Latest update: 25 May 2018

CASES DECIDED JULY – DECEMBER 2016

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

Administrative law – review – grounds for – procedural fairness – *audi alteram partem* rule – disciplinary authority refusing to supply record of proceedings to person appealing against authority's decision – gross irregularity

Moyo v *Commr-Gen, ZRP & Ors* HB-241-16 (Takuva J) (judgment delivered 29 September 2016)

A police constable was convicted of disciplinary offences by a board of inquiry. His request to be provided with a record of the proceedings by the police authorities to enable him to appeal was refused.
Held: (1) In terms of s 35(1) of the Police Act [*Chapter 11:10*] the proceedings of the board of inquiry were required to be as close as possible to those in the magistrates court. The denial of the record violated the section and amounted to a gross irregularity.
(2) The *audi alteram partem* rule or right to procedural fairness required that the applicant be provided with the record of the proceedings. His right was suffocated by the failure to supply the record and by the Commissioner-General's failure to order that the record be supplied.

Arbitration – arbitral proceedings – parties reaching agreement after matter referred to arbitration – proceedings not automatically terminate – must be terminated by arbitrator – agreement being reduced to an award – party entitled to have award registered for enforcement

Karemba v *Zimbabwe Mining Development Corporation* HH-586-16 (Matanda-Moyo J) (judgment delivered 28 July 2016)

A labour dispute in which the applicant had sought compensation for unfair dismissal had been referred to arbitration. While the arbitration hearing was pending, the parties came to an agreement which had been registered as an arbitral award. When the applicant now applied to have it registered under s 28(14) of the Labour Act [*Chapter20:01*], the respondent objected, arguing that the parties had not referred to matter to arbitration, and that when the agreement was entered into, the arbitral proceedings pending before the arbitrator were terminated. There was thus no arbitral award to register.
Held: under articles 30 and 32 of the First Schedule to the Arbitration Act [*Chapter 7:15*], the arbitration proceedings can only be terminated by an order of the arbitral tribunal, to the effect that the proceedings have been terminated. Without such an order the proceedings remain pending before the arbitrator. No such order had been made. The parties had an obligation in terms of the law to ensure the proceedings were lawfully terminated. When the agreement was forwarded to the arbitrator, with the respondent's knowledge, the arbitrator was still seized with the matter. It was within the arbitrator's powers to proceed to reduce the agreement to an award. The fact of reaching an agreement did not automatically terminate the arbitral proceedings. The arbitrator must terminate the proceedings.
(2) The arbitrator had reduced the agreement to an award. His mandate ended with the granting of the award. The applicant was entitled to have the award registered in terms of the Labour Act.

Arbitration – award – setting aside of – grounds – award contrary to law of Zimbabwe – arbitrator in mining matter ordering transfer of mining claims – such order may only be given by High Court or mining commissioner – order set aside – allegation that arbitrator had violated principles of natural justice – arbitrator's conduct entirely proper – no ground for setting aside whole award

Mtemwa Hldgs (Pvt) Ltd & Anor v *Mutunja & Anor* HH-532-16 (Mangota J) (Judgment delivered 7 September 2016)

A dispute as to the transfer of mining claims had been referred by agreement between the parties for arbitration by an arbitrator agreed by the parties. The arbitrator needed to decide whether an agreement had existed between the parties, whether it had been cancelled and whether aspects of the applicants conduct was tainted by fraud. He confirmed the cancellation of the contract which the parties had concluded and directed the reversal of all the mining claims which the respondent had transferred to the applicants and awarded costs against the applicants. The applicants applied for the arbitral award to be set aside, alleging it was in conflict with the public

policy of Zimbabwe. It was further alleged that the arbitrator had violated the principles of natural justice and failed to disclose aspects which were likely to give rise to justifiable doubt as to his impartiality before the arbitration commenced.
Held: (1) The arbitrator was correct in his findings that the agreement between the parties had been properly cancelled by the first respondent because the applicants had failed after due notice to make a required payment.
(2) It was not permissible for the first respondent to raise before the court aspects which had been abandoned before the arbitrator.
(3) The arbitrator was incorrect in ordering the reversal of the mining claims, as this could only be done by the High Court or the Mining Commissioner.
(4) As the fraud allegation by the first respondent was not established, each party should pay its own costs and split the arbitrator's fee equally.
(5) The arbitrator had been selected by both parties, had acted entirely properly and there was no evidence at all to suggest that he had violated the principles of natural justice or that he had failed to disclose any circumstances which were likely to give justifiable doubts as to his impartiality.

Burial

See below, under FAMILY LAW (Burial).

Company – judicial management and liquidation – judicial manager – liquidator – duties – officer of court – duty to act in interests of all interested parties – judicial manager failing to answer serious allegations about his conduct – grounds for removal

Chipamba & Anor v *Militala NO & Anor* HH-824-16 (Phiri J) (Judgment delivered 7 December 2016)

The applicants sought the removal of the first respondent as provisional liquidator of two companies. They alleged, *inter alia*, that he had failed to take any steps to recover debts owed to the companies; in addition, they alleged that he dismissed experienced employees and hired his relations. He did not answer any of the allegations, nor did he explain what he was paying himself. The Master had also failed to address the allegations raised against the liquidator.
Held: (1) A liquidator is answerable to the Master who, in turn, is answerable to the court. Both the liquidator and the Master are officers of the court. They are, as such, enjoined to be always clear and transparent in the manner that they deal with cases which parties bring before them for determination. Anything which they do without transparency and/or accountability does, at the end of the day, impact negatively on the country's system of justice delivery. Liquidators occupy a position of trust, not only towards creditors but also to the companies in liquidation whose assets vests in them. Liquidators are therefore required to act in the best interests of all interested parties. A liquidator should be wholly independent, should regard equally the interests of all creditors and should carry out his or her duties without fear or favour or prejudice.
(2) Irreparable harm was likely to ensue if the first respondent were not removed from the post of provisional liquidator. The interests of justice would be best served if the first respondent were removed from office and substituted and replaced by a person who would be in a position to manage the companies, in issue, honestly, dispassionately and professionally for the benefit of the creditors.

Company – liquidation – application for – grounds – "fair and equitable" – no alternative remedy available – when company should be wound up on such grounds

Kim v *Sensationell (Zimbabwe) Pvt) Ltd* HH-484-16 (Chigumba J) (Judgment delivered 17 August 2016)

The applicant filed an application for the winding up of the respondent company on the grounds that it was fair and equitable to do so. The applicant alleged that the respondent's shares were held by one Park who had opened a competing company in Zimbabwe and another in Zambia. The applicant sought to file an additional affidavit deposed to by his wife as a further opposing affidavit but his wife had not filed any founding affidavit. The applicant's wife had titled her affidavit "answering affidavit" although, because she had filed no founding affidavit, the court found that the affidavit was improperly before it.
Held: (1) in considering whether it ought to allow the admission of such a further affidavit, the court ought to consider whether the other litigants would be prejudiced by the contents of the supplementary affidavit which was proposed to be filed. The guidance given was that the court should be loath to admit any further affidavits, especially where they seek to introduce new evidence which would be prejudicial to the other party, where the prejudice could not be alleviated by an appropriate order as to costs.

(2) In applying the concept of "fair and equitable" as envisioned by s 206(g) of the Companies Act, one should consider the analogy of partnership and the concept is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. The applicant did not aver in his papers that the respondent company qualified as one that was amenable to the application of the deadlock principle, nor was it averred by that the parties were in a "quasi partnership".
(3) It was not just, or equitable, to wind up the respondent company at the instance of the applicant who was only a 30 percent shareholder, in the absence of cogent evidence of wrongdoing on the part of the majority shareholder. Other remedies lay at the applicant's disposal in terms of the Companies Act.
(4) The court dismissed the application and ordered that costs be awarded on a higher scale to register its displeasure at the filing of an application which was entirely devoid of merit, both on the facts, and in terms of the applicable law which the applicant sought to rely on.

Company – private company formed at dissolution of a parastatal – legislation indicates whether it is a successor company

Company – successor – assumes rights and obligations of the company it succeeds

Karoi Town Council v *TelOne (Pvt) Ltd* HH-402-16 (Chirewa J) (judgment delivered 6 July 2016)

The defendant company disputed the plaintiff council's charge for a shop licence fee for the premises on which it operated its telephone exchange. The defendant argued that it was exempt under s 3 and the First Schedule of the Shop Licences Act [*Chapter 14:17*], being the successor to the Posts and Telecommunication Corporation (PTC), which had not been obliged to pay such fees. The Council was unable to prove its claim that the PTC had in fact paid but proceeded to argue that TelOne was not a successor to the PTC and was therefore not exempt. The PTC, as a parastatal, was a statutory body, and TelOne, as the successor to the PTC, was a private company and hence could not claim exemptions granted to a parastatal. The defendant argued that, in terms of s 108 of the Postal and Telecommunications Act [*Chapter 12:05*], it was clear that it was successor to the PTC and took over all rights and obligations of its predecessor.
Held: sections 105 and 106 of the Act determined that the legislation made it clear that the defendant was a successor company. Since the provision for exemptions in the Schedule to the Shop Licences Act had not been amended, the defenadnt was entitled to the same exemption.

Company – proceedings against – company under judicial management – court's authority required to proceed against such company

Trustees, Makomo e Chimanimani Share Ownership Community Trust v *Min of Lands & Anor* HH-556-16 (Munangati-Manongwa J) (judgment delivered 22 September 2016)

See below, under PRACTICE AND PROCEDURE (Parties – *locus standi*).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – application to enforce such rights – who may bring – trust acting on behalf of its members

Trustees, Makomo e Chimanimani Share Ownership Community Trust v *Min of Lands & Anor* HH-556-16 (Munangati-Manongwa J) (judgment delivered 22 September 2016)

See below, under PRACTICE AND PROCEDURE (parties – *locus standi* – constitutional application).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – freedom from arbitrary eviction (s 74) – effect on by-laws authorizing demolition of illegal structures

Mungurutse &Ors v *City of Harare & Anor* HH-558-16 (Tagu J) (judgment delivered 28 September 2016)

A provisional order barred the first respondent from demolishing the applicants' homes in a high density suburb in Harare, in the absence of a court order. In confirmation proceedings, the applicants alleged that the demolition was unlawful without a court order in view of s 74 of the Constitution. The respondents argued that

the council was entitled in terms of the Urban Councils (Model) (Use and Occupation of Land and Buildings) By-Laws 1979 (RGN 109 of 1979) to demolish structures it deemed illegal in the absence of a court order and that the by-laws had not been declared unconstitutional. The applicants contended, however, that all existing laws must be construed in conformity with the Constitution. The first respondent argued that s 74 of the Constitution needed to be read with s 86 of the Constitution, which stated *inter alia* that the fundamental freedoms may be limited in the interest of regional or town planning or the public interest.
Held: (1) the Constitution was the supreme law and any law inconsistent with the Constitution is *ultra vires* the Constitution. (2) Section 74 of the Constitution was clear and unambiguous and before the respondents could lawfully demolish the homes of the applicants, or any other illegal structures, a court order was required.

Constitutional law - Constitution of Zimbabwe 2013 – Declaration of Rights – freedom of assembly and freedom to demonstrate (ss 58 & 59) – limitations which may be imposed (s 86) – limitations must meet test of proportionality

Dzamara & Ors v *Comm-Gen of Police & Ors* HH-398-16 (Tsanga J) (judgment delivered 4 July 2016)

The applicants had been holding an "indefinite" demonstration in Africa Unity Square in Harare, to continue until their grievances against the government were met. They were rounded up, assaulted and dispersed by police. They now made an urgent chamber application to interdict the police from violating their right to peacefully assemble and demonstrate and to be free of violence. They also sought a final order declaring the actions of the police unlawful. The court was requested to determine that the application be considered urgent.
The applicants based their claim for urgency on the fact that constitutional rights had been violated by the police, who had threatened to do so again if the demonstration was resumed. The police, as respondents, argued that the applicants had not shown that they had no other legal remedy, and they had been dispersed because they had resisted the arrest of some criminals hiding in their midst, thus threatening public safety. A continuous demonstration would also stretch the resources of the police. Furthermore, the applicants had contravened the law by not notifying the police of their demonstration.
The court considered the question of urgency in terms of rights as well as the permissible restrictions placed on those rights guaranteed by s 86 of the Constitution, and reflected in international human rights instruments. Anyone who violates rights must justify any restrictions in terms of s 86(2). The dispersal of a lawful gathering, even one of which the police have not been notified, will be unlawful unless it meets the proportionality test: the nature and extent of interference must be balanced against the reason for interfering. The applicants would have to take account of the possibility for violence and disorder if they wish to hold a demonstration in a public meeting place and engage the police to ensure order.
The behaviour of the police in perpetrating violence has at times contributed to a lack of culture of peaceful demonstration, but in this case, the reasons for restriction of the right made the restriction justifiable, since they were aiming at reducing crime. The potential for health and safety problems justify the limitations on the rights, which passed the test of proportionality. The applicants also did not show why they could not use other avenues to present their grievances to government.
In view of these conclusions, the matter was ruled not to be urgent and could be heard on the ordinary roll.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – protection against discrimination – discrimination on grounds of disability – given legislative effect by Disabled Persons Act [Chapter 17:01]

Masendeke v *Kukura Kurerwa Bus Svcs (Pvt) Ltd* HH-598-16 (Chigumba J) (Judgment delivered 12 October 2016)

See below, under CONTRACT (Termination).

