Administrative law — natural justice — observance of — hearing by disciplinary tribunal — conduct of — not necessary for oral evidence to be led, nor to allow cross-examination

Chataira v *ZESA* S-83-01 (Ebrahim JA, Chidyausiku CJ & Malaba JA concurring)

See below, under EMPLOYMENT (Code of conduct)

Administrative law — administrative decision — limited grounds on which court may interfere with such decision — Registrar-General — independence of

Tsvangirai & Anor v *Registrar-General & Ors* HH-37-02 (Garwe JP)

See below, under ELECTION (Registrar-General).

Appeal — bail pending appeal — application for — prospects of success on appeal — how court may approach question of whether there are prospects of success

S v *Musasa* S-45-02 (Ziyambi JA, in chambers)

In determining the prospects of success on appeal, a court is entitled to take each ground of appeal and examine the judgment of the lower court to ascertain whether there was substance in the criticism and whether there were prospects of success on appeal.

Appeal — court's powers on appeal — interference with discretionary power of court *a quo* — limited grounds for interference — decision not irrational — interference not possible

SEDCO v *Chimhere* S-23-02 (Ebrahim JA, Chidyausiku CJ & Ziyambi JA concurring)

The acting Chairman of the Labour Relations Tribunal had granted condonation of the late noting of an appeal. He was of the view that the delay, though inordinate, was not wilful or deliberate; and that there was an arguable case. On appeal against the acting Chairman's ruling: held, that it could not be said that the acting Chairman's decision was grossly unreasonable, even if the Supreme Court might have decided the matter differently, and there were no other grounds for interfering with his decision.

Appeal — court's powers on appeal — interference with discretion of lower court — when appeal court may interfere — no power to interfere once it has found that lower court exercised its discretion properly — raising of matters *mero motu* — limits to appeal court's powers to do so

Goto v *Goto* S-60-01 (Muchechetere & Sandura JJA, Chidyausiku CJ dissenting)

Where there is an appeal against a discretionary order of a lower court, the appeal court will not interfere with the lower court's discretion except in limited circumstances. If the appeal court finds that the lower court exercised its discretion properly, that is the end of the matter, even if the appeal court considers that a different result might be fairer.

The matters which an appeal court may raise *mero motu* are limited to such issues as illegality and the non-joinder of a third party who would be affected by the order it is asked to make. It may not provide remedies which neither party has raised or sought.

Appeal — court's powers on appeal — Supreme Court's wide powers in civil appeal — making order which lower court should have made and remitting matter for further hearing

Eastern Highlands Electrical (Pvt) Ltd v *Gibson Investments (Pvt) Ltd* S-26-02 (Ebrahim JA, Chidyausiku CJ & Ziyambi JA concurring)

The appellant company had brought an action against the respondent, which made a counter claim against it. During the course of evidence it emerged that the appellant should not have been the plaintiff; another company should have. The appellant applied with withdraw the admission made in the pleadings that it was the plaintiff, and to have the correct company joined or substituted. The application was refused and absolution was granted at the end of the appellant's case. Held: (1) the application to withdraw the admission should have been granted. The admission had been made in error and contrary to the facts. No prejudice could have resulted, and the matter could have been decided on the merits. (2) The Supreme Court's powers on appeal in a civil case are very wide, and it would order that the application to withdraw the admission should be granted and the matter be remitted to the lower court for further hearing.

Appeal — notice of — validity of notice — requirement for appellant to comply with rules — failure to do so — notice a nullity — condonation of late noting of appeal — grounds — practitioner's earlier ineptness — not a ground on which to grant condonation

S v *Sibanda* HB-50-01 (Cheda J)

The accused was granted bail by a magistrate. The State's representative announced that he would appeal against the grant of bail. The subsequent notice of appeal did not comply with the requirements of the rules, nor was a copy served on the magistrate. Held: there was no appeal before the court, as the rules has not been complied with, and the magistrate's order stood. Condonation would not be granted. The only reason given for such an application was "shortcomings" on the part of the State, and this was a case where the party (the State) would have to suffer for the negligence of its lawyer.

Appeal — noting of — effect — order by High Court to pay maintenance — High Court not a "maintenance court" — order not governed by provisions of s 27 of Maintenance Act [*Chapter 5:09*]

Chakras v *Chakras* S-30-02 (Sandura JA, Cheda & Malaba JJA concurring)

In issuing an order for divorce, the High Court ordered the appellant to pay maintenance to the respondent. He appealed against the order to pay maintenance. At the appeal, the respondent argued that the appellant should not be heard as he was in contempt, because he had not paid any maintenance after noting the appeal. Section 27 of the Maintenance Act [*Chapter 5:09*] provides that the operation of an order of a maintenance court is not suspended by the noting of an appeal against the order. Held: the High Court is not a "maintenance court" and an order issued by the High Court is not governed by s 27 of the Act.

Appeal — noting of — failure to serve notice of appeal in terms of rules — effect of such failure — effectively no appeal filed — courses open to appellant

Erasmus v *Zimet & Anor* HH-40-02 (Paradza J)

An order of ejectment was granted against the applicant, who noted an appeal. The notice of appeal was not timeously served on the Registrar of the High Court, as required by the rules of the Supreme Court. The applicant sought an order restraining the Sheriff from executing the order of ejectment. Held: there was effectively no appeal noted. The applicant should have sought condonation or other indulgence to file his appeal out of time.

Arbitration — arbitrator — award — setting aside of — procedure — may not be brought on review under High Court Act — failure by arbitrator to comply with formal requirements for issue of award — how such failure should be rectified

NSSA v *Chrmn, NSSA Workers Cttee & Ors* HH-51-02 (Smith J)

The third respondent was arbitrator in a wages dispute. He made an award, but did not give reasons for the award. The employer did not ask him for his reasons, but brought an application for review in terms of the High Court Act [*Chapter 7:06*] on the grounds of arbitrariness, irrationality and failure to comply with the requirements of the Arbitration Act. Held: (1) An arbitrator's award may not be taken on review in terms of s 26 of the High Court Act. The narrow grounds on which an arbitral award may be set aside are set out article 34 of the UNCITRAL Model Law, and recourse to the courts against an award may only be made by way of an application under that article. For failure to use the correct procedure, the application would have to fail. (2) In any event, the only ground that could have been raised was that the award was contrary to public policy by reason of its irrationality, and there were no grounds for making such a finding. (3) The fact the award did not comply with the formal requirements of the article did not mean that it was a nullity. A dissatisfied party can approach the court for an order requiring the arbitrator to remedy the omission.

Arbitration — arbitrator — challenge to impartiality of — procedure for — must be in terms of Arbitration Act — relief that can be obtained — failure by arbitrator to respond to challenge — effect

Arbitration — arbitrator — duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence — effect of failure to do so — bias — when an arbitrator is disqualified on grounds of bias — test to be applied

Musonzoa (Pvt) Ltd v *Standard Fire & General Insurance Co Ltd* HH-85-02 (Chinhengo J)

A challenge to an arbitrator in respect of his impartiality is made in terms of Articles 12 and 13 of the Model Law. It can also be made in terms of Article 34(2) as read with Article 34(5) of the Model Law if the grounds upon which a challenge could have been made emerge after an award has been handed down. Any such challenge may be made if circumstances exist that give rise to justifiable doubts as to the impartiality of the arbitrator. It is mandatory for the arbitrator to disclose to the parties any circumstances which give rise to justifiable doubts as to his impartiality. If the challenge is successfully made in the High Court under articles 12 and 13, the mandate of the arbitrator is terminated; any hearings previously held shall be repeated; the award made after the challenge falls away; and the arbitrator is not entitled to a fee, the proceedings being a nullity. If, after an award has been made, a party discovers that the arbitrator was disqualified by reason of his failure to disclose any circumstances that were likely to give rise to justifiable doubt as to his impartiality, that party may proceed only in terms of Article 34 of the Model Law and will have to establish that the arbitrator was actually biased or that the award was otherwise in conflict with the public policy of Zimbabwe.

Where the arbitrator has a prior association with one of the parties, the test to be applied is an objective one where, after investigating the actual circumstances of the case, the court must impute knowledge of those circumstances to the reasonable man and decide whether there was a real danger on the part of the arbitrator unfairly to regard with favour the case of a party to the issue before him. The arbitrator's view of his own ability to be impartial, or the fact that others may consider his standing in society to lend him an air of impartiality, is immaterial to a determination of the issue of bias.

Failure by an arbitrator to disclose a prior association and to decide on a challenge to his impartiality would be grounds for setting aside an award as being contrary to public policy.

Citizenship — Citizenship of Zimbabwe Act [*Chapter 4:01*] — s 9(7) — loss of citizenship for failure to renounce foreign citizenship — citizen by birth with claim to foreign citizenship through either parent — no requirement to renounce foreign citizenship unless he actually holds such citizenship — evidence required to show that person holds foreign citizenship

Todd v *Registrar-General & Anor* HH-76-01 (Mungwira J)

The applicant was born in Zimbabwe though both her parents were born in New Zealand. The Registrar-General refused to renew her passport, claiming that she had lost her citizenship of Zimbabwe because she had failed to renounce her New Zealand citizenship. Held: unless it was shown that she was actually a citizen of New Zealand, rather than having only a claim to that citizenship, there was no requirement for her to renounce anything. If the Registrar-General wished to show that she was a citizen according to the law of New Zealand, he would have to call expert evidence to that effect.

Company — legal personality — when "corporate veil" may be lifted — limited grounds for doing so

Mkombachoto v *CBZ Ltd & Anor* HH-10-02 (Ndou J)

The applicant had obtained an overdraft from a bank and mortgaged her immovable property as security for the overdraft. She repaid the overdraft and sought return of her title deeds, as she wished to donate the property to her minor son. The bank refused to return the title deeds on the grounds that she was a guarantor of loans to two companies of which she was a director and the title deeds were the bank's only security. Held: a mortgage, which is a form of lien, is always accessory to a principal obligation. The mortgagor's liability is only in respect of the obligation for which the mortgage was undertaken, and no other. The court may only "lift the corporate veil" and disregard the separate legal personality of a company in limited circumstances, such as fraud or manifest injustice. There was no fraud in this case, nor was there any manifest injustice. The bank could have sought security from the guarantors of the loans to the companies but did not do so.

Constitution of Zimbabwe 1980 — Declaration of Rights — s 18 — requirement to establish guilt of accused person on criminal case — onus placed on accused by statute — when lawful to place onus on accused — Aircraft (Offences) Act [*Chapter 9:01*] — s 7(1)(a) — placing dangerous goods on an aircraft without lawful excuse — Law and Order (Maintenance) Act [*Chapter 11:07*] — s 37(3) — possession of offensive weapons without lawful authority or reasonable excuse — onus placed on accused to establish excuse — not a contravention of s 18 of the Constitution

S v *Blanchard & Ors* S-78-01 (Chidyausiku CJ, Sandura JJA concurring, McNally JA dissenting in part)

See below, under CRIMINAL LAW Statutory Offences

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 18(1) — right to protection of the law — legislation allegedly denying supporters of opposition candidate right to register as voters — candidate's right to protection of the law not infringed

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 20(1) — right to freedom of expression — legislation restricting right to postal ballot — not open to candidate to allege that his right to freedom of expression being infringed

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 24(1) — right of person to approach Supreme Court in respect of an alleged contravention of Declaration of Rights — *locus standi* — need to establish facts which would show that Declaration of Rights has been infringed in respect of applicant

Tsvangirai v *Registrar-General & Ors* S-20-02 (Chidyausiku CJ, Cheda, Ziyambi & Malaba JJA concurring, Sandura JA dissenting)

