Zimbabwe Post (Pvt) Ltd* HH-110-16 (Mangota J) (Judgment delivered 4 February 2016)

Relying on a provision in its code of conduct defining "member representative" as either a trade unionist or a member of the workers' committee, the respondent's disciplinary committee refused audience to the applicant's legal practitioner when the applicant appeared on disciplinary charges. The applicant brought proceedings to have the disciplinary proceedings declared illegal, on the grounds that his rights under s 69(4) of the Constitution were being infringed. This provides that every person has a right, at his own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.
Held: the interpretation which the respondent's disciplinary committee relied upon in denying the applicant his constitutional right to legal representation was misplaced. The interpretation rendered the committee's proceedings a nullity.

Employment – Labour Court – jurisdiction – labour matter – what is – unfair labour practice – includes failure to pay terminal benefits as soon as reasonably practicable after termination of employment – Labour Court having jurisdiction even though employer-employee relationship has ceased

Nyanzara v *Mbada Diamonds (Pvt) Ltd* HH-63-16 (Chitapi J) (Judgment delivered 13 January 2016)

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

Employment – strike – show cause order by Minister – failure by Minister to respond to application for show cause order – applicant's remedies under Administrative Justice Act – Minister's failure not entitling applicant to approach High Court for other relief

Triangle Ltd & Ors v *Zim Sugar Milling Industry Workers' Union & Ors* HH-74-16 (Makoni J) (Judgment delivered 21 January 2016)

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

Employment – suspension on allegations of misconduct – effect of suspension – employee retains status as such – subsequent finding of not guilty – whether employer obliged to reinstate employee – "reinstatement" – meaning of – distinction from order for reinstatement following finding that employee wrongfully dismissed

CIMAS v *Nyandoro* S-6-16 (Malaba DCJ, Hlatshwayo & Mavangira JJA concurring) (judgment delivered 25 February 2016)

An employee who is suspended is not dismissed from employment *ipso facto*. Suspension and dismissal are different, though related, concepts. A suspended employee does not lose his employee status. He remains employed and can be called upon any time by the employer to perform work

Depending on the circumstances of the case, an employer whose employee was suspended on allegations of having committed an act of misconduct may serve a notice in writing on the employee reinstating him in the job if the grounds of suspension are not proved at a disciplinary hearing. Whilst an employer is under an obligation in terms of s 6(2)(b) of the Labour (National Employment Code of Conduct) Regulations (SI 15 of 2006) to investigate the allegations of misconduct levelled against an employee and conduct a disciplinary hearing within fourteen days following the employee's suspension, the employer is not under an obligation to serve the employee with a notice of removal of the suspension after he is found not guilty of the alleged misconduct for which he was suspended, if the circumstances of the case do not allow for such a reinstatement.
Failure to serve a notice of removal of a suspension in terms of s 6(2)(b) of the Code is not necessarily an unfair conduct. Whether it is unfair conduct will depend on the circumstances of the case. An employer may be entitled not to serve the employee with a notice of removal of the suspension if the behaviour of the employee is such that it would satisfy any reasonable employer that he regards the relationship between the parties to have broken down to the extent that he no longer wants to work for the employer.
The word "reinstatement" in s 6(2)(b) does not have the same meaning it has when it forms the content of an order directed at an employer following a finding that the employee was unfairly dismissed. It has the limited meaning of removal of the suspension so that the employee can resume work. There can be no question of payment of damages in lieu of reinstatement. The ordinary meaning of reinstatement is the restoration of a person in his former job with no loss of salary and benefits. In its wide sense, an employee who is allowed to resume work upon the removal of suspension is "reinstated". The employee is regarded as never having been suspended.
Where an order of reinstatement is accompanied by an option to pay damages in lieu of reinstatement, it means that there has been a determination by the tribunal that the employee had been unfairly dismissed. In other words, an order of reinstatement, coupled with an option for payment of damages in lieu of reinstatement, is evidence of the fact that the tribunal was faced with the question of the fairness or otherwise of a dismissal of an employee. Back-pay is associated with reinstatement following a determination that the dismissal of an employee was unfair, because back-pay forms a large portion of damages payable in lieu of reinstatement. So an order of payment or reimbursement is evidence of a finding by the tribunal that the employee was unfairly dismissed.

Family law – child – abduction – child removed from jurisdiction by one parent – application for return of child to country of habitual residence – how application should be made – applicant having obtained order of court of country of child's habitual residence – mechanisms for enforcement

Wheeler v *Egglestone* HH-99-16 (Chitakunye J) (Judgment delivered 29 January 2016)

The parties, who were not married to each other, were the parents of a minor child. They lived in South Africa, where the child was born. Their relationship deteriorated and they separated, the applicant (who was the mother) remaining with the child. The respondent had regular access to the child. The applicant then came to Zimbabwe, where her parents lived. With the consent of the respondent, she brought the child to Zimbabwe. It was expected that the child would return to South Africa, so that the respondent could have access and the child could attend school. The applicant did not return the child to South Africa, but remained in Zimbabwe. The respondent obtained an order from a South African court, ordering the applicant to return the child to South Africa. The applicant sought an interdict declaring the order to be of no force or effect and preventing the respondent from removing the child. Her application was said to be in terms of the Child Abduction Act [*Chapter 5:05*], which gives effect within Zimbabwe to the Convention on the Civil Aspects of International Child Abduction.
The objects of the Convention are to secure the prompt return of children wrongfully removed to or retained in any contracting state; and to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states. Some instances where the removal will be deemed wrongful include where the removal is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and at the time of removal or retention those rights were actually exercised either jointly or alone, or would have been exercised but for the removal or retention.
It was common cause that the child was habitually resident in South Africa before being brought to Zimbabwe, as were both parents. The principles of custody and of access in South Africa would thus have to be taken into account in determining whether there was wrongful removal or retention as the country of habitual residence.
Held: (1) the application was said to be in terms of arts 13 and 20 of the Convention, which articles pertain to grounds upon which a judicial or administrative authority may refuse to grant the request for the return of the minor child. These articles presuppose an application or request for the return of the child has been made, which the applicant had not alleged.