Constitutional law - Constitution of Zimbabwe 2013 – Declaration of Rights – right of access to the courts (s 69(3)) – right to access Constitutional Court – party must first exhaust remedies through lower courts

Livera Trading (Pvt) Ltd & Ors v *Tornbridge Assets Ltd & Ors* CC-13-16 (Ziyambi JCC) (judgment delivered 17 October 2016)

The applicants, representing a company producing cigarettes, had been interdicted from any activity involving the marketing of their cigarettes on the grounds that they were infringing the trademark rights of another cigarette company. The High Court had granted an interim order and the respondents had applied for permission

to execute the order immediately. In granting that permission, the High Court had ruled that appeal could only be pursued with its leave. The applicants then approached the Constitutional Court to invalidate the paragraph of the interim order which barred an appeal, on the grounds that it violated s 69 of the Constitution guaranteeing access to the courts.
In an urgent chamber application, the Constitutional Court rejected the application on the grounds that the applicants had not exhausted all other remedies before approaching the Constitutional Court. The correct approach would have been to lodge an appeal with the Supreme Court.

Constitutional law – Constitution of Zimbabwe 2013 - Declaration of Rights – right of access to courts (s 69(3)) – court challenge to appointment of chief – remedy available to approach Provincial Assembly with complaint – domestic remedies must be exhausted before brining matter to court – resolution of dispute regarding appointment of chief (s 283(c)(iii)) – ouster of jurisdiction of courts – would violate principle of separation of powers

Meki v *Acting District Administrator, Masvingo Province & Ors* HH-614-16 (Matanda-Moyo J) (judgment delivered 19 October 2016)

See below, under CUSTOMARY LAW (Chieftainship – appointment of chief – dispute – court's role).

Constitutional law - Constitution of Zimbabwe 1980 – declaration of rights – right to fair trial within reasonable time (s 18(1) & 2)) – lengthy delay presumes unfairness – not unfair if delay caused by accused

S v *Madzore* CC-12-16 (Mavangira AJCC; Chidyausiku CJ, Malaba DCJ, Ziyambi, Gwaunza, Garwe, Gowora, Hlatshwayo, and Guvava JJCC concurring) (Judgment delivered 28 May 2014; reasons made available 11 July 2016)

The accused, a member of Parliament of the opposition party, was charged in 2006 with assaulting a policeman. In 2007 he was removed from remand, and the case did not proceed to trial until 2011, at which point the accused applied for referral to the Constitutional Court on the grounds that his right to a fair trial had been violated due to the long delay. The magistrate granted the referral under s 24 of the 1980 Constitution. The accused argued that the delay was caused mostly by the State, and that due to the delay he had lost contact with his sole witness and hence would be prejudiced. The State prosecutor countered that the delay had been caused by the accused himself failing to make himself available for service of summons, giving excuses as to why he could not be available for trial, and failing to appear when a trial date was agreed.
The court considered the factors which would indicate that the right to a fair trial had been violated if a trial was delayed. These were the length of the delay, the reasons for the delay, whether the accused attempted to exercise his rights, and whether the accused was prejudiced by the delay.
Held: (1) a lengthy delay provides a presumption of the inability to achieve a fair trial. (2) A delay of four years and six months in this case would be consider a sufficiently long delay. (3) The delay had been primarily caused by the accused himself, as detailed by the prosecution evidence. (4) He had made no attempt to assert his right to a speedy trial. (5) His defence would not be prejudiced by the absence of his witness, as that individual was now appearing on the list of State witnesses. Hence the accused's right to a speedy trial had not been violated.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to life (s 48) – permissibility of death penalty for murder where aggravating circumstances exist – requirement that "a law" should define what constitute aggravating circumstances – "law" not limited to Act of Parliament – can include judicial precedent

S v *Kufakwemba & Ors* HH-795-16 (Chatukuta J) (Judgment delivered 8 December 2016)

At the end of the accused persons' trial for murder committed during the course of a robbery, the question arose whether the death penalty was competent. Under s 48(2) of the Constitution of Zimbabwe 2013 (which protects the right to life) –

> "A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstance, and –
> (a) the law must permit the court a discretion whether or not to impose the penalty …"

The issue was whether or not there is a law that defines what constitutes aggravating circumstances and consequently whether or not the court could impose the death sentence. In some previous cases in the High Court, the judge had taken the view that an Act of Parliament was required to define the terms on which the court could impose the death penalty and, until such an Act was passed, the death penalty could not be imposed.
Held: (1) Under s 332 of the Constitution, the word "law" means more than just an Act of Parliament. It includes unwritten laws, such as customary law. Section 48(3), which protects the lives of unborn children, expressly provides that an Act of Parliament must make provision for such, but no such requirement was provided in s 48(2).
(2) The common law had, through judicial precedent, defined "aggravating circumstances". The courts had always expressed the view that murder committed in the furtherance of other crimes such as rape or robbery amounts to murder committed in "aggravating circumstances". The common law, which is also part of our law, provides for what constitute aggravating circumstances in the commission of a crime, as a plethora of decisions of the superior courts demonstrate. Notwithstanding the absence of a definition of aggravating circumstances, it is possible, from the particular facts of a case, to make a finding of what constitutes aggravating circumstances.
(3) Before the promulgation of the present Constitution, the Criminal Procedure and Evidence Act [*Chapter 9:07*] had made the death penalty mandatory for murder unless extenuating circumstances were found. "Extenuating circumstances" were not defined but this has not prevented the courts from finding such circumstances exist. Aggravating circumstances, being circumstances that worsen the accused's moral blameworthiness, are the converse of extenuating circumstances. In the absence of extenuating circumstances, and of necessity the presence of aggravating circumstances, our courts have imposed the death penalty. One circumstance that has been found to be aggravating, warranting the imposition of the death penalty, is the murder of a person during the commission of a robbery. There is a plethora of case authority on this point. What constitutes aggravating circumstances can be gleaned from our common law and in particular from precedents. As such, the law envisaged in s 48(2) already exists in sources of law other than an Act of Parliament.
(4) The legislature has already provided in the Criminal Law (Codification and Reform) Act that killing a person during the course of a robbery is an aggravating circumstance.
(5) The amendment to the Criminal Law (Codification and Reform) Act outlining what constitute aggravating circumstances in determining the appropriate sentence for murder, although not having retrospective effect, merely restates or reconfirms what have always been considered to be aggravating circumstances. Murder during the commission of another offence has always been considered as committed in such circumstances. The amendment should therefore not be considered as filling any lacuna created by the new Constitution because none existed.
(6) Whilst the Constitution recognizes that the law that defines aggravating circumstances is in existence, the Constitution has changed the law in two respects. The first is that a court now has a discretion whether or not to impose a death sentence, even where there are aggravating circumstances. Secondly, the onus to prove whether or not the death penalty should or should not be imposed has been shifted to the State.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – freedom from psychological torture and such like treatment (s 53) – unlawful deprivation if property without compensation (s 72(3)) – rights of persons with disabilities (s 83) – eviction of disabled farmer from farm after acquisition, without prior payment of compensation – not a breach of Declaration of Rights

S v *Stander* CC-1-16 (Malaba DCJ; Chidyausiku CJ, Gwaunza JCC, Gowora JCC, Guvava JCC, Hlatshwayo JCC, Mavangira AJCC, Chiweshe AJCC & Makoni AJCC concurring) (Decision given on 9 July 2014; reasons made available 1 September 2016)

The applicant was charged in the magistrates court with occupying gazetted land without lawful authority, in contravention of s 3(2) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:08*]. The applicant raised a number of constitutional questions which the magistrate referred to the Constitutional Court for determination. The questions were: whether the eviction of the applicant from the farm without paying him for improvements on the land amounted to unlawful deprivation of property in terms of s 72(3) of the Constitution; whether eviction of the physically disabled applicant was in breach of obligations imposed by ss 2 and 83 of the Constitution; whether eviction without first paying compensation amounted to physical or psychological torture, or cruel inhuman or degrading treatment or punishment in violation of s 53 of the Constitution.
Held (1) No law required the State to pay the former owner of compulsorily acquired agricultural land compensation for improvements before eviction. (2) The applicant could not claim the benefit of the protection of the rights of disabled persons in terms of s 83 of the Constitution to defeat the enforcement of the obligation imposed on him by s 3(2)(a) of the Gazetted Land (Consequential Provisions) Act. (3) There is nothing inhuman or degrading in a process the purpose and effect of which is the prevention of a continued commission of a crime. The eviction of a former owner of compulsorily acquired agricultural land is an exercise of power

sanctioned by the Constitution and cannot be said to be in contravention of fundamental rights included in the Constitution.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – freedom of assembly (s 58) and freedom to demonstrate – police prohibiting all public processions and demonstrations for a specified period in a particular area – police power to do so in terms of s 27(1) of Public Order and Security Act – whether such prohibition a contravention of freedom of assembly

DARE & Ors v *Saunyama NO & Ors (2)* HH-589-16 (Chiweshe JP (judgment delivered 4 October 2016)

The first respondent, in his capacity as the police officer commanding Harare District, issued a notice in terms of s 27(1) of the Public Order and Security Act (POSA) barring for a specified period the holding of all public processions and demonstrations in the central business district of Harare. The applicants in the several cases being considered filed urgent chamber applications challenging the validity of the notice, alleging that s 27 of POSA violated the applicants' rights protected by ss 58 (freedom of assembly and association), 59 (freedom to demonstrate and petition), 61 (freedom of expression), 66 (freedom of movement) and 67 (political rights) of the Constitution. They also sought the setting aside of the notice made by the first respondent.
Held: (1) The Constitution was the supreme law, and any law inconsistent with it was invalid to the extent of the inconsistency and the court should adopt a generous rather than a restrictive interpretation of the Constitution.
(2) Section 27 of POSA clearly constituted a derogation of the rights accorded in terms of s 59 of the Constitution (the right to demonstrate peacefully). But the question to be answered was whether it constituted a fair, reasonable, necessary and justifiable derogation or limitation in a democratic society of that freedom as allowed by s 86 of the Constitution. (3) The rights referred to form the very core of our democracy – they are sacrosanct. However, no democracy can function or thrive in an environment of public disorder and anarchy. The freedom of assembly was not absolute and must be balanced against the responsibility of government to maintain public order and protect public security. (4) The provisions of s 27 of POSA satisfied the requirements set out under s 86 of the Constitution. The limitation it imposes on the right to demonstrate as enshrined under s 59 of the Constitution is fair, reasonable, necessary and justifiable in a democratic society based, on openness, justice, human dignity, equality and freedom. Accordingly s 27 is not *ultra vires* the Constitution. (5) Although the applicants could have approached the magistrates court in the first instance, it was not inappropriate to have proceeded in the High Court, the High Court having original jurisdiction over all civil and criminal matters throughout Zimbabwe.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – rights of accused person (s 70) – onus of accused person to show that confirmed statement was not made freely and voluntarily – whether accused person's constitutional rights violated thereby

S v *Chidhakwa* HH-422-16 (Chitapi J) (judgment delivered 22 June 2016)

See below, under CRIMINAL PROCEDURE (Statement by accused person – production of).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right of arrested person to be released pending trial – s 50(1)(d) – whether such right applies to court application for bail

S v *Kondo & Anor* HH-99-17 (Chitapi J) (Judgment delivered 29 December 2016)

See below, under CRIMINAL PROCEDURE (Bail).

Constitutional law - Constitution of Zimbabwe 2013 – Declaration of Rights – right to lawful administrative conduct (s 68(1)) – right violated if legal processes laid down by statute are not followed

Constitutional law - Constitution of Zimbabwe 2013 - Declaration of Rights – right not to be evicted without a valid court order (s 74) – rural council displacing villagers in order to expand growth point – need for council to follow due process in displacing villagers – right of villagers to raise claim in High Court if right violated

Bomba &Ors v *Murewa RDC & Anor* HH-497-16 (Tsanga J) (judgment delivered 24 August 2016)

The plaintiffs were a group of villagers who were being displaced from their rural homes by the actions taken by the defendant in expanding Murewa Growth Point. They had sought a declaratur stating that their constitutional and legal rights had been contravened and were seeking compensation.
The defendants entered a special plea barring the plaintiffs on the basis that they had approached the wrong court, that they had not exhausted domestic remedies and that their claim for compensation had prescribed. They argued that the plaintiffs should have approached the Administrative Court, since under s 53 of the Regional and Town and Country Planning Act [*Chapter 29:12*] grievances regarding compensation should be heard by that court. They also claimed that they were entitled to take any action when operating a master plan and once again grievances should be addressed to the Administrative Court. If they had a complaint under the Administrative Justice Act it could be taken to the High Court, but as an application, not by summons as they had done. Furthermore, since this process had begun several years previously, the plaintiff's claims had expired through prescription and hence could not be heard.
The plaintiffs, challenging the special plea, argued that the jurisdiction of the Administrative Court does not provide for it to make a declaratur. They pointed out that the defendants could not rely on s 53 of the Regional and Town Planning Act, as they had produced no evidence that they were acting on the basis of a master plan, or even that a master plan existed, hence s 53 of this Act was irrelevant. No draft plan had been presented to the public, and no consultation had taken place. The plaintiffs were making their claim based on protections of rights in the Constitution and acting on s 85(1) of the Constitution. The council had acted unlawfully, evicting people without a court order, hence violating s 74(1) of the Constitution.
Held: in failing to follow legal procedures the Council had indeed violated the plaintiffs' constitutional right under s 68 to administrative conduct that is lawful. According to s 327 of the Constitution, the court was required to interpret legislation in line with international law and that the right not to be evicted without due process is protected in international law. No evidence was presented to suggest that any legal process had been followed, hence the council's actions were unlawful. The defendants could not restrict the plaintiffs to processes which would limit their ability to claim their rights when they themselves had not followed legal procedures.
The special plea was dismissed with costs.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – rights of children – right to name and birth certificate (s 81) – not violated by s 12 of Births and Deaths Registration Act [*Chapter 5:02*]

Paunganwa v *Registrar of Births and Deaths & Anor* HH-406-16 (Munangati-Manongwa J) (judgment delivered 7 July 2016)

A woman who had been in an unregistered customary law union lost her husband two months after the birth of their baby, before the birth was registered. The registrar refused to issue a birth certificate including the father's name, citing s 12(2)(c) of the Births and Deaths Registration Act [*Chapter 5:*02] which, in a case of the father of a child born out of wedlock, required a witness from the father's family to confirm paternity. The mother had been unable to secure their co-operation and was now applying for an order compelling the Registrar to issue the birth certificate including her late husband's name as father. She claimed that the section of the Act violated the child's rights guaranteed in s 81(1)(b) and (c) of the Constitution – the right to a name and family and to be issued promptly with a birth certificate. Furthermore, it violated against her rights as it discriminated against her as a woman who was in a customary law marriage, and she sought to have the section declared unconstitutional. The respondent argued that there was no evidence of the putative marriage, and such discrimination was necessary to protect families from fraudulent claims of paternity.
Held: (1) s 86 of the Constitution allows limitations to rights in specified circumstances and s 56 allows for discrimination under certain circumstances. (2) The applicant had not been discriminated against on the basis of guardianship, gender or her unregistered marriage, as the requirements were not onerous or unreasonable. (3) The requirement of the Act that paternity be confirmed by the husband's relative did not violate the child's right to a name, as it was reasonable and justifiable in a democratic society. (4) The applicant had alternative remedies, as she could register the child in her own name or seek an order from the court requiring the relatives to undergo DNA testing. (5) Where an issue can be resolved without raising constitutional matters, such remedies should be sought.

