Cases Decided from July 2002 -December 2002

Administrative law — administrative decision — failure by person exercising public authority to exercise powers — Minister having listed farm for acquisition — subsequently failing to respond to request by farmer to continue farming — such failure not rendering original decision illegal

Mead v *Minister of Lands & Anor* HH-173-02 (Hlatshwayo J)

The applicant was the lessee of a farm, which was listed in the *Gazette* for compulsory acquisition. A notice of acquisition was served on the owner under s 5 and s 8 of the Land Acquisition Act. No notice was served on the applicant. When he became aware of the notice, he wrote to the respondent for authority to continue farming. The respondent did not reply. The applicant sought an order declaring that the notices were invalid in respect of him, and that, through failure to exercise a discretion, the respondent's actions became unlawful. Held: (1) Direct notification need only be given to the owner or holder of a registered real right in the property. Persons with lesser rights are notified indirectly through publication of the intention to acquire. (2) A subsequent failure to exercise a discretion or to decide did not make the underlying decision illegal.

Administrative law — administrative decision — statutory requirements — failure to comply with — effect — decision voidable at instance of affected person — other consequences of that decision also falling away

Tengwe Estates (Pvt) Ltd v *Min of Lands & Anor* HH-109-02 (Hungwe J)

Where the State intends to acquire land, it required to serve a notice of acquisition on the landowner and on any other person with a registered real right in the land. Failure to do so makes the notice of acquisition voidable at the instance of the landowner or that other person. If the notice is held to be void, any consequences of failure to comply with it also fall away.

Administrative law — review — grounds for — failure to supply record of proceedings — fatal irregularity — bias — persons on disciplinary committee likely to have reason to be biased against accused — proceedings set aside

Chiura v *Public Service Commission & Anor* HH-190-02 (Paradza J)

The applicant, a public servant, had been found guilty of a disciplinary offence and demoted. She brought the matter on review on several grounds. One was that there was no proper record of the proceedings in the disciplinary committee. The second was that the committee was biased, in that two of the members of the committee were people who were already seized with prior conceptions, ideas and biases about this matter by virtue of their previous association with the applicant. Held: (1) The rules of court require that a record of proceedings must be prepared by the officer responsible for those proceedings and must be lodged with the registrar. What was tendered as the record of proceedings could not be described as a record of proceedings. Failure to supply the record of proceedings amounts to an irregularity. (2) Apart from the fact that there was irrelevant and prejudicial material in the Arecord" that had been submitted, one member of the committee had previously found the applicant guilty of misconduct. Another was the applicant's subordinate, who was tipped to take over her position. Reasonable, right-thinking persons would regard these two persons as unlikely to be impartial. The proceedings would therefore be set aside and the applicant reinstated.

Agency — agent — authority — agent bringing application purportedly on behalf of principal — need to establish authority to do so

Masenga v *Guthrie & Ors* HH-146-02 (Ndou J)

The applicant, purporting to act on behalf of a church, bought a sculpture from an employee of the respondents. The respondents, on learning of the sale, repudiated it and offered to return the purchase price. They said the sculpture had already been sold abroad. The applicant obtained a provisional order, prohibiting the removal of the sculpture from Zimbabwe pending an action to be instituted by the church. The applicant instituted an application, seeking an order to direct the respondents to deliver the sculpture to her. Although the applicant purported to be acting on behalf of the church, her agency was disputed by responsible officials on the church. The applicant did not answer any of the points made by the church officials. Held: (1) for the applicant to act as agent, she would have to establish her authority to do so. As there was a material dispute, she had not established her authority. (2) The terms of the provisional order were that an action should be instituted, not an application. She thus could not be heard.

Agency — agent — person holding himself out to be agent — whether in fact an agent — when such person may be sued in his own right

Ukumbana Kubatana InvestmentsLtd v *Privatization Agency of Zimbabwe & Ors* HH-207-02 (Chinhengo J)

The Government, through a company wholly owned by the Reserve Bank, owned a company, which it decided to split into 3. The shares in the 3 companies continued to be held by the Government. The Government had adopted a policy of privatising parastatals and disposing of shares in State-owned companies. The Government had established an agency within the President's Office for this purpose. A procedure for the privatisation process was set out in a document. The agency advertised the sale of the shares in the 3 companies. The applicant paid for the tender documents and submitted a bid security. The applicant's tender was the highest received. The agency subsequently purported to terminate the tender process, without having announced any winners. The applicant sought an order to compel the agency to announce the winning bidders and to allot shares to the winners. The agency argued that the bidding process had been lawfully terminated. The question also arose whether the agency was a separate legal *persona* from the Government, the agency arguing that it was an agent only for its principal, the Government. Held: (1) once the Cabinet had Asigned off" a transaction, the agency was empowered to transact the business without further reference to the Cabinet. The agency had represented itself as an entity with the responsibility, authority and power to conduct and manage the privatisation programme. (2) A relationship between a purported principal and agent may not in fact be a relationship of principal and agent as it is normally understood but it can be one *sui generis*. The agency had many characteristics which took it out of the ordinary relationship of principal and agent. It was in a position to contract in its own right and to assume rights and obligations for itself in respect of which it could sue and be sued in its own right. (3) An agent may be liable on contracts made by himself in the following situations: (a) where he expressly takes upon himself personal liability, even though he is known to be acting as an agent; (b) where a contract is made with him in the belief and on the faith that he is the principal; and (c) where he impliedly warrants that he has an authority which he, in fact, does not have. (4) The agency could thus be sued in its own name, and would be ordered to announce the winners and allot shares.

Appeal — criminal appeal — appellant absenting himself from country beyond time stipulated by court — appellant thereby becoming a fugitive from justice — correct procedure to adopt — court declining to hear case in his absence

S v *Sylow* HH-136-02 (Adam J, Mavangira J concurring)

While on bail pending appeal, the appellant was allowed by the court to leave the country for a limited period. He did not return in the time stipulated, and an unauthenticated medical certificate was produced as the reason for his failure to return. His bail was estreated and a warrant was issued for his arrest. After several months the court was asked whether the matter could be heard in the absence of the appellant from the country. Other reasons were advanced for his absence from the country. Held: as long as the appellant has not purged his contempt, that is, having breached the terms of his bail conditions by being out of the jurisdiction of the court, he must be regarded as a fugitive from justice. His legal practitioners should have applied for an extension of the time he was permitted to remain outside the country. The court would decline to hear the matter.

Appeal — Labour Relations Tribunal — appeal against decision of — appeal only lies on point of law — decision by Tribunal on quantum of damages — misdirection by Tribunal — appeal competent

Madyara v *Globe & Phoenix Industries (Pvt) Ltd* S-63-02 (Sandura JA, Cheda JA & Gwaunza AJA concurring)

See below, under EMPLOYMENT (Labour Relations Tribunal)

Appeal — Labour Relations Tribunal — appeal from — appeal on point of law only — appeal against quantum of damages — assessment based on unreasonable grounds — issue appealable

ZUPCO v *Daison* S-87-02 (Sandura JA, Ziyambi & Malaba JJA concurring)

An appeal to the Supreme Court against a decision if the Labour Tribunal lies on a point of law only. Where the point at issue is the quantum of damages, and the Tribunal's assessment is based on unreasonable grounds, an appeal would be properly before the Court.

Arbitration — award — grounds on which may be set aside — allegation that party unable to present his case — arbitrator granting award in absence of party's legal representative — written submissions previously received by arbitrator — legal

representative failing to attend meeting called by arbitrator to discuss procedure to be followed — arbitrator entitled to make award on basis of written submissions

Minister of Local Government & Anor v *Madondo* HH-152-02 (Garwe JP)

In referring a matter for arbitration, the High Court had ordered that if either party failed to provide documentation required by the arbitrator within 14 days of being so requested or failed to attend any arbitration proceedings as required by the arbitrator, the arbitrator may finalise the matter as he sees fit and any decision reached would be binding on both parties. The applicant, having made written submissions, failed to attend a meeting called by the arbitrator to discuss the procedure to be followed. The arbitrator made his award on the basis of the documents submitted to him. The applicant applied for the award to be set aside. Held: the arbitrator was empowered, in default of appearance of the applicant's representative, to deal with the matter on the merits even though the initial intention had been to discuss and agree on the procedure to be adopted. This was not a situation where the party was unable to present his case.