(2) A foreign judgement cannot be enforced without invoking internal processes. Under the Convention, the respondent would have to approach the Secretary for Justice, the central authority for Zimbabwe. This he had not done. He could also have approached the High Court for registration of the judgment. As the judgment did not sound in money, it could not be enforced under the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*], but under the common law, which the Act specifically preserved, while it could not be directly enforced, it constituted a cause of action. Such an action could be enforced, subject to well established principles. The respondent had to comply with the relevant legal processes to obtain the relief he sought.
(3) The Convention was clear that the preference is for the issue of custody to be dealt with by a court of the child's country of habitual residence. It would thus be premature to deal with issue of custody before an application and determination has been made on whether the child should be returned or not. Whilst the applicant had rights to protect *vis-à-vis* the minor child, this should take into account the provisions of the Convention under which she made her application. She could raise the available defences to the removal of the child back to the country of habitual residences in terms of the Convention whenever an application for the removal was made. The removal of the child without a proper hearing and ascertainment of the key issues in terms of the applicable law would not be in the best interest of the child. The applicant would be allowed to retain custody pending the determination of a proper application for the registration or enforcement of the South African judgment in terms of the Convention or by a lawful internal process, whichever the respondent chose.

Family law – husband and wife – marriage – minimum age for – marriage of person under 18 unconstitutional

Mudzuru & Anor v *Min of Justice & Ors* CC-12-15 (Malaba DCJ, Chidyausiku CJ, Ziyambi JCC, Gwaunza JCC, Garwe JCC, Gowora JCC, Hlatshwayo JCC, Patel JCC & Guvava JCC concurring) (judgment delivered 20 January 2016)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – marriage rights)

Family law – husband and wife – marriage – recognition and protection given to marriage by Constitution – effect on delict of adultery – delict still subsisting

Njodzi v *Matione* HH-37-16 (Mwayera J) (Judgment delivered 14 January 2016)

See above, under DELICT (*Actio injuriarum* – adultery).

Human rights – right to water – legislative measures to ensure supply of potable water – duty of urban council to ensure water distributed fairly

Hopcik Invstm (Pvt) Ltd v *Min of Environment & Anor* HH-137-16 (Dube J) (Judgment delivered 17 February 2016)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – right to water).

Insurance – broker – function of – liability – broker undertaking to secure insurance cover – contract providing that insured and insurer must then enter into contract – insurer refusing to provide insurance cover on terms proposed by insurer – broker not liable for subsequent loss cause by lack of insurance cover

Tel-One (Pvt) Ltd v *Capital Ins Brokers (Pvt) Ltd* HH-26-16 (Charewa J) (Judgment delivered 13 January 2016)

The plaintiff, a State agency, floated a tender inviting registered insurance brokers for the provision of insurance cover. The defendant won the tender. The tender documents included a pro-forma agreement between the plaintiff and the insurer, which contract would only come into effect after the parties signed it. The defendant sourced for an insurer and when it advised the plaintiff of this, the plaintiff paid the premiums it had proposed. The insurer withdrew on the basis that there was no agreement between it and the plaintiff. A second insurer

was found; this one demanded either a higher premium or a reduction in the benefits. The plaintiff did not accept either of these adjustments. The result was that the plaintiff was left without insurance cover, and was not indemnified against deaths of staff members. It sued the defendant for payment of the sum of money arising from those deaths. Among other issues, one was whether there could be a claim against the defendant.
Held: an insurance broker does not provide insurance cover as it is not an insurer. An insurance broker is a facilitator and cannot force an insurer to cover a risk. It can only advise an insured on how it can properly secure its risk and it facilitates negotiations with an insurer for an appropriate package for the insured, following which an insurance contract would be entered into between the insurer and insured. Here, in order to succeed in its claim, the plaintiff had to prove the fact that either of the two insurers, or indeed any other insurer, was willing to cover its risk on its terms. The defendant presented to the first insurer the insurance package required by the plaintiff in terms of the tender. The insurer was willing to assume the risk, but it made a counter offer whereby the plaintiff had to pay more in premium rates to maintain the level of cover that the plaintiff required. The plaintiff insisted that it would only pay the rates in terms of the tender documents. The first insurer and the plaintiff were therefore never *ad idem*. A similar situation arose with the second insurer. The fact that the defendant wrote to the plaintiff advising that it had placed cover with one or other insurer did not negate the requirement for the plaintiff to enter into a contract of insurance with the insurers. Since no insurer was willing to assume the risk on the plaintiff's terms, and the plaintiff was unwilling to compromise, it could not be said that the defendant breached its duty.

Land – acquisition – former employees remaining on farm – no right to do so – employment ceased on acquisition of farm – liable to prosecution for occupying gazetted land without lawful authority

Yoramu & Ors v *P-G* CC-2-16 (Garwe JCC; Chidyausiku CJ, Malaba DCJ, Ziyambi JCC, Gwaunza JCC, Gowora JCC, Hlatshwayo JCC, Patel JCC & Mavangira AJCC concurring) (Decision given 21 January 2015; reasons published 24 February 2016)

The applicants had been employees of a farmer whose farm had been expropriated for resettlement and allocated to various beneficiaries. After the farmer left, the applicants remained on the farm and continued to use the farm compound, house and storage sheds situated on land allocated to one of the beneficiaries. The applicants were not formally engaged to provide services for any of the persons who had been allocated land on the farm. They were consequently charged with of contravening s 3(2)(a) as read with s 3(3) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], it being alleged that as "former occupiers of gazetted land" they had continued to use and occupy the farm without lawful authority. When placed on remand, they requested that various matters be referred to the Supreme Court in terms of s 24(2) of the 1980 Constitution.
They alleged that they had either migrated to Zimbabwe a long time ago or had been born and bred on the farm and had worked for the farmer for many years. As part of their conditions of employment, he had provided them with accommodation, clean and safe drinking water, electricity, sanitary facilities and food rations. Whilst accepting that title in the farm now vested with the Government, they maintained that the acquisition of the farm had not meant the automatic termination of their contract of employment, rather that it had resulted in a transfer of the farming undertaking and consequently, in terms of s 16 of the Labour Act [*Chapter 28:01*], the beneficiaries had assumed the position of employer, with the concomitant responsibility of employing them, on terms and conditions similar to those they previously enjoyed. They further submitted that their prosecution and possible eviction at a time when their employment had not been lawfully terminated violated their right to the protection of the law under s 18(1) and (1a) of the Constitution and in particular their labour rights and the right not to be subjected to inhuman and degrading treatment.
It was argued for the respondents that s 16B of the 1980 Constitution provided for the compulsory acquisition of agricultural land for resettlement and such land would vest in the State with full title therein. Section 16B(6) provided that an Act of Parliament may make it a criminal offence for any person to continue to possess, occupy or use acquired land without lawful authority. The prosecution of former owners or occupiers of gazetted land was therefore derived directly from the Constitution. As the applicants had no lawful authority to occupy a portion of the farm, they were liable to prosecution in terms of the Act. They had ceased being employees. Their employment had been terminated following the acquisition of the farm. The Labour Relations (Terminal Benefits and Entitlement of Agricultural Employees affected by Compulsory Acquisition) Regulations (SI 6 of 2002) applied to them.
The respondents also argued that no constitutional issue arose from the prosecution of the applicants in this matter. Section 3(2) of the Gazetted Lands Act refers to "every former owner or occupier" of gazetted land. The applicants were occupiers of such land. A number of decisions of the Supreme Court, sitting as a constitutional court, had held that the prosecution of former owners or occupiers was not a violation of the right to the protection of the law or any other right under the Declaration of Rights. On the merits the respondent has