Constitutional law – Constitution of Zimbabwe 2013 – rule of law – primacy and meaning of – undermining of by government official failing to comply with court order

Mangwiro v *Chombo NO* HH-710-16 (Tsanga J) (Judgment delivered 16 November 2016)

The applicant had obtained a default judgment against the respondent in the latter's official capacity as the Minister for Home Affairs. The respondent and his co-defendants had lodged an application for rescission, but this was not pursued to finality, resulting in the applicant filing an application for dismissal for want of prosecution. This application was granted following the respondent's lack of action. Subsequently, the applicant obtained an order directing the respondent to exercise his powers under s 5(2) of the State Liabilities Act [*Chapter 8:14*] to pay, from the Consolidated Revenue Fund, the money awarded to the applicant in terms of the default judgment. The order directed him to comply within 14 days of service of the order, failing which he would be declared to be in contempt of court. The order was sent directly to the respondent 3 days later. This was followed by another letter from the applicant's legal practitioners, reminding the respondent of the time limit. No compliance with the order having been shown, an application for committal for contempt was served personally on the respondent by the additional sheriff. The application was also served on the Attorney-General a few months later. No action was taken by the respondent or the Attorney-General. The application was accordingly set down for hearing.
The day before the hearing date, the respondent filed an affidavit stating that he had not been personally served, as required by the High Court Rules.
Held: (1) besides the factual realities, the legal basis for granting the order for contempt was fundamentally constitutionally rooted. One of the founding values of the Constitution is respect for the rule of law. The concept of the rule of law denotes a government of laws and not of men. Individuals working within the state machinery are expected to exercise their official duties and responsibilities in accordance with the law. In other words, the rule of law represents the supremacy of law. Central to the rule of law is that no person is above the law. The rule of law binds government and all officials to its precepts and also preserves the equality and dignity of all persons. In essence, equality before the law is not a hollow concept. Everyone, regardless of factors such as their economic or social status, or political affiliation is subject to the law. Respect for the rule of law would be ferociously eroded were courts to permit a government official to send a message to a litigant who has successfully sued that the State does not value court orders.
(2) Where a return of service clearly indicates that proper service has been effected, that is accepted as *prima facie* proof of what is stated. The onus is then on the person alleging otherwise to prove his or her assertion by clear and satisfactory evidence, which was lacking in this matter.
(3) There was evidence of a valid court order; that the order to comply with his statutory obligation had been brought to the respondent's attention; and there had been no compliance with that order.

Contract – cession – what constitutes – how formed – distinction from pledge – *justa causa* for cession – need to show

Zimplow Hldgs (Pvt) Ltd v *Senoj Invstms (Pvt) Ltd* HH-761-16 (Dube J) (Judgment delivered 30 November 2016)

A cession is a contract between a cedent and a cessionary, whereby the cedent agrees to give up his rights. It is a transfer of rights to a claim, from one creditor to another, of a debtor's obligations. The debtor is not involved in the cession. As soon as the cession agreement is concluded, the cedent falls out of the picture. The cessionary derives rights and interest on conclusion of the cession contract.
It is accomplished by means of an agreement of transfer between the cedent and the cessionary arising out of a *justa causa* from which the intention of the cedent to transfer the right to claim to the cessionary (*animus transferendi*) and the intention of the cessionary to become the holder of the right to claim (*animus acquirendi*) appears or can be inferred. The agreement of transfer can coincide with, or be preceded by, a *justa causa* which can be an obligatory agreement such as, for example, a contract of sale, a contract of exchange, a contract of donation an agreement of settlement or even a payment (*solutio*). The difference between an out and out cession and a pledge is that an out and out cession involves a total transfer of rights, whilst a cession in *securitatem debiti* is basically a pledge of the right and no transfer of the right takes place.
The *justa causa* determines the nature and extent to which the right is transferred between the parties. The *justa causa* of a cession can be an obligatory agreement as in a loan agreement, lease agreement, donation or contract of sale entered into between the debtor and the cedent. An agreement to provide security by means of a cession is adequate *justa causa*. Where a cession takes place, it is the *justa causa* that gets transferred to the cessionary. Where the *justa causa* is not expressly stated it must be capable of being inferred from the cession agreement in order for the agreement to be valid. A non-existent right of action or a non-existent debt cannot at law be transferred as a subject matter of a cession.

Contract – formation – contract based on a purchase order and memorandum of agreement not signed and having no start date – no clear offer and acceptance needed – valid if it was acted on

Bell PTA (Pvt) Ltd v *Cab Park Invstms (Pvt) Ltd* HH-430-16 (Tsanga J) (judgment delivered 20 July 2016)

The plaintiff had an agreement to supply a technician to maintain the machinery it had supplied to the respondent. The respondent had been paying for labour on an *ad hoc* basis, but had made a purchase order to the plaintiff for the supply of the technician on a full-time basis at 200 hours a month. The plaintiff sent a memorandum of understanding to that effect which had never been signed, but the technician was nevertheless supplied on a full-time basis. However, some errors in the billing were made and an hourly rate continued to be used, resulting in the respondent being under-invoiced. The respondent decided it would be advantageous to cancel the relationship and employ the technician directly, and thus wrote to the plaintiff cancelling the arrangement. The plaintiff then billed the respondent for the previous three months at 200 hours per month. The respondent denied that any such contract existed as the memorandum had not been signed.

Held: the existence of a contract did not depend on a firm offer and acceptance. The fact that a full-time technician had been supplied and the respondent had proceeded on that basis was sufficient to conclude that a contract was implicitly agreed. That was in fact the contract that the respondent was terminating when it wrote to the plaintiff. The respondent was ordered to pay the amount claimed by the plaintiff, minus the amounts already paid in terms of the hourly invoices.

Contract – performance – time for – position when time for performance not agreed between the parties – need for defaulting party to be placed in mora by demand being made specifying time for performance

Barrel Eng & Founders (Pvt) Ltd v *Bitumen Construction Svcs (Pvt) Ltd* HH-715-16 (Mangota J) (Judgment delivered 17 November 2016)

The defendant, when called upon to pay a debt owed to the plaintiff, sought and was more than once granted indulgences to pay. It did not deny liability. When the plaintiff brought the present action, the defendant claimed that the debt had prescribed. The plaintiff had also alleged that the defendant was liable on demand for payment being made, the contract not having been specific in this regard.
Held: (1) the defendant's tacit acknowledgment of liability interrupted the period of prescription. The request for indulgences and the granting of the same interrupted the prescriptive period. The interruption caused the period of prescription to commence to run afresh.
(2) Where time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if, after a demand has been made calling upon the debtor to perform by a specified date, he is still in default. The demand, or *interpellatio*, may be made either judicially, by means of a summons, or extra-judicially, by means of a letter of demand, or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period for performance.

Contract – termination – breach – anticipatory breach – what is – breach committed before performance is due

Masendeke v *Kukura Kurerwa Bus Svcs (Pvt) Ltd* HH-598-16 (Chigumba J) (Judgment delivered 12 October 2016)

The plaintiff was disabled, being unable to walk on his own without assistance. He was taken by his sister to catch a bus operated by the defendant company. He was accosted by defendant's conductor as he was boarding the bus, and asked rude and embarrassing questions. He was given no assistance to board the bus, on which there was no area reserved for persons with disabilities. He eventually found a seat for himself. The conductor was rude to him, and the plaintiff withheld payment of the bus fare after the bus had started moving, unless the conductor apologized to him. The conductor refused to give the plaintiff his name and contact information. At the next town he was unceremoniously ejected from the bus by the conductor who with the assistance of two other men, manhandled him off the bus and dumped him on the ground on his back. He was humiliated and left stranded on the side of the road.

The plaintiff issued summons against the defendant, claiming, amongst other things, damages for violation of his freedom from discrimination, for *injuria* and for assault suffered as a result of being denied transport services on account of his disability, as well as interest and costs. The basis of his claim was that the defendant was liable in terms of the Disabled Persons Act [*Chapter17:01*], being vicariously liable for the wrongful conduct of its employees who acted within the course and scope of their employment when they verbally abused the plaintiff and forcibly threw him off the bus. The defendant, he claimed, was also liable for *injuria* for negligence because it owed a duty of care to disabled persons. The defendant's treatment of the plaintiff was unfairly discriminatory, contrary to s 56 of the Constitution.
The matter was referred to trial for determination of whether plaintiff was entitled to payment of the sum claimed, or of any sum, from the defendant for violation of his freedom from discrimination.

At the conclusion of the plaintiff's case, the defendant applied for absolution. It also argued that the plaintiff's case was confined to the Disabled Persons Act and that he could not rely on the Aquilian action, as that had not been specifically pleaded. It was submitted that the cause of action in terms of the Act was a narrow one which should be confined to what the lawmaker provided. The guiding phrase, it was submitted, was "on the ground of disability alone", which translated into the following elements which a plaintiff must prove in order to establish a cause of action:
1. that the plaintiff was disabled
2. that he sought access to a service or amenity which is ordinarily offered to members of the public at large;
3. that he was denied the service only because he was disabled.

It was common cause that failing to pay the bus fare was an offence in terms of s 43 of the Motor Transportation Act [*Chapter 13:15*]. The defendant argued that this constituted an anticipatory breach of the contract.
The plaintiff argued that he had established a *prima facie case* against the defendant on the issue referred to trial, and that the evidence adduced on his behalf satisfied the definition of discrimination on the basis of disability set out in s 56(3) and (4) of the Constitution.
Held: (1) the purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed. A pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.
(2) By imposing a condition which did not form part of the original contract of carriage, the plaintiff in effect repudiated the contract, even though that may not have been his express intention. He created a different contract. The question then became one of whether the defendant owed the plaintiff a duty of care, or any duty at all, when the plaintiff refused to pay the fare and the contract of carriage was repudiated.
(3) The ejectment of the plaintiff from the bus was for failure to pay the fare, and not because of his disability. The plaintiff would have been transported to his destination had he paid the requisite fee. The plaintiff repudiated the contract of carriage when he refused to pay the fare. He was not entitled to any carriage by the defendant unless he paid the fare. The cause of action based on the Act was not proved on a *prima facie* basis.
(4) It was shown to have been established, on a *prima facie* basis, that he was treated in a discriminatory manner for the purposes of s 56(3) of the Constitution by being subjected directly or indirectly to a condition, restriction or disability which other people were not, or that other people were accorded directly or indirectly a privilege or advantage which he was not accorded. Although the pleadings did not expressly and specifically rely on s 56 of the Constitution to found a cause of action, it is clear that the Act was born of the provisions of s 56(6) of the Constitution. It provided for and protected the rights of disabled persons.
(5) Section 176 of the Constitution itself provided that the court had inherent power to protect and regulate its own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of the Constitution. The plaintiff could rely on s 56 of the Constitution because it could not be said, as a matter of law, that he did not plead it as the basis of his cause of action.

Court – contempt – application for committal – need for application to be served personally

Mangwiro v *Chombo NO* HH-710-16 (Tsanga J) (Judgment delivered 16 November 2016)

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

Court – contempt – application for committal – grounds for refusal – disputes of fact – application should be granted where disputes of fact are illusory

Moyo v *Ncube* HB-237-16 (Mathonsi J, Bere J concurring) (judgment delivered 16 September 2016)

The appellant and respondent were neighbours involved in a dispute over boundary demarcation. The dispute was resolved by a consent order in the magistrates court. The respondent failed to comply with the consent order. The appellant commenced an application for contempt of court against the respondent in the magistrates court. The magistrate dismissed the application, finding that it should have been commenced as an action and not an application as there were disputes of fact.
On appeal, held: there was a consent order and the boundary had also been properly demarcated by the relevant authorities. The dispute of fact was illusory and the magistrate should have granted the contempt of court order on application.