Arbitration — contract — arbitration clause — interpretation of — clause providing that dispute concerning "implementation" of contract should be referred for arbitration — meaning of — dispute preventing performance of the contract — such dispute subject to arbitration

Artcraft Furniture Mfg v *Tokozani (Pvt) Ltd & Ors* HB-98-02 (Cheda J)

The parties entered into an agreement of sale in terms of which property was to be sold by the applicant to the respondents. One of the terms was that a general notarial bond be passed over the property. The bond was passed, but well out of the time stipulated. The respondents blamed the delay on the tardiness of the applicant in providing the information necessary to enable the bond to be passed. The applicant claimed summary judgment for the outstanding balance of the purchase price. The respondents argued, *inter alia*, that an arbitration clause required that any dispute regarding the Aimplementation" of the contract be referred to arbitration and accordingly the court should not hear the matter at all. Held: AImplementation" meant performance; and there was a dispute over the performance of the contract. This dispute fell clearly within the purview of the arbitrator, so the application must fail.

Company — shares — assets — sale of — company's sole assets being sold — requirement that sale be authorised by shareholders in general meeting — unanimous assent of members of company obtained though not in formal meeting — effect

Annandale v *Material Finance (Pvt) Ltd* HH-213-02 (Smith J)

The applicant was buying a property from the respondent, by means of buying all the shares in a company owned by the respondent. The company's only assets consisted of the property. It was agreed that part of the purchase price was to be determined paid in Zimbabwe currency, by reference to an amount in US dollars, plus a percentage. The agreement was reached before the Aparallel" currency market had developed, where the official exchange rate was substantially below the unofficial, parallel rate. The applicant paid the amount at the official rate plus the agreed percentage, plus interest. The respondent argued, not only that the wrong amount had been paid, but that the sale of the shares had not been authorised by the company in general meeting in terms of s 183 of the Companies Act. Held: (1) at the time of the agreement, the parties had not envisaged that the parallel market would arise. The contract reflected the intention of the parties at the time. (2) Section 183 was applicable in relation to the sale of the shares, since those shares were the respondent's sole assets and the ownership of the property was the major undertaking of the company. However, the section existed for the protection of shareholders; and as this was a family company, and the family had agreed to the sale, the unanimous assent of the members of the company to the transaction had the same effect as if the formalities prescribed by the Act had been strictly followed.

Company Bwinding up — application — purpose — not to be used for enforcement of payment of debt — application by a single creditor — liquidation should not lightly be granted on application of single creditor

Apotex Inc v *Surgimed (Pvt) Ltd* S-100-02 (Cheda JA, Chidyausiku CJ & Gwaunza AJA concurring)

Winding-up proceedings should not be resorted to in order to enforce payment of a debt, the existence of which is *bona fide* disputed on reasonable and substantial grounds; the procedure is not designed for the resolution of disputes as to the existence or non-existence of a debt. An order for the liquidation of a company should not be lightly granted on the application of a single creditor.

Conflict of laws — domicile — acquisition by choice — what must be shown

Latif v *Latif* HH-150-02 (Adam J)

See below, under FAMILY LAW (Husband and wife — divorce — domicile).

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — right to privacy — to what extent protected by Constitution — need to balance against right to freedom of expression and freedom of the press

Mandaza v *Daily News & Anor* HH-144-02 (Adam J)

The respondent newspaper published photographs of properties owned by the applicant. The applicant was a well-known public figure. He sought an interdict preventing the publication of any dossier of his properties or committing any further intrusions into his private life. He claimed that he had a constitutional right to privacy. The respondents argued that an interdict would infringe the freedom of the press and their right to freedom of expression. Held: (1) there was a right to privacy granted by ss 11 and 18 of the Constitution, though not a well-expressed one. (2) There was a qualified common law right to privacy, which aimed at unlawful intrusions upon the personal privacy of another and the unlawful publication of private facts about a person. (3) The right to privacy had to be balanced against the right to freedom of expression. (4) The information about the applicant's ownership of the properties was in the public domain, being obtainable from the Deeds Office. (5) The photographs were not taken by means of unlawful intrusion into or over the properties. It could not be said that the applicant had suffered any *injuria* by the publication of photographs of his property. Had the photographs been of sensitive personal data, the result might have been otherwise.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — protection against acquisition of property without compensation — s 16 — interpretation — notice of acquisition — whether must be given to person other than owner

Mead v *Minister of Lands & Anor* HH-173-02 (Hlatshwayo J)

Section 16(1)(b) of the Constitution does not require that notice of intention to acquire must be given to a person other than the owner of the property. It would not be sufficient to give notice to a tenant without giving notice to the owner.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 20(1) — right to receive information — does not include right to demand voters' roll from Registrar-General

Tsvangirai & Ors v *Registrar-General* S-93-02 (Gwaunza JA, Ziyambi & Malaba JJA concurring)

The constitutional right to receive information without interference does not extend to a right to demand a copy of the voters' roll from the Registrar-General.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 21 — right of freedom of association and assembly — Labour Relations Act [*Chapter 28:01*] — s 23(1) — proviso — provision that managerial employee may not be a member of a workers' committee — not an infringement of s 21 — managerial employees entitled to form their own workers' committees

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 24(1) — orders which may be granted — declaratory order — may be granted even if no Aopponent" exists — abstract or hypothetical question — not permissible to grant order in respect of such matter — need for there to be interested persons on whom declaratory order would be binding

Ngulube v *ZESA & Ors* S-52-02 (Chidyausiku CJ, Sandura, Cheda & Malaba JJA & Gwaunza AJA concurring)

The applicant was employed by the respondent in a managerial position. He joined the respondent's workers' committee. He was instructed to withdraw from the committee on the grounds that, as a managerial employee, he was ineligible. Because he refused to withdraw, he was, after disciplinary proceedings, dismissed. Apart from bringing an action before the Labour Tribunal, he brought a constitutional application, arguing that his rights of freedom of association and assembly had been contravened in two ways: (1) by s 45(1)(b)(i) of the Labour Relations Act, which provides that a trade union shall not represent employers or managerial employees; and (2) by the proviso to s 23(1) of the Act, which provides that a managerial employee may not be a member of a workers' committee other than such a committee consisting solely of managerial employees. Held: (a) there did not have to be an "opponent" for the court to be able to make a ruling; all that was required was that the applicant had an interest in an "existing, future or contingent right or obligation" and that he satisfied the court that the case was a proper one for the exercise of the court's discretion. The court could make a declaratory order. (b)

Whatever the merits of the applicant's argument about s 45(1)(b)(i) of the Act were, they were abstract: his interest was no more than an idle one, not grounded in any past, present or future action that he might wish to take or that may be taken against him and/or undefined managerial employees on whose behalf he purported to make the present application. There must be interested persons on whom a declaratory order would be binding. (3) Section 21(1) of the Constitution guarantees every individual the right of freedom of assembly and association, not simply for the sake of it, but for the sake of protecting his interests. The right is therefore, in that sense, qualified and restricted to such association as is meant to protect the interests of the individual concerned. The proviso to s 23(1) of the Act is a permissible derogation from the general provisions of s 21 of the Constitution. There is of necessity a divide between management and non-managerial employees. The proviso to s 23(1) allowed the formation of workers' committees to represent managerial employees, so the applicant's right to join a workers' committee remained.