The applicant, the main opposition candidate in the Presidential election, applied to the Supreme Court under s 24(1), alleging that ss 18 and 20 of the Declaration of Rights were being infringed. In respect of s 18 (the right to the protection of the law), he alleged that legislation which denied his supporters the right to be registered as voters, while giving the President's supporters that right, infringed his right to protection of the law. In respect of s 20(1), the right to freedom of expression, he alleged that legislation limiting postal ballots to members of the armed forces denied the right of freedom of expression to other voters. Held (by the majority): the applicant, to have *locus standi*, had to show that the Declaration of Rights was being infringed in respect of him. Assuming that the legislation did prevent his supporters from being registered as voters, it would be for them, not him, to approach the court for relief. Similarly, the applicant could only approach the court in respect of postal voting if he personally had been denied the right to a postal vote. Held (*per* Sandura JA, dissenting): the Court has always taken a broad view of *locus standi* in order to determine the real issues raised where the applicant has a real and substantial interest in the matter. The right to the protection of the law embraces the right to require the legislature to pass laws consistent with the Constitution. The section of the Electoral Act which gives the President the right to amend the Act is arguably inconsistent with the Constitution. The applicant was a person adversely affected by amendments made by the President and thus has the right to approach the Court for relief.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 20 — right to freedom of expression — s 21 — right to freedom of assembly — Public Order and Security Act [*Chapter 11:17*] — s 24 — requirement for organiser of public meeting to give prior notice to police — while requirement infringes rights, purpose of section is reasonably justifiable in a democratic society

Biti & Anor v *Minister of Home Affairs & Anor* S-9-02 (Sandura JA, Chidyausiku CJ, Cheda, Malaba & Ziyambi JJA concurring)

The applicant, on behalf of his political party, had notified the police, as required by s 24 of the Public Order and Security Act [*Chapter 11:17*], of its intention to hold a number of rallies before the Presidential election. Acting under powers given by other sections of the Act, the police had prohibited most of the planned rallies. The applicant sought a declaration that s 24 of the Act contravened the rights to freedom of expression and of assembly contained in ss 20 and 21 of the Constitution. Held: the rights of freedom of expression and assembly must be reconciled with governmental responsibility to ensure the sound maintenance of public order. There must be a compromise which will accommodate the exercise of the protected rights within a framework of public order which enables ordinary people to go about their business without obstruction. While s 24 infringes the rights of freedom of expression and freedom of assembly, these rights may be derogated from in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic society. The purpose of s 24 is, first, to afford the regulating authority a reasonable opportunity of anticipating or preventing any public disorder or any breach of the peace and, secondly, to ensure that the gathering concerned does not unduly interfere with the rights of other people or lead to an obstruction of traffic, a breach of the peace or public disorder. These objectives are reasonably justifiable in a democratic society. Section 24 does not give the police the power to prohibit gatherings; these powers are given by other sections of the Act, not presently under consideration.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 23 — protection of freedom from discrimination — statute requiring educational qualifications for candidate for office of executive mayor — not discriminatory in terms of section — Constitution of Zimbabwe 1980, ss 23(3)(d) and 113; City of Gweru (Private) Act [*Chapter 29:03*]

Kombayi v *Registrar-General* S-88-01 (McNally JA, Sandura & Malaba JJA concurring)

See below, under ELECTION (Urban council election)

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 23 — protection of freedom from discrimination — whether section has only vertical application — discrimination by college against student — college not a public authority — discrimination not proscribed under Constitution

Chaduka NO & Anor v *Mandizvidza* S-114-01 (McNally JA, Chidyausiku CJ, Muchechetere JA, Ziyambi JA & Malaba JA concurring)

The respondent was a student at a teacher training college run by a church. She signed a contract on entering the college, agreeing that if she became pregnant she would be withdrawn from the course. She married under customary law and later became pregnant. She was obliged to withdraw from the college before completing her studies. It was argued that she was being treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority, contrary to s 23(1)(b) of the Constitution. Held: (1) the term "public authority" not being defined in s 113 of the Constitution, the court could place a wider meaning on the word "public" than in the other phrases in that section where the word Apublic" occurred. (2) "Public authority" was a broader concept than "State authority", and could thus include local government institutions. However, a college such as in this case, even if it did provide a public benefit, was not under State control to the extent where it could be regarded as an organ of the State. (3) Without deciding generally whether the Declaration of Rights had only vertical application, it was clear that s 23 only had such application. Consequently, the respondent could not get relief under s 23. (4) The discriminatory clause in the contract could be struck down as being *contra bonos mores*, being worded far more widely than would be necessary if it related strictly to morality.

Constitutional law — Constitution of Zimbabwe 1980 — interpretation — principles — normal principles of statutory interpretation applicable — history and background of constitutional provision — when permissible to take account of history and background

Constitutional law — Constitution of Zimbabwe — President — election of — election by voters on "common roll" — meaning — does not mean that voter entitled to vote other than in constituency in which registered

Constitutional law — Constitution of Zimbabwe 1980 — Schedule — qualification of voters — citizen permanently resident since 31 December 1985 — loses right to vote if ceases to be a citizen

Registrar-General & Ors v *Tsvangirai* S-12-01 (Chidyausiku CJ, Cheda, Ziyambi & Malaba JJA concurring, Sandura JA dissenting in part)

The provision in the Constitution that the President is elected by the voters on the common roll does not mean that a voter is entitled to cast a vote in a constituency other than that in which he is registered. Voters are registered by constituencies. The sum total of the constituency rolls makes up the common roll.

The right to vote is restricted to citizens and those persons who (a) meet the residence qualifications prescribed and (b) have been permanently resident since 31 December 1985. If a citizen who was registered as a voter loses his citizenship, he also loses his right to vote, even if he has been permanently resident since that date. *Per* Sandura JA (dissenting): a citizen who was ordinarily resident in Zimbabwe since 31 December 1985 is regarded by virtue of the written law as having been permanently resident. He would be qualified for registration as a voter on two grounds: citizenship and residence. He would remain qualified if he lost his citizenship.

In interpreting the constitution, the normal principles of statutory interpretation apply. The exclusionary rule, under which it was not permissible to take into account the history and background of the legislation, derived from English law. It has since been abrogated there and is not followed in South Africa. It is an affront to common sense, and would no longer be followed here.

Constitutional law — Constitution of Zimbabwe 1980 — Parliament — powers — bound by Constitution — may not pass laws other than in manner provided by Constitution — standing orders of Parliament — status of — standing orders are laws which must be obeyed — separation of powers — right and duty of Supreme Court to determine whether laws validly enacted

Biti & Anor v *Min of Justice & Anor* S-10-02 (Ebrahim JA, Sandura, Cheda & Ziyambi JJA concurring; Malaba JA dissenting)

On 8 January 2002, a Bill which had gone through the normal parliamentary processes was defeated after its third reading. The next day, the respondent Minister, who was responsible for steering the Bill through Parliament, gave notice that he

would move that the House rescind its decision and that standing order 127 should be suspended. Under this standing order, the same bill may not be offered twice in the same session. On 10 January, the two motions were passed. A new third reading took place and the third reading was approved by a majority of the members. The Bill was promulgated on 4 February. The first applicant, a member of Parliament, and his party, the second applicant, sought an order declaring that the manner in which the third reading of the Bill was undertaken for a second time by Parliament failed to afford them due process and protection of law and failed to follow correct legal processes, in that the provisions of the Constitution of Zimbabwe and Standing Orders were breached, and that therefore the Bill was not properly passed by Parliament, and was invalid legislation. Held: (1) the independence enjoyed by Parliament in the control of its internal affairs does not prevent its members from applying to the Supreme Court under s 24 of the Constitution rights should they believe that Parliament has wrongfully abrogated or infringed their fundamental rights. (2) Parliamentary procedure is governed by the Constitution, which gives Parliament the power to make standing orders. Standing orders are laws, which must be obeyed; they are not merely rules of a club, to be suspended at the convenience of a party. (3) Even if a bill can be reintroduced, it must be introduced and dealt with in accordance with the Constitution, and the normal procedures followed. (4) It is for the courts, in a constitutional democracy, to determine the lawfulness of the actions of other bodies, including Parliament. The judiciary is the guardian of the Constitution and the rights of the citizens. The Supreme Court has not only the power, but also the duty, to determine whether or not legislation has been enacted as required by the Constitution. Parliament can only do what is authorised by law and specifically by the Constitution. (5) Section 3 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] itself expressly forbids what was done in the present case.

Contract — breach — election — when party who is entitled to repudiate contract must be treated as having elected to abide by it — objective test of party's intention — requirement to make election within reasonable time — what is a reasonable time

Guardian Security Svcs (Pvt) Ltd v *ZBC* S-95-01 (Sandura JA, Chidyausiku CJ & Ziyambi JA concurring)

The respondent corporation had entered into agreement with the appellant whereby the appellant would provide guard services at the corporation's several premises for a defined period. Before the expiry of the period, items were stolen at one of the corporation's premises, in spite of the presence of a guard employed by the appellant. While the theft was being investigated by the police and the appellant, the corporation continued to pay the appellant its monthly fees in terms of the contract. It did not reserve the right to terminate the contract. It demanded damages for the loss. About a year after the theft, the corporation told the appellant it was terminating the contract. The appellant claimed damages for breach of contract, arguing that the corporation had elected to abide by the agreement. The corporation argued that as that matter had not been pleaded or raised in the pre-trial conference, it could not be relied on. Held: (1) where a matter has been fully canvassed in evidence, a party is entitled to rely on it, even if it is not pleaded. (2) The doctrine of election means that where, with knowledge of a breach of contract, a party does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way. The intention to waive or to elect not to enforce a contractual right is to be tested objectively. The test is satisfied where the innocent party, with full knowledge of his rights, performs an unequivocal act from which it can reasonably be inferred that he has elected to abide by the agreement. Only if the act is equivocal may subjective considerations be relied on. (3) The election must be made within a reasonable time of the breach. Twelve months was not a reasonable time; the corporation should have made its election by the time the next monthly payment was due.

Contract — formation — employer unilaterally increasing allowances payable to employees — acceptance of such increase constituting a contract — alteration of contract — contract not capable of alteration unilaterally

Air Zimbabwe (Pvt) Ltd v *Zendera & Ors* S-125-01 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

The respondents were flight attendants with the appellant airline. A few years earlier, the airline had increased the meal allowances paid to flight attendants and pilots when they were outside Zimbabwe. Subsequently, the airline had agreed with an association representing the pilots (but not the flight attendants) that the allowance should be reduced. The respondents argued that the airline had no right to do so. Held: when the airline raised the allowance, and the pilots and flight attendants accepted the increase, a contract was created. This contract could not be unilaterally altered. The fact that the pilots' association had agreed to a reduction in the allowance was irrelevant. The respondents were not members of that association and had not given it a mandate to act on its behalf. The shortfall should be paid with effect from the date it was reduced, but because it was to be paid in foreign currency (UK pounds), interest would be payable at the rate prevailing at the Bank of England.

Contract — lease — what is — distinction from contract of hire-purchase — lessee being obliged at end of contract to deliver goods to lessor — not a contract of hire-purchase

Scotfin Ltd v *Polka Nominees (Nineteen) (Pvt) Ltd & Ors* HH-58-02 (Hlatshwayo J)

The plaintiff finance company had contracted with the first defendant to lease a vehicle. The second two defendants, directors of the first defendant, had later bound themselves as sureties for the debt. When the first defendant defaulted, the plaintiff claimed from the second and third defendants, who excepted to the claim on the grounds that the contract was one of hire-purchase and that the collateral contract of suretyship would be unenforceable. The plaintiff argued that the defendants should not have excepted, but should have raised the matter in their plea. Held: (1) the remedy of an exception is available where the complaint goes to the root of the opponent's claim or defence. If the exception were to be upheld, the plaintiff's claim would fail. (2) It was necessary to examine the contracts holistically to see what they in fact were, rather than what they were called by the parties. (3) In this case, the lessee had no right to purchase the goods after two or more instalments had been paid, or to renew the lease agreement at a nominal rental. When the lease terminated, not prematurely but upon due date, then the lessee was obliged to deliver the goods to the lessor, and the lessor required to sell the goods for the best offer obtainable. On this basis, the contracts were for the lease of the vehicle, and the exception would therefore fail.