Court – judicial officer – duties – deal with matters with reasonable promptness – unexplained delays – parties' right to complain

Court – judicial officer – duties and role – encourage and support negotiated settlements between parties – desirability and benefits of reaching settlement

City of Harare v *Thomas & Anor* HH-544-16 (Chitapi J) (Judgment delivered 14 September 2016)

A consent order had been made between the applicant and the first respondent whereby the applicant undertook to supply water to the first respondent's property for a minimum of two days a week or such lesser period as may be agreed, allowing an application for variation if the applicant maintained that the first respondent was unreasonably refusing to consent to variation. Several years later the applicant applied for variation of the court order to specify that it would supply water as and when it was able to do so. The judge, endeavouring to adopt a dispute resolution approach sought to seek an agreement between the parties, specifying that if agreement was not reached by a specific date, judgment would be handed down. Agreement was not reached and after a substantial delay occasioned by administrative deficiencies, the file was referred to the judge for judgment.
Held: (1) courts should endeavour to encourage and give judicial support to negotiated settlements between opposing parties. If parties settle their disputes amicably without the need for adjudication by the court, they basically enter into a compromise arrangement. A compromise puts an end to a law suit and would be on the same footing as a judgment because it renders the dispute *re judicata*. Compromise agreements invariably promote an orderly and effective system of justice administration. The litigants benefit from avoiding costs which are the hallmark of protracted and often acrimonious trials. The cases which have to be disposed of through trial are reduced hence reducing the case load on the judicial system. The court's resources, including the judges, are not clogged and stretched. This allows for a smoother and more efficient justice delivery system. Compromise agreements help the parties to retain an amicable relationship which is likely to last and from a logic point of view, parties are likely to abide by and perform the rights and obligations which they will have created and/or imposed mutually on one another more readily that if the same are forced upon them.
(2) In terms of s 165(1)(b) of the Constitution, justice should not be delayed and the judiciary is required to perform its duties with "reasonable promptness". In terms of s 162, "judicial authority derives from the people of Zimbabwe and is vested in the courts". Unexplained delays in handing down judgments have the potential effect of undermining public confidence in the judicial system, in that the public will perceive courts as institutions which do not bother to expeditiously resolve disputes. The Judicial Service Code of Ethics 2012 was enacted to among other things set standards relating to the handing down of reserved judgements. The fact that one of the parties files a complaint should not and has not influenced the court's decision. However, it is desirable, where a party makes follow ups on a reserved judgement or indeed on any matter in which there is another litigant involved, to also copy correspondence, to give the opportunity for openness. It should not appear as though the judge has been influenced or pressured to act by one party without the knowledge of the other.
(3) The variation sought by the applicant was very open ended, effectively leaving the first respondent unable to challenge the applicant's inability to supply water. (4) The applicant, while pleading that it was beset by very severe financial constraints, that its pumping capacity was hampered by old and inefficient pumps which continually broke down and that the high altitude of the first respondent's property made pumping extremely difficult, had not, however, indicated what remedial measures it was putting in place to surmount its stated challenges.
(5) The first respondent had accordingly not been unreasonable in refusing to consent to the variation and the application for variation of the consent order was dismissed.

Court – judicial officer – leaving bench – completion of part heard matters – magistrate – need for magistrate to take oath of office again before hearing matters

S v *Munatsi* HH-533-16 (Mtshiya J) (Judgment delivered 9 September 2016)

A regional magistrate commenced a trial but left the bench three months later, before completing the matter. He returned to continue the hearing three months after that, without retaking the oath of office.
Held: (1) Sections 6 and 9 of the Magistrates Court Act [*Chapter 7:10*] require a magistrate to take the oath of office before presiding over proceedings.
(2) Unlike the Labour Act and the Constitution which make provision for presidents of the Labour Court and judges of the High Court to complete matters they commenced before their appointments expired, there is no such provision in the Magistrates Court Act.
(3) Accordingly, the magistrate should have retaken the oath of office before presiding. The proceedings had to be quashed and commenced *de novo* before another regional magistrate.

Court – officer – deputy sheriff – sales in execution – attachment of property – sheriff's duty to attach no more than required to satisfy judgment debt

Zimbabwe Mining Co (Pvt) Ltd v *Outsource Security (Pvt) Ltd & Ors* S-50-16 (Uchena JA, Malaba DCJ & Bere AJA concurring) (decision given on 29 March 2016; reasons made available 4 October 2016)

See below, under PRACTICE AND PROCEDURE (Execution – sale – attachment of property in execution – duties of sheriff).

Criminal law – general principles – liability – director or employee of a company – vicariously liable for criminal acts of other directors or employees

S v *Chikuku* HH-527-16 (Musakwa J, Hungwe J concurring) (Judgment delivered 12 September 2016)

The appellant was employed by a company as a clerk. A director of the company, together with the appellant's co-accused (who had since died), bought maize from the complainant, purporting to act on behalf of a company. The maize was delivered to the company's premises and an invoice was issued. The appellant undertook to have the complainant paid, but no payment was made. When the complainant called to see the appellant, he was told that the appellant was elsewhere in the country. The appellant was convicted of fraud. On appeal, the issue of his liability for the offence was raised.
Held: in terms of s 277 of the Criminal Law Code [*Chapter 9:23*], any conduct on the part of a director or employee of a corporate body who is acting in the exercise of his or her power or in the performance of his or her duties as such, or in furthering or endeavouring to further the interests of the corporate body, shall be deemed to have been the conduct of the corporate body. In terms of s 277(3), any conduct, which constitutes a crime for which a corporate body is or was liable to prosecution, is be deemed to have been the conduct of every person who at the time was a director or employee of the corporate body. However, where it is proved that a director or servant took no part in the conduct, such criminal liability shall not apply to him or her. The onus is on the director or servant to prove on a balance of probabilities that he did not take part in the commission of the offence and could not have prevented it. Here, although the appellant was not the one who initially made representations to the complainant, he subsequently made common cause with the director and his co-accused. This he did by making assurances that payment would be made.

Criminal law – offences under Criminal Law Code – culpable homicide – motoring case – sudden emergency – principles – collision by vehicle with a cyclist – travelling in the same direction – cyclist unexpectedly crossing into the vehicle's path

S v *Stockil* HH-562-16 (Mushore J, Hungwe J concurring) (judgment delivered 28 September 2016)

See below, under EVIDENCE (Facts agreed).

Criminal law – offences under Criminal Law Code – fraud – theft – person taking property by means of misrepresentation – should be charged with fraud, not theft

S v *Mashiri* HH-596-16 (Musakwa J) (judgment delivered 7 October 2016)

See below, under CRIMINAL PROCEDURE (SENTENCE) (Offences under Criminal Law Code – theft).

Criminal law – offences under Criminal Law Code – murder – defences – defence of property – when can be a complete defence – accused's action must be proportionate to the potential harm done by the attacker

S v *Mundisi* HH-645-16 (Chitapi J) (judgment delivered 18 October 2016)

The accused was a security guard employed to protect a crop of maize which was being harvested at the time. Thieves entered the field and stole bags of harvested maize. The accused shouted at them to stop, and, when they continued to run away, he fired one shot which killed one of the thieves. The verdict hinged on whether it was legal to kill in defence of property. The court reviewed the provisions of ss 257, 258 and 259 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which lay out the circumstances under which defence of property can be a complete defence to a charge of murder.
Held: (1) in determining guilt or innocence the court should pass a value judgment which takes into account the circumstances of the case and the person of the accused. In this case, the accused had not acted unreasonably in seeking to defend the property of his employer and had cause to fear that the attackers might do harm to his person. However, his behaviour could not constitute a complete defence, since he had not satisfied the requirement of s 257(1)(d) that any harm in defence of property be proportionate to the harm which would be caused by the unlawful attack. He acted too hastily in firing his weapon without considering all the relevant factors of the situation. The doctrine of proportionality favours saving or preserving life unless this cannot be achieved without endangering grossly the life or property of the victim. The accused was thus found guilty of culpable homicide.
(2) In determining an appropriate sentence, it is necessary to consider the need to protect the right to life as provided in s 48 of the Constitution of Zimbabwe. In sentencing an accused guilty of culpable homicide, it is necessary to take into account the facts of the particular case and establish the degree of negligence or *culpa* demonstrated. The accused was negligent in the use of his firearm, but was a first offender, of good character, remorseful, and had tried to help the victim after he discovered that he had shot her. However, community service would not provide a sufficient deterrent to others; a long sentence would not be necessary as the accused was unlikely to repeat the offence. Hence a sentence of 30 months was appropriate.

Criminal law – offences under Criminal Law Code – undermining authority of or insulting the President (s 33) – what must be shown – statement must not only be false, but have potential to produce prohibited results

S v *Maseko & Anor* CC-11-16 (Malaba DCJ, Chidyausiku CJ, Ziyambi JCC, Gwaunza JCC, Garwe JCC, Gowora JCC, Hlatshwayo JCC, Patel JCC & Guvava JCC concurring) (decision given 15 January 2014; reasons for decision made available 13 September 2016)

The applicant told a public gathering that the President was 82 years old and because of that should not extend his term of office. He was charged with contravening s 33 of the Criminal Law Code [*Chapter 9:23*], it being alleged that he publicly, unlawfully and intentionally made a statement about or concerning the President with the knowledge or realizing that there was a real risk or possibility that the statement was false and that it might engender feelings of hostility towards or cause hatred, contempt or ridicule of, the President in person or in respect of the President's office. The applicant brought an application to the Constitutional Court, questioning the constitutional validity of the statutory provision. At the hearing, State counsel advised the court that the State had decided not to proceed with the charges, on the grounds that the facts on which the charges against the accused was based could not if proved by the available evidence at the trial constitute an offence..
Held: the facts vindicated the State's decision. The President's age was a fact. To found a criminal charge on the allegation that the statement that the President was 82 years old was false was unfortunate. Considering the fact that the accused was making a political speech it would require more than merely alleging that he incited the gathering to public violence when he said the President should not extend his term in office because of old age. That is the kind of unsolicited advice a politician in opposition in a democracy would be prone to giving without intending to excite his or her audience to public violence. The right to freedom of expression would protect him when he said what he did, as it was not a false statement in the sense that it was deductive reasoning from the true statement on the President's age. The criminal offence with which the accused was charged was not intended to cover facts relating to the kind of political speech made by the accused. Even if the statement had been false, it would be necessary to show that the statement in itself was capable of producing the prohibited results in the minds of right thinking people. Not every false statement about or concerning the President has the potentiality of producing the prohibited consequences even if they are intended.

Criminal procedure – bail – entitlement to – court application – whether necessary for State to show compelling reasons for bail to be granted

S v *Kondo & Anor* HH-99-17 (Chitapi J) (Judgment delivered 29 December 2016)

Section 50(1)(d) of the Constitution requires that an arrested person must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. It was argued for the applicants that this principle applies to a bail application in court.
Semble, that the provision only applies to a person who is yet to appear before a court. The provision has not changed the requirements of the Criminal Procedure and Evidence Act regarding the granting of bail by a court. Section 115C(2)(ii)(A) places the onus on the accused, if charged with a Third Schedule offence, to justify his release on bail.

Criminal procedure – bail – pending appeal – necessary to have record of proceedings of trial court and reasons for judgment – where record of proceedings cannot be found, it needs to be reconstructed by the State and appellant – duty of court to promote justice dispensation and ensure justice system was not brought into disrepute

Criminal procedure – record – trial record lost – how to be reconstructed

S v *Sawadye* HH-514-16 (Chitapi J) (Judgment delivered 26 August 2016)

The appellant had been convicted of armed robbery, attempted murder and a firearms offence in October 2005 and sentenced to an effective 28 years imprisonment. He successfully applied for condonation of late noting of appeal in January 2010 and in the same month filed grounds of appeal. Over six years later, in May 2016, he applied for bail pending appeal. He filed this application without including the necessary judgment from his criminal trial and record of proceedings. This was because the responsible court authorities had for all that period been unable to locate the judgment or record of proceedings – despite saying they had "frantically" tried to do so.
Held: (1) Granting condonation of late noting of appeal did not in itself entitle an appellant to bail pending appeal as he needed to satisfy the court that the interests of justice would not be endangered by his release on bail.
(2) The record of proceedings and judgment of the trial court were necessary for proper consideration of an application for bail pending appeal.
(3) Where the record is incomplete, destroyed or lost, the State and the accused have a duty to try to reconstruct the record, by obtaining depositions from the accused and witnesses who gave evidence at the trial as to the evidence they gave. Thereafter the presiding magistrate, in consultation with the State and accused, would certify the reconstructed record.
(4) The applicant had the right in terms of s 70 (4) and (5) of the Constitution to be given a copy of the record within a reasonable time, once he had paid for it, and have his appeal determined.
(5) Accordingly at the court's direction further searches for the record had been urgently carried out and these resulted in the record which had been before the judge who granted condonation of late noting of appeal being found.
(6) The record being found following the Court's intervention did not translate into automatic resolution of the defective bail application, and the appellant elected to withdraw the application as presently framed.
(7) It was, however, the duty of the court to promote justice dispensation and ensure that the judicial system was not brought into disrepute.
(8) The appellant was not legally represented and was granted leave to prosecute the appeal in person.
(9) The facts of the application presented a serious indictment of the criminal justice delivery system.
(10) Directions would be given to ensure that when the appellant filed a fresh application for bail pending appeal with the necessary record and judgment attached, it would be dealt with timeously.

Criminal procedure – charge – splitting of – rationale for rule against – extent to which rule has been diluted by s 145 of Criminal Procedure and Evidence Act [*Chapter 9:07*]

S v *Chikukwa* HH-813-16 (Chitapi J) (Judgment delivered 3 October 2016)

Section 145 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] provides for what may be done when it is not clear which of several offences can be constituted by the facts proved. In that event, the accused may be charged with having committed all or any of those offences, and any number of such charges may be tried at one time; or the accused may be charged in the alternative with having committed some or one of those offences. The section has largely diluted the scope of the exception which an accused can take based on an alleged splitting of charges. It allows great latitude to the State to charge various offences, whether separately or in the alternative, arising from one act or series of acts or where facts are uncertain as to what charge exactly to put to the accused in the indictment. The objection to a slitting of charges may well have become academic in view of the provisions of the section.
One of the reasons for the rule against splitting of charges is that the rule is intended to protect the accused from being unduly prejudiced due to a multiplicity of convictions arising from one continuous conduct, in that the accused would then have to be sentenced on each charge. This can be cured by taking the counts as one for sentence.
The test for determining if there has been a splitting of charges is not a rule of law but of logic and common sense. The facts of each case must be considered on their merits in order to achieve fairness towards the accused. The application of the practice and tests should not lead to fettering the authority of the Prosecutor General to bring to court against the accused the charges which, on the evidence available, the accused should answer to.