Constitutional law — State — statutory corporation — when may be regarded as an organ of the State — Zimbabwe Broadcasting Corporation — not an organ of the State — Corporation's property not State property

Fawcett Security Operations (Pvt) Ltd v *ZBC & Ors* HH-169-02 (Chinhengo J)

A civil judgment had been obtained against the respondent, the Zimbabwe Broadcasting Corporation (ZBC). When the Deputy Sheriff attempted to execute against the Corporation's property, he was prevented from doing so by police and military personnel. He was informed that he could not execute against State property. Held: (1) the ZBC's property is not State property, and is liable to attachment and sale. (2) The Deputy Sheriff was entitled to use force to gain entry. It was an offence to obstruct him in the execution of his statutory duties. (3) Even if the ZBC's premises were a protected place in terms of the Protected Places and Areas Act [*Chapter 11:12*] (and there was not evidence that the responsible Minister had declared the premises to be a protected place), that did not debar the Deputy Sheriff from entering the premises. (4) The ZBC's course was to apply for a stay of execution, which it had not done.

Contract — condition — resolutive condition — what is — clause providing that if payment not made by a certain date, the contract would be cancelled — effect — contract not automatically cancelled

McAninch v *Maisiri & Anor* S-131-02 (Malaba JA, McNally & Muchechetere JJA concurring)

The appellant sold a property to the respondents. A clause in the contract provided that if the respondents did not pay the full purchase price by a certain date, the contract would be cancelled. Subsequent to that date, the parties continued negotiating about the payment of the purchase price. The appellant purported then to cancel the contract. Held: the wording used in the contract did not have the effect of cancelling the contract automatically, but at the option of the appellant. As he did not specifically cancel the contract, it remained in force.

Contract — donation — *inter vivos* — formation — what must be shown — burden on person alleging the donation made to him

Dube NO & Anor v *Logan & Ors* HH-117-02 (Ndou J)

The deceased had made a will in which he left certain items to the first respondent. After making the will, he had married the second applicant. Although the marriage was unhappy and a divorce was contemplated, it had not been dissolved. The first applicant, executor dative of the deceased's estate, applied for an order compelling the first respondent to hand over all assets which he could have inherited. The respondent argued that the will was valid and that the marriage was not, having been induced by *inter alia* duress and lack of consummation. He also claimed that the assets had been donated to him before the deceased died. Held: (1) in view of the provisions of s 16 of the Wills Act, the will was invalid. (2) There was nothing in the papers to show that the marriage was a nullity. (3) The respondent appeared to be alleging a donation *inter vivos*, there being nothing to suggest a donation *mortis causa*. The burden was on the respondent to show that a donation had been made, and he had failed to discharge the burden.

Contract — formation — tacit contract — three-fold inquiry into whether tacit contract formed — failure to return merchandise — not necessarily proof of acceptance

Mutamba v *R & C Invstms (Pvt) Ltd* S-85-02 (Gwaunza AJA, Sandura & Cheda JJA concurring)

When the respondent's supermarket business became unviable, the appellant took over the lease, as well as some of the stock. The parties agreed the value of the stock. A few months later, the respondent demanded that the appellant pay the agreed value. The appellant argued that the purpose of the stocktaking was different and that he had never agreed to buy the stock. The trial judge accepted that a tacit contract had been created. On appeal, held: the inquiry into whether a tacit contract

has been created involves 3 stages: (1) to decide what facts have been established; (2) to decide how the proved facts, that is, the conduct of each party and surrounding circumstances, must have been interpreted by the other; (3) finally, to decide what conclusion consistent with those facts is most likely to be correct. For a valid agreement of sale to be implied from the parties' conduct, it would be necessary to show, on a balance of probabilities, that the appellant accepted the offer in circumstances where the two were *ad idem* on the matter. The failure to return the merchandise was not proof of acceptance. Had the appellant traded in the merchandise, the situation would have been different.

Contract — loan — loan made in foreign currency — loan to be repaid locally — exchange rate applicable — exchange rate at time of payment

Chisese v *Garamukanwa* S-68-02 (Gwaunza AJA, Chidyausiku CJ & Cheda JA concurring)

The appellant paid certain university fees in Britain on behalf of the respondent. The fees were paid in UK currency, but the parties intended that repayment be made locally. Against the amount owed by the respondent was set off a sum owed by the appellant to the respondent. The questions for decision were the exchange rate and interest rates to be applied. Held: (1) the exchange rate would be that prevailing at the time payment was effected. (2) Where no specific interest rate is agreed on, and the payment is made in local currency, the prevailing prescribed local rate of interest should apply. (3) The way in which the defence was conducted showed a calculated and sustained campaign to avoid repaying a loan that was advanced, in good faith and with good intentions, by the appellant to and on behalf of the respondent. In view of the lack of good faith with which the defence was conducted, it would be appropriate to award costs on the higher scale.

Contract — nature of — need to determine parties' true intention from agreement itself — agreement showing that cession rather than assignment intended

United Transport Group Services Ltd v *Scotfin Ltd & Anor* HH-206-02 (Hungwe J)

The first respondent, a financial institution, had entered into an agreement with a company (now in liquidation) to take over the collection of rentals due to the company by its clients, of whom the applicant was one. The liquidator claimed that the payments should be made to him. The first respondent argued that the right to receive payment had been ceded to it. The liquidator argued that the agreement was one of assignment. Held: an examination of the agreement showed that the first respondent was given the right to claim payment of the rental, and judgment would be entered in its favour.

Contract — option — nature of contract of option — failure by party to exercise option within stipulated period — effect

Eastern Motors (Pvt) Ltd v *City of Mutare* HH-212-02 (Makarau J)

The applicant took occupation of a piece of land in terms of an agreement which gave it an option to buy the land. The time stipulated in the agreement depended on the completion of certain developments by the respondent. After these were completed, the applicant failed to exercise the option to purchase and the respondent sought to repossess the land. Held: an option comprises two distinct parts, an offer to sell, and an agreement to keep that offer open for a stipulated period. The acceptance of the offer within the stipulated period brings into being a valid sale agreement. The offer to purchase the land was made to the applicant when the option agreement was concluded. It was up to the applicant during the stipulated time to accept the offer and thereby bring into being a sale agreement. The fact that the actual purchase price had not been not determined at the time the option agreement was concluded did not change the position that it was up to the applicant to accept the offer upon the completion of the developments effected by the respondent.

Contract — *pactum commissorium* — enforceability — general rule against enforceability — exceptions to rule — limits to

Upperclass Enterprises (Pvt) Ltd v *Oceaner (Pvt) Ltd & Ors* S-88-02 (Cheda JA, Chidyausiku CJ & Gwaunza AJA concurring)

A *pactum commissorium* is an agreement by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full ownership in the thing will invariably pass to the creditor in payment of the debt. Generally speaking, such an agreement is not enforceable. However, there may be an exception where the arrangement meets the requirement that a fair price is agreed at the time that the debt is due, not at the time the property or thing is pledged. The debtor should be in a position to redeem the property pledged when the time for payment arrives.

Contract — right of first refusal — when established — necessary for grantee to accept offer — offer to sitting tenants of flats to buy the flat — not a right of first refusal — withdrawal of offer before acceptance

Eastview Garden Residents' Assn v *Zimbabwe Reinsurance Corp & Ors* S-90-02 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

A right of first refusal (or pre-emption) is created when the grantor undertakes that when he decides to sell his property he will first give the grantee the opportunity of refusing or buying the property at a price equal to that offered by another person. The grantor is under an obligation, at the time he sells the property, to offer the property to the grantee first at a price equal to that offered by a third party or which he is prepared to accept from any other would-be buyer. The grantee is said to have acquired the correlative right to have the property offered to him first so that he can match the price offered by the third party or refuse the offer. A right of pre-emption can only be created by contract or agreement between the grantor and the grantee. Where breach of the right is alleged as a cause of action and its existence is denied, the *onus* is on the plaintiff to show that there was an agreement between the parties in terms of which the defendant undertook to offer to him the property at a price equal to that offered by another. A simple offer to sell a flat to a sitting tenant does not constitute a right of first refusal. Such an offer may be withdrawn on notice at any time before it is accepted.