submitted that the acquisition of land is not a contractual transaction and, therefore, the employment of the applicants was not transferred to the beneficiaries of the land redistribution programme.
Held: (1) Section 3 of the Gazetted Lands Act has been held in a number of decisions of the Supreme Court sitting as a constitutional court to be constitutional. The 2013 Constitution, in s 72(6), provides that an Act of Parliament may make it a criminal offence for any person, without lawful excuse, to possess or occupy agricultural land. In effect, therefore, the 2013 Constitution has not tampered in any way with the law as it existed under the 1980 Constitution and in fact re-affirms that the provision remains the same. There was this no constitutional issue to be referred.
(2) The question whether the applicants remained employees in terms of s 16 of the Labour Act was a question of interpretation. It was not an issue involving a breach of the declaration of rights.

Landlord and tenant – lease – commercial premises – sum paid to secure lease – payment of such sum a breach of Commercial Premises (Rent) Regulations (SI 676 of 1983) – landlord not entitled to retain such sum on termination of leas
Value Chain Trading (Pvt) Ltd v *Pentecostal Assemblies of Zimbabwe* HH-148-16 (Charewa J) (Judgment delivered 24 February 2016)

The plaintiff issued summons against the defendant for a refund of monies paid towards goodwill and security deposit, interest thereon and costs on the higher scale, arising from a lease agreement. The issue for determination was whether or not, upon cancellation of the lease agreement between the parties, the plaintiff was entitled to a refund of the goodwill paid to the defendant. The lease agreement had been for four years. As well as a security deposit, the plaintiff had paid a sum of money as “goodwill”. After four months, the plaintiff cancelled the lease and gave possession to the defendant. The plaintiff argued that the issue was covered by s 19 of the Commercial Premises (Rent) Regulations (SI 676 of 1983), which proscribes extra payments apart from rent and security deposits. Any such payment, being illegal, should be refunded. If the plaintiff were to forfeit the “goodwill” deposit, that would amount to a tacit contractual penalty contrary to the Contractual Penalties Act [*Chapter 8:04*], leading to the defendant’s unjust enrichment. The defendant argued that s 19 was not applicable; that the plaintiff had not properly pleaded unjust enrichment; and that that the payment of goodwill was not illegal, and did not render the lease agreement illegal. In terms of the *in pari delicto* rule, the loss lay where it fell.
Held: (1) The clear intention of the legislature in enacting s 19 was to prohibit the tendency on the part of some landlords to take advantage of desperate tenants seeking to rent accommodation by demanding, over and above the amounts that a landlord may lawfully demand from a lessee, such as rent and a security deposit, other amounts that are not permissible in terms of the Regulations. It is impermissible and a breach of the law for a landlord to demand payment of “a commitment fee”, or “goodwill”, or “a lease consideration fee” or any other fee, by whatever name, which amounts to a bonus or premium or a consideration for negotiating the lease. The agreement to pay goodwill was contrary to the statutory provisions, illegal and therefore null and void.
(2) The forfeiture of the goodwill premium would amount to a disproportionate penalty in terms of the Contractual Penalties Act, because the defendant would have both the premises and the goodwill, to the detriment of the plaintiff. At best, were such goodwill validly due to the defendant, it would be appropriate to order a refund of an amount commensurate with the period that the plaintiff was in tenancy.
(3) Ordinarily, the *in pari delicto* rule presupposes that both parties are equally morally guilty and hence the loss should lie where it falls. However, the courts have chosen not to adopt an overly technical approach, choosing instead to examine the results of the illegal agreement to determine where the equities lie. The approach is normally to examine whether public policy would be best served by upholding or rejecting the plaintiff’s claim. If public policy considerations do not favour either party, then the rule will operate against the plaintiff who seeks to extricate himself from the consequences of the illegal agreement. In every case, the court will not enforce an illegal agreement, but will seek to do justice between the parties. Here, both parties were in breach of the Regulations, but in the interests of the public, there was need to protect other prospective tenants from being charged goodwill illegally for the same premises. The equities therefore favoured the plaintiff, as it would be unconscionable for the defendant to have both the property and the goodwill. Public policy required that the defendant should not be allowed to profit from the illegality.
(4) It was not necessary for the plaintiff to have specifically pleaded for the relaxation of the *in pari delicto* rule or that defendant was unjustly enriched. Once it was shown that the defendant retained both the premises and the goodwill, the onus shifted onto it to show that it had not been unjustly enriched.

Editor’s note: Goodliving Real Estate (Pvt) Ltd & Anor v *Lin*, referred to in the judgment, is reported in 2013 (2) ZLR at p 393.

Police – claims against – prescription period – period applies whether claim is under delict or arising out of alleged breach of constitutional right

Mangena v *Min of Home Affairs & Anor* HH-115-16 (Munganati-Manongwa J) (Judgment delivered 10 February 2016)

Under s 70 of the Police Act [*Chapter10:11*], any civil proceedings instituted against the State or a member in respect of anything done or omitted to be done under the Act must be commenced within 8 months after the cause of action has arisen and notice in writing of any such civil proceedings and the grounds thereof shall be given in terms of the State Liabilities Act [*Chapter 8:14*].

The plaintiff was wounded by gunshots fired at his car by members of the police force on 24 March 2014. He was hospitalised, and whilst there was chained to his bed by the police and kept under guard. Only 12 days later was he informed of the reasons for his arrest. He denied the allegations against him. He was never prosecuted in respect of those allegations. On 5 March 2015, after having given timeous notice of his intention to sue the police, the plaintiff issued summons claiming damages for wrongful arrest and for other wrongs. The defendants claimed that the claim was made out of time and was prescribed.