Criminal procedure – discharge at close of State case – no application by accused – court finding insufficient evidence to proceed must nevertheless discharge

Criminal procedure – evidence – production of – extra-curial statement by accused – statement confirmed by magistrate – whether onus placed on accused to show such statement not freely made contravenes Constitution

S v *Chidhakwa* HH-422-16 (Chitapi J) (judgment delivered 22 June 2016)

A charge of murder against the accused had been poorly investigated. The confession by the accused had been confirmed by a magistrate, but the accused claimed he had been tortured and feared further torture. Even though there had been no application made for discharge at the close of the State case, the court ruled that in such a case, where the matter had clearly been mishandled by the police and prosecutor and there was no evidence on which a conviction might be secured, the judge had an obligation to discharge the matter without putting the accused on his defence.
Quaere: whether s 256(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] violates the provisions of s 70(1)(a) of the Constitution (on the presumption of innocence) and s 70(1)(i) (the accused's right not to testify). The section requires that where an accused's statement has been confirmed by a court, it lies with the accused to prove that the statement was not made voluntarily.

Criminal procedure – questioning of accused in relation to matters relevant to sentence – how such questioning should be conducted

S v *Karadzangare* HH-794-16 (Chitapi J) (judgment delivered 20 July 2016)

The accused had pleaded guilty to culpable homicide and had been convicted. In determining an appropriate sentence the judge applied the combination theory, which required him to consider the offence, the offender and the interests of society. The accused had strangled his heavily pregnant wife and left her motionless; when he returned later to find her lifeless he wrapped up her body and buried it in a shallow grave at night. He only confessed when the body was discovered some days later.
After counsel for both sides had made their submissions on sentence, the court posed several questions to the accused. It did so in terms of s 271(5) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The court held that the questions which the prosecutor and the court may put to the accused in terms of this section must be relevant to sentence and not conviction. The provisions of this section must be used sparingly and only in circumstances where the prosecutor or the court hold the view that there are pertinent facts relative and material to the assessment of sentence which the accused needs to shed light on. If not properly invoked and utilized, there is a danger that the procedure may degenerate into a mini trial and some questions, if not properly measured, may solicit answers which may lead the court to reconsider its verdict as the answers may raise a defence. It is also permissible where the accused is represented to elicit the relevant facts which need filling up

by directing questions to the accused's counsel who can always be approached by his counsel with the leave of the court to solicit the answers. Lastly, where the provisions of the section have been invoked and the accused is represented, defence counsel should strictly be guided by rules relating to re-examination. The questions which defence counsel may ask the accused should arise from questions by the prosecutor or the court, as the case may be, by way of clarifying any points or facts adduced during questioning by the prosecutor or the court. The procedure is not designed to give the accused's defence counsel a second bite of the cherry to mitigate on sentence or elicit from the accused new facts in mitigation, save as such facts may arise from questions put to the accused by the prosecutor or the court.

The court considered that the accused should have realized that his actions could cause death, and narrowly escaped being convicted of murder; thus the negligence was gross and he went on further to lie and conceal his crime. However, he had no record of violence and had experienced several provocations from his wife, and was genuinely remorseful and wishing to compensate his in-laws. Society would require a sentence which showed a high degree of respect for life. The accused was sentenced to 12 years imprisonment, of which 4 years were suspended.

Criminal procedure – review – incomplete proceedings – refusal by magistrate to discharge applicant at conclusion of prosecution case – superior court should always be slow to intervene in unterminated proceedings of an inferior court – should only do so in the very rare situations where a grave injustice would occur if the superior court does not intervene

Achinulo v *Moyo NO & Anor* HB-226-16 (Mathonsi J) (Judgment delivered 25 August 2016)

The applicant was arraigned before a magistrate on a charge of theft. At the close of the prosecution case he applied for discharge, which application the presiding magistrate refused. The applicant took this decision on review but the prosecution wished to proceed with the trial and the applicant filed an urgent application for the stay of the criminal proceedings pending the review.

Held (1) a superior court should always be slow to intervene in unterminated proceedings of an inferior court and will ordinarily not sit in judgment over a matter that is before the court below except in very rare situations where the irregularity is gross and a grave injustice would occur if the superior court does not intervene.

(2) The magistrate's failure to discharge the applicant at the close of the State case when there was no *prima facie* case established against him met the necessary stringent criteria and the application was granted pending the conclusion of the review proceedings commenced by the applicant.

Criminal procedure – trial – High Court trial – documents supplied to accused person before trial – list of witnesses and summary of witnesses' evidence – what such list and summary should contain – not permissible for State simply to summarise all the State evidence

S v *Moyo* HH-528-16 (Chitapi J) (Judgment delivered 16 July 2016)

In preparing the summary of the State case in High Court prosecutions, the State should be guided by the provisions of s 66(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In terms of this provision, the State is required to prepare a document to be served upon the accused together with the indictment or charge and a notice of trial. The document should contain a list of witnesses and a summary of the evidence of each such witness which he or she will give at the trial.

The content of the summarized evidence should be sufficient to inform the accused of all the material facts upon which the State will rely. The accused is required to give an outline of his or her defence and to also list the witnesses he or she propose to call and to outline the evidence of each such witness in sufficient detail to inform the Prosecutor-General of all the material facts relied upon in his or her defence.

The State has adopted a practice of considering the statements of its witnesses and other evidence and then making a summary what it alleges as having taken place. Such a summary or State's conclusions is not provided for in the law and is of no evidential value. The summary may also have the effect of misleading the court on what the case is about.

If the prosecutor wants to address the court before leading evidence, he or she should do so before opening the State case, as provided for in s 198(1) of the Act. Whether such opening address is made in writing or verbally does not matter. The address or summary should not be included as part of the document which is referred to in s 66(6)(a), which document has come to be colloquially referred to as the State Outline or summary of State case. A distinction in procedure should be noted between trials in the magistrates court and the procedure in the High Court. In the magistrates court, where a plea of not guilty is entered, where in terms of s 188 of the Act, the prosecutor is required in terms of s 188 of the Act to make a statement outlining the nature of the State case and the material facts on which he relies.

Criminal procedure (sentence) – general principles – mandatory minimum sentences – when sentence higher than mandatory minimum sentence may be imposed – imposing higher sentence in order to allow for suspension of part thereof – impropriety of

S v *Chitate* HH-568-16 (Mafusire J) (Judgment delivered 22 September 2016)

Where a statute provides for a mandatory minimum sentence in the absence of special circumstances, the court may go above the prescribed minimum. The court's discretion to impose a sentence other than the prescribed minimum should, though, be exercised judiciously, not whimsically. The sentence should not be a thumb-suck.
As a sentencing principle, a court may suspend the operation of a sentence, or a portion of it, on conditions that it must specify: s 358 of the Criminal Procedure and Evidence Act [*Chapter 9: 07*]. But where there is a prescribed minimum sentence for any given offence, the remaining effective sentence should not be less than the prescribed minimum. Where there is a prescribed minimum sentence for an offence, it is improper for the court to impose a harsher penalty above the prescribed minimum in circumstances where such a sentence is not warranted, simply to create some room to suspend a portion, for whatever purpose, for example, restitution. If the appropriate sentence is the prescribed minimum, the court should stick to that sentence. This does not necessarily leave the complainant without a remedy. Through the prosecutor, the injured person can always apply for restitution or compensation in terms of Part XIX of the Act. Unlike the award of restitution or compensation under s 358(2), the award of compensation or restitution under Part XIX is not part of the sentencing formula.

Criminal procedure (sentence) – general principles – suspended sentence – subsequent offence – existence of suspended sentence immediately brought to court's attention – whether court has discretion to further suspend previous suspended sentence

S v *Sibanda* HB-243-16 (Mathonsi J) (judgment delivered 29 September 2016)

The accused was a pathological stock thief, regularly stealing goats. His first offence incurred a sentence of 90 days' imprisonment. His second offence, committed very shortly thereafter, resulted in a sentence of 18 months' imprisonment of which six months was suspended for five years on condition he was not convicted of an offence for which he was sentenced to imprisonment without the option of a fine. Shortly after his release he again stole a goat and was sentenced to 24 months imprisonment of which portion was suspended on condition of payment of compensation to the complainant before a specified date. The 6 months suspended for the prior conviction was further suspended on the same terms.
Held: (1) The discretion to grant further suspension of a suspended sentence is triggered only where the court has ordered an offender to be brought before it in terms of s358(5) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. (2) Where the offender is tried and convicted of a different or fresh charge and the sentence for that different or fresh charge brings about a violation of the suspended sentence, the court has no such discretion. A conviction during the currency of the period resulting in a sentence of imprisonment without the option of a fine, amounts to a breach of the condition of suspension. Having violated the condition, the accused lost the benefit of the suspension and the suspended sentence had to be brought into effect.

Editor's note: this decision seems, with respect, to be contrary to long accepted practice, which has been that the court exercised a discretion. See *R* v *Tachi* 1950 SR 199.

Criminal procedure (sentence) – offences under Criminal Law Code – culpable homicide – motoring case – negligence causing death of a pedestrian – endorsement of driver's licence under Road Traffic Act [*Chapter 13:11*]

S v *Maposhere* HH-451-16 (Tagu J) (judgment delivered 25 July 2016)

A magistrate sentenced a driver who had negligently caused the death of a child to a suspended sentence and community service as provided for in the Criminal Law Codification and Reform Act [*Chapter 9:23*]. The driver's licence was also ordered to be endorsed in terms of the Road Traffic Act [*Chapter 13:11*]. A scrutinsing regional magistrate queried whether it was competent for the accused to be penalized under the Road Traffic Act when the law under which he had been charged did not provide for such a penalty.
Held: s 64 of the Road Traffic Act provides for anyone convicted under any other law in connection with driving a motor vehicle to have their licence endorsed as if they were being charged under the Road Traffic Act,

as would have occurred before the criminal law was codified. It was thus competent for the court to invoke the provision of the Road Traffic Act which allowed the endorsement of the accused's driving licence.

Criminal procedure (sentence) – offences under Criminal Law Code – culpable homicide – when custodial sentence necessary to demonstrate protection of right to life – length hinges on degree of negligence or *culpa*

S v *Mundisi* HH-645-16 (Chitapi J) (judgment delivered 18 October 2016)

See above, under CRIMINAL LAW Offences under Criminal Law Code (Murder – defences).

Criminal procedure (sentence) – offences under Criminal Law Code – theft – fine which may be imposed – provision in Code for level 14 fine or twice value of property stolen, whichever is the higher – mandatory minimum not intended

S v *Mashiri* HH-596-16 (Musakwa J) (judgment delivered 7 October 2016)

The accused was charged with two counts of theft of trust property. In each case, he had told the owner of a mobile phone that he wanted to borrow the phone to make a call, but made off with the phone and sold it. After conviction, he was fined. A scrutinising regional magistrate was of the view that the fine should have been at least twice the value of the items and that a fine of that level was mandatory in terms of s 113(1) of the Criminal Law Code. On review,
Held: (1) under s 344(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], when a person is liable to be sentence to a fine of any amount, he may be sentenced to a fine of any lesser amount. Section 113(1) of the Criminal Law Code provides that a person convicted of theft is liable to **a fine not exceeding level fourteen or twice the value of the stolen property, whichever is the greater**. This does not entail any minimum mandatory fine or require the imposition of a fine that is equivalent to twice the value of the stolen property.
(2) As this was a case of misrepresentation, the accused should have been charged with fraud. However, the charge could not be amended after conviction and sentence, since an amendment is meant to cure an imperfect charge and not to substitute with a different one. The conviction and sentence would be set aside and a retrial held.

Criminal procedure (sentence) – offences under Criminal Law Code – murder – death penalty competent when murder committed in aggravating circumstances – what constitute – murder committed during armed robbery – such murder committed in aggravating circumstances

S v *Kufakwemba & Ors* HH-795-16 (Chatukuta J) (Judgment delivered 8 December 2016)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – right to life (s 48)).

Customary law – chieftainship – appointment of chief – dispute – duty reposed in President by Constitution to settle such disputes – need for parties to approach the President first before bringing President's decision on review

Gweshe v *The President & Ors* HH-542-16 (Dube J) (Judgment delivered 14 September 2016)

The third defendant was appointed acting chief for the Negomo area. The plaintiff averred that the third defendant's family had no traditional or other right to the chieftainship and that the chieftainship should come from the plaintiff's family. He had sought the assistance of the second defendant (the responsible Minister) to resolve the dispute but the Minister had ruled against him. The plaintiff averred that that the Minister's finding was irrational and sought the intervention of the court to declare that the plaintiff's family were the rightful heirs to the chieftainship. The first and second defendants submitted that the ourt had no jurisdiction in terms of s 283 of the Constitution to resolve disputes regarding chiefs – that being the prerogative of the President, on the recommendation of the Provincial Assembly of Chiefs. It was accordingly submitted that the plaintiff had approached the court prematurely as he had not yet exhausted his domestic remedies.
Held: (1) In terms of s 283 of the Constitution, the President had the duty to resolve disputes between traditional leaders and the plaintiff had not exhausted the domestic remedies available and had come to the wrong forum

(2) The court could only intervene on review after the President had resolved the dispute. (3) Accordingly the matter was improperly before the court and the order the plaintiff sought incompetent.