Contract — sale — agreement that part of sale price be payable in Zimbabwe currency but calculated in relation to a foreign currency value — value at time of agreement — subsequent effective devaluation of local currency — intention of parties at time determining factor

Annandale v *Material Finance (Pvt) Ltd* HH-213-02 (Smith J)

See above, under COMPANY (Shares — assets — sale of)

Contract — terms — tacit or implied — sale of goods — implied term that goods sold free of encumbrances — when purchaser may bring claim against seller

Marimo v *Brancos & Anor* HH-142-02 (Chinhengo J)

The plaintiff bought a car from the defendants (who were second-hand car dealers) in 1997. In 2000 he put the car up for sale at an auction. The car was impounded by the Department of Customs, which claimed that it was owed outstanding import tax and surtax. The plaintiff paid the sums claimed to get the car back, then sued the defendants for the sums paid. Held: (1) it was a tacit term of the contract that the car was free from any encumbrances, in particular that there would be no customs duty or surtax to which the plaintiff would be liable after paying the purchase price. (2) If a demand is made against the purchaser and such demand appears to him sustainable at law, the purchaser may call upon the seller to intervene to ensure that he is not evicted. (3) However, a *virilis defensio* must be made where the third party's claim is not unassailable. In this case, the Department of Customs' claim was prescribed. The applicant could have resisted it, and should have put up a defence. Consequently, he could not claim against the seller.

Contract — validity — *justus error* on part of party to contract — when may be relied on by party seeking to resile from contract

PTC v *Posts & Telecommunications Workers Union & Ors* S-107-02 (Cheda JA, Sandura JA & Gwaunza AJA concurring)

The PTC reached an agreement with its workers regarding salary increases. The new salaries were gazetted as an industrial agreement. After a few months the PTC sought to resile from the agreement on the grounds that it could not afford the salary increases. The Minister, instead of amending the agreement, ordered the PTC to pay a different, lower level of salaries and to refer the matter to a mediator. The PTC also claimed that there had been an error on its part when it agreed to the salaries. Held: (1) the Minister was not empowered to direct the PTC to ignore the industrial agreement, nor to refer the matter to a mediator. (2) Even if the figures were a result of an error on the PTC's part, it could not be regarded as a *justus* error. The test is whether the party who is trying to resile been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself. The PTC had been negligent in not checking what effect the increases would have on its wage bill despite the fact that its ability to pay was raised during the negotiations.

Costs — *de bonis propriis* — legal practitioner — practitioner making unsubstantiated allegations of impropriety against another officer of court

Chibanguza Motor Car Repairs & Spares (Pvt) Ltd v *Mutyasira & Ors* HH-228-02 (Smith J)

See below, under COURT (Officer — Master — allegations of impropriety made against Master)

Costs — higher scale — unsuccessful party — lack of good faith on part of defendant — calculated campaign to avoid paying monies which were unquestionably due

Chisese v *Garamukanwa* S-68-02 (Gwaunza AJA, Chidyausiku CJ & Cheda JA concurring)

See above, under CONTRACT (Loan).

Court — abuse of process C court's jurisdiction to protect itself from abuse C appeal noted on point which had previously not been disputed C appeal dismissed

Galante v *Galante* S-82-02 (Sandura JA, Cheda JA & Gwaunza AJA concurring)

During divorce proceedings brought by the appellant against her husband, she averred that he was domiciled in Zimbabwe. She obtained maintenance *pendent elite*, but her divorce action was subsequently withdrawn. Her husband then brought a divorce action against her. She disputed his domicile in Zimbabwe. The High Court held that she was estopped from denying his domicile. She appealed against that decision, but before the appeal was heard the divorce action took place. During the trial, the husband's statement that he was domiciled in Zimbabwe was not challenged. Held: in the circumstances the appeal was an abuse of process and should be dismissed.

Court — contempt — constructive contempt — when may be shown to have been committed — main issue triable in spite of respondent's acts — constructive contempt not shown

Mfune v *Mutiti & Ors* HB-122-02 (Ndou J)

Constructive contempt could be shown by the commission of some act with the ulterior object of preventing an application from being heard. Where an act is done with the intention of defeating the ends of justice or obstructing the court in its functions there is *dolus* and the act is punishable as contempt of court, whether or not an order of court is in existence at the time of the act. Where there is no order of court in existence, there is an onus on the part of the applicant to establish *dolus* on the part of the respondent. Where a person deliberately interferes with another's right of free access to the courts, he is guilty of contempt of court, whether or not he *bona fide* thinks he has a right to do so.

The question must also be considered whether such an act prevented any of the main issues being properly tried. If the acts complained of are not such that they can prevent any of the main issues being properly tried, the respondent cannot be held to be in constructive contempt of the court.

Court — contempt — acts constituting — prison officials failing to release prisoners after court had ordered release — defence of superior orders — such order manifestly unlawful — appropriate punishment

Mpofu & Anor v *Madida & Ors* HB-76-02 (Chiweshe J)

The applicants, who had been held on charges of murder, were released on bail by a judge of the High Court. That order was confirmed by the Chief Justice when the Attorney-General failed to appeal in time. The respondent prison officers failed to release the applicants, claiming that because the applicants were Astate security prisoners" they were not to be released without instructions from the respondents' superiors. Held: while the Prisons Act required the respondents to obey lawful orders from their superiors, an instruction to disobey a court order is manifestly unlawful, and accordingly the respondents were guilty of contempt. However, because the respondents' superiors should also have been cited, and because they had purged their contempt by releasing the applicants, a wholly suspended fine would be appropriate.

Court — judges — law-making function — need for law to be dynamic and accommodating to change

Magondo v *Magondo* HH-174-02 (Cheda J)

The law cannot be static. It must be dynamic and accommodating to change. The courts have an inherent duty to do justice between man and man and should not be found wanting when the outcry for just change is made. It is further their duty to protect and promote the interests of the minorities in our society.

Court — jurisdiction — divorce action — domicile — what must be shown to establish that husband had acquired domicile in Zimbabwe

Latif v *Latif* HH-150-02 (Adam J)

See below, under FAMILY LAW (Husband and wife — divorce — domicile).

Court — officer — Master — allegations of impropriety made against Master — legal practitioner's responsibilities when making such allegations — effect of failure to act responsibly

Chibanguza Motor Car Repairs & Spares (Pvt) Ltd v *Mutyasira & Ors* HH-228-02 (Smith J)

Two brothers each owned half the shares in the applicant company. When one brother died, a dispute arose over the value placed by the surviving brother on properties owned by the company. The executor and the deceased's widow believed that too low a value was placed on the properties and that they would be prejudiced as a result. The Master directed that an independent valuation be undertaken by a neutral party. The surviving brother sought to have the Master's decision set aside as unreasonable and capricious. Held: Where the Master has, or appears to have, acted improperly, then a legal practitioner is required to bring the matter before the Court. However, before doing so the legal practitioner must be satisfied that there is some evidence to substantiate the claim. Where a legal practitioner associates himself with an application which impugns the integrity of the Master, or any other officer of the court, he must put forward valid reasons, supported by credible evidence, to substantiate the allegations made. A legal practitioner is expected to act responsibly, especially where allegations of impropriety on the part of another officer of the court are made. In this case, the Master had exercised powers conferred on him by law. He had acted responsibly. There was no onus on him to consult anyone as to the appointment of a responsible valuator. The legal practitioner and the surviving brother would be required to pay the costs *de bonis propriis* on the higher scale.

Court — official — Deputy Sheriff — powers and duties of — right to enter premises to execute judgments

Fawcett Security Operations (Pvt) Ltd v *ZBC & Ors* HH-169-02 (Chinhengo J)

See above, under CONSTITUTIONAL LAW (State C statutory corporation)

Criminal law — defences — insanity — non-pathological "criminal incapacity" — what must be shown for defence to succeed

S v *Ncube & Anor* HB-100-02 (Kamocha J)

The first accused killed her husband with an axe. The marriage had been unhappy from the outset and there was a long history of physical and mental abuse of the accused by the deceased. The accused raised the defence of non-pathological criminal incapacity. It was argued that because of the treatment she had received at the hands of the deceased she was incapable of appreciating the wrongfulness of her acts. Held: while such a defence exists in our law, it should not succeed too easily. A foundation must be laid for it by the accused. There must usually have been a long period in which the accused's level of emotional stress increased steadily, with the ultimate event being the last straw. While the accused had been subjected to ill-treatment by the deceased, the other evidence pointed to a pre-planning on her part. The defence thus could not avail her.