Contract — option — right of first refusal — offeree exercising right by refusing to buy at price offered — right of first refusal thereby falling away

Central African Processed Exports (Pvt) Ltd &Ors v *Macdonald & Ors* S-40-02 (Malaba JA, Sandura & Cheda JJA concurring)

The tenant of a residential property had made an offer to purchase the property. The estate agent representing the owner wrote to the tenant, giving him the right of first refusal once the highest offer for the property had been made. Another person made a higher offer which the tenant was not willing to match. He said that he did not want to increase the amount of his offer. The tenant did, however, exercise the option to renew the lease and the other person subsequently withdrew his offer. The tenant then offered to buy the property, but the owner said he had withdrawn it from the market. The tenant sought to have the property transferred to him on payment of the price he had offered. Held: the tenant had exercised his right of first refusal by declining to buy the property at the higher price. Once he had exercised his right, it fell away and the owner of the property was not longer bound by any right of first refusal in favour of the tenant.

Contract — suretyship — surety — liability of — action brought against surety after judgment taken against principal debtor — action brought after prescription period for original debt had expired but before expiry of prescription period for novated debt — surety's liability dependent on construction of deed of suretyship

PTC v *Lamb* HH-19-02 (Smith J)

In terms of a deed of suretyship, the defendant guaranteed the debts owed by third party to the plaintiff. Action was taken against the third party in 1992 and judgment obtained in 1994. In 1997 the plaintiff commenced action against the defendant, who pleaded prescription. The plaintiff argued that the original debt had been novated by the judgment and the prescription period extended to 30 years. Held: whatever the common law might be about the continuing liability of sureties, it was the wording of the deed of suretyship that was decisive. The defendant had guaranteed only the original debt and not the novated debt.

Contract — validity — clause in contract contrary to public policy — clause requiring female students at a school who became pregnant to withdraw from course — clause worded too widely — clause struck down

Chaduka NO & Anor v *Mandizvidza* S-114-01 (McNally JA, Chidyausiku CJ, Muchechetere JA, Ziyambi JA & Malaba JA concurring)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — Declaration of Rights — s 23).

Criminal law — common law offences — fraud — prejudice — non-proprietary prejudice — act prejudicial to integrity of the administration of government and government policies — when can found a charge of fraud

S v *Matongo* HH-71-02 (Chinhengo J)

The accused was charged with fraud after he has posed as another person in order to undergo a driving test. His object was to enable that other person to get a drivers licence. The charge did not allege prejudice to anyone. Held: it is essential that a charge of fraud should allege prejudice, although prejudice may be inferred from the facts alleged. This was a case of non-proprietary prejudice, a notable instance of which is the State's concern for the integrity of the administration of government and government policies. The requirement of prejudice is satisfied by the risk of harm to the State and it is unnecessary to consider the cases of the other persons and bodies who might be prejudiced. A fraudulent misrepresentation which is

calculated materially to inconvenience or to prejudice some aspect of public administration can thus found a charge of fraud if all the other elements of such a charge -unlawfulness, causation and the intention to defraud - are satisfied. The rationale for this offence is that the State or other public body can only function properly if it can adhere to its policies and that it is harmed or prejudiced by any misrepresentation that induces it to depart from its policies.

Criminal law — common law offences — murder — intention to kill — actual intent and legal intent — distinction between — what must be shown before court can find an actual intent to kill — proof of legal intent — may be proved by inference

S v *Mugwanda* S-19-02 (Chidyausiku CJ, Ebrahim & Ziyambi JJA concurring)

Stabbing cases are usually a matter of degree, and intention to kill must not be inferred by hindsight from the fact of death. To establish intention it is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. Subjective foresight, like any other factual issue, may be proved by inference. For a trial court to return a verdict of murder with actual intent it must be shown that either (a) the accused desired to bring about the death of his victim and succeeded in completing his purpose; or (b) while pursuing another objective he foresees the death of his victim as a substantially certain result of that activity and proceeds regardless. A verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else).

Criminal law — common law offences — rape — essential elements — penetration — when considered to have occurred

S v *Banda* HB-13-02 (Kamocha J, Chiweshe J concurring)

Rape is committed when the male organ penetrates the female genitalia even to the slightest degree. However, where the male organ merely contacts the outside of the female genitalia, without any penetration, the accused can be convicted only of attempted rape.

Criminal law — statutory offences — Aircraft (Offences) Act [*Chapter 9:01*] — s 7(1)(a) — placing dangerous goods on an aircraft without lawful excuse — Law and Order (Maintenance) Act [*Chapter 11:07*] — s 37(3) — possession of offensive weapons without lawful authority or reasonable excuse — what accused must show to establish to establish lawful excuse or reasonable excuse — onus on accused to establish excuse — not a contravention of s 18 of the Constitution

S v *Blanchard & Ors* S-78-01 (Chidyausiku CJ, Sandura JJA concurring, McNally JA dissenting in part)

The appellants, who were American nationals and who claimed to be missionaries, brought a large quantity of weapons and ammunition from the Congo, where they had been operating, into Zimbabwe. They were arrested at Harare Airport after they were found to have placed weapons in their hold baggage in the aircraft they were intending to leave on. Further weaponry was found in a vehicle left in a car park at the airport. They were arrested. While custody, they were subjected to torture at the hands of the police. They were sentenced to a short effective term of imprisonment, backdated to the date of arrest. They appealed against conviction and sentence, arguing that they had shown a reasonable excuse for possessing the weapons and placing them on the aircraft. The State cross-appealed against the sentence, arguing that it was incompetent and far too lenient. Held: (1) s 7(1) of the Aircraft (Offences) Act prohibited the placing of dangerous goods on aircraft. It was not necessary to prove a sinister motive or an intent to jeopardise the safety of the aircraft. (2) With regard to whether the appellants had shown that they had a lawful excuse, the offender must show not only that he had an excuse or reason for what he did, but also that the excuse was one in accordance with the law. It is not enough to show that the conduct was permissible under the common law. A lawful excuse had not been shown for placing the goods on the aircraft. (3) With regard to reasonable excuse, it was not necessary to go as far as establishing a lawful excuse. Whether a reasonable excuse was established would depend on the facts of the particular case. In this case, a reasonable excuse was not established. (4) The placing of the onus on the accused to establish the lawful or reasonable excuse was not a contravention of s 18 of the Constitution and fell within the guidelines laid down by the Supreme Court. (5) There was no provision for the back-dating of the prison sentence and it was wholly irregular for the trial court to do so. (6) While it was proper for the court to take into account the torture inflicted on the accused, the court went too far and trivialised what was a very serious offence for which a substantial sentence of imprisonment was normally warranted. In this case, a sentence of 5 years would have been appropriate

Criminal law — statutory offences — Public Order and Security Act [*Chapter 11:*17] — s 32(4) — failure to produce an identity document to police — no offence created

S v *Hwete* HH-75-02 (Smith J)

The accused was charged with contravening s 32(4) of the Public Order and Security Act [*Chapter 11:17*]. It was alleged that he had, when being arrested for common law offences, he had failed to produce an identification document. Held: the section does not create an offence or provide a penalty. What it provides is that a person who in stated circumstances fails to produce an identification document may be detained until his identity is established. The police must give him every reasonable facility to establish his identity.

Criminal law — statutory offences — resisting arrest — not an offence under Criminal Procedure and Evidence Act [*Chapter 9:07*] — accused should be charged with contravening s 6(l)(f) of the Miscellaneous Offences Act [*Chapter 9:15*]

S v *Tirivanhu* HH-32-02 (Paradza J)

The accused was apprehended by a police officer, but wrenched himself free and ran away. He was charged under s 46 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and convicted. Held: the section under which he was charged did not create an offence, nor did s 44 of the Act cover the situation. He should have been charged with hindering or resisting a police officer in the execution of his duty, in contravention of s 6(l)(f) of the Miscellaneous Offences Act [*Chapter 9:15*].

Criminal law — statutory offences — Road Traffic Act [*Chapter 13:11*] — s 57(1)(b) — driving motor vehicle without owner's consent — employee of owner — continuing to use car after unlawful dismissal — not a contravention of section

S v *Masara* HH-33-02 (Paradza J)

A person who has been given the exclusive use of a motor vehicle by reason of a contract of employment cannot be charged with a contravention of s 57(1)(b) of the Road Traffic Act [*Chapter 13:*11] (driving a motor vehicle without the owner's consent) simply because the employer has decided to terminate his employment and has not done so lawfully. It would be necessary for the court to be satisfied that the employer had acted lawfully in denying the accused the benefit of the use of the motor vehicle.

Criminal procedure — bail — grant of — principles — bail should be granted where possible — evidence showing that accused not likely to stand trial and likely to interfere with witnesses — onus then falling on accused to show why bail should be granted

S v *Biti* HH-23-02 (Ndou J)

In a bail application, the presumption of innocence is in favour of the applicant, and the court should always grant bail where possible and should lean in favour of the liberty of the applicant provided that the interests of justice will not be prejudiced. The approach is one of striking a balance between the interest of society (i.e. the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused (who, pending the outcome of his or her trial, is presumed to be innocent). Where evidence is given that there is a strong case for the prosecution, that a heavy sentence is likely, increasing the risk of the accused absconding, and that other perpetrators of the crime are still at large, the onus then falls on the accused to show that the interests of justice will not be prejudiced, namely, that it is likely that he will stand his trial and not otherwise interfere with the administration of justice or commit an offence.

Criminal procedure — bail — decision of High Court — appeal against — leave to appeal must be obtained within period stipulated in statute — failure to obtain leave — condonation not possible

A-G v *Mpofu & Anor* S-50-02 (Chidyausiku CJ)

Where a party wishes to appeal against an order of a judge of the High Court granting or refusing bail, the leave of the judge must be sought. If leave is refused, a judge of the Supreme Court may entertain an application for leave to appeal. This is a statutory requirement, and failure to comply with it may not be condoned.

Criminal procedure — bail — decision of High Court — limited grounds on which Supreme Court may interfere with judge's decision — irregularity or misdirection entitling Supreme Court to interfere

Criminal procedure — bail — principles to be observed — onus on accused to show that he should be freed on bail — accused must be allowed to call evidence to show that allegations are unfounded

S v *Ncube* S-126-01 (Sandura JA, in Chambers)

In considering a bail application, a judicial officer must bear in mind the presumption of innocence, and should grant bail where possible. The onus (the quantum of which varies from case to case) is on the accused to show why he should be granted bail. He can discharge this onus by calling witnesses to show that the allegations against him are unfounded. Failure by the court to allow him to call such evidence is a serious misdirection, one which would allow the Supreme Court to interfere with a decision of a judge of the High Court to refuse bail.

Criminal procedure — bail — grounds for refusing — safety of accused — not a reason to refuse bail

S v *Bhebhe & Ors* HB-25-02 (Kamocha J)

Fears for the safety of the accused because of the unlawful actions of a mob outside the court room, threatening to kill the accused, are not a ground to refuse to grant bail, particularly once the accused is removed from the area.

Criminal procedure — charge — splitting of — tests for whether improper splitting of charges has occurred — avoidance of prejudice to accused by treating multiple counts as one for sentence

S v *Zacharia* HH-17-02 (Chinhengo J, Garwe JP concurring)

There are two tests for whether there has been an improper splitting of charges, the Asingle intent" or Acontinuous transaction" test and the Asame evidence" or Adominant intent" test. The latter is related to the intention of the accused person as he performs several acts which are logically and intrinsically connected to the one offence which he then commits. The concern whether the criminal conduct is in reality a single conviction is aimed at avoiding prejudice to the accused where the duplication of convictions arises. If no prejudice is occasioned to the accused, then the question whether or not there has been a duplication of convictions becomes one of little or no consequence. The prejudice to the accused may be avoided by treating all the separate counts as one for the purposes of sentence.

Criminal procedure — plea — guilty — questions put to accused to canvass essential elements of crime — need to put proper questions and record the answers correctly — effect of failure to do so

S v *Ndlovu & Anor* HB-30-02 (Cheda J)

The two accused were jointly charged with assault with intent to do grievous bodily harm and pleaded guilty. When putting questions to clarify the essential elements of the crime, the magistrate did not record any answer to the question whether they intended to cause serious bodily harm. In respect of other questions, it was not made clear whether the reply was from one or both of the accused. Held: Questions relating to the essential elements should not be regarded as questions which should be asked as a matter of course, but rather, as questions whose answers should assist the court in establishing whether the accused understands the core of the allegations against him. In view of the answers given, or not given, it was not safe to convict the accused.