Constitutional law – Constitution of Zimbabwe 2013 - Declaration of Rights – right of access to courts (s 69(3)) – court challenge to appointment of chief – remedy available to approach Provincial Assembly with complaint – domestic remedies must be exhausted before brining matter to court – resolution of dispute regarding appointment of chief (s 283(c)(iii)) – ouster of jurisdiction of courts – would violate principle of separation of powers

Customary law – chieftainship – appointment of chief – dispute – court's role – need to exhaust domestic remedies first

Meki v *Acting District Administrator, Masvingo Province & Ors* HH-614-16 (Matanda-Moyo J) (judgment delivered 19 October 2016)

The plaintiff wished to challenge the appointment to the position of Chief Mapanzure by the President. He had cited the DA of the district and the PA of the province, and the Minister of Local Government. He was challenging the recommendation made by the Minister to the President rather than the action of the President, which had already been taken. He sought an order declaring that the defendants had contravened custom by making the recommendation in question, that the recommendation be set aside, and that an independent body be appointed to review the process of making the recommendation.
The defendants maintained that the failure to cite the President was fatal to the application, since the President had already acted, and further, that jurisdiction of the courts in matters of disputes regarding appointment of chiefs was ousted by s 283(c)(iii) of the Constitution of Zimbabwe.
Held: (1) since the President had already made the appointment, and the Constitution placed on him the obligation to resolve disputes regarding appointments of traditional leaders, the failure to cite the President was fatal to the case.
2) The courts' jurisdiction could not be ousted as no ouster clause appears in the Constitution, and any attempt to remove such jurisdiction would contravene the doctrine of separation of powers which requires the actions of the executive to be subject to the scrutiny of the judiciary.
(3) The plaintiff had not exhausted other domestic remedies before approaching it, in spite of his argument that due to the non-alignment of the Traditional Leaders Act with the Constitution, there was no other alternative. The plaintiff should have lodged his complaint with the Provincial Assembly of Chiefs, which is provided for in the Constitution as well as the Act.

Delict – liability – vicarious liability – right of plaintiff to sue both servant and master for wrongful acts committed in course of employment

Mahlangu v *Dowa & Ors* HH-653-16 (Chigumba J) (Judgment delivered 28 October 2016)

The plaintiff, a senior legal practitioner, was representing a client, on whose behalf he wrote a letter to the fourth defendant, the Attorney-General. The latter took the view that the letter was an attempt to interfere with the course of justice and instructed the third defendant, the Commissioner-General of Police, to arrest the plaintiff. The arrest was carried out by the first and second defendants, who were police officers. The plaintiff was detained overnight but released by a magistrate the following day. The plaintiff sued for damages, claiming that his arrest without a warrant was wrongful and unlawful, and contrary to the provisions of s 13 of the former Constitution, in that: there was no reasonable suspicion that he had committed an offence which entitled the first defendant to arrest him; the order given to the first defendant to arrest him was unlawful; and the fourth defendant's instruction to the third defendant to cause his arrest was unlawful. The defendants, he averred, acted maliciously and in breach of the law and failed to exercise their discretion in a reasonable manner. He averred further that first four defendants were being sued in their personal capacities.
The defendants averred that they were acting in the course and scope of their employment, and that therefore it was improper for them to be sued in their personal capacities. In any event, they had acted lawfully and reasonably.
There was a dispute about whether the onus was on the defendants to start the trial, the plaintiff saying that where a litigant is arrested without a warrant, the onus lies on the arresting detail to prove the basis on which such an arrest was made. Here, the duty lay on the defendants. The defendants argued that the court had a discretion. The defendants also raised the issue of whether the plaintiff was entitled at law to sue the defendants in their personal capacities in the circumstances of this case. The plaintiff had given the necessary notice in

terms of the Police Act [*Chapter 8:14*] and the State Liabilities Act [*Chapter 8:14*] of his intention to sue the first, second, third and fifth defendants. The plaintiff's declaration had averred that the defendants were acting in the course and scope of their employment and thus they fall within the category of s 13(5) of the former Constitution which imputes liability for compensation to their employer. The defendants further submitted that the plaintiff's declaration did not make the necessary averments for purposes of s 13(5) and allege that the defendants –

(a) did not act reasonably; and
(b) did not act in good faith; and
(c) acted with culpable ignorance/negligence.

The defendants could not be asked to answer in their personal capacities for actions which they took while acting in their official capacities. They could only be held liable in their personal capacities if they were not acting in their official capacities.

The plaintiff argued that the first issue was one of vicarious liability, and that the question that the court should determine was that of whether the vicarious liability of the employer gives immunity to the employee. Case law indicated otherwise. The delict of wrongful arrest could be committed by an individual, and could give rise to a claim for compensation. The plaintiff was seeking compensation in terms of the common law and not in terms of the Constitution. In any event, Parliament had not made any law to exempt public officers from liability to pay compensation. The plaintiff was asserting his common law right to sue both the servant and the master.

Held: (1) accepting the common law position that a servant can be sued at the same time as his master in the same action for some wrong that he committed during the course and scope of his employment, the servant's wrongful actions cannot be imputed to the master if the actions did not take place during the course of employment. If the defendants acted in their personal capacities, then they were not acting in the course and scope of their employment.

(2) The purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed. A pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another. When regard was had to the plaintiff's summons and declaration, it was apparent that the plaintiff averred that the action that he sought to be compensated for took place during the course and scope of the defendants' employment.

Employment – contract – termination – contract of fixed duration – when employee can be said to have legitimate expectation of re-engagement – engaging of another person in place of such employee – does not include engagement of company to carry out task performed by employee

ZETDC v *Madungwe & Ors* S-44-16 (Malaba DCJ; Gowora & Patel JJS concurring) (decision given 9 March 2015; reasons made available 6 October 2016)

The respondents were employed on fixed term contracts by the appellant as security guards. The contract period ranged between one and six months and were occasionally renewed. The appellant decided to do away with the system based on fixed term contracts and did not renew the respondents' contracts when they expired. It instead engaged a private security company to provide security services. The respondents maintained, relying on s 12B(3)(b) of the Labour Act, that as their contracts had been renewed several times before, they had entertained a legitimate expectation that they would be employed on a permanent basis when their fixed term contracts expired. The respondents further argued that while entertaining the legitimate expectation they were unfairly dismissed at the expiry of their contracts, when the appellant engaged another person.

Held: (1) The onus of proving a legitimate expectation rested with the respondents and in addition the respondents needed to prove that they were supplanted by another person. (2) The respondents had not discharged the onus of establishing a legitimate expectation of being re-engaged when the contracts of fixed duration expired. (3) The respondents had also not established that another person had been engaged instead of themselves, as "another person" meant a natural person and could not include a company.

Employment – contract – termination – replacement of existing contracts with contracts on different terms – such amounting to retrenchment without following retrenchment procedures

Masvibo & Ors v *vTN Harlequin Luxaire Ltd* HB-253-16 (Makonese J) (judgment delivered 6 October 2016)

The applicants sought a declaratory order that the termination of their contracts of employment by the respondent was unlawful. The applicants had been employed on contracts without limits of time. The respondent, because of adverse economic conditions, wanted to terminate the applicants' contracts and replace

them with new contracts based on productivity. The applicants did not accept the offer of the new contracts, claiming that they amounted to retrenchment, without following the rules and regulations on retrenchment.
Held: (1) The respondent's wholesale termination of the applicants' contracts constituted an unlawful retrenchment exercise and an unlawful termination of the applicants' contracts of employment. (2) It could not be stated on the facts that the applicants had repudiated their contracts. (3) The grant of the declaratory order was appropriate.

Employment – dismissal – dismissible act of misconduct –employer's discretion as to whether to dismiss – can only be overturned if discretion exercised unreasonably – appeal tribunal having no power to substitute its own discretion

NEC, Catering Industry v *Kundeya & Ors* S-35-16 (Bhunu JA, Gwaunza JA and Hlatshayo JA concurring) (Judgment delivered 18 August 2016)

The four respondent employees were dismissed by their employer for disobeying a lawful instruction to relocate their workstations around the country. The respondents had been given reasonable notice of their employer's requirement but sought to overturn the dismissal first in an arbitration. Subordination to the employer's lawful orders is a fundamental ingredient of the contract of employment without which it cannot exist. In the arbitration, the dismissal was overturned. The Labour Court agreed with the arbitrator and reinstated the respondents. The decision of the Labour Court was taken on appeal.

Held: once an employer has established that an employee committed a dismissible act of misconduct, the discretion whether or not to dismiss lies solely with the employer. Generally speaking, it is not for the appellate court, arbitrator or tribunal to substitute its own discretion for that of the employer. The correct test on appeal was whether the disciplinary committee, on the facts before it, had acted unreasonably in ordering dismissal and not whether the mitigating factors outweighed the aggravating factors as postulated by the arbitrator and sustained by the court *a quo.* Both the arbitrator and the Labour Court fell into error by applying the wrong test. Both the arbitrator and the court *a quo*, being creatures of statute without inherent jurisdiction, fell into error and misdirected themselves by exercising a non-existent power to substitute their own discretion for that of the employer in the absence of any error or misdirection on the part of the disciplinary committee.

Employment – Labour Court – appeal to – stay of execution sought pending appeal against arbitral award – respondent nonetheless registering award in High Court – stay of execution granted against order registering award

Unilever Zimbabwe (Pvt) Ltd v *Murira & Ors* HH-545-16 (Chitapi J) (Judgment delivered 14 September 2016)

The applicant filed a chamber application seeking a stay of execution of an order granted by a High Court judge in favour of the first and second respondents registering an arbitral award granted in favour of the respondents by an arbitrator. The involvement of the High Court arose from the fact that it was the court for execution of Labour Court orders. The applicant had noted an appeal to the Labour Court against the arbitral award and also a chamber application in the Labour Court for stay of execution. The main appeal in the Labour Court had been argued about a year earlier and judgment had been reserved, but was still outstanding. A check with the Labour Court had been unable to establish when it would be handed down.
Held: (1) Once an order of an arbitrator or the Labour Court had been registered in the High Court, it became an order of the High Court. The ideal situation would be for the Labour Court to control its processes and execute its orders. However, once an order of an arbitrator or the Labour Court has been registered in the High Court for purposes of enforcement, it becomes an order of the High Court.
(2) The matter was not *lis pendens* before the Labour Court as the High Court has original jurisdiction in terms of s 171 of the Constitution over all criminal and civil matters. However, having two parallel processes running at the same time in different courts was undesirable and untidy and the Rules should be synchronised.
(3) It makes no sense that where an application for suspension of award and stay of execution pending appeal has been filed before a competent court and awaits determination by the same court which will hear the appeal, the respondent, who is opposing that application and the appeal, nonetheless and in the full knowledge of the pending application, proceeds to apply for registration of that same award. If after registration the registered order becomes an order of the High Court, what becomes of the pending application for stay of execution and suspension of award in the Labour Court? The labour legislation needs to be revisited.
(4) A *prima facie* case for granting the application had been established and a stay of execution was granted.

Evidence – admissibility – hearsay – civil proceedings – urgent application – reliance on hearsay evidence in founding affidavit – when such evidence is admissible

Glenwood Heavy Eqpt (Pvt) Ltd v *Hwange Colliery Co Ltd & Ors* HH-664-16 (Dube J) (Judgment delivered 25 October 2016)

The law allows the admission of first-hand hearsay evidence in motion proceedings, provided that the evidence sought to be introduced falls within the ambit of s 27(1) of the Civil Evidence Act [*Chapter 8:01*]. The rules that govern admissibility of evidence in trial actions are different to those applicable to applications, more so urgent applications. The rules are based on the standard that an application stands or falls on its founding affidavit. A founding affidavit constitutes evidence and must contain evidence that is admissible and sufficient to found a cause if action. The admission of hearsay evidence is subject to safeguards. A litigant seeking or rely on hearsay evidence in a founding affidavit must satisfy the court that it has a cause of action and that it has evidence to sustain such a cause of action. For hearsay evidence to be admissible in an urgent application, the following key requirements require to be met:

(1) the deponent to the founding affidavit must sufficiently disclose the source of the information or statement he gives.
(2) the deponent to the affidavit must state in his sworn statement that he believes those claims to be true. The grounds of his belief in the truthfulness of the evidence sought to be introduced must be disclosed in his sworn statement.
(3) the evidence sought to be admitted must be about a statement made orally or in writing.
(4) the evidence must be such that it would have been admissible if the person responsible for it were to be present to give the evidence.

Second hand and third hearsay evidence is inadmissible. This is purely on the basis that such evidence may not be capable of verification. The court is required to weigh the prejudice the admission of the evidence will have on the other party should the evidence be led later and determine if there is any justification, such as urgency, for the evidence being placed before it in in that form. The applicant must proffer both an acceptable explanation as to why direct evidence is not available and good reason why such evidence is being presented in that manner.

Evidence – extra-curial statement by accused – statement confirmed by magistrate – whether onus placed on accused to show such statement not freely made contravenes Constitution

S v *Chidhakwa* HH-422-16 (Chitapi J) (judgment delivered 22 June 2016)

See above, under CRIMINAL PROCEDURE (Statement by accused person – production of).

Evidence – facts agreed – court premising decision on facts not forming part of record – impermissibility of doing so

S v *Stockil* HH-562-16 (Mushore J, Hungwe J concurring) (judgment delivered 28 September 2016)

The appellant was convicted of culpable homicide and fined after a collision between the vehicle he was driving and a cyclist, which resulted in the death of the cyclist. The appellant and the cyclist were travelling in the same direction. The basis of the appellant's defence was that as he approached the cyclist, the cyclist unexpectedly crossed into his path. He swerved to the left, hooted and braked to try and avoid the cyclist, but the deceased was hit by the right side of his vehicle.

Held: (1) The magistrate in convicting the appellant had based his decision on facts which were never part of the record. He excluded evidence on record when weighing up the evidence. He ignored crucial evidence and engaged in conjecture on unfounded facts, thereby rendering the conviction unsafe. (2) The appellant had been faced with a sudden emergency and took all the necessary care which could reasonably have been expected in the circumstances by swerving, hooting and braking.