Criminal law — common law offences — robbery — offence committed in South Africa but part of proceeds brought to Zimbabwe — not competent for Zimbabwean courts to try accused in Zimbabwe for robbery

S v *Ncube & Anor* HB-126-02 (Ndou J)

The accused were wanted for on trial in South Africa on a charge of robbery, the crime having been committed in Johannesburg. A small portion of the proceeds of the robbery was brought into Zimbabwe. At a hearing for bail pending extradition, the question arose whether the accused could be charged in Zimbabwe with the robbery. Held: although theft is a continuing offence, robbery is not. The accused could only be charged in Zimbabwe with the theft of the money that was brought into the country.

Criminal law — contempt of court — remarks critical of sentence passed by judge — when such remarks may be regarded as contemptuous — contempt aggravated by respondent's subsequent actions

In re *Chinamasa* HH-118-02 (Blackie J)

The respondent, when Attorney-General, made highly critical and intemperate remarks following the passing of sentence in a criminal case. The judge ordered that proceedings be taken against him for contempt of court. Held: (1) the respondent genuinely believed the sentence to be unreasonable or inordinately lenient. However, the terms used were not within the bounds of reasonable courtesy. What brought the statement within the ambit of contempt was the respondent's intention and lack of good faith. The remarks were intended to bring the judge into disrepute as a judge and the administration of justice by the High Court into disrepute. (2) The respondent's contempt was compounded by his deliberate and contemptuous response to the authority and process of the court to the hearing of the contempt indictment against him and to the warrant of arrest issued against him when he failed to appear at the hearing. He made no attempt to explain why he did not respond to the notice setting the original contempt indictment down for hearing. He made no effort to deal with the warrant of arrest that he knew has been issued. He deliberately scorned and avoided the processes and directives of the court. His only response to the authority of the court was abuse and threats.

Criminal procedure — bail — application — further applicationB change in circumstances justifying reconsideration of bail — postponement of trial — whether a change in circumstances

S v *Barros & Ors* HH-110-02 (Hlatshwayo J)

A postponement of a trial is a change in circumstances entitling a court to reconsider the question of bail. Whether bail should in fact be granted will depend on the circumstances of the case in question, the length of the postponement and the nature of the charges.

Criminal procedure — bail — conditions on which bail granted — person arrested on charge under Land Acquisition Act — not reasonable to order that such person should not return to farm — such condition amounting to eviction before conviction

S v *Prior* HH-163-02 (Smith J)

The appellant was charged with failing to vacate her farm, in respect of which an acquisition order had been made under s 8 of the Land Acquisition Act [*Chapter 20:10*]. She was granted bail, one of the conditions of which being that she should not return to the farm other than to collect her possessions. She appealed in respect of that condition. Held: it was not reasonable to order that she should not return to her home. She was contesting the acquisition, and until that issue had been determined, she was entitled to exercise her rights of ownership. The section provided for eviction only after conviction; the bail condition effectively amounted to eviction before conviction. The condition would be altered to require her to reside at her home.

Criminal procedure — bail — extradition proceedings — principles — same principles apply as in application for bail pending trial

S v *Ncube & Anor* HB-126-02 (Ndou J)

There is no material difference between the principles governing bail pending trial and those governing bail pending extradition.

Criminal procedure — bail — grant of — principles — risk of absconding — assessment of — nature of charges and severity of likely punishment — critical importance of

S v *Jongwe* S-62-02 (Chidyausiku CJ)

When assessing the risk of an applicant for bail absconding before trial, the court will be guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the State case; the accused's ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial. The most critical factors are the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the State case.

Criminal procedure — bail — application — procedure to be followed — no formal procedure established

S v *Ncube & Anor* HB-126-02 (Ndou J)

Bail applications are *sui generis*: there is no prescribed format or procedure. It is the duty of the presiding officer, with due allowance for the circumstances of each case, to determine the way in which each party must submit its evidence. In a majority of cases *ex parte* statements are made by both the defence and by the public prosecutor who intimates what the police objections are. There are no formalities; no evidence is led, no affidavits are placed before the court and the record is so meagre that there may be little or nothing to place before the superior courts if the matter is taken on appeal.

Criminal procedure — plea — of guilty — alteration of after conviction — trial held in magistrates court but matter referred to the High Court for sentence — application to change plea must be directed to trial court — what applicant must show High Court to have matter remitted — Criminal Procedure and Evidence Act [*Chapter 9:07*] — ss 227 and 271(2)(b)

S v *Jackson* HH-201-02 (Chinhengo J)

The accused, together with a colleague, stole a car in Chinhoyi. While driving it away, the accused lost control. His companion was killed; the vehicle was badly damaged. At his trial in a regional magistrates court, the accused pleaded guilty and was convicted. The matter was referred to the High Court for sentence. Before the hearing, the accused's legal representative indicated that the accused wished to change his plea to one of not guilty. The reason given was threats by the police. The question was whether the High Court could remit the matter to the lower court for the accused to change his plea. Held: (1) the application to change the plea should be directed to the trial court. (2) Although there is no onus on the accused — all he must do is offer a reasonable explanation for having pleaded guilty — less is required of him when he applies to the High Court for remittal to change his plea. All he must show is that he has an explanation which *prima facie* shows that he has a reasonable explanation for a change of plea to give to the trial court.

Criminal procedure — plea — of guilty — procedure when accused is legally represented — need to record that legal practitioner has confirmed that he had ensured that the accused understood the facts alleged and admitted them or that the elements of the offence had been explained to him — effect of failure to record this — Criminal Procedure and Evidence Act [*Chapter 9:07*] — s 271(2)(b)

S v *Mvurume* HH-198-02 (Chinhengo & Makoni JJ)

The appellant, who was legally represented at his trial for attempted murder, pleaded guilty. The magistrate did not put the normal questions to the appellant to satisfy himself that the plea was genuine. He convicted the appellant. Some months later, in spite of the fact that there were no medical reports either on the complainant's condition or on the appellant's mental state, the magistrate sentenced the appellant. On appeal against conviction and sentence, held: (1) the court must record that the statement on which it relies for a conviction was made by the legal practitioner because it is only for that reason that the court may decide not to give the necessary explanation. A failure to record that the legal practitioner made the statement may cast doubt on whether that statement was made at all. In any event, a statement by a legal practitioner does not preclude the court from making the enquiry itself. (2) In cases of attempted murder involving a physical assault, the absence of a medical report as to the injuries, where the injuries are admitted to have been inflicted, is not fatal to the proceedings in regard to conviction and even to sentence, provided that the injuries are such that they would enable the court to reach, as the only reasonable inference, that the accused intended to cause the complainant's death. (3) The magistrate was not entitled to ignore the evidence about the appellant's condition. While the evidence was not clear, it would be safer to remit for trial afresh.

Criminal procedure — review — alteration of sentence on review — community service — increase in number of hours to level set out in guidelines — not permitted

S v *Binga* HH-196-02 (Makarau J)

Where a magistrates court has erroneously set a lower period of community service than set out in the guidelines, a court on review may not increase the period to what it ought to have been, as that would amount to an increase in sentence.

Criminal procedure — scrutiny — submission of record of case — time limits — mandatory nature of — effect of failure to comply

S v *Bhanke & Ors* HH-123-02 (Ndou J)

The provisions of the Magistrates Court Act regarding the submission of the record of a case for automatic review or scrutiny are mandatory. Failure to comply could result in proceedings being interfered with on review.