The plaintiff opposed the special plea. One ground was abandoned, but he also argued that the cause of action only arose on 19 September 2014, when he became aware through a letter from the police that the he was shot by a police officer as he was a suspect in a robbery case and they still intended to prosecute him. He alleged that before this official confirmation, which only came after requesting the police for an investigation, he was not armed with the full facts that could enable him to prosecute his case.

He also argued that his claim was based on s 85 of the Constitution which grants a right to any person acting on his own interests the right to approach a court alleging that a right has been infringed. In terms of that provision, the court may grant appropriate relief including a declaration of rights and an award for compensation. The plaintiff alleged that his rights under various other sections of the Constitution were violated when he was shot and unlawfully arrested by the police. That being so, the Police Act did not cover constitutional claims as the application of s 70 of the Police Act was limited to acts or omissions under the Police Act. The 8 months prescription period provided for in the Police Act did not apply as his claim was grounded upon a constitutional provision. Alternatively, he submitted that if the court found that the Police Act applied, then s 70 is *ultra vires* the Constitution. He submitted that the limitation of time provided in s 70 of Police Act promotes violation of human rights and promotes anarchy, as it was designed to protect the police rather than citizens.

Held: (1) statutes of limitation do not affect the substantive right guaranteed under a Constitution but merely limit the time within which a person has to institute proceedings when enforcing his or her rights for a remedy. In pursuing a remedy or compensation for violation of a fundamental right, the claim has to be within the four corners of the rules of procedure, and evidence and if there are limits prescribed by statute, they have to be adhered to. The claims by the plaintiff against the defendants should comply with the time limit stated in s 70 of the Police Act, irrespective of whether they are based in delict or arising from a violation of constitutional rights.

(2) The second question was when the cause of action arose, the "cause of action" being the entire set of facts which gives rise to an enforceable claim and includes every fact which it is material to plead and prove so as to successfully sustain an action. Here, the cause of action in respect of the shooting only arose on 19 September 2014 when the plaintiff became aware of the debtor's identity and the full facts of the matter which were material in order for him to succeed in his claim for damages arising out of the shooting. Full information came out after the police had done an internal investigation when a complaint was raised by the plaintiff's legal practitioner. In respect of the claim for unlawful arrest, at the time of arrest the plaintiff was not informed of the charges against him. Having been arrested, a warned and caution statement already recorded, the plaintiff was uncertain of his future. Plaintiff remained an accused person with a threat of prosecution hanging over his head. A process was set in motion which became continuous and could be said to have been reasonably stopped by the plaintiff when he realised that no prosecution was to be done when he instituted proceedings on 5 March 2015. The threats of prosecution having been made on 19 September 2014 and nothing turning on it, the plaintiff could not be expected to wait till eternity.

Local government – District Development Fund – proceedings against – Fund not a legal *persona* – need to sue Minister of Local Government

Masiya v *District Development Fund & Anor* HH-119-16 (Charewa J) (Judgment delivered 17 February 2016)

See below, under PRESCRIPTION (Extinctive).

Local government – urban council – suspension and dismissal of councillors – powers given to Minister in terms of Urban Councils Act – such powers inconsistent with constitutional requirement for establishment of independent tribunal for such purpose

Kombayi & Ors v *Min of Local Govt & Ors* HB-57-16 (Bere J) (Judgment delivered 22 February 2016)

The applicants, who were the elected mayor and councillors of Gweru, were suspended from office by the first respondent in terms of s 114(1) of the Urban Councils Act [*Chapter 29:15*] on allegations which impacted negatively on their ability to continue discharging their functions. They were thereafter served with a formal notice to appear before a tribunal to be chaired by the third respondent, the two other members of which were the fourth and fifth respondents. Subsequently, they were served with a document containing specific allegations which had been preferred against them and which the tribunal was supposed to deal with. These charges were framed by the second respondent, the Provincial Administrator. Following a letter to the respondents by the applicants' legal practitioner, the present application was brought, seeking a declaration that the proceedings were *ultra vires* s 278 of the Constitution and thus void *ab initio*. That section requires the establishment of an independent tribunal to exercise the function of removing mayors and councillors from office and specifies the grounds on which this may be done, whereas the Act gives such power to the Minister.
Held: the Constitution is the supreme law and any law inconsistent with it is invalid to the extent of the inconsistency. Whenever a legal norm or rule or decision laid down by the Constitution comes into practical collision with the legal norm or rule of decision laid down by any sort of non-constitutional law – be it parliamentary legislation, subordinate legislation, common law, or customary law – the Constitution's norm is to be given precedence by anyone whose project is to carry out the law. Although the Act predated the Constitution and continued in force, it had to be construed in conformity with the Constitution.
When courts give relief, they attempt to synchronise the real world with the ideal construct of constitutional world. This means that a court should not only consider what is appropriate relief under the circumstances is, but also what the effect of its order on the general public will be. It must take into account the interests of all persons affected thereby. It must also determine whether the declaration of invalidity will give rise to a situation less consistent with the Constitution than the existing situation. However, this was not merely a superficial violation of the Constitution. The court had to deal with illegal actions not only by the first respondent but also by the second respondent, who gave himself powers which were not given in s 114 of the Act, there being nothing in the section for him to lay any charges against the applicants; that was the prerogative of the Minister.
When s 278 of the Constitution speaks to the need to appoint an independent tribunal to look into the allegations raised against the applicants, it meant much more than hand picking those who constitute such a tribunal. The qualifications of those independent members of such a tribunal must not be a subject of speculation; it was the prerogative of the Legislature to define such qualifications. In the absence of a specific Act of Parliament to define the nature of the independent tribunal envisaged, it was not competent for the first respondent to hand pick individuals to sit in the tribunal.

Practice and procedure – affidavit – authentication of – affidavit commissioned by local commissioner of oaths – no requirement to authenticate document with seal of office

United Africa Technologies (Pvt) Ltd v *Twenty Third Century Systems (Pvt) Ltd* HH-118-16 (Muremba J) (Judgment delivered 20 January 2016)

Where a local justice of the peace or commissioner of oaths commissions an affidavit, it is not essential that he or she authenticates the affidavit by affixing thereto the seal or pressing thereon the stamp used by him or her in connection with his office. The need to authenticate only arises in affidavits that are commissioned outside Zimbabwe.