Criminal procedure — review — irregularity justifying setting aside of conviction — legal practitioner giving evidence, having previously interviewed State witnesses and accused — a serious irregularity

S v *Banda* HB-34-02 (Kamocha J)

The accused, a police officer, was charged with corruption. It was alleged that he had taken a bribe from three foreigners whom he had arrested on suspicion of car theft. A legal practitioner had interviewed the foreigners, and thereafter interviewed the accused. The same legal practitioner was called as a State witness during the accused's trial, at which he accused was represented by another member of the practitioner's firm. Held: that the practitioner's testimony was as a result of the privileged position he enjoyed from consulting the three foreigners and interviewing the accused. He should have decided who to represent. Representing the three foreigners and the accused was improper. The conflict of interest in this matter culminating in the practitioner giving evidence against the accused amounted to an irregularity actually resulting in a substantial miscarriage of justice. The proceedings should be set aside.

Criminal procedure — trial — conduct of — need to ensure that trial is fair in substance and form — unrepresented accused — duty of trial magistrate towards

S v *Garande* HH-46-02 (Ndou J, Blackie J concurring)

It is a fundamental principle of our law that an accused person is entitled to a fair trial. The trial should be fair in substance as well as form. Where the accused is unrepresented, a trial magistrate has a duty to assist the accused, and to ensure that relevant evidence is called.

Criminal procedure — trial — conduct of — unrepresented accused — duty of trial magistrate towards — duty to ensure all factors relevant to sentence are canvassed

S v *Ngulube* HH-48-02 (Ndou J)

Before assessing sentence, a magistrate must equip himself with sufficient information in any particular case to enable him to assess sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. The needs of the individual and the interests of society should be balanced with care and understanding. Pre-sentencing information is very important. Whilst the age, marital and family status, employment, savings and assets are important aspects in the assessment of sentence, magistrates should always bear in mind that the reason why the accused committed the offence and the circumstances of the offence are of equal importance. Where the accused is not represented, the magistrate has a duty to canvass all these aspects with the accused, if necessary postponing the trial to enable the information to be obtained.

Criminal procedure — verdict — special verdict under Mental Health Act [*Chapter 15:12*] — person suffering from temporary psychotic episode at time of offence — entitled to special verdict and, if no longer mentally disordered, to be released

S v *Machona* HH-14-02 (Chinhengo J, Guvava J concurring)

After a series of personal misfortunes, the appellant attempted to commit suicide by cutting his own throat. When taken to a doctor for treatment, he attacked the doctor, severely and permanently injuring him. The medical evidence was that the appellant, who was charged with attempted murder, had suffered a brief Areactive psychosis" or Apsychotic episode" which was unlikely to recur. Held: the appellant was mentally disordered at the time, and not merely suffering from diminished responsibility, and should have been found not guilty by reason of insanity. Because he was no longer mentally disordered, he was entitled to be released from custody.

Criminal procedure (sentence) — general principles — corporal punishment — a very severe form of punishment — should not be resorted to where other sentencing options are available

S v *Tototai* HH-5-02 (Hungwe J)

Corporal punishment should only be imposed when the personal circumstances of the accused and the nature of the crime clearly justify it. It must be the most effective, if not the only, form of punishment available. It should not be imposed where it is possible for a young person to pay a fine or undergo community service.

Criminal procedure (sentence) — general principles — factors affecting — crime involving dishonesty — large amount involved — accused voluntarily making full restitution and showing contrition, repentance and reformation — fine appropriate

S v *Allegrucci* HB-37-02 (Sibanda J, Cheda J concurring)

The appellant made a fraudulent claim against an insurance company, but when the fraud was discovered he admitted it, co-operated fully with the insurer, and made full restitution plus interest and paid certain other expenses. Held: there is no rule which states that where the amount of money involved is large, the accused must necessarily get a custodial sentence. Each case must be decided on its merits. Even where the amount is large, if the accused has, on his own initiative and accord prior to conviction and sentence made good his damage by paying full restitution and in circumstances that clearly indicate that he is contrite, repentant and certainly reformed, a fine may be appropriate.

Criminal procedure (sentence) — general principles — imprisonment — date from which sentence of imprisonment begins — not competent to order that sentence should run from date of arrest and detention

S v *Blanchard & Ors* S-78-01 (Chidyausiku CJ, Sandura JJA concurring, McNally JA dissenting in part)

See above, under CRIMINAL LAW Statutory offences

Criminal procedure (sentence) — general principles — pre-sentencing information — importance of — duty of court to ensure that such evidence is fully canvassed

S v *Ngulube* HH-48-02 (Ndou J)

See above, under CRIMINAL PROCEDURE (Trial — conduct of — unrepresented accused)

Criminal procedure (sentence) — general principles — youthful offenders — need to treat differently from adult offenders — need to avoid imprisonment

S v *Munukwa* HH-35-02 (Chinhengo J, Guvava J concurring)

Offenders in the age group of 18 to 21 years are young offenders who, depending on the offence of which they are convicted and the circumstances thereof, must generally be treated differently from adult offenders. In this country there are advanced, modern and appropriate provisions for the treatment of young offenders. Judicial officers are unfortunately behind in their treatment of young offenders and have not acclimatised to these alternative methods of treating youthful offenders. The routine imprisonment of such offenders should be avoided.

Criminal procedure (sentence) — common law offences — fraud — large amount involved — accused voluntarily making full restitution and showing contrition, repentance and reformation — fine appropriate

S v *Allegrucci* HB-37-02 (Sibanda J, Cheda J concurring)

See above, under CRIMINAL PROCEDURE (SENTENCE) General principles (Factors affecting)

Criminal procedure (sentence) — statutory offences — Aircraft (Offences) Act [*Chapter 9:01*] — s 7(1)(a) — placing dangerous goods on an aircraft without lawful excuse — Law and Order (Maintenance) Act [*Chapter 11:07*] — s 37(3) — possession of offensive weapons without lawful authority or reasonable excuse — appropriate sentence

S v *Blanchard & Ors* S-78-01 (Chidyausiku CJ, Sandura JA concurring, McNally JA dissenting in part)

See above, under CRIMINAL LAW Statutory offences.

Criminal procedure (sentence) — statutory offences — Control of Goods (Price Control) Regulations 2001 (SI 334 of 2001) — s 39(1)(b) — selling goods at price exceeding that fixed in price control order — no minimum penalty provided — fine relating to "value" of the commodity — meaning

S v *Chihwai & Ors* HH-93-02 (Smith J)

The Control of Goods (Price Control) Regulations 2001 (SI 334 of 2001) do not provide a minimum penalty for selling goods a price above that fixed in a price control order. They provide a maximum penalty which relates to the Avalue" of the commodity being sold. In this context, the Avalue" of the commodity is the gazetted maximum price.

Criminal procedure (sentence) — statutory offences — Prevention of Corruption Act [*Chapter 9:16*] — attempting to bribe police officers — whether community service may be imposed

S v *Nyoni* HB-22-02 (Cheda J)

Attempting to bribe a police officer is too serious an offence for community service to be considered as appropriate. A substantive term of imprisonment should be imposed.

Criminal procedure (sentence) — statutory offences — Prevention of Corruption Act [*Chapter 9:16*] — attempting to bribe a police officer — approach to be taken to such offences — youthful offender — effective sentence below 12 months — community service should have been considered

S v *Mutukura* HH-39-02 (Guvava J, Chinhengo J concurring)

The appellant, when stopped at a police road block, offered a bribe to one of the police officers. He pleaded guilty to and was convicted of bribery and sentenced to 6 months' imprisonment, of which 2 months were suspended. On appeal against sentence, held: (1) insufficient weight was given to the plea of guilty; (2) because the effective sentence was less than 12

months, community service should have been considered; (3) where a member of the public is the offender, a distinction must be drawn from the case where the offender is a public officer. The latter situation is regarded more seriously; (4) a sentence of imprisonment was not appropriate and a substantial fine would be substituted.

Customs and excise — seizure — goods imported without duty having been paid — another person subsequently acquiring such goods — acquisition for less that true value — onus on such person to show that he was unaware that goods liable to seizure and that true value paid — requirement to provide evidence to show who imported goods

Chiondegwa v *Director of Customs & Excise* S-18-02 (Sandura JA, Chidyausiku CJ & Ziyambi JA concurring)

The appellant acquired a motor vehicle which had been imported into the country in contravention of the Customs and Excise Act and without duty having been paid. The price he paid was around half the true value. The Director of Customs and Excise seized the vehicle. The appellant sought an order compelling the Director to release the vehicle. Held: the vehicle would not be liable to seizure if it was acquired for true value and the appellant was unaware that it was liable to seizure. The onus of showing that he was unaware of that rested on the appellant. If he did not import the vehicle himself or pay duty on it, he had to produce the evidence necessary to enable the Director to locate the person who did. He had failed to show that he paid the true value and had failed to provide the evidence required.

Customs and excise — seizure — goods imported without duty having been paid — another person subsequently acquiring such goods — true value of goods paid — person acquiring them not aware that they had been imported — seizure more than two years after goods became liable to seizure — right of seizure prescribed

Xaba v *Director of Customs & Excise* HB-45-02 (Sibanda J)

The applicant bought a car over two years after it had first been registered in Zimbabwe. She paid the market value for the car. The Director of Customs seized the vehicle on the grounds that when it was imported no duty was paid. Held: the applicant was entitled to the return of the car. She was not the importer, nor could she been deemed to be. In any event, the right of the Director to seize the vehicle was prescribed.

Damages — assessment — when appeal court may interfere with trial court's decision — expert evidence supporting such finding

United Bottlers (Pvt) Ltd v *Shambawamedza* S-130-01 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

The respondent had hired a paraffin refrigerator from the appellant. It broke down and one of the appellant's employees carried out repairs. In so doing, he failed to remove some spilled paraffin. A fire broke out and the respondent was severely burnt when he opened a cover at the back of the refrigerator and was engulfed in flames. Substantial surgery and other medical treatment were required. The trial court found that the respondent was guilty of contributory negligence. The appellant appealed on the question of liability and the quantum of damages. The respondent cross-appealed against the finding of contributory negligence. Held: (1) The failure by the mechanic to remove the paraffin from the top of the tank and the reservoir where he had spilled it was negligent. Having introduced a new source of danger into the chamber in the form of spilled paraffin a reasonable man would have foreseen the possibility of heat generated in the burner melting the solder and igniting the paraffin causing fire. (2) The act of the respondent in opening the cover was not a *novus actus* affecting the chain of causation but was the kind of act which the appellant might reasonably have anticipated as likely to follow from its employee's act of negligence in leaving spilled paraffin on the tank and reservoir with a lit burner likely to generate a lot of heat if incorrectly positioned under the chimney. (3) On the quantum, not only did the court have before it evidence proving that the surgical operation was necessary but it also had evidence from an expert to the effect that the estimated cost of the operation was reasonable. (4) Before finding that the respondent was guilty of contributory negligence, the court would have had to find that he failed to take the reasonable care which a prudent man in the particular circumstances would have taken for his own safety. On the facts, there was no basis for such a finding.

Damages — *injuria* — bigamy — wife in second, bigamous marriage — entitlement to damages for *injuria*

Sibanda v *Sibanda & Anor* HH-90-02 (Smith J)

The plaintiff went through a marriage ceremony with the defendant at a time when a marriage between him and another woman still subsisted. The plaintiff was unaware of the other marriage. She sued the defendant for divorce, division of the matrimonial property, and damages for the *injuria* suffered by her because of the bigamous marriage. Held: (1) the purported marriage was null and void. (2) Although the plaintiff was entitled to a share, she was not entitled to half the property, because the defendant's real wife and his numerous children were also entitled to support. (3) The plaintiff was entitled to

damages for *injuria*, but without proof that she was a sensitive woman who suffered anguish and humiliation when she discovered the fact of the bigamy, the damages would not be high.