Criminal procedure — seizure of articles — seizure by police of article to be used as an exhibit — not spoliation entitling person to recover article

Geza v *Khumalo & Anor* HH-140-02 (Ndou J)

The applicant sold a car to the second respondent. Several months later, the second respondent returned the purchase price and made a complaint to the police that the applicant had stolen the car. The parties agreed that the car should, pending resolution of the dispute, be kept at the applicant's lawyers' office, while the second respondent's lawyers would keep the keys. The first respondent, a police officer, took the vehicle and handed it back to the second respondent, on condition that she brought it to court on the date of any criminal trial. The applicant sought a spoliation order. Held (after outlining the nature of and requirements for a spoliation order): (1) the applicant had co-possession with the second respondent, and this was sufficient. (2) The police officer was entitled, in the course of investigation, to seize the car to be used as an exhibit. Such seizure did not amount to spoliation. He may have been unwise in entrusting it to the second respondent, but this was a matter within his discretion.

Criminal procedure — trial — conduct of — medical evidence — failure to lead — charge of attempted murder — whether failure to lead such evidence fatal

S v *Mvurume* HH-198-02 (Chinhengo & Makoni JJ)

See above, under CRIMINAL PROCEDURE (Plea — of guilty — procedure when accused is legally represented)

Criminal procedure — trial — High Court — indictment to High Court for trial — need for reasonable suspicion — not necessary that evidence on which reasonable suspicion is based be admissible

S v *Ncube & Ors* HB-95-02 (Chiweshe J)

The Attorney-General was proposing to indict the accused for trial before the High Court on a charge of murder. The only evidence against any of the accused was in confessions made by their co-accused. Such evidence, the defence argued, was inadmissible and accordingly there was no reasonable suspicion on which to base a charge. Held: Before a person may be lawfully arrested, detained or put on remand, there must be reasonable suspicion that he has committed an offence. The same considerations would apply throughout the pre-trial stage, including indictment proceedings. However, all the State must do is show that there is a reasonable suspicion that the accused had committed the offence: the admissibility or otherwise of the evidence is not relevant at this stage. Where one accused person implicates another, that would give ground to a reasonable suspicion. The admissibility of the evidence is a matter for the trial court.

Criminal procedure — trial — onus — on State — evidence relating to an essential element of alleged crime missing — no requirement for accused to raise matter in cross-examination

S v *Manyika* HH-215-02 (Makarau J, Mavingira J concurring)

The onus on the State in a criminal trial remains the same even where the defence proffered by the accused is not worthy of belief. Unless the accused person admits any one of the elements of the offence charged, the State bears the onus of proving each essential element of the offence beyond reasonable doubt. Thus, on a charge of rape, the State must not only prove sexual relations but lack of consent. Where evidence proving an essential element is missing, the issue that the appellant did not challenge it in cross-examination does not arise. He cannot challenge what is not there.

Criminal procedure (sentence) — general principles — community service — number of hours of community service to order — guidelines set by National Committee on Community Service — adherence to — when courts may depart from guidelines

S v *Binga* HH-196-02 (Makarau J)

When imposing a period of community service as an alternative to a period of imprisonment, magistrates courts should generally adhere to the guidelines set by the National Committee on Community Service, but may depart from them for a good

reason, which must be stated. A failure to do so may amount to a misdirection as it gives rise to the inference that the court has acted arbitrarily.

Criminal procedure (sentence) — general principles — fine — level of — Criminal Penalties Amendment Act 2001 — failure of Minister to lay before Parliament statutory instrument setting out levels of fines — effect

S v *Chandafira* HH-137-02 (Smith J)

Legislation was enacted to set fines in over 200 statutes by reference to a Alevel" rather than to a specific monetary amount. The legislation came into effect on 20 May 2002. The Act provided that the Minister could set the levels by statutory instrument, but that the statutory instrument would not come into effect until approved by a resolution of Parliament. The Minister had published such a statutory instrument, but it had never been laid before or approved by Parliament. Held: there was now a lacuna in the law. Effectively, a fine could not be imposed. An instruction from the Attorney-General that the previous level of fines should continue to apply was incompetent.

Criminal procedure (sentence) — general principles — jurisdiction — increased jurisdiction of magistrates under Stock Theft Act — accused convicted of theft by false pretences, having taken money from complainant for cattle which were not his — not a theft of the cattle and increased jurisdiction not applicable

S v *Uzande* HH-139-02 (Adam J)

The accused was convicted of theft by false pretences. He purported to sell cattle, which actually belonged to his father, and converted the proceeds of the sale to his own use. The magistrate assumed the increased jurisdiction provided under the Stock Theft Act [*Chapter 9:18*] and sentenced the accused on the basis that he had stolen the cattle. Held: the magistrate had erred. This was not a case of theft of stock, but of theft of the money.

Criminal procedure (sentence) — general principles — suspended sentence — conditions of suspension — need for precision in formulating condition — offence involving dishonesty — what is — what other offences are contemplated

S v *Maremba* HB-124-02 (Ndou J)

The accused was convicted of setting snares on another's land. After conviction, the magistrate brought into effect a sentence previously suspended on condition that the accused did not commit an offence involving dishonesty. Held: where a sentence is suspended on condition the accused does not commit another offence involving dishonesty, the court has in mind offences of a kindred nature to theft. Even the broadest definition of "dishonesty" would not cover the setting of snares. It was thus incompetent to bring the suspended sentence into operation.

Criminal procedure (sentence) — common law offences — assault — political motives behind assault — custodial sentence appropriate

S v *Pedzisa* HH-184-02 (Smith J)

Ordinarily, in cases of assault, the appropriate sentence depends on the severity of the assault. In cases where the assault is carried out for political motives and clearly with the intention to intimidate members of an opposing political party, different considerations apply. A custodial sentence is richly deserved.

Criminal procedure (sentence) — common law offences — extortion — attempt by a couple to extort large sum after complainant was — "discovered" to be about to have sexual relations with the woman — custodial sentence justified

S v *Hollington & Anor* HH-125-02 (Adam J, Makoni J concurring)

The appellants attempted to coerce a man to pay them a large sum of money. They had set up a situation where the complainant was "discovered" by the second appellant in bed with the first appellant, about to have sexual relations with her. A custodial sentence was passed. Held: there were no grounds for interfering with the sentence passed by the trial court.

Criminal procedure (sentence) — common law offences — murder — extenuating circumstances — need for court to consider cumulative effect of relevant circumstances — youthfulness— may standing alone constitute an extenuating circumstance

S v *Chininga* S-79-02 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

When considering extenuating circumstances, the court must consider the cumulative effect of all the relevant circumstances. Failure to do so is a misdirection. Youthfulness on its own or together with other factors can constitute an extenuating circumstance. Youthfulness connotes immaturity, lack of experience of life, thoughtlessness and a mental condition of susceptibility to external influences, especially those emanating from adult persons.

Criminal procedure (sentence) — common law offences — rape — on young victim — appropriate sentence

S v *Nyamimba* HH-204-02 (Guvava J, Hlatshwayo J concurring)

The 44 year old appellant was convicted of the rape of a 6 year old child and sentenced to 9 years' imprisonment, of which 2 years were suspended on conditions. Held: Complainants in sexual cases are traumatized by the act of rape. Further trauma, having far-reaching psychological effects on rape victims, can occur when the complainant is victimised by other persons because of the rape. A rape perpetrated on a young girl should attract a sentence of at least 10 to 12 years' imprisonment.

Criminal procedure (sentence) — statutory offences — Public Order and Security Act [*Chapter 11:17*] — s 17(1)(b) — riotous assembly etc — destruction and theft of property to make complainant change political affiliation — appropriate sentence

S v *Muchoro* HH-182-02 (Smith J)

The accused was charged with contravening s 17(1)(b) of the Public Order and Security Act [*Chapter 11:17*]. The charge was that she unlawfully and riotously assembled with others with a common intent forcibly to disturb the public peace or security or to invade the rights of others. She and other members of the ZANU (PF) Youth League went to the complainant's homestead for the purpose of making him renounce his membership of the Movement for Democratic Change and affiliate with ZANU (PF). The complainant would not comply with their wishes so they destroyed his kitchen utensils and wardrobe and removed property from his kitchen and granary. The total amount of damage caused was $15 560. She was sentenced to a modest fine with a short alternative period of imprisonment. Held: the sentence was manifestly too lenient. It was unlikely to be an effective deterrent.