Family law – burial – right to determine place of burial – customary law partially followed by deceased – no clear right of spouse – common sense must prevail

Mhindu v *Machokoto & Anor* HH-399-16 (Mafusire J) (judgment delivered 5 July 2016)

The widow and the father of a deceased pastor were in dispute over the place of burial of the deceased. The widow was supported by her children and several pastors in demanding that the burial take place on a farm which they had occupied only a few months previously, and the father was supported by the rest of the extended family in claiming burial in a cemetery which would be accessible to the public.
Held: (1) when it comes to deciding burial rights over a deceased person, there is no single overriding factor. Neither the right of the heir or spouse in relation to burial rights, nor the right of the deceased's family, is exclusive. Where the surviving spouse is the heir, the family of the deceased must also participate in the decision, according to tradition and custom. Although the deceased was a Christian pastor and concluded a Christian marriage, there was sufficient evidence that he had also followed African custom in some aspects of his life. Where there is disagreement, common sense must be imposed by the court. (2) Here, burial in a public cemetery was more reasonable than burial on a farm allocated under the land reform, where there are no title deeds and no public access.

Family law – child – birth registration – child born out of wedlock – father deceased - requirement of relatives of father to confirm paternity – not unconstitutional

Paunganwa v *Registrar of Births and Deaths & Anor* HH-406-16 (Munangati-Manongwa J) (judgment delivered 7 July 2016)

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

Interdict – interim – requirements for – alternative remedy available – interdict refused

Landlord and tenant – tenant – sub-tenant – rights *vis-à-vis* landlord – eviction from leased premises – sub-tenants having no right to be treated as statutory tenants

Zindodyeyi & Anor v *Aspinal Invstms (Pvt) Ltd & Anor* HB-239-16 (Takuva J) (judgment delivered 22 September 2016)

The applicants sought an urgent interim interdict preventing their eviction from premises they claimed to be renting from the first respondent in terms of an oral agreement, having previously rented them as sub-tenants of the second respondent. They claimed that the rent due was being paid to the first respondent, who refused to provide them with receipts.
Held: (1) an interim interdict may only be granted if the applicant establishes (a) that the right he seeks to protect is clearly or at least *prima facie* established; (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted; (c) the balance of convenience favours granting interim relief; and (d) the applicant has no satisfactory remedy. (2) The applicants had failed to prove on a balance of probabilities that they had an oral lease agreement with the the first respondent. The version in their affidavits was not only improbable but thoroughly incredible. (3) The applicants had no rights as statutory tenants as they had not paid rent to the landlord. (4) The applicants had a satisfactory alternative remedy in terms of s 39 of the Magistrates Court Act.

Land – acquisition – agricultural land – what constitutes agricultural land – land unsuitable for cropping but used for keeping animals

Land – acquisition – challenge to – acquisition can only be challenged when acquitted outside provisions of the law

CMAL (Pvt) Ltd v *Min of Lands & Anor* HH-561-16 (Muremba J) (judgment delivered 28 September 2016)

The applicant was the owner of a farm close to the Harare city boundary. It was served with a notice of intention to acquire the land in terms of s 5 of the Land Acquisition Act [*Chapter 20:10*] and an order of acquisition was granted. The applicant challenged the acquisition on the ground that the land was not suitable for agricultural purposes as it consisted of a rocky hill and was used for dwellings and horses were kept there for riding. Since the State acquiring the land in 2001 no-one had been allocated the land or issued with an offer letter. Held: (1) Although the acquisition of land within the provisions of the Constitution cannot be challenged in a court of law, where the Minister has acted outside the provisions of the law, that can be challenged and the court can

nullify such acquisition. (2) Although the Minister did not dispute the applicant's contention in its founding affidavit that the land was not agricultural, the definition of "agricultural land" included land used for keeping animals. The applicant had admitted that it was doing horse breeding for the purpose of riding on the farm. Accordingly this met the definition of "agricultural land" and the application was dismissed.

Local government – by-laws – construction of – must be read in conjunction with Constitution – by-law authorizing demolition of illegal structures – constitutional prohibition of demolition of homes without court order – such prohibition overriding by-laws

Mungurutse &Ors v *City of Harare & Anor* HH-558-16 (Tagu J) (judgment delivered 28 September 2016)

See above, under CONSTITUTIONAL LAW (Declaration of Rights – freedom from arbitrary eviction).

Posts and telecommunications – PTC – successor company to – assumes all rights and obligations of PTC

Karoi Town Council v *TelOne (Pvt) Ltd* HH-402-16 (Chirewa J) (judgment delivered 6 July 2016)

See above, under COMPANY (Private company formed at dissolution of parastatal).

Practice and procedure – affidavit – supporting affidavit – supplementary affidavit

Kim v *Sensationell (Zimbabwe) Pvt) Ltd* HH-484-16 (Chigumba J) (Judgment delivered 17 August 2016)

See above, under COMPANY (Liquidation).

Practice and procedure – application – for committal for contempt of court – need for application to be served personally

Mangwiro v *Chombo NO* HH-710-16 (Tsanga J) (Judgment delivered 16 November 2016)

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

Practice and procedure – application – urgent – grounds for –defence of constitutional rights – not sufficient grounds for urgency

Dzamara & Ors v *Comm-Gen of Police & Ors* HH-398-16 (Tsanga J) (judgment delivered 4 July 2016)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – freedom of assembly and freedom to demonstrate).

Practice and procedure – application – urgent – matter struck off as not being urgent – whether matter requires to be re-enrolled

Ramwide Invstms (Pvt) Ltd v *Rondebuild Zimbabwe (Pvt) Ltd & Ors* HH-444-16 (Matanda-Moyo J) (judgment delivered 27 July 2016)

See below, under PRACTICE AND PROCEDURE (Striking off roll).

Practice and procedure – execution – sale – attachment of property in execution – duties of sheriff – should attach no more than enough to satisfy judgment debt

Zimbabwe Mining Co (Pvt) Ltd v *Outsource Security (Pvt) Ltd & Ors* S-50-16 (Uchena JA, Malaba DCJ & Bere AJA concurring) (decision given on 29 March 2016; reasons made available 4 October 2016)
In respect of a debt totalling $36 748, the Deputy Sheriff Gwanda attached a large amount of property valued in excess of several hundred thousand dollars. She then sold three of the attached items for a total of $104 000.
Held (1) The Deputy Sheriff is required in terms of r 335 of the High Court Rules to make a proper inventory and valuation of the items attached and only to attach items deemed sufficient to satisfy the debt. (2) The

Deputy Sheriff is also required in terms of r 340 of the High Court Rules to stop the sale when enough money has been raised to meet the judgment debt and costs. (3) The Deputy Sheriff utterly failed to act in terms of the specific requirements of the High Court Rules. Her conduct was patently unreasonable, irresponsible, unlawful and vindictive. (4) The attachment was a nullity and all of the sales in execution in consequence of the attachment were a nullity and set aside.

Practice and procedure – execution – sale – setting aside of – grounds -- purchase by third party who is not *bona fide* – failure to advertise – need to show that such irregularities resulted in a lower price if sale is to be set aside

Ramwide Invstms (Pvt) Ltd v *Rondebuild Zimbabwe (Pvt) Ltd & Ors* HH-444-16 (Matanda-Moyo J) (judgment delivered 27 July 2016)

See below, under PRACICE AND PROCEDURE (Striking off roll).

Practice and procedure – execution – stay of – grounds for granting stay – matter not finally resolved – stay granted

MOB Capital (Pvt) Ltd v *Chabata & Ors* HB-242-16 (Makonese J) (judgment delivered 29 September 2016)

The respondents had filed a bar against the applicants after refusing to supply further and better particulars requested by the applicant and had obtained default judgment. An application for rescission of judgment had been filed but not resolved and an application to uplift the bar had also been filed and was outstanding. In spite of all the pending and unresolved matters, the respondent had proceeded with execution and attached the applicant's property for removal.
Held: (1) The applicant had established a *prima facie* right to a stay of execution. Matters were still pending to be resolved and the applicant stood to suffer irreparable harm if execution was not stayed. (2) It could not be argued that the application for stay had been filed for the sole purpose of delay and frustrating the course of justice and the balance of convenience favoured the applicant.

Practice and procedure – interpleader proceedings – property attached in execution – claim to ownership of – property found in possession of person other than the claimant –what must be shown

Deputy Sheriff, Marondera & Anor v *ZB Bank Ltd & Ors* HH-417-16 (Dube J) (judgment delivered 13 July 2016)

A claimant introduced interpleader proceedings, claiming to own property seized by the sheriff to satisfy the judgment debt of another person. The property in question was found in the possession of the other person, creating a presumption of ownership. To prove that he was the owner of the item in question, a truck, the claimant provided an unstamped and undated list of assets in which it was included. The court denied the claim, ruling that in interpleader proceedings a person who disputes ownership must overcome the presumption of ownership in favour of the possessor by producing a legal document, such as, in this case, a registration book. The list of assets was insufficient to prove his claim to own the truck.

Practice and procedure – judgment – rescission – judgment granted "in error" – opposing affidavit not being submitted due to administrative error and matter erroneously being treated as unopposed – such affidavit not presenting arguments of substance – rescission refused

Pandhari Hotels v *Nyabadza & Ors* HH-622-16 (Chitapi J) (judgment delivered 19 October 2016)

The applicant had been the unsuccessful party in a labour case which was decided by arbitration. When the successful party applied for registration of the award, the applicant filed an opposing affidavit which was mistakenly omitted from the case file by the Registrar when it was presented to the judge. The matter was treated as unopposed. The award was registered and on the same day execution was granted. The applicant requested that the order for registration of the award be rescinded since it had been granted in error, in absence of the opposing affidavit.

Held: it is important to correct any error made by a court, since the aim is to serve justice. However, it was necessary to determine whether the opposing affidavit, which had not been considered, presented a valid argument, which would have altered the court's judgment. The arguments made in favour of the applicant were without substance, seeking merely to avoid execution. While a clerical error had been made, it resulted in no error of substance, hence thd judgment did not need to be corrected

Practice and procedure – judgment – rescission – judgment granted "in error" in absence of party affected – what error will justify rescission – "patent" error – what is

Rainbow Tourism Group Ltd v *Clovegate Elevators* HH-616-16 (Chiweshe J) (Judgment delivered 19 October 2016)

Once an order or judgment is pronounced, the court becomes *functus officio* and cannot ordinarily revisit the case to correct any perceived errors. Where the terms of the judgment are clear and unambiguous and there is no patent error or omission to be found therein, there can be no basis for a court revisiting its judgment. A "patent" error or omission is an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it.
However, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement the judgment or order in one or more of the following situations:
(i) in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant;
(ii) to clarify the judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the sense and substance of the judgment or order;
(iii) to correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense of substance;
(iv) where counsel has argued the merits and not the costs of a case, but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.
For the purposes of an application made under r 449(1)(a) of the High Court Rules, it is irrelevant whether the reasoning of the court in arriving at the judgment or order is sound or unsound. What is important is that the order was made and that it reflects the intention of the judge giving it.

Practice and procedure – parties – joinder – application – how should be made – should be by court application, not chamber application

Practice and procedure – parties – joinder – purpose – avoidance of unnecessary duplication of litigation

Sibanda v *Vansburg Drumgold Entprs & Ors* HB-251-16 (Makonese J) (judgment delivered 6 October 2016)

An urgent chamber application was made for joinder in a mining dispute. The dispute involved a number of interested parties, and there were several other applications in regard to the same dispute already filed. The applicant was the landowner on whose land the mining claims in dispute were located.
Held: (1) Applications for joinder may be brought at any stage of the proceedings but should be brought by court application and not by chamber application. (2) The court, however, has a discretion in terms of r 4C of the High Court Rules to order a departure from the Rules as it saw fit. (3) The purpose of joinder is to ensure that all matters in the cause may be effectively and completely determined and adjudicated upon and to prevent an unnecessary multiplication of litigation and to facilitate the speedy resolution of disputes, by ensuring that everyone whose legal interests are likely to be affected by the outcome of the proceedings is joined as a party to the proceedings. (4) The applicant, as the landowner on whose land the disputed claims were located, clearly had an interest in the matter and joinder was ordered.

Practice and procedure – parties – joinder – failure to join – action brought against wrong party – effect

Reitz v *Standard Chartered Bank Zimbabwe Ltd & Anor* HH-565-16 (Tsanga J) (judgment delivered 28 September 2016)

The applicant was immigrating to America to set up a business. He filed an urgent chamber application seeking to compel the first respondent, his bank, to transfer his funds to America. The funds were held in trust by the second respondent, a firm of legal practitioners, in an account with the bank. Approval to remit the funds was received from the Reserve Bank of Zimbabwe (RBZ). The law firm, on receipt of confirmation from the bank that the RBZ had given authority to remit the funds, contacted the bank in regard to the payment. The bank immediately wrote to the RBZ indicating that it had insufficient funds from its allocation to make the payment and requested the requisite funds from RBZ's Allocation Committee. The RBZ responded to indicate that the application had been referred to the Financial Markets Division for consideration.
Held: (1) The applicant lacked *locus standi* in bringing the application against the bank and the firm. The remedy would lie against the RBZ in an application brought by the firm on the applicant's behalf, since it was the RBZ which had the responsibility to issue funds to the bank, in order for them to put into effect instructions given to them by the firm on behalf of the applicant.
(2)The applicant's right to freedom of movement was not being infringed by the bank or the firm.

Practice and procedure – parties – joinder – President – Presidential action being challenged – must join President

Meki v *Acting District Administrator, Masvingo Province & Ors* HH-614-16 (Matanda-Moyo J) (judgment delivered 19 October 2016)

See above, under CUSTOMARY LAW (Chieftainship – appointment of chief – dispute – court's role).