Delict — negligence — contributory negligence — liability for — what must be shown

United Bottlers (Pvt) Ltd v *Shambawamedza* S-130-01 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

See above, under DAMAGES (Assessment)

Election — election petition — allegations made in petition — must be stated with sufficient precision to enable the respondent to know what case he has to answer

Election — election petition — allegation of undue influence and general violence — what must be shown

Mberengwa West Election Petition HH-43-02 (Hlatshwayo J)

Although an election petition may be brought on very wide grounds, the petition itself must state the grounds with sufficient specificity to enable the respondent to know the case he has to answer. Other irregularities revealed during the course of the enquiry may be dealt with in terms of s 137 of the Electoral Act.
Where undue influence and general violence are relied upon, it must be shown that these were in the nature of pressure on the candidate or voters. It must also be shown that they pervaded the whole constituency, and not just a portion of it.

Election — election petition — allegation of non-compliance with provisions of Act — registered voters not being allowed to vote — pages missing from voters roll and other irregularities — result affected

Seke Election Petition HH-11-02 (Ziyambi J)

An election may be set aside under s 149 of the Electoral Act [*Chapter 2:01*] for non-compliance with the provisions of the Act, where such non-compliance affected the result of the election. One provision of the Act is that every registered voter is entitled to vote. It was shown that there were numerous pages missing from the voters roll, that over 3000 voters were wrong turned away on the allegation that their names were not on the voters roll and that some persons were allowed to vote when their names were not on the roll. Held: (1) it was contrary to the principles of the Act to say that voters denied the right to vote at one polling station should go to another in the hope of finding their names on the roll there. The intention of the Act was that the polling station should be brought to the people. (2) Once the non-compliance with the Act was established, the Registrar-General had to show that the non-compliance was trivial. This was not the case here. (3) The court did not have to find that but for the irregularity another candidate would have been elected. The word Aaffect" here meant Abear upon the result", and there could be no doubt that if the voters had been allowed to vote the result would have been different.

Election — election petition — burden of proof upon petitioner — akin to that on prosecution in a criminal trial — election offences — undue influence — scope of offence — must be aimed at influencing particular person — criminal acts aimed at electorate at large — not necessarily undue influence — Electoral Act [*Chapter2:01*] — ss 105, 137

Mwenezi Election Petition HH-4-02 (Makarau J)

The burden of proof in an election petition is high, akin to that in criminal proceedings. The election offence of undue influence is widely cast, in respect of the acts covered, but narrowly cast, in that the acts must have been committed by the respondent or his agent, and must have been aimed at a particular person, and not at the electorate at large. Acts such as illegal roadblocks and assaults upon the candidate, though criminal, do not necessarily amount to undue influence.

Election — election petition — nature of proceedings — essentially civil, not criminal, proceedings — suitability of petition procedure for enforcing election morality — election offences — undue influence — general violence not covered by s 105 of Electoral Act [*Chapter 2:01*] — review of finding by Electoral Supervisory Commission that election free and fair — need to cite Commission as a party

Mt Darwin South Election Petition HH-8-02 (Makarau J)

Election petitions are essentially civil proceedings. The court does not return a verdict, but is called upon to consider whether or not there is sufficient evidence upon which a conviction will ensue under proper prosecution. However, the proceedings, where the petitioner has to prove the allegations beyond reasonable doubt, are not suitable as a basis for

enforcing election morality. The offence of undue influence has been narrowly cast, and does not cover a number of acts which are unacceptable in a democratic society, such as general violence which is not targeted at a particular person with the specific intent of inducing or compelling that person to sign or refrain from signing a nomination paper, to vote or to refrain from voting. Where the Electoral Supervisory Commission has declared that election to be free and fair, the court would not be able to review that decision unless the Commission was cited as a party.

Election — notice of — minimum period between notice of election and polling — mandatory nature of — not permissible for shorter notice to be given — not a formal defect capable of condonation

MDC v *Registrar-General & Anor* HB-45-01 (Kamocha J)

The first respondent gave 25 days' notice of council elections to be held in Matabeleland North. The applicants applied for the election to be set aside and for fresh nominations and elections to be held. Held: s 103L of the Electoral Act requires that a minimum of 28 days' notice must be given of an election, and anything less would fall short of the intention of the legislature. There was no good reason why the respondent could not comply with the provisions of the Act. The defect was not a formal one: it was a substantive defect, and the order sought would be granted.

Election — Presidential election — voter — who is entitled to vote — common roll — what is

Tsvangirai v *Registrar-General & Ors* HH-22-02 (Makarau J)

Under s 28(2) of the Constitution, the President is elected by voters on the Acommon roll". This term is not defined in any law. All persons who are adult citizens or who have been permanently resident in Zimbabwe since December 1985, and who can either prove residence in a particular constituency or satisfy the Registrar-General of links with another constituency, are entitled to be registered as voters. The Constitution entitles them to vote for the President. It is not necessary for them to be in their constituency, and they should be allowed to vote at any polling station where copies of the common roll are available.

Election — Presidential election — common roll — meaning — does not mean that voter entitled to vote elsewhere than his own constituency — requirement for voter to register in a particular constituency

Registrar-General & Ors v *Tsvangirai* S-12-01 (Chidyausiku CJ, Cheda, Ziyambi & Malaba JJA concurring, Sandura JA dissenting in part)

See above, under CONSTITUTIONAL LAW.

Election — Registrar-General — discretionary powers of — limited grounds on which court may interfere with exercise of those powers

Tsvangirai & Anor v *Registrar-General & Ors* HH-37-02 (Garwe JP)

The Registrar-General had refused to extend the voting in the Presidential election to a fourth day. The applicants sought an order compelling him to do so. Held: a court has no jurisdiction to intervene in administrative decisions or direct administrative authorities on how they should act. The discretion bestowed on an administrative authority cannot be interfered with in the absence of illegality, irrationality or procedural impropriety. That the discretion of the Registrar-General should not lightly be interfered with is also clear from the provisions of the Electoral Act itself, the intention of which was to create some degree of independence on the part of the Registrar General except where he is given instructions by the Election Directorate. The court had no jurisdiction to give administrative directions to the Registrar General except in the limited circumstances mentioned, and the applicants had not established as basis on which the court could interfere.

Election — Registrar-General — powers of — decision of constituency registrar — Registrar-General's right to bring such decision on review

Kombayi v *Registrar-General* S-88-01 (McNally JA, Sandura & Malaba JJA concurring)

See below, under ELECTION (Urban council election)

Election — urban council election — mayoral election — candidate — qualifications required for — candidate not holding such qualifications — nomination a nullity

Kombayi v *Registrar-General* S-88-01 (McNally JA, Sandura & Malaba JJA concurring)

The appellant lodged nomination papers as a candidate for a mayoral election. The constituency registrar accepted his papers, but the Registrar-General took the matter on review to the High Court on the grounds that the appellant did not have the requisite educational qualifications. The High Court upheld the Registrar-General's objection. The appellant appealed on various grounds. Held: (1) the registrar-General had *locus standi*. The constituency registrar exercised his powers in his own right, not as the Registrar-General's subordinate. (2) The educational requirements laid down by the Act were quite clear, and the appellant did not hold those qualifications. There were no grounds for arguing that his qualifications were equivalent to those stipulated. (3) The Constitution allows discrimination on the grounds of qualification for public office or service with a body corporate established under an Act of Parliament for a public purpose. The city council concerned was such a body.

Election — voter — qualification — citizen permanently resident since 31 December 1985 — such person ceasing to be citizen because of failure to renounce foreign citizenship — does not lose right to vote — removal of names of such persons from voters roll not lawful — citizenship laws of Zimbabwe — history of — extension of time period within which to renounce foreign citizenship — such extension should be granted — requirement to renounce foreign citizenship — only applies to persons who are actually foreign citizens

Tsvangirai v *Registrar-General & Ors* HH-29-02 (Adam J)

A citizen who has been permanently resident in Zimbabwe since 31 December 1985 does not cease to be a voter because he has lost his citizenship by virtue of the Citizenship of Zimbabwe Amendment Act 2001. The Minister's failure to extend the 6 month period allowed for renunciation of foreign citizenship was unreasonable, given the difficulties and time required to renounce foreign citizenship according to the laws of the foreign countries concerned. The Registrar-General was wrong in assuming that any person who had a foreign born parent was automatically a foreign citizen. It was not his function to interpret the law. A Zimbabwe citizen was only required to renounce foreign citizenship if he was actually a foreign citizen, not if he merely qualified for it or had a claim to it.

Election — voter — qualification — citizen permanently resident since 31 December 1985 — loses right to vote if ceases to be a citizen

Registrar-General & Ors v *Tsvangirai* S-12-01 (Chidyausiku CJ, Cheda, Ziyambi & Malaba JJA concurring, Sandura JA dissenting in part)

See above, under CONSTITUTIONAL LAW.

Employment — code of conduct — disciplinary action under — hearing by disciplinary tribunal — conduct of — natural justice — observance of — not necessary for oral evidence to be led, nor to allow cross-examination

Chataira v *ZESA* S-83-01 (Ebrahim JA, Chidyausiku CJ & Malaba JA concurring)

In a disciplinary hearing against an employee, natural justice requires that the employee should know of the accusations he has to meet; that he should be given an opportunity to state his case; and that the internal tribunal acts in good faith. It is not necessary that *viva voce* evidence be led. The employee must be shown any statements or documentary evidence that is being produced before the disciplinary committee but he need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral bearing; or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents.

Employment — contract — alienation — assets of one employer being alienated to another — employees of first employer thereby becoming employees of second — notice of retrenchment by first employer — such notice falling away when assets alienated

Nkomo & Ors v *Rubber & Allied Products (Pvt) Ltd & Anor* S-14-02 (Sandura JA, Ziyambi & Malaba JJA concurring)

The appellants were employed by the first respondent, which decided to sell its assets and business to another company. As the other company would not be able to absorb all the first respondent's employees, notice of retrenchment was given to them. Three days later the first respondent's assets and business were sold to the other company. The appellants objected to the retrenchment and the normal processes were followed to deal with their objection. An application by the appellants to compel the first respondent to pay salaries and benefits failed. On appeal, held: the application was misconceived. When the first respondent's assets were transferred, the appellants became employees of the other company. The notice of retrenchment by the first respondent fell away. Any relief should have been sought against the other company.

Employment — contract — termination — dismissal — constructive — employee given choice between resignation and disciplinary proceedings — what must be shown before constructive dismissal can be said to have occurred

Muzengi v *Standard Chartered Bank Zimbabwe Ltd & Anor* S-129-01 (Ziyambi JA, Chidyausiku CJ & Malaba JA concurring)

The appellant, faced with the prospect of suspension without pay and, eventually, dismissal and having been given the option to resign and receive his terminal benefits, opted for resignation. Held: it could not be said that constructive dismissal had occurred, and his employment ceased when he submitted his resignation.

Employment — contract — termination — on notice — contract of assignment in course of employment — such contract subject to termination on notice — contract of employment not thereby also liable to termination on notice — reinstatement after termination — allegation of breakdown of relations between parties — what must be shown before reinstatement may be refused

Dairibord Zimbabwe Ltd v *Muyambi* S-22-02 (Sandura JA, Chidyausiku CJ & Cheda JA concurring)

The respondent was employed by the appellant. During his employment, he was assigned to a sister company outside Zimbabwe for a fixed period. The contract of assignment could be terminated on notice. The appellant sought to give the appellant notice after his return to Zimbabwe. It also argued that if the respondent's employment had been terminated, reinstatement should not be ordered because the relationship between the parties had broken down to such an extent as to make reinstatement intolerable. Held: (1) termination on notice only applied to the contract of assignment, not to that of employment. The latter could only be terminated in terms of the appellant's code of conduct or under the Labour Relations Act. The respondent thus remained an employee. (2) Even if reinstatement was in issue, the appellant did not produce any proof that the relationship between the parties had broken down to the extent required.

Employment — contract — termination — resignation — a unilateral act, requiring neither acceptance nor rejection by the employer — notice of resignation — interpretation of — letter stating employee wished to resign — not an offer to do so

Riva v *NSSA* HH-68-02 (Blackie J)

After disciplinary proceedings were started against him by the respondent, his employer, the applicant wrote to the respondent, stating that Aas per his contract", he wished to give three months' notice to terminate his employment and to make use of the benefits normally due on resignation. Ten days later, he wrote to say that as he had received no confirmation of his letter, he retracted his notice of resignation. The respondent wrote at the same time agreeing that he be allowed to terminate his services by resignation. The applicant claimed that his letter was not a formal act of resignation, but an offer which could be accepted or rejected by the respondent. Held: the giving of notice is a unilateral act, which requires no acceptance or rejection. It can only be withdrawn with the consent of the employer. The applicant's letter was not expressed as an offer but as a statement, and as such his resignation could not be withdrawn except with the respondent's consent.