Criminal procedure (sentence) — statutory offences — Public Order and Security Act [*Chapter 11:17*] — s 17(1)(b) — riotous assembly etc — destruction and theft of property and serious assault to make complainant change political affiliation — appropriate sentence

S v *Mutsengiwa & Ors* HH-183-02 (Smith J)

The 5 accused were charged with contravening s 17(1)(b) of the Public Order and Security Act [*Chapter 11:17*]. The charge was that they unlawfully and riotously assembled with others with a common intent forcibly to disturb the public peace or security or to invade the rights of others. They were all members of the ZANU (PF) Youth League. They had to the complainant's homestead for the purpose of making him renounce his membership of the Movement for Democratic Change and affiliate with ZANU (PF). The complainant would not comply with their wishes, so they destroyed a large amount of his property and severely assaulted him, breaking one leg. They were all sentenced to terms of imprisonment, of which all or part was suspended. Held: political violence is unacceptable and deterrent sentences must be imposed. The moral blameworthiness of those who planned the violence was much greater.

Customary law — application — not applicable when justice of case so requires — acquisition of matrimonial home by urban dwellers — general law applying

Magondo v *Magondo* HH-174-02 (Cheda J)

In a dispute between Africans, general law, rather than customary law, applies if the justice of the case requires it. Where married urban dwellers acquire a matrimonial home, justice demands that general law applies, and that such concepts as tacit universal partnership and ownership of immovable property can be considered.

Customary law — application — unregistered customary law marriage — termination — distribution of estate — should be decided by general law principles

Marange v *Chiroodza* HH-130-02 (Makarau J)

Customary law is inapplicable in all instances when the estate of parties to a terminated unregistered customary marriage has to be distributed. It should rarely appear just and proper to any court that customary law should apply to the distribution of the estate of those in an unregistered marriage. In all cases where the distribution of the estate of parties in an unregistered union is raised and the estate includes land or rights to land, the application of general law is justified. To apply customary law to the distribution of such an estate will be to perpetuate an injustice and to discriminate against African women who chose to marry according to custom.

Customary law — marriage — when comes into existence — lobola must be agreed — not necessary that lobola has actually been paid

Magondo v *Magondo* HH-174-02 (Cheda J)

A customary law marriage comes into existence when lobola and other payments are agreed. It is not necessary to wait until they are actually paid.

Customary law — succession — intestate succession — governed by customary law — grandson succeeding to estate — daughter having no right to succeed

Chaumba v *Chaumba* S-15-02 (Cheda JA, Ebrahim & Sandura JJA concurring)

Where an African dies intestate, his estate is administered and distributed according to the usages and customs of his tribe. Under Shona customary law, a female has no right to succeed. The deceased had a son and a daughter. After the deceased died, his son also died. Under customary law, the estate had to go to the son's son, not to the daughter.

Customs and excise — customs duty — rebate granted to immigrant — goods purchased and fully paid for before immigrant entered Zimbabwe — all of purchase price paid before but part of price received by seller after immigrant arrived — whether goods "fully paid for by immigrant"

Mazarura v *Director of Customs & Excise* S-98-02 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

The appellant paid part of the purchase price of a new car and initiated payment of the balance before he returned to Zimbabwe as an immigrant. The seller of the car received the balance of payment only after the appellant's arrival because of delays in the banking system. The Director refused his application for an immigrant's rebate of duty on the grounds that the goods were not fully paid for before his arrival. Held: "fully paid for by the immigrant" did not necessarily mean "receipt of full payment by the seller". The appellant had done everything that could be expected of him.

Damages — assessment — damages arising from death of breadwinner — approach to — effect of inflation — right of children to claim only up to age of their majority

Dapi & Anor v *Mutare & Anor* HH-108-02 (Smith J)

In assessing damages arising out of the death of a breadwinner, the court must make an estimate of the present value of the loss. The fact that the assessment will to some degree involve guesswork does not mean that the court may adopt the approach that it cannot make an award at all. Damages should be awarded as the sense of equity of the judge may determine, account being taken of the maintenance which the deceased would have been able to afford and had usually afforded to his dependents. Inflation is a factor that must be taken into account. Minor children can only claim damages in respect of the period between the death of the parent and the date on which each attains majority.

Damages — assessment of — patrimonial loss — cost of repairs — inflation causing massive rise in cost of repairs — effect on assessment of damages

Leighton v *Eagle Insurance Co Ltd & Ors* HH-193-02 (Smith J)

The plaintiff was injured in a motor cycle accident which occurred in 1996. He claimed for, among other things, the cost of repairs. The 1996 value of the motor cycle was less than $95000. The summons was issued in 1997 but the defendant only pleaded in 2002. It offered $150000 for the replacement value of the motor cycle. During the intervening period, there had been rampant inflation in Zimbabwe, around 160%, and by 2002 the spares would cost over 10 times the 1996 value of the motor cycle. Held: in view of the high levels of inflation, the defendants' offer was not a reasonable one. A departure of the usual yardstick of the salvage value of the motor cycle was required. The plaintiff would be awarded a sum based on the current cost of spares.

Delict — *injuria* — invasion of privacy — when an *injuria* — approach to be taken — plaintiff a public figure — relevance of

Mandaza v *Daily News & Anor* HH-144-02 (Adam J)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — Declaration of Rights — right to privacy)

Delict — liability — vicarious liability — rationale for holding employer vicariously liable — deviation from duties for which employed — tests to be applied to determine whether servant is Aon a frolic of his own"

NSSA v *Dobropoulos & Sons (Pvt) Ltd* S-86-02 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)
The rationale behind holding employers vicariously liable for the acts of their employees, even where the latter have deviated from the strict course of their duty, is that it is right and proper, where one of two innocent parties has suffered a loss arising from the misconduct of a third party, that the loss should fall on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. This approach does not depend upon a "creation of risk" theory, but uses the customary test for determining the existence of vicarious liability which serves the interests of society by maintaining a balance between imputing liability without fault, which runs counter to general legal principle, and the need to make amends to an injured person who might otherwise not be recompensed. Where there has been a deviation from duty, the employer's liability depends on the nature and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of degree.

Election — election petition — recognisances by petitioner — form of — no requirement that petitioner should enter into bonds or cession — suitability of person as surety — not disqualified on grounds that he is facing criminal charges — no requirement that recognisance should show *ex facie* that it was signed in presence of Registrar

Tsvangirai v *Mugabe & Ors* HH-114-02 (Gowora J)

The applicant filed an election petition challenging the outcome of the Presidential election. He and 3 others entered into recognisances in an amount set by the registrar of the High Court. The respondents challenged the security on the grounds that (a) it was insufficient; (b) two of the sureties were facing criminal charges; (c) the recognisance was defective as no bond had been deposited; and (d) the recognisance was a nullity as it did not show that it had been signed before the registrar or a magistrate. However, the Registrar confirmed that it had been signed in her presence. Held: (a) while the Registrar had exercised a discretion, the court could interfere if the Registrar was found to be wrong in her assessment of the likely costs involved. In the light of what the petitioner was alleging, the trial was likely to be very protracted, and the amount she had assessed was inadequate. (b) There was no ground for saying that a person facing criminal charges could not be a surety. Even a criminal conviction not necessarily affect a person's ability to discharge his debts. (c) In view of the accepted meaning of "recognisance", there was no basis for holding that the petitioner had to enter into bonds or cessions to give effect to the recognisance. (d) The legislation did not require that the recognisance should show *ex facie* that it was signed in the presence of the Registrar. While the respondent had the right to object to a recognisance, if grounds the objection were removed, the petition could proceed.

Election — voter — voters' roll — copies of — supply by Registrar-General — copies must be in printed, in not electronic format

Tsvangirai & Ors v *Registrar-General* HH-111-02 (Makarau J)

The applicants sought an order compelling the respondent to supply, on payment of a fee, copies of the voters' roll on CD. The respondent argued that while he could supply a printed version of the roll, he could not be required to supply the roll

on CD. Held: (1) the legislation under which copies of the voters' roll could be obtained clearly referred to printed copies or extracts therefrom. The law was behind the times, and remained in the pre-computer age, but was clear. (2) The fact that the respondent had previously consented to the granting of a similar order did not mean that he could not now be heard to oppose such an order.