Practice and procedure – affidavit – who may commission affidavit – commissioner must be impartial and unbiased in relation to subject matter – officer in police commissioning founding affidavit in application brought by Prosecutor-General – propriety of

P-G v *Mtetwa & Anor* HH-82-16 (Mawadze J) (Judgment delivered 27 January 2016)

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

Practice and procedure – execution – sale – dwelling house – dwelling house occupied by judgment debtor – what debtor must show and do to avoid sale in execution

Masimbe v *Rainbow Tourism Group* HH-158-16 (Muremba J) (Judgment delivered 24 February 2016)

A judge may postpone or suspend the sale in execution of a dwelling house if he is satisfied that the execution debtor or his family are in occupation of the house and will likely suffer great hardship if the dwelling is sold. In addition to showing that great hardship is likely to be suffered, the execution debtor should make a reasonable offer to settle the debt. If a reasonable offer is made, the judge will postpone or suspend the sale to enable the execution debtor to pay off the debt. If the execution debtor cannot make a reasonable offer to settle the debt, he should, in addition to showing that he or his family will likely suffer great hardship, show that he or his family needs a reasonable period to secure alternative accommodation. In that case, the judge will postpone or suspend eviction for a reasonable period to enable the debtor or his family to find alternative accommodation before they can vacate the dwelling. If the execution debtor, after showing that he or his family will likely suffer great hardship, neither offers a reasonable offer to settle the debt nor shows that he or his family needs a reasonable period to acquire alternative accommodation, but advances some other good ground which persuades the judge, the judge may postpone or suspend the sale or the eviction on conditions he thinks fit.

Practice and procedure – execution – sale in execution – dwelling house – house mortgaged as security for loan – mortgagee foreclosing when debt not serviced – mortgagor not entitled to stay of execution

Nyadindu & Anor v *Barclays Bank of Zimbabwe Ltd & Ors* HH-135-16 (Dube J) (Judgment delivered 17 February 2016)

The applicants, who were husband and wife, sought an order for the setting aside of the sale, conducted by the Sheriff, of their house, which had been mortgaged a security for a loan. When the first applicant failed to service the loan, the first respondent, the bank which had made the loan, obtained judgment to recover the balance. The Sheriff sold the house by public auction. The first applicant filed an objection with the Sheriff in terms of r 359 of the High Court Rules, claiming that the bid price was unreasonably low, in that the price realized at the sale could not extinguish the debt owed to the judgment creditor, and, given time to sell the property by private treaty, they could get a higher offer for the property. The Sheriff dismissed the objections and confirmed the sale.

The applicants submitted that the property was a family home and the family's primary home and ought not to have been sold. They submitted that the effect of the respondents' action was to make the applicants' family destitute. They said that the respondents had taken all their movable property, including their motor vehicle and furniture. They argued that sale of their primary residence was contrary to public policy and s 28 of the Constitution. They should be given a chance to settle the debt and exhaust all avenues available to them before their home was sold.

The bank argued that the application was out of time. The sale was proper. The applicants had never suggested that the Sheriff had not complied with the provisions of r 348A(2)(a) in that he failed to communicate to the Secretary for Housing the fact of the sale, nor that the sale had been improperly conducted.

Held: (1) objections challenging a sale in execution may be raised on any impropriety that may have occurred from the moment of commencement of execution of the order given against the judgment debtor to the time of the judicial sale, including its conduct. The objections are not limited to the actual conduct of the judicial sale. The Sheriff is expected to hear the objections and render a ruling. A party aggrieved by the decision of the Sheriff may apply to the court to set it aside in terms of r 359(8).

(2) Where a dwelling is attached, r 348A(2) a) provides that when the Sheriff receives documents and particulars relating to the attachment, he shall forthwith send written notice to the Secretary for Housing indicating that the dwelling has been attached and is to be sold in execution. Here, though, the bank had a mortgage bond over the property and instituted foreclosure proceedings when the applicants failed to pay the debt. Rule 348A is applicable where the Sheriff attaches a "dwelling" in circumstances where the debt sought to be recovered is not linked to the dwelling concerned. It applies where the dwelling attached is not under mortgage. The rule is not applicable to foreclosure proceedings. Where a person approaches a bank for a loan and mortgages his house as security for a debt, he cannot, when he defaults, plead that his house is his sole dwelling. A person who puts his home up as security for loan and does so being well aware of the fact that, should he fail to service the loan, his house will be up for sale cannot complain when the bank attaches his

home. Such a person takes a risk which he should live with. To allow litigants in foreclosure proceedings to hide behind the fact that the mortgaged house is a family dwelling would amount to home seekers getting mortgages without security. This would naturally have a negative effect on the mortgage lenders as they will not be able to recover their investments. They will no longer be keen to give mortgages to home seekers. There is nothing that is contrary to public policy about two parties entering into a loan agreement and a mortgagor calling up loaned monies and foreclosing on the mortgage bond. This arrangement remains purely a commercial transaction and is legal.

Practice and procedure – heads of argument – what they should contain – should be clear and precise – not necessary to contain every fact and argument

Practice and procedure – judgment – correction, rescission or variation of judgment granted in error in absence of affected party – no time limits specified – applicant for rescission should nonetheless act expeditiously in making application – should also explain reason for delay

Milton Gardens Assn & Anor v *Mvembe & Ors* HH-94-16 (Dube J) (Judgment delivered 3 February 2016)

Heads of argument are meant to be simply that. Their purpose is to set out briefly the main heads of argument, not to be a platform to set out fully one's arguments. They are required to be drawn up in a clear and concise manner. It is inappropriate to file voluminous papers and expect the other party, as well the court, to plough through such papers and still be able to make sense out of them. It is an abuse of court process for the heads to contain every fact and argument. This style of drafting heads of argument and conduct ought to be discouraged. The eventual consequence of such conduct results in delays in delivery of the judgment concerned. Litigants who bombard the court with voluminous papers and information deserve to be penalized even if they are eventually successful in the litigation. Where they lose the application, they deserve to be mulcted with an order of costs on a punitive scale.
Rule 449 of the High Court Rules provides for the correction, rescission and variation of a judgment or order granted in error in the absence of a party affected by the judgment or order. The rule does not set time frames within which rescission should be sought, but it is required that an r 449 application be made expeditiously. The nature of the application envisaged under r 449 is one where an applicant is expected to take expeditious steps to vacate an obviously erroneous order. It was not envisaged that a party who is aware of an erroneous order would delay in bringing the application, hence the lack of a provision setting out the time frames within which the application is required to be brought. A party who delays in taking remedial measures to correct an order erroneously sought or granted may be taken to have acquiesced to the order. The court will only exercise its discretion favourably towards such a party, who, through no fault of his, was not afforded an opportunity to oppose an order and who, upon being aware of the order, takes expeditious steps to correct the order. Whilst the rules do not require that a party who has delayed in bringing the application make an application for condonation of the late filing of the application, a statement explaining the circumstances surrounding the delay is pertinent and should form part of his application. The purpose of this is to equip the court in assessing the reasonableness of the delay. Failure to do so will result in the application being thrown out.