Employment — contract — termination — right of employee to receive salary and other benefits — does not remove employer's right to set off any liquidated debts owed by the employee to the employer

Ndebele v *Industrial Crops Research Institute* HB-65-02 (Chiweshe J)

The right given by s 13 of the Labour Relations Act [*Chapter 28:01*] to an employee, at the conclusion of a contract of employment, to receive his pay and benefits does not override the employer's right to set off any liquidated debts owing to him by the employee.

Employment — contract — termination — rural district council employee — applicability of Labour Relations legislation to

Mukundu v *Chairman, Mutasa RDC & Anor* S-25-02 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

A rural district council's right to discharge an employee in terms of the conditions of service approved under s 67(1) of the Rural District Councils Act does not detract from the council's obligation to proceed in terms of the labour legislation governing the suspension and discharge of employees.

Employment – disciplinary action – warning – entitlement of employee to be heard before warning issued – transfer other than in accordance with wishes of employee – right of employee to be heard

Director of Works &Anor v *Nyasulu & Ors* S-27-02 (Ziyambi JA, Chidyausiku CJ & Ebrahim JA concurring)

The respondents received warning letters, based on allegations of unsatisfactory performance of their duties, then later letters transferring them elsewhere in the appellant's service. Held: a hearing should have been held before a warning was issued; and even if the transfers had been justifiable as merely administrative moves and not punitive ones, the respondents were entitled to be heard before being transferred.

Employment – industrial disputes – industrial action – notice of – requirement to give notice – form of notice required – period of validity of notice

Moyo & Ors v *Central African Batteries (Pvt) Ltd* S-66-02 (Gwaunza AJA, Chidyausiku CJ & Cheda JA concurring)

The appellants gave notice to the respondent, their employer, of a proposed strike. The Ministry of Labour intervened and the strike did not take place on the stated date. The appellants, however, went on strike 4 months later, relying on the same notice. They were dismissed on the grounds that no notice of the later strike had been given. Held: assuming that the respondent had been given proper notice (as opposed to merely becoming aware of the appellants' intention), it would be absurd to hold that a notice would remain valid months later. In any event, the Act required written notice to the employer, and this peremptory requirement had not been met.

Employment — industrial disputes — representation — workers committees — no right to represent members in litigation

Cold Storage Co Workers Committee v *Cold Storage Co Ltd* HB-8-02 (Kamocha J)

A workers committee is not a legal *persona* and is not entitled to represent its members in litigation.

Evidence — credibility — child witness — sexual offence — approach to be taken to — very young child unlikely to make serious allegations without any basis

S v *Musasa* HH-52-02 (Hlatshwayo J)

While the evidence of child witnesses must be approached with caution, such caution must be creative or positive caution, where a judicial officer uses knowledge of psychology or other relevant disciplines in order to maximise the value of such testimony. Psychological research has established that young children do not fantasize about being raped and other unusual, horrific occurrences but that their fantasies and play are characterized by their daily experiences.

Evidence — sexual offences — witness of tender years — no grounds for suggesting that such witnesses are apt to fantasize about such matters

S v *Musasa* S-45-02 (Ziyambi JA, in chambers)

While the nature and circumstances of an alleged sexual offence must be considered carefully, there is no basis for suggesting that in such matters children of tender years are apt to fantasize.

Evidence — sexual matter — complaint — when such evidence may be admitted — complaint induced by leading questions — not admissible

S v *Garande* HH-46-02 (Ndou J, Blackie J concurring)

Evidence of complaint in a sexual matter may only be admitted in limited circumstances. In particular, the complaint must not have been made as a result of leading questions.

Exchange Control — Exchange Control Regulations 1996 (SI 109 of 1996) — s 10 — payment of debt to foreign resident — only lawful through exchange control authority at official rate of exchange

Echodelta Ltd v *Kerr & Downey Safaris (Pvt) Ltd* HH-94-02 (Smith J)

The plaintiff claimed from the defendant a sum being the equivalent in Zimbabwe currency of a stated amount in US dollars. Since the time of the claim, the value of the local currency had collapsed. While official exchange rate had been pegged at 55:1, on the unofficial Aparallel" market the rate was some 6 times higher. It was not possible to buy foreign currency at the official rate; anyone wanting foreign currency had to buy at the Aparallel" rate. Held: the plaintiff was a foreign resident and under

the Exchange Control Regulations the defendant could only pay the debt it owed to the plaintiff by way of an exchange control authority, at the official rate of exchange, even though the official rates of exchange for foreign currencies were far removed from reality.

Exchange control — Exchange Control Regulations 1996 (SI 109 of 1996) — s 11 — payment by Zimbabwean resident in foreign currency to non-resident — payment made out of free funds — payment not unlawful

African Homesteads Touring & Safaris (Pvt) Ltd v *Barker & Anor* HH-101-02 (Hlatshwayo J)

The applicant company entered into an agreement to buy a restaurant from the first respondent, who had emigrated from Zimbabwe. Part of the total price was to be paid in Zimbabwean currency and part in US dollars. The first respondent sought to resile from the contract as he had subsequently had a better offer. When the applicant brought an action to enforce the contract, the first respondent argued that the contract was illegal because it provided for part of the payment in foreign currency. Held: under s 11 of the Exchange Control Regulations, payment in foreign currency outside Zimbabwe was lawful if made from free funds held by the payer. The Regulations did not prohibit a corporate entity from holding free funds. The contract was thus not tainted with illegality or such illegality as to render it null and void.

Family law — husband and wife — divorce — property division following — wife in second, bigamous marriage — entitlement to share of matrimonial property

Sibanda v *Sibanda & Anor* HH-90-02 (Smith J)

See above, under DAMAGES (*Injuria* — bigamy).

Hire-purchase — repossession of goods after failure to pay instalments — purchase price of goods exceeding $3000 — restrictions on repossession imposed by s 20 of the Hire-Purchase Act [*Chapter 14:09*] — not applicable in such a case

UDC Ltd v *Chawara Kapenta Fishing Co-op Ltd* S-29-02 (Ziyambi JA, Chidyausiku CJ & Malaba JA concurring)

The respondent purchased a lorry in terms of a hire-purchase contract financed by the appellant. When it failed to pay arrear instalments on the contract, the appellant repossessed the lorry and sold it. The respondent claimed that the repossession was unlawful, in that it breached s 20 of the Hire-Purchase Act [*Chapter 14:09*], which prohibits repossession other than in accordance with the procedures laid down by that section, in any case where 50% of the purchase price has been paid. Held: s 20 was not applicable in this case, as the purchase price exceeded $3000, and the repossession was lawful. *Per curiam*: the $3000 limit is no longer relevant, as little of value can be purchased for that sum

Intellectual property — trade mark — application to register — two foreign companies, neither having previous trade record in Zimbabwe — application granted to company which first applied for registration

Philip Morris Products Inc v *Marlborough Shirt Co SA Ltd* S-127-01 (McNally JA, Cheda & Ziyambi JJA concurring)

Two companies, neither of which had an established trading record or reputation in Zimbabwe, applied to register an identical trade mark containing the word AMarlboro". The appellant had an international reputation, primarily relating to its cigarette brands, but also in respect of other commodities. The respondent, a South African company, had been selling clothing in South Africa for decades, using the same AMarlboro" device on the clothes. Held: where two parties lodge competing applications to register a trade mark, reputation and a track record may be an advantage, but they are not a prerequisite. Neither party had either a reputation or a track record of trade in Zimbabwe. Priority in time should be the determining factor in this case and as the appellant had applied earlier, it should succeed.

Interest — rate of — judgment sounding in foreign currency — interest payable at rate prevailing in foreign country at time debt arose

Air Zimbabwe (Pvt) Ltd v *Zendera & Ors* S-125-01 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

See above, under CONTRACT (Formation)

International law — sovereign immunity — international organization granted immunity under Privileges and Immunities Act [*Chapter 3:02*] — commercial contract entered into by such organization — such an act *jure gestionis* restricting immunity

Sibanda & Anor v *International Committee of the Red Cross* HH-54-02 (Chinhengo J)

The applicants were employed by the respondent. Their employment was terminated. The applicants disputed the termination. The respondent, which was an international organization enjoying immunity under the Privileges and Immunities Act [*Chapter 3:02*], claimed that the court had no jurisdiction. Held: (1) the respondent had no more immunity than a foreign sovereign. Absolute immunity applies only in respect of *acta jure imperii*; in respect of *acta jure gestionis* restricted immunity applies. If the dispute concerns the commercial transactions of a foreign government and it arises properly within the territorial jurisdiction of our courts there is no ground for granting immunity. (2) An organisation or government claiming immunity in any given case must raise the defence and, after fully canvassing it in court, the court may then decide whether immunity may validly be raised. The ICRC, like a foreign government, enjoys immunity from suit and legal process but subject to international law. (3) When a foreign organisation employs local personnel to carry out certain of its functions, the employment contract is a commercial arrangement of master and servant, which falls to be determined, so far as the question of the organisation's immunity is concerned, as an *actus jure gestionis.* Should a dispute arise from the employer/employee relationship established by such a commercial arrangement, then the doctrine of restricted sovereign immunity should apply.

Interpretation of statutes — principles — *noscitur a sociis* — *expressio unius est exclusio alterius* — applicability — word defined in limited way in 4 cases but not in fifth — court entitled to place wider interpretation in fifth case

Chaduka NO & Anor v *Mandizvidza* S-114-01 (McNally JA, Chidyausiku CJ, Muchechetere JA, Ziyambi JA & Malaba JA concurring)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — Declaration of Rights — s 23).

Local government — appointment of commissioners to run city in absence of councillors — maximum period for which may be appointed — no provision for re-appointment — requirement to hold mayoral and council elections in spite of appointment of commissioners

Stevenson v *Min of Local Government & Ors* S-38-02 (Sandura JA, Ebrahim JA concurring; Ziyambi JA dissenting)

The appellant, a resident of and registered voter in Harare, brought an application in the High Court to compel the holding of mayoral and council elections. The city had been run for about 2 years by commissioners appointed by the Minister, without elections having been held. She brought the action in her personal capacity, but also alleged *locus standi* on other grounds. The trial judge considered that she did not have *locus standi* and declined to hear the application. Held: (1) the trial judge had erred. As a resident of Harare, the appellant had an interest in the issue of whether the affairs of the City of Harare should be run by a commission appointed by the Minister or by an elected mayor and an elected council. (2) On the merits of the matter, there were no grounds for not holding mayoral and council elections as required by the Urban Councils Act. The dates for election stipulated by the Electoral Act had passed. Commissioners could only be appointed for a maximum period of 6 months, and there was no provision for re-appointment. The appointment of commissioners did not entitle the Minister to postpone the holding of elections.

Local government — urban council — election

Kombayi v *Registrar-General* S-88-01 (McNally JA, Sandura & Malaba JJA concurring)

See above, under ELECTION (Urban council election).

Practice and procedure — admission — withdrawal of — when admission may be withdrawn — admission made by mistake and contrary to facts — such admission may be withdrawn

Eastern Highlands Electrical (Pvt) Ltd v *Gibson Investments (Pvt) Ltd* S-26-02 (Ebrahim JA, Chidyausiku CJ & Ziyambi JA concurring)

See above, under APPEAL (Court's powers on appeal — Supreme Court's wide powers in civil appeal)

Practice and procedure — application — declaratory order — when application may be treated as such rather than as application for review — allegation that proceedings under consideration were a nullity and prayer that proceedings be declared void — not an application for review of the proceedings

Geddes Ltd v *Tawonezvi* S-34-02 (Malaba JA, Ebrahim & Sandura JJA concurring)

Thirty-three months after he was dismissed from his employment, the respondent applied to the High Court for relief. His application sought an order setting aside his dismissal and the proceedings on which they were based as being null and void. He alleged several procedural irregularities and failures by the appellant to comply with the applicable code of conduct. The appellant responded that he was out of time to lodge an application for review and that there was no application for condonation. The respondent averred that he was seeking a declaratory order, for which no time limit was provided. Held: in deciding whether an application is one for a declaration or review, the court has to look at the grounds of the application and the evidence produced in support of them. The fact that an applicant seeks a declaratory relief is not in itself proof that the application is not for review. The respondent alleged that the proceedings against him were a nullity because the person conducting them had no jurisdiction to do so, not having been properly appointed. This meant that the person's actions as such were not being reviewed, and the matter could be treated as an application for a declaratory order.