Practice and procedure – parties – *locus standi* – constitutional application – trust acting on behalf of members, seeking to assert constitutional right –wide scope of s 85 of Constitution in regard to infringements of constitutional rights

Trustees, Makomo e Chimanimani Share Ownership Community Trust v *Min of Lands & Anor* HH-556-16 (Munangati-Manongwa J) (judgment delivered 22 September 2016)

The applicant alleged it represented people who, prior to the colonial period, enjoyed use of the land that became known as the Tilbury Estate and claimed the right to this land. This land was owned by the second respondent before being compulsorily acquired by the Government of Zimbabwe in 2005. It was now held in terms of a Bilateral Investment Protection Promotion Agreement between the Zimbabwe and the German Federal Republic. The applicant sought to assert that it had rights granted by s 72(7)(c) of the Constitution, such that that the compulsory acquisition of land for the resettlement of people in accordance with the land reform process must be conducted in such a manner as to ensure that the people of Zimbabwe are enabled to reassert their rights and regain ownership of their land. A number of points *in limine* were dealt with by the court to resolve the application.
Held (1) In regard to the claim of lack of *locus standi* and absence of authority on the part of the applicant, the applicant trust had *locus standi* to bring the application. The object of the trust was to further the interest of the aboriginal people of the Chimanimani area. Furthermore, s 85 of the Constitution greatly widened the group of persons who can take action when there are allegations of infringement of constitutional rights. (2) The applicant's deponent's statement that he had authority to depose the founding affidavit on behalf of the applicant was sufficient. (3) Failure to cite the judicial manager of the second respondent was not a fatal misjoinder. It was sufficient to cite the second respondent company and specify that it was under judicial management. (4) There was, however, a specific court order requiring all actions against the second respondent under judicial management not to be proceeded with, without the leave of the court. Accordingly the applicant's attempt to bring proceedings against the second respondent without obtaining the leave of the court was fatal to the application.

Practice and procedure – pleadings – cause of action – need to specify cause of action – impermissible to plead one cause of action but rely on another one

Masendeke v *Kukura Kurerwa Bus Svcs (Pvt) Ltd* HH-598-16 (Chigumba J) (Judgment delivered 12 October 2016)

See above, under CONTRACT (Termination).

Practice and procedure – pleadings – founding affidavit – hearsay evidence in founding affidavit – when admissible

Glenwood Heavy Eqpt (Pvt) Ltd v *Hwange Colliery Co Ltd & Ors* HH-664-16 (Dube J) (Judgment delivered 25 October 2016)

See above, under EVIDENCE (Admissibility – hearsay).

Practice and procedure – pleadings – further particulars – application for – purpose of further particulars – limits as to what may be requested

Glendenning v *Kader* HH-575-16 (Mafusire J) (judgment delivered 5 October 2016)

The applicant (the defendant in the main action) made an application to compel delivery of further particulars in respect of the respondent's (plaintiff in the main action) declaration in the main action. The applicant had made an extremely lengthy and very detailed request for further particulars, to which the respondent had responded in part. The applicant, without asking the respondent to supply further and better particulars, made the court application to compel the delivery of the further particulars.
Held: (1) Although it might well have been much more sensible and cost saving to have sought further and better particulars from the respondent before commencing the court application, there was no legal requirement to do so. (2) The furnishing of further particulars were, *inter alia*, to define the issues with more precision, to enable a party to know the case or defence he has to meet. (3) It was not the function of further particulars, *inter alia*, to enable a party to find out on what evidence his opponent intended to rely, or to go on fishing expedition on the other party's pleadings. (4) The respondent's claim in the declaration was set out with sufficient particularity to enable the applicant to plead to it and the application was accordingly dismissed.

Practice and procedure – pleadings – need to set out clearly what basis of claim is – citation of servants in their personal capacities – need for pleadings to make clear how parties are being cited

Mahlangu v *Dowa & Ors* HH-653-16 (Chigumba J) (Judgment delivered 28 October 2016)

See above, under DELICT (Liability – vicarious lability).

Practice and procedure – process – service of – proof of service – sheriff's return of service as *prima facie* proof – what party must show if alleging lack of service

Mangwiro v *Chombo NO* HH-710-16 (Tsanga J) (Judgment delivered 16 November 2016)

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

Practice and procedure – process – service of – summons – *dies induciae* –summons may be served with or without particulars of claim - 10 days added to the time for filing a plea only after appearance to defend served – rescission under r 449 limited to cases where there has been error or oversight by court

Delward Eng (Pvt) Ltd & Anor v *Warara & Associates* HH-463-16 (Tagu J) (Judgment delivered 17 August 2016)

Default judgment was granted after the defendant had failed to enter an appearance to defend 10 days after service of a provisional sentence summons and declaration. The defendant applied to court for rescission of judgment in terms of r 449, contending that it was allowed 20 days to enter an appearance to defend. It was common cause that the appearance to defend had been served after the ten days normally allowed for an appearance to defend. In the majority of cases, where a party does not proceed in terms of r 20 (i.e. summons claiming provisional sentence), the practice is to file summons and declaration together as provided for under rule 113. It is only then that a further 10 days are added to the time for filing a plea (not for filing appearance to defend).
Held: r 119 permits a plaintiff to serve both the summons and the declaration upon the defendant at the same time. Once that has happened, the defendant is entitled to an extra ten days within which to file his plea,

exception or special plea. The defendant is expected to file his or her appearance to defend within ten days from date of service of the summons. Then within the next extra ten days the defendant is expected to file his or her plea. The proviso only gives a period of 20 days to the defendant in which to file a plea, exception or special plea. The proviso does not extend the *dies induciae* within which to enter appearance to defend.

Practice and procedure – provisional sentence – application for – when should be referred to opposed roll for hearing – notice of opposition filed – not in itself reason to refer to opposed roll – what court should consider

Zimbabwe Leaf Tobacco Co (Pvt) Ltd v *Cooke* HH-829-16 (Matanda-Moyo J) (Judgment delivered 28 December 2016)

The remedy of provisional sentence is for a plaintiff who is a holder of a liquid document to secure speedy relief. To therefore postpone the remedy if all requirements are met is to deny the plaintiff such quick access to relief. Unlike summary judgement such relief is not final in nature. The defendant is still free to defend the matter, once he has acted in terms of the provisional sentence. Also if the provisional sentence proceedings are not successful, the matter continues on the normal course. The relief is therefore provisional in nature and does not take away the defendant's right to pursue any possible defences to the claim.
The next question is whether the noting of any opposition to the claim for provisional sentence automatically result in the matter being removed from the roll of unopposed matters to the roll of opposed matters. There is no consensus on the position by this court. One school of thought has found that once a notice of opposition has been filed prior to set down, the matter should not be set down on the unopposed roll. The other believes the matter can still be heard on the unopposed roll.
Rule 25 of the High Court Rules does not make a hard and fast rule that simply because an opposition has been filed the matter should automatically be referred to the opposed roll. The rule is supposed to be interpreted in the context of an application for a provisional sentence. Order 32 is interpreted with the necessary changes that would not take away the meaning of provisional sentence. To automatically refer the matter to the opposed roll, without the court making a finding that the defendant has a defence to be canvassed, is to undermine or take away the remedy. The court on the date of set down should hear the parties, especially the defendant. If the defendant's defence is such that the matter can be resolved either way, the court should dispose of the matter. If the defence raised by the defendant requires further filing of papers by the parties, the court can either refer the matter to the opposed roll, or to trial if the facts are not capable of resolution on papers. This can be done where the defendant produces sufficient proof on affidavit to show that the probability of success in the principal case favours the defendant.
Accordingly, the mere fact that a notice of opposition has been filed should not automatically lead to the matter being referred to the opposed roll.

Practice and procedure – striking off roll – urgent application – matter struck off as not being urgent – whether matter requires to be re-enrolled

Ramwide Invstms (Pvt) Ltd v *Rondebuild Zimbabwe (Pvt) Ltd & Ors* HH-444-16 (Matanda-Moyo J) (judgment delivered 27 July 2016)

The applicant sought to set aside a sale in execution of movable goods. Before the main matter could be heard a point *in limine* was raised by the respondent claiming that the matter had been struck off the roll previously and hence it was necessary for the applicant to re-apply to place it on the roll. The applicant argued that the matter had been struck off as urgent but remained on the normal roll, hence there was no need to apply to re-enroll the matter.
On the main issue, the applicant sought to set aside a sale in execution on the grounds that the purchaser of the property was an interested party, the property was not properly valued by the messenger, the auctioneer did not adequately advertise the property and hence a low price had been obtained.
Held: (1) there is no High Court rule covering this situation. There is a distinction between striking a matter off because it is defective and the present situation. Since the matter had been struck off the urgent roll, but had not been deemed defective, it was simply transferred to the normal roll, and as there was no prejudice to anyone, the hearing could proceed.
(2) On the facts the purchaser was not a *bona fide* third party, hence was not protected by vindication. The property had not been adequately advertised. However, valuation does not necessarily have to be done formally in writing, and the respondent had not brought any evidence to show that the interested nature of the purchaser and the failure to advertise had affected the sale price. Hence the sale could not be set aside.

Practice and procedure – taxation – fee – whether refundable – State Liabilities Act [*Chapter 8:14*] – application of s 6

Puwayi Chiutsi Legal Practitioners v *Registrar of the High Court & Anor* HH-485-16 (Chigumba J) (Judgment delivered 17 August 2016)

A bill of costs had been taxed by the taxing master (the second respondent). The second respondent has raised a fee in respect of his taxation of that bill. Subsequently the taxation was set aside. The parties resolved the matter and the bill was withdrawn. The respondents refused to refund the taxing fee, but did not oppose this application and asked the court for guidance regarding the legal position.
One issue was whether a taxing fee, deducted at the instance of the registrar or taxing officer refundable in any circumstances and, in particular, where the bill of costs had been set aside on review and the parties to the dispute reached amicable settlement. The High Court Regulations were promulgated by the Minister in terms of s 57 of the High Court Act and provided for all fees in respect of instruments, services or other matters received, issued, provided for or otherwise dealt with by the Registrar or the Sheriff or an officer of the High Court in the course of his duties.
Held: (1) nothing in the rules provides for a refund of the fee. A taxing fee is payable in recognition of the work done by the Registrar in scrutinizing the bill, applying the prescribed fee and allowing or disallowing items, calculating the amount due as well as other issues incidental to setting the date for taxation and notifying the parties. Once the service has been rendered it is not refundable. Had the court intended it to be so, such would have been attached to the order considering review.
(2) s 6 of the State Liabilities Act applies to such circumstances since the officer's powers of taxation, emanating from the Minister and said officers, had executed their official duties. Consequently 60 days' notice ought to have been given of the intended action.

Prescription – interruption of – acknowledgment of debt – tacit acknowledgment made when seeking indulgence – prescription thereby interrupted

Barrel Eng & Founders (Pvt) Ltd v *Bitumen Construction Svcs (Pvt) Ltd* HH-715-16 (Mangota J) (Judgment delivered 17 November 2016)

See above, under CONTRACT (Performance).

Property and real rights – movable property – ownership – proof of – unstamped list of assets not sufficient – requires legal document

Deputy Sheriff, Marondera & Anor v *ZB Bank Ltd & Ors* HH-417-16 (Dube J) (judgment delivered 13 July 2016)

See above, under PRACTICE AND PROCEDURE (Interpleader proceedings).

Review – criminal matter

See above, under CRIMINAL PROCEDURE (Review).

Road traffic – motoring offences – culpable homicide in the course of driving – sentence – endorsement of offender's driving licence

S v *Maposhere* HH-451-16 (Tagu J) (judgment delivered 25 July 2016)

See above, under CRIMINAL PROCEDURE (SENTENCE) (Offences under Criminal Law Code – culpable homicide – motoring case)

Statutes – Public Order and Security Act [*Chapter 11:17*] – power given to police to prohibit processions and gatherings – need for interested parties to be given notice of intention to prohibit processions – parties' constitutional rights violated when no notice given – no power under section given to any person to make regulations – statutory instrument issued by police invalid

DARE & Ors v *Saunyama NO & Ors (1)* HH-554-16 (Chigumba J) (judgment delivered 23 September 2016)

The applicants intended to hold public gatherings and processions against police brutality. They had given notice to the police of the date of the proposed demonstration. A week before the planned date, the first respondent (the Officer Commanding Harare Police District) issued a statutory instrument, seeking to proscribe any public processions for a two week period. The notice was purportedly issued in terms of s 27 of the Public Order and Security Act (POSA). The applicants sought interim orders suspending the operation of the statutory instrument and interdicting the police from interfering with the processions. As final relief, they sought orders or declarations that's that the statutory instrument was *ultra vires* the POSA, and that the statutory instrument, as well as s 27 of the POSA, breached the applicants' fundamental rights protected by ss 59, 61, 66, 67, 68 and 92 of the Constitution. The application was sought on an urgent basis.

Held: (1) The application for a declaration that s 27 of POSA was unconstitutional was not urgent. The section had been on the statute book for over three years and the applicants would suffer no irreparable damage if the matter was not dealt with immediately.

(2) It was, however, appropriate to urgently consider the constitutional validity of the statutory instrument. The applicants' need to act arose when the instrument was published. The applicants did so and the issue was not one within the exclusive jurisdiction of the Constitutional Court.

(3) The applicants had also established the basic requirements for the granting of an interim interdict.

(4) Section 27 of POSA did not give power to the first respondent or the Commissioner of Police or the Minister of Home Affairs to make regulations. The first respondent had abrogated to himself a power which he did not have. This was illegal and unconstitutional and the Attorney General was guilty of drafting the statutory instrument.

(5) The statutory instrument was therefore null and void for being *ultra vires*.

(6) The constitutionality of s 27 of POSA was not before the court but the respondents had at any rate failed to follow the requirements of s 27 of POSA. They had failed to give the interested parties an opportunity to be heard, failed to provide written reasons before issuing the notice, failed to issue the notice in the manner prescribed and issued the notice as statutory instrument when they had no power to do so.

(7) The applicants' right to lawful, prompt, efficient, reasonable, proportional, impartial administrative conduct was violated when the statutory instrument was purportedly issued.

(8) In terms of s 175 of the Constitution the court had the power to suspend conditionally or unconditionally a declaration of invalidity for any period to allow the competent authority to correct the defect.

(9) It was just and equitable to suspend the declaration of constitutional invalidity for 7 working days to allow the competent authority to comply with the requirements of the Constitution and the POSA.