Practice and procedure – judgment – rescission – grounds for – judgment erroneously granted in absence of applicant for rescission – meaning of absence – includes deliberate and intentional not to appear or to file papers timeously even though aware of proceedings

Capital Brake Co (Pvt) Ltd & Anor v *Benatar* HH-34-16 (Chigumba J) (Judgment delivered 13 January 2016)

Under r 449 of the High Court Rules, a judgment may be corrected, varied or rescinded on the grounds, *inter alia*, that it was erroneously sought or erroneously granted in the absence of any party affected thereby. The purpose of the rule is to enable the court to revisit its orders and judgments to correct or set aside any orders or judgments given in error where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and would destroy the basis on which the justice system rests. It must be resorted to only for the purposes of correcting an injustice that cannot be corrected in any other way. The rule goes beyond the ambit of mere formal, technical and clerical errors and may include the substance of the error or judgment. "Absence", for the purposes of r 449, refers not only to physical absence as in not being before the court or judge when judgment is granted, but to absence in terms of the rules, as in being deliberately and intentionally not in attendance despite service of the papers in terms of the rules, or despite notice that an order is being sought, in default. "Absence" also means that a litigant was not before the court when the judgment was granted, as in not

having filed the requisite papers, in time, despite having notice of intention of obtaining judgment. Rule 449 does not apply where a party or his legal practitioner is aware of the proceedings and deliberately opts not to appear or to file the necessary papers within the prescribed time period.

Practice and procedure – judgment – superannuation of – when judgment becomes superannuated – need for judgment to be revived before may be executed on

Nzara & Ors v *Kashumba NO & Ors* HH-151-16 (Mafusire J) (Judgment delivered 24 February 2016)

In terms of Part IV of the Prescription Act [*Chapter 8: 11*], a judgment debt becomes extinct by prescription after the lapse of 30 years. But prescription is irrelevant here. In the context of court judgments, prescription and superannuation may be cognates. But they are different concepts. Once it has run its course, prescription constitutes an absolute bar to claim. On the other hand, superannuation refers to something that may just be too old to be used. It still can be revived and be used.
The Roman-Dutch law provided for the superannuation of judgments. In Holland, in the 16th century, there had developed, alongside prescription, a rule of practice whereby the executability of a judgment debt would lapse after a certain period. According to that rule, the judgment became superannuated and execution could not be carried into effect unless the judgment was revived. The *ratio* of the superannuation rule was to prevent a judgment debtor being taken by surprise when the plaintiff suddenly executed some years later. The rule was introduced for the benefit of a debtor, who, however, could waive it. The period of superannuation was 3 years. Our common law, being Roman-Dutch law, the rule applies in this country. Our rules of court, in r 324, provide that no writ of execution shall be issued after the judgment has become superannuated, unless that judgment has first been revived.
The superannuation rule may not apply to all judgments. For example, in matrimonial proceedings, once an order of annulment, or decree of divorce, is granted, the result is that the putative or pre-subsisting marriage immediately terminates. On the other hand, the superannuation rule would apply to a judgment for the transfer of an immovable property which involves the delivery up or transmission of real rights from one person to another.

Practice and procedure – parties – District Development Fund – proceedings against – Fund not a legal *persona* – need to sue Minister of Local Government

Masiya v *District Development Fund & Anor* HH-119-16 (Charewa J) (Judgment delivered 17 February 2016)

See below, under PRESCRIPTION (Extinctive).

Practice and procedure – parties – trust – not a legal person – may nonetheless through a trustee sue and be sued in its own name

Musemwa & Ors v *Gwinyai Family Trust & Ors* HH-136-16 (Dube J) (Judgment delivered 14 January 2016)

See above, under AGENT (Liability of).

Practice and procedure – pre-trial conference – failure by party to attend – judge striking out defence and plea – judgment given in default – remedies open to defaulting party – must apply for rescission of judgment – not competent to apply for reinstatement of plea and defence

Jonas v *Mabwe* HH-72-16 (Chigumba J) (Judgment delivered 22 January 2016)

The applicant's plea was struck out at the pre-trial conference due to the non-appearance of his legal practitioner, who averred that he had entered the wrong time in his diary. The applicant sought the reinstatement of his plea and of his defence to the action, which he averred to be *bona fide.* The respondent said that the applicant did not indicate the procedural basis on which his application was founded, and that the proper course of action would be to seek an order for rescission of default judgment, as opposed to reinstatement of plea and defence. The respondent contended that in terms of r 182(11) of the High Court Rules, the default which the court takes into consideration is that of the litigating party, not that of his legal practitioner. Therefore the

lawyer's dilatoriness in attending late at the pre-trial conference was irrelevant to the question of default, as it was not his attendance at the pre-trial conference which was mandatory in terms of the rules, but that of the applicant. The applicant's lawyer stated that he had intended to apply to excuse the applicant's failure to attend personally, as the applicant resided outside Zimbabwe.
Held: under r 182(11), the pre-trial conference judge has a discretion to dismiss a party's claim or strike out his defence, or make some other appropriate order, where the party fails to comply with any direction given by the judge as prescribed in r 182, or where the party fails to comply with a notice issued in terms of r 182. In this case, there was no direction issued in terms of r 182, but the failure by the applicant to attend the pre-trial conference at the set down date and time constituted a failure to comply with a notice given in terms of r 182(4). That failure constituted a default on the applicant's part. The striking out of a defence for failure to attend a pre-trial conference constitutes a judgment given in default. The applicant ought to have elected to approach the court using any one of the three methods of seeking rescission. All three methods of rescission of judgment require that the necessary averments be set out in the founding affidavit, which in this case they were not. The relief sought was thus incompetent. Had the applicant and his legal practitioner applied their minds to the rules, they would have brought an appropriate application, buttressed by the necessary averments.