Practice and procedure — application — when appropriate — order for eviction of applicant from property previously granted despite noting of appeal by applicant — subsequent application for order preventing sale of property — effect of such order — correct course of action

Faye Trust v *Zhanje & Anor* HH-57-02 (Smith J)

The applicant had bought a piece of land from the respondent. It defaulted on its payments. The respondent cancelled the sale, and sought the eviction of the applicant. An order for eviction was granted, against which the applicant appealed. Another judge granted an application for leave to execute the order for eviction, notwithstanding the noting of the appeal. The applicant sought an order preventing the respondent from selling the property to a third party. Held: the order sought would have the effect of reinstating the effect of the noting of the appeal. What the applicant should have done was appeal against the order granting leave to execute. The doctrine of issue estoppel meant that the court could not now interfere.

Practice and procedure — discovery — documents in possession of third party — when order may be granted compelling such party to disclose documents — legal or other action must be contemplated

Matabeleland Zambezi Water Trust v *Zimbabwe Newspapers (1980) Ltd* HB-59-01 (Malaba J)

A newspaper owned by the respondent published a series of articles in which it alleged that employees of the applicant had defrauded the applicant of sums of money. The applicant denied the allegations, claiming that they were defamatory. Nonetheless it sought discovery of the documents in possession of the newspaper which would apparently have substantiated the allegations. Held: discovery can only be granted in aid of some existing proceedings, or at the most in aid of intended proceedings. The onus was on the applicant to produce facts which show that there has been a violation of its rights by its employees and officials for the purposes of the vindication of which it required the information in the possession of the respondents. It also had to show that the respondents mixed themselves up with the tortious acts committed against it by its employees and officials. As the applicant denied wrongdoing on the part of its employees, disclosure was sought not for the purpose of vindicating rights but for the mere gratification of curiosity.

Practice and procedure — execution — sale — when sale in execution may be set aside — sale price said to be unreasonably low — onus on judgment debtor — valuation certificate — what it should contain — need for such certificate to be on oath — weight to be attached to valuation certificate — setting aside of sale on equitable grounds — balance if equities must be in favour of judgment debtor

Zimunhu v *Gwati & Ors* S-43-02 (Sandura JA, Ziyambi JA & Gwaunza AJA concurring)

The appellant sought to have the sale in execution of his dwelling house set aside. The first ground he advanced was that the sale was for less than the market value. He produced a valuator's certificate, dated a year before the sale, which put the value as nearly 3 times what it realised at the sale in execution. He also advanced four Aequitable" grounds, one of which was that the sale in execution did not realise enough to cover the debts, whereas a sale by private treaty would have. Held: (1) the onus of showing that the sale price was unreasonably low lay on the appellant. The valuation obtained was out of date; it did not show the upper and lower limits of the suggested market price; it was not made under oath; it did not show the qualifications of the valuator; and in any event the opinion of a valuator is worth less than the acid test of the price actually offered. Consequently, the appellant had failed to discharge the onus on him. (2) Only if the balance of equities is in favour of the judgment debtor may a sale in execution be set aside on equitable grounds. On the facts, the appellant had failed to show that this was the case.

Practice and procedure — execution — stay of execution pending appeal — mining claim — order for ejectment from claim — rights of owner of claim — risk of irreparable harm of execution stayed

Chase Minerals (Pvt) Ltd v *Madzikita* HB-44-02 (Sibanda J)

The applicant was registered owner of certain mining claims and obtained an order for the ejectment of the respondent from them. The respondent sought to prevent execution pending an appeal. Held: as registered owner of the claims, the applicant had exclusive rights to mine the ore there. For anyone else to take it constituted theft. The applicant could be irreparably damaged if execution were stayed.

Practice and procedure – judgment – default judgment – rescission – application – late application – need to apply for condonation as well – effect of failure to do so

Highline Motors Spares & Hardware (1933) (Pvt) Ltd & Ors v *Zimbank* S-37-02 (Sandura JA, Ziyambi & Gwaunza JJA concurring)

Default judgment was taken against the appellants, and 4 months later their property was attached in execution. Four months after that an application for rescission of the default judgment was filed. No application for condonation of the late application for rescission was filed. Held: the court should not have entertained the application for rescission at all. Even if an application for condonation had been made, the appellants did not establish that they were not in wilful default. They could not rely on their lawyers' dilatoriness. In any event, it was clear that the appellants did not have a *bona fide* defence to the claim.

Practice and procedure – judgment – default judgment – rescission – application for – requirement to state date on which applicant became aware that default judgment had been given – effect of failure to do so

Sibanda v *Ntini* S-74-02 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

An application for rescission of a default judgment must be made within one month of the date on which the applicant becomes aware of the judgment having been taken. That date must be stated in the application. If the date is not stated, the applicant is deemed to have become aware of the judgment two days after the judgment was given. If the application for rescission is made later, it must be accompanied by an application for condonation.

Practice and procedure — judgment — default judgment — rescission of — "good and sufficient cause" for rescission — meaning of — relevance of wilful default, *bona fides* and *prima facie* defence in determining whether good and sufficient cause shown — wilful default — meaning of

V Saitis & Co (Pvt) Ltd v *Fenlake (Pvt) Ltd* HH-65-02 (Chinhengo J)

In the High Court, rescission of a default judgment may be set aside for Agood and sufficient cause". In deciding whether good and sufficient cause exists, the court will have regard to such factors as whether the applicant was in wilful default, whether his application was *bona fide* and whether he had a *prima facie* defence to the claim. The existence of wilful default does not necessarily mean that good and sufficient cause cannot exist. Each element of the test of good and sufficient cause may be decisive on its own in any particular case but that does not mean that it becomes the only element or that the court should not have regard to the other elements of good and sufficient cause. It is not correct to say that in the magistrates court rescission will be granted unless wilful default is proved; there must still be good and sufficient cause shown for rescission. AWilful" default connotes deliberateness in the sense of a knowledge of the action and its legal consequences, and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be. But where a party, deliberately and with full knowledge of the legal consequences of the default, refrains from defending the action because he genuinely believes that such defence is not called for, as where he believes that the respondent's claim is either ill-founded in law or that he has discharged his obligation giving rise to the claim, his refraining from defending the action cannot be wilful.

Practice and procedure — judgment — default judgment — validity — before default judgment may be granted, procedures set out in Rules must be followed — failure to comply with Rules — default judgment a nullity

Heating Elements Engineering (Pvt) Ltd & Ors v *PTA Bank* S-13-02 (Sandura JA, Cheda and Ziyambi JJA concurring)

The respondents brought an action against the appellants. After the appellants had requested further particulars, which were supplied, they requested further and better particulars. The respondents, considering that such particulars were unnecessary, filed a notice of intention to bar. The appellants filed another request for further and better particulars. The respondents then obtained default judgment, which the appellants sought to have rescinded. Held: the default judgment could only have been

properly granted if the procedure for barring the appellants had been correctly followed. These were defective in several respects and so default judgment could not have been granted in terms of the Rules.

Practice and procedure — judgment — judgment expressed in foreign currency but payable in Zimbabwe — must be paid at official rate of exchange even though such rate unrealistic and would result in loss to plaintiff

Echodelta Ltd v *Kerr & Downey Safaris (Pvt) Ltd* HH-94-02 (Smith J)

See above, under EXCHANGE CONTROL.

Practice and procedure — order — validity — order purporting to modify statutory requirements — not competent for court to do so, irrespective of motives

Registrar-General v *Combined Harare Residents Assn & Anor* S-4-02 (Chidyausiku CJ, in chambers)
Registrar-General v *Combined Harare Residents Assn & Anor* S-7-02 (Chidyausiku CJ, Cheda, Ziyambi & Malaba JJA concurring, Ebrahim JA dissenting)

In late 2001 the Association brought an action in the High Court to compel the Registrar-General to hold mayoral and council elections for Harare, which had been run by a commission appointed by the Minister for well over a year. The High Court ordered that the elections be held on 28 December 2001, and the Registrar-General appealed. The Supreme Court dismissed the appeal, other than to change the date to 11 February 2002. If the Registrar-General was going to comply with the Supreme Court's order, he would have had to start the process no later than 14 January. He failed to take any steps to comply with the Supreme Court's order. On 23 January the President issued a notice, purportedly in terms of s 158 of the Electoral Act [*Chapter 2:*01], which stated that notwithstanding any order of court to the contrary, the Harare election were to be held on 9 and 10 March 2002. On 28 January the Association sought a provisional order from the High Court compelling the Registrar-General to give formal notice of the election and declaring the Presidential notice to be *ultra vires* the Act. Held: that before a provisional order could be issued, the court had to be satisfied that the Association had made out a *prima facie* case. This it had done: the Supreme Court's order was still extant, and it seemed clear that the Electoral Act did not allow the President to override a court order. However, the time limits set out in the Act would of necessity have to be modified to meet the election date of 11 February.

The Registrar-General filed a notice of appeal, and the papers were laid before the Chief Justice in chambers. Held: the order against which the Registrar-General sought to appeal was a provisional one, and he should have sought leave of the court *a quo* to appeal. The crucial issue was whether the Notice was valid. Leave to appeal should be sought from the court *a quo*.

The Registrar-General duly applied to the court *a quo* for leave to appeal. Held: there could only be one ground of appeal, namely, that the respondents had failed to make out a *prima facie* case, and to succeed in doing so he had to show that he had a reasonable prospect of success. The prospect depended on the validity of the Notice. Section 158 allowed the President to make statutory instruments suspending or amending any provision of the Act or any other law, in so far as it applied to any election. On the authorities, and on a reading of s 158 itself, Aany other law" was to be limited to statute law, not to court orders or the common law. There was thus no prospect of success and leave to appeal would be refused.

The Registrar-General then sought leave of the Supreme Court to appeal against the provisional order. Held (by the majority): (1) because of the importance of the case, leave should be granted. (2) The court *a quo* had no power to modify the provisions of the Electoral Act by prescribing shorter periods for the election process than those in the Act; only Parliament could do that. That alone meant the provisional order could not be upheld. (3) The Notice was the law in force until a competent court declared it invalid. The court *a quo* did not have to, and could not, make a final determination on that issue, as its order was provisional only. (4) It was not competent in these circumstances for the Supreme Court to determine the validity of the Notice, which thus remained the existing law. (By Ebrahim JA, dissenting): the question for determination was the validity of the Notice, and the phrase Aany other law" in s 158 could not be interpreted as including a court order.

Practice and procedure — parties — immunity — sovereign immunity — doctrine of applied immunity in international law — restricted immunity — part of the law of Zimbabwe — exact bounds of restricted immunity — only accords immunity to *acta jure imperii* — commercial transaction — employment contract — an *actum jure gestionis* — restricted immunity applies

Sibanda & Anor v *International Committee of the Red Cross* HH-54-02 (Chinhengo J)

See above, under INTERNATIONAL LAW (Sovereign immunity).

Practice and procedure — parties — *locus standi* — need for plaintiff to show an interest or special reason entitling him to sue — resident of city — such person having an interest in whether affairs of city should be run by an elected mayor and council

Stevenson v *Min of Local Government & Ors* S-38-02 (Sandura JA, Ebrahim JA concurring; Ziyambi JA dissenting)

See above, under LOCAL GOVERNMENT (Appointment of commissioners to run city in absence of councillors)

Practice and procedure — parties — party in contempt — not entitled to be heard until contempt purged

Mpofu v *Mlilo* HB-011-02 (Cheda J)

The respondent had obtained an ejectment order against the applicant and the Sheriff had effected the ejection. However, the applicant sought the aid of a city councillor, who prevented the respondent from taking possession. The applicant then sought a stay of execution. Held: the applicant could not be heard. He was in contempt of court. His remedy, if he did not accept the ejectment order, was to appeal against it. Until he did so, he was bound to obey it. He deliberately sought to frustrate and impede the course of justice.

Practice and procedure — parties — representation — workers committee — not entitled to represent members in litigation on their behalf

Cold Storage Co Workers Committee v *Cold Storage Co Ltd* HB-8-02 (Kamocha J)

A workers committee is not a legal *persona* and is not entitled to represent its members in litigation.

Practice and procedure — pleadings — exception — when may be taken — remedy available when complaint goes to root of opponent's claim or defence

Scotfin Ltd v *Polka Nominees (Nineteen) (Pvt) Ltd & Ors* HH-58-02 (Hlatshwayo J)

See above, under CONTRACT (Lease).

Practice and procedure — pleadings — issue not raised in pleadings — when may be adjudicated on — matter raised at start of trial and fully canvassed in evidence — permissible to treat matter as if pleaded

Guardian Security Svcs (Pvt) Ltd v *ZBC* S-95-01 (Sandura JA, Chidyausiku CJ & Ziyambi JA concurring)

See above, under CONTRACT (Breach)

Practice and procedure — *res judicata* — principles — what must be shown to satisfy plea of *res judicata* — distinction from issue estoppel — applicability of principles of issue estoppel in Zimbabwean law

Galante v *Galante (1)* HH-31-02 (Smith J)

The parties, who were husband and wife, came to Zimbabwe from the United States and established residence here. The wife sought a divorce from her husband but after the litigation had been under way abandoned that claim. She had averred, in order to establish jurisdiction, that her husband was domiciled in Zimbabwe. She has made a similar averment when she claimed maintenance. However, when the husband filed an action for divorce, she filed a special plea, claiming that the court did not have jurisdiction because he was not domiciled here. The husband claimed that she was estopped from denying that the court had jurisdiction. Held: Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties, involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue. This is similar to the somewhat narrower Roman-Dutch concept of *res judicata*, the requisites of which are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties, and the same thing must have been demanded. While the doctrine of issue estoppel may not be part of Roman-Dutch law, the courts, in the wider application of existing law in the light of current modes of thought, have found the artificiality of limiting estoppel to the same subject to be unproductive of justice, and have embraced the doctrine of issue estoppel under the general rule of public policy that there should be finality in litigation. The averment that the husband was domiciled here was essential to the wife's claim and she could not now dispute it. The equities of the case did not demand a lifting of the bar of issue estoppel.

Practice and procedure – *res judicata* – requirements for – need for all three elements to be satisfied – delictual claims arising out of same cause of action as contractual claim – not previously pursued – not *res judicata*

Gwaze v *NRZ* S-44-02 (Gwaunza JA, Sandura & Ziyambi JJA concurring)

The appellant was dismissed by his former employer. He took the matter to the Labour Tribunal, but while the Tribunal's decision was pending, he tendered his resignation and demanded and received terminal benefits. The Tribunal ruled that his dismissal had been unlawful and ordered that he be paid his full salary up to the date of his resignation. Over a year later the appellant brought an action in the High Court, claiming among other things back pay and damages for various delictual wrongs allegedly suffered as a result of his dismissal. Held: the claim for back pay and other benefits was *res judicata*, but the delictual claims were not, as they had not been brought before the Labour Tribunal, nor could have been.

Practice and procedure — review — late noting of application for — condonation — what must be shown — applicant establishing good grounds for delay — prospects of success poor — application refused

Sithole v *City of Harare* HH-60-02 (Ndou J)

The applicant had been dismissed by the respondent on disciplinary charges. Some 19 months later, she brought an application for review. In seeking condonation, she argued that the delay was caused by her attempts to seek redress through domestic remedies. Held: although the explanation for the delay was reasonable, the prospects of success were poor. Condonation would not be granted.

Practice and procedure — summary judgment — application — founding affidavit — who may depose to — employee of plaintiff company — must show that he holds office which would enable him to have acquired personal knowledge of facts deposed to

Time Bank of Zimbabwe Ltd v *Moyo* HH-26-02 (Smith J)

In an application for summary judgment, the founding affidavit should be made by the plaintiff himself or by any other person who can swear positively to the facts; it must be an affidavit verifying the cause of action and the amount, if any, claimed; and it must contain a statement by the deponent that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. Where an application is made by a company, the affidavit must be made by an office or employee of the company, who should give some indication of his office or capacity which would show an opportunity to have acquired personal knowledge of the facts to which he deposes. A bank manager or other officer of a bank who holds a position that gives him access to the relevant documentation on which he can obtain the knowledge or form the beliefs set out in the founding affidavit is competent to make the affidavit.

Practice and procedure — trial — postponement of — application — when should be granted — principles

Galante v *Galante (2)* HH-89-02 (Smith J)

A court should be slow to refuse a *bona fide* and timeous application for the postponement of a trial where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case. The dominant consideration in the exercise of the court's discretion will be whether prejudice is caused to either party. The prejudice to the respondent may in some cases be compensated for by an order of costs, but the fact that it can be so compensated does not entitle the applicant to the postponement sought.

Prescription — extinctive — hire-purchase contract — when claim becomes prescribed — claim prescribed 730 days after end of repayment period stipulated in hire-purchase agreement

Udc Ltd v *Dorba Dorba Transport (Pvt) Ltd & Ors* S-32-02 (Sandura JA, Cheda & Malaba JJA concurring)

The appellant claimed against the respondents after the first respondent had defaulted on the payments due by it under two hire-purchase agreements which had been ceded to the appellant. The two agreements had specified that the full price had to be paid within two years and three years, respectively. More than three years after the last instalment was due under the later agreement, summons was issued. The respondents pleaded prescription. The appellant argued that as the maximum period over which the full purchase price under a hire-purchase agreement is payable is 60 months, and a period of 730 days after that period had expired was allowed before prescription operated, the appellant was in time. Held: although the Act

prescribed a maximum period of 60 months, the parties had agreed to a shorter period, and the action should have been brought within 730 of the agreed periods expiring.

Prescription — period of — novation — novated debt — action brought against surety after judgment taken against principal debtor — action brought after prescription period for original debt had expired but before expiry of prescription period for novated debt — surety's liability dependent on construction of deed of suretyship

PTC v *Lamb* HH-19-02 (Smith J)

See above, under CONTRACT (Suretyship)

Property and real rights — lien — always accessory to a principal obligation — mortgage bond — mortgagor's liability only in respect of obligation for which mortgage undertaken and no other — not permissible for bond holder to retain title deeds as security for other unsecured loan

Mkombachoto v *CBZ Ltd & Anor* HH-10-02 (Ndou J)

See above, under COMPANY (Legal personality)

Property and real rights — servitude — praedial servitude — holder of dominant tenement — how must exercise his rights — deep open storm water drain constructed through residential stand — not reasonable to leave such drain uncovered

Mhaka & Anor v *Zimre & Anor* HH-95-02 (Smith J)

The applicants bought a residential stand from the respondent. They found that the size of the stand had been substantially reduced by the existence of a deep, open storm water drain constructed along one side of the stand. They argued that the respondent had no right to construct the drain. Held: (1) it was a condition of the applicants' title that they had to grant a servitude for a storm-water drain whenever one was required. (2) The dominant tenement must exercise its rights over the servient tenement *civiliter modo*. While the storm-water drain was necessary and could not be moved, there was no reason why it could not be covered. To leave it uncovered would create a serious hazard, particularly to small children.

Review — application for — employment matter — domestic remedies under code of conduct and labour legislation not exhausted — no special reason shown justifying approach to High Court — application should not be entertained

Muzengi v *Standard Chartered Bank Zimbabwe Ltd & Anor* S-129-01 (Ziyambi JA, Chidyausiku CJ & Malaba JA concurring)

Where domestic remedies have not been exhausted and proceedings are still possible under the applicable legislation, it is peremptory that an applicant for review shows special reasons justifying his approach to the High Court. In the absence of such reasons, his application should not be entertained.

Statutes — Electoral Act [*Chapter 2:01*] — s 158 — provision enabling President to make statutory instruments amending provisions of Act or "any other law" — whether allows him to amend or override court orders

Combined Harare Residents Assn & Anor v *Registrar-General & Ors* HH-24-02 (Chinhengo J)
Registrar-General v *Combined Harare Residents Assn & Anor* HH-27-02 (Chinhengo J)
Registrar-General v *Combined Harare Residents Assn & Anor* S-7-02 (*per* Ebrahim JA dissenting)

See above, under PRACTICE AND PROCEDURE (Order — validity)

Statutes — interpretation — history and background of legislation — when permissible to take account of history and background

Registrar-General & Ors v *Tsvangirai* S-12-01 (Chidyausiku CJ, Cheda, Ziyambi & Malaba JJA concurring, Sandura JA dissenting in part)

See above, under CONSTITUTIONAL LAW.

Statutes — Public Order and Security Act [*Chapter 11:17*] — s 24 — notification to police of public meeting — meeting of trade union — no requirement to notify police of such meeting — public meeting — what is — meeting of trade union council not such a meeting

ZCTU v *OC Police, Harare District, & Anor* HH-56-02 (Chinhengo J)

The applicant organised a meeting of its members to discuss the organisation's business. The meeting was to be held at a hotel in Harare. The police claimed to be entitled under the Public Order and Security Act [*Chapter 11:*17] to attend the meeting and to prohibit the meeting if they were denied entry. The applicant sought an order confirming that they were entitled to hold the meeting and excluding the police from attending. Held: (1) while notification of a public meeting had to be given to the police for the limited reasons stated in s 24, a trade union meeting was exempt from this requirement. (2) The meeting was not in any case a Apublic meeting", as defined.

Statutes — Public Order and Security Act [*Chapter 11:17*] — s 26 — power of protecting authority to prohibit public gathering of which he has been notified — not competent to do so because another political party wants to use same venue

MDC v *Sibanda NO & Ors* HB-17-02 (Cheda J)

The applicant party had contracted with the Bulawayo City Council to have the use of a stadium to hold a political gathering, and had notified the police of their intention to hold the gathering. The first respondent, who was the protecting authority for the area, purported to prohibit the gathering. The grounds on which he purported to do so were that the President also wished to hold a meeting at the same venue on the same day. Held: the only grounds on which the protecting authority can prohibit a public gathering are that he believes, on reasonable grounds, that public disorder may be caused. In addition, where he proposes to prohibit a gathering, he must give the affected party the opportunity to make representations, which he had not done. The purported prohibition was therefore invalid.

Statutes — regulations — validity — presumption in favour of — regulations remaining as law in force until struck down by competent court

Registrar-General v *Combined Harare Residents Assn & Anor* S-7-02 (Chidyausiku CJ, Cheda, Ziyambi & Malaba JJA concurring, Ebrahim JA dissenting)

See above, under PRACTICE AND PROCEDURE (Order — validity)

Succession — will — revocation — presumption — withdrawal of will from possession of executor and drafting of different will — withdrawal of copy of will — copy withdrawn with intention of revoking will — revocation effective

Sansole NO & Ors v *Ncube & Ors* S-133-01 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

The deceased was married to the second appellant and had made a will in her favour. The marriage broke down and divorce proceedings began. The deceased asked the first appellant, the executor and a legal practitioner, for the return of his will. A copy was mistakenly supplied and the original remained at the executor's office. The deceased subsequently remarried under customary law. He also had another will drafted which excluded the second appellant. Before he could sign the draft, he died. The second appellant claimed that the original will was still valid. Held: it was clear from the circumstances in which the deceased asked for the return of his will that he did so with the intention of revoking it. The fact that he obtained a copy of the will and not the original did not in the circumstances mean that he did not intend to revoke the will. However, because the new will had not been signed, the deceased should be regarded as having died intestate.

Words and phrases — "set aside"

Musonzoa (Pvt) Ltd v *Standard Fire & General Insurance Co Ltd* HH-85-02 (Chinhengo J)