Practice and procedure – provisional sentence – requirement for plaintiff to hold a "liquid document" – requirements for document to be accepted as a liquid document

Maseko v *Ndlovu* HB-20-16 (Mathonsi J) (Judgment delivered 11 February 2016)

In order to obtain provisional sentence, a plaintiff must hold a valid acknowledgment of debt, commonly known as a "liquid document". The term is not defined in the High Court Rules, but the following principles have emerged from the decided cases:

(a) any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document;
(b) a liquid document which, on the face of it, speaks unequivocally, must have the story of the transaction behind it as an investigation into the story may show that the defendant is not liable in terms of the liquid document
(c) if the court has to go behind the liquid document the onus is on the defendant to show that if evidence is heard the probabilities are that he would succeed;
(d) where the legality of a document is called into question, as when the document may be tainted with illegality, the court has to decide whether to let the loss lie where it falls or to relax the rule against illegal agreements in order to do justice between the parties. Such an inquiry cannot be made at the provisional sentence stage; it can only be determined at the trial of the matter;
(e) where the defendant denies that the signature on a document is his or that of his agent, the onus is on the plaintiff to prove that the signature is the defendant's;
(f) it would be a travesty of justice if the court were to grant provisional sentence on the strength of vague, confusing and unclear documents whose authenticity has been questioned.

Practice and procedure – striking out – application to strike out unnecessary parts of pleadings – form of application – need for applicant to show prejudice in conduct of claim or defence if material not struck out

Hepker v *Woncon Invstms (Pvt) Ltd & Ors* HH-19-16 (Musakwa J) (Judgment delivered 13 January 2016)

The plaintiff (respondent) issued an endorsed summons in terms of r 13() of the High Court Rules. The summons was accompanied by a declaration. Appearance to defend was then filed on behalf of the defendants (applicants). Subsequently they requested for further particulars to which the plaintiff responded. They again sought further and better particulars to which the plaintiff responded. They then wrote to the plaintiff, pointing out that the filing of a declaration was superfluous since he had opted to file an endorsed summons. They intimated an intention to apply for the striking out of those parts of the summons that were inconsistent with the particulars furnished. The plaintiff replied that there was nothing to prevent the defendants from pleading and filed a notice to plead and intention to bar. The defendants then filed an application to strike out. The application to strike out was in the form of a statement which contended that the plaintiff's declaration should be struck out as being superfluous.
Held: an application to strike out should be in the form of a court application or chamber application, as required by r 226. The form of such application is stipulated in r 227. An application to strike out will not be granted

unless the applicant shows that it will be prejudiced in the conduct of its claim or defence. While the plaintiff needlessly filed a declaration accompanying an endorsed summons, the defendants had not led evidence showing in what way it they had been prejudiced in the conduct of their defence. That the defendants would needlessly incur costs in pleading to the additional document was neither here nor there. The plaintiff would, in the event of succeeding in his claim, be restricted to costs of preparation of the endorsed summons only.

Prescription – extinctive – cause of action – when arises – delictual claim arising out of motor vehicle accident – plaintiff able to ascertain names of potential defendants within short period after accident – criminal proceedings against defendants – no need for plaintiff to wait until completion of such proceedings

Prescription – interruption of – notice of intention to proceed in terms of State Liabilities Act – not legal process – does not interrupt running of prescription

Masiya v *District Development Fund & Anor* HH-119-16 (Charewa J) (Judgment delivered 17 February 2016)

The plaintiff claimed damages from the defendants. The second defendant was an employee of the first (the DDF) and was responsible for a road accident in which the plaintiff's wife was killed. A little over a year later, the second defendant was convicted of culpable homicide. Summons was issued 2 years and 2 months after the accident. The defendants raised 3 special pleas: (a) the first defendant was not a legal *persona* capable of suing and being sued; (b) the citation of the second defendant was improper in terms of the State Liabilities Act, as he was being sued in his official rather than his personal capacity; and (c) the matter had prescribed. It was argued that the first defendant was a trust and thus was not a legal *persona*. The Minister should have been cited, in which case the provisions of s 3 of the State Liabilities Act would apply. In respect of prescription, the defendants argued that the cause of action arose on the date of the accident, that being the date when the plaintiff became aware that a wrongful act had been committed against him. The notice of intention to sue given just over 2 years after the accident was not process for purposes of interrupting prescription in terms of s 6(4) of the Prescription Act [*Chapter 8:11*]. The plaintiff argued that the cause of action only arose either on the conviction of the second defendant for culpable homicide or a year later, he became aware of the first defendant's identity. He contended that, though he knew that his wife had died in an accident, he was not aware who actually caused the accident and how until the time of the second defendant's conviction for culpable homicide. This was because there were two accused persons and he could only proceed against one or the other at the conclusion of the prosecution and conviction. Further, he was not aware that the first defendant was the second defendant's employer and could be sued for vicarious liability until he was so advised by his lawyers.

Held: (1) only legal persons may be brought to court. If such a person is constituted by statute, the relevant Act of Parliament must vest legal *persona* on that person must make provision for it to operate as a legal *persona*. Consequently, for summons to have force and effect it must be issued against a legal person with capacity to sue and be sued. The DDF was established by the District Development Fund Act [*Chapter 29:06*]. Section 3(2) of the Act vests in the Minister for Local Government, Rural and Urban Development the sole management, control and use of the Fund as the trustee, while s 4 also vests the control of the Fund's assets, liabilities and expenditure in the Minister. The development of areas and application of the fund is also vested in the Minister in terms of ss 5 and 6. The DDF is a fund set up for a particular purpose and managed by a legal person, who is responsible for its assets and liabilities, and has the authority to sue and be sued with regard thereto. There is no provision in the Act creating corporate identity or legal *persona* for the DDF, which is thus not a self-administering institution which cannot acquire rights and is not capable of suing or being sued because the relevant Act has not made provision for it to act as a legal *persona*.

(2) The second defendant was being sued for his own act of negligence and there was no reason to sue him as an officer of the DDF.

(3) A debt does not become due until the claimant is aware or ought reasonably to have become aware, of the facts from which the debt arose. These "facts" have generally been interpreted to mean the material or broad facts from which a cause of action arises or all the facts which a plaintiff must prove to obtain judgment in his favour. For loss, injury or death claims, these facts relate to the damage and loss suffered, how such loss or damage was caused and the wrongful conduct and negligence from which the loss flowed. The plaintiff will be deemed to have such knowledge if he is aware of the cause of damage or loss and that he has been wronged by the defendant, even if he may not know all the details of the wrongdoing. It is not necessary or required that plaintiff should have specific knowledge of the actual details of how he was wronged. The onus is on the defendant to prove that, within three years before the date of service of summons, the plaintiff had or ought to have had knowledge of the facts on which the debt arose. Wrong legal advice and ignorance of the law are irrelevant.

The occurrence of the accident itself and the circumstances thereof alerts a plaintiff of the cause of his action. In any event, s 16 of the Prescription Act requires that, by exercising reasonable care, the plaintiff ought, within a few days of the accident, to have discovered how the accident occurred and who the suspected culprits were.
Whether the plaintiff's wife died as a result of the negligence and wrong doing of one or other of the two persons charged with her death was immaterial to the issue of the plaintiff's awareness of the facts giving rise to his claim. What mattered was that, at the very least, at the time the two drivers collided, one or other of them caused the accident, and upon being informed that his wife had died in an accident, the plaintiff became aware of the cause of his wife's death.
The conviction of a person is not necessary to ground awareness of the plaintiff's rights or claim. Delictual liability is not predicated on a conviction for any offence. In any event, the plaintiff waited for over a year from the conviction before issuing summons.
(3) A notice of intention to proceed in terms of the State Liabilities Act is not legal process for the purposes of the Prescription Act.

Property and real rights – immovable property – property subject to mortgage – mortgagee's right to foreclose if debt not serviced – mortgagor not entitled to stay on grounds that dwelling house is being attached

Nyadindu & Anor v *Barclays Bank of Zimbabwe Ltd & Ors* HH-135-16 (Dube J) (Judgment delivered 17 February 2016)

See above, under PRACTICE AND PROCEDURE (Execution – sale in execution).

Revenue and public finance – income tax – exemptions from income tax – amount received by or accrued to or in favour of an employee participating in approved employee share ownership trust – requirements for such trust – dominant purpose or effect – must be for employees to share in the profits or income of company – trust created to ensure compliance by employer with indigenisation legislation – not constituting approved employee share ownership trust

Old Mutual Zimbabwe Ltd v *C-G,ZRA & Anor* HH-143-16 (Kudya J) (Judgment delivred 24 February 2-16)

In order to comply with the objectives of the Indigenisation and Economic Empowerment Act [*Chapter 14:33*], the applicant company created its Indigenisation Employees Share Trust. The trust had two main objectives: (a) to satisfy the requirements of the indigenisation legislation of moving majority shares from the control of foreign shareholders to local control; and (b) as a skills retention measure, wherein the employee would hold a stake in the company and earn income from the shares allocated to him or her. The trust, together with additional trusts for the benefit of senior and former employees, a youth fund and a special purpose company (all set up by the applicant), were to hold 25% of the issued share capital of the applicant.
In order to avoid tax liability for the employees and for itself, the applicant sought to have the trust treated as an approved employee share ownership trust (AESOT), as defined in s 2, as read with s 15(2)(jj), and para 19 of the Third Schedule to the Income Tax Act [*Chapter 23:06*]. The respondent determined that it lacked the authority to approve the scheme as an AESOT and that the scheme, on the information supplied, failed to meet the requirements of s 2(a) and (b) and especially of 2(b)(ii) of the definition of an AESOT in the Act. The scheme was disqualified under s 2(b)(ii) on the basis of the ownership structure of the trust shares. The applicant sought to have the matter brought on review.
Held: (1) the respondents were not empowered by law to approve an AESOT. No administrative authority is empowered by any law to grant such an approval. In any event, no such approval is required. An AESOT is merely an appellation described and defined in s 2 of the Act. The use of the term "approved" does not indicate that approval is required. The role of the Minister for Indigenisation is not to approve an AESOT but to certify compliance of indigenisation plans with the requirements of the indigenisation legislation. He is certainly not authorised to approve an AESOT.
(2) The requirements for an AESOT are:

- (a) the existence of a notarised trust deed, and
- (b) whose dominant purpose or dominant effect is for employees to share in the profits or income of the company emanating from trading operations and share dealings of the company, and
- (c) in which the shares are held in trust for the employees; and
- (d) either –

(i) any contributions of the employees or profits or income from which disbursements come are pooled or
(ii) each employee has a right or interest in the shares held in trust for him capable of being sold to or bought by the trust.

Requirement (a) was satisfied, but (b) was not. The dominant purpose for forming the trust was not for the employees to share in the profits or income of the applicant; rather, it was for the applicant to comply with the requirements of the indigenisation legislation. This was further confirmed by the inherent fear expressed by the applicant that the failure to recognize the trust as an AESOT jeopardised the approved indigenisation plan. Again, the expressed dominant result of the formation of the trust was to retain staff in the applicant and its subsidiaries by giving them a stake in the company. With respect to requirement (c), there were no shares held in trust for the employees, as shown by the absence of any share certificates in the names of the trustees and the purported direct payment of dividends by the applicant to the prospective beneficiaries rather than to the trust. In respect of (d)(i), there was no evidence that any such income was received by or accrued to the trust or that any dividend income was pooled in the trust. Rather, the evidence was that the applicant paid the dividends directly to each employee and withheld income tax which it remitted to the respondents. In respect of (d)(ii), the applicant failed to establish as a matter of law that each employee, including the bad leavers, was capable of selling his allotment to the trust or that the trust could buy his allotment from him before the share vested. In addition, the applicant failed to establish on a balance of probabilities that in the two years between the award date and the first date of vesting or for that matter even until the date of the determination any shares had been bought from any employee by the trust or sold to the trust by any employee. It thus failed to establish the factual existence of sales and acquisitions before the date of vesting between the trust and any one of the employees.
Accordingly, the Commissioner was correct in saying that he was not satisfied that the arrangement in the trust deed constituted an AESOT as defined.

Trust – nature of – not a legal *persona* – can only be represented by trustee – trustee may sue or be sued in name of trust

Musemwa & Ors v *Gwinyai Family Trust & Ors* HH-136-16 (Dube J) (Judgment delivered 14 January 2016)

See above, under AGENT (Liability of).