Election — voter — voters' roll — copies of — supply by Registrar-General — limitations on requirement to supply voters' roll — no requirement to supply copy of common voters' roll to candidate in Presidential election

Tsvangirai & Ors v *Registrar-General* S-93-02 (Gwaunza JA, Ziyambi & Malaba JJA concurring)

A person inspecting a constituency voters' roll is entitled to make copies of it. There is no provision in the Electoral Act whereby the Registrar-General can be required to provide copies of the common voters' roll to a candidate in a Presidential election.

Employment — code of conduct — disciplinary action under — appeal following conviction by disciplinary committee — appeal upheld — effect

Mnensa & Anor v *Chingwena NO & Anor* HH-179-02 (Smith J)

The applicants were suspended from their employment on allegations of misconduct. They were found guilty by the disciplinary committee, but on appeal the chief executive set aside the committee's decision on procedural grounds. He referred the matter back for a fresh hearing. The applicants sought an order that they remained employees and were entitled to reinstatement. They argued that the chief executive had no jurisdiction to order a fresh hearing. Held: the code of conduct did not specifically give the chief executive power to remit a case for hearing afresh. Even if it did, this would not be an appropriate case to do so, since the committee chairman, for whom there was no alternate, had already determined the applicants' guilt. In any event, the time limits set out in the code of conduct had long passed. The applicants remained employees and were entitled to their salaries and benefit from the date of suspension.

Employment — code of conduct — unregistered code of conduct — conduct warranting dismissal under code of conduct — requirement for employer to proceed under labour regulations — conduct not warranting dismissal under code — not permissible to apply for dismissal under regulations

Matungamire v *PTC* S-84-02 (Sandura JA, Ziyambi & Malaba JJA concurring)

Where there is an unregistered code of conduct, an employer who wishes to dismiss an employee must apply in terms of the labour regulations for termination of the contract of employment. However, where the code of conduct provides a punishment less than dismissal for the particular act of misconduct, the employer should not proceed in terms of the Regulations and seek authority for the employee's dismissal. He should proceed under the code of conduct.

Employment — collective bargaining agreement — employer awarding increase higher than provided for in agreement — need for employer to negotiate with employers and agree on increase — not permissible to decide unilaterally on amount of increase

Thomas Meikle Centre (Pvt) Ltd v *TM National Workers' Cttee & Ors* S-77-02 (Gwaunza AJA, Cheda & Malaba JJA concurring)

The appellant company unilaterally decided to award a wage increase of 3% above the rate provided for in the collective bargaining agreement for the industry. It refused to negotiate with the employees about the increase. They appealed to a labour relations officer, alleging an unfair labour practice. The officer ordered that negotiations should be entered into. The appellant argued that the parties were bound by the constitution of the first respondent and that there was no obligation to negotiate about the increase. Held: (1) there was nothing in the constitution which made the first respondent the only negotiating forum between the parties. (2) Section 74(6) of the Labour Relations Act, which allows an employer and his employees to agree to conditions more favourable than those provided for in a collective bargaining agreement, requires an agreement rather than a situation where the employer unilaterally awards higher wages.

Employment — contract — termination — on notice — code of conduct in existence — requirement to follow procedures set out in code of conduct — dismissal unlawful if such procedures not followed fully

Mabhena v *PG Industries* HH-115-02 (Mungwira J)

The applicant was dismissed from his employment on notice. The grounds given for his dismissal were his inadequate performance and the fact that the employer was re-organising its structures. Apart from alleging that his dismissal was unlawful, the applicant claimed that for various periods he had not been properly paid. The respondent argued that as there was a registered code of conduct in force, it was entitled to dismiss employees on notice in terms of the code of conduct. Held: (1) the existence of the code implies some essential procedural requirements to be observed and failure to observe them may result in dismissal being declared to be void. The code of conduct was more than an embodiment of contractual terms governing the applicant's employment with the respondent. It represented a product of the statutory provisions contained in the codes of conduct regulations. Implementation of the provisions of the code of conduct is in turn a process of effecting compliance with the provisions of the code of conduct regulations. The existence of these regulations placed the applicant's case on an entirely different plane from the ordinary master and servant category. Acceptance of the fact that the code of conduct was applicable to the applicant necessarily implies that the employer in dismissing the applicant acted after exhausting the set procedures. There was no evidence that this was the case. (2) If reorganisation requires the discharge of staff, the retrenchment procedures must be followed.

Employment — contract — termination — retrenchment — application for Minister's approval — status of employees pending Minister's decision — entitlement to salaries and benefits

Chipunza & Ors v *Beverley Building Society* HH-133-02 (Smith J)

Where an application has been made to the Minister for the approval of proposed retrenchment of staff, the persons concerned remain employees until the Minister has made his decision. They are entitled to the salaries and benefits due under their contracts.

Employment — contract — termination — suspension of employee without pay and benefits pending application for order to terminate employment — benefits including motor vehicle — employee not challenging suspension — employee resigning while suspended — not entitled to retain use of motor vehicle during period of suspension

Tafuma v *Tudor House Consultants (Pvt) Ltd* HH-153-02 (Chinhengo J)

The applicant had been suspended from work by his employer, the respondent, pending the determination of the matter in terms of the labour legislation. The suspension was without pay or benefits. After a few months, the applicant, anxious to finalise the matter, resigned and returned the motor car that had been part of his benefits. The respondent deducted certain expenses in relation to this car from the final payment due to him. Held: (1) resignation constitutes a final act of termination by an employee, the effects of which he cannot avoid without the employer's consent. The employer cannot refuse to accept the resignation nor can he decline to act upon it: he really has no option. (2) The failure by the employee to challenge the suspension means that the suspension takes effect with all its consequences. In terms of the Regulations an employer is permitted to suspend an employee, without pay or benefits and the employee, unless he challenges such suspension, remains suspended and suffers the attendant effects, until the question of his dismissal is determined. (3) Since the applicant had not challenged the suspension, he was not entitled to retain the car during the period of suspension, and the respondent was entitled to recover its costs.

Employment — contract — termination — unlawful — order for payment of damages, back-pay and benefits — assessment of quantum — back-pay must be net pay, not gross

Chiriseri & Anor v *Plan International* S-56-02 (Sandura JA, Cheda & Ziyambi JJA concurring)

The appellants were suspended from employment pending an application to terminate their employment. The labour relations officer and, subsequently, the Labour Tribunal ordered that they be reinstated without loss of salary or benefits, alternatively that damages be paid in lieu. The Tribunal based its assessment of damages on a period of 18 months. The question on appeal was whether they were also entitled to back pay and benefits from the date of suspension until the date of the Tribunal's ruling. Held: (1) it was clear that the order for reinstatement was intended to be retrospective in effect. (2) Where an order of reinstatement is retrospective in effect, the damages to be paid in lieu of reinstatement must include back-pay and benefits. (3) The appellants were entitled to back-pay and benefits up to the date of the labour relations officer's ruling. (4) The amounts payable were the net amounts they would have received, less the net amounts of any income earned in mitigation.

Employment — contract — termination — unlawful — order for reinstatement — reinstatement without loss of pay or benefits — retrospectivity implied — damages in lieu — duty to mitigate loss — onus on employer to show that employee could have mitigated loss

ZUPCO v *Daison* S-87-02 (Sandura JA, Ziyambi & Malaba JJA concurring)

Where an employee is reinstated without loss of pay or benefits, the reinstatement is retrospective. If damages are paid in lieu, they must include back-pay and benefits. Although the employee should mitigate his loss by taking other employment, the employer has the onus of showing that he has, or should have, earned money from another source.

Employment — contract — termination — unlawful — order for reinstatement — where order implies retrospectivity, employee entitled to back-pay and other benefits — benefits to which employee entitled — duty to mitigate loss — onus on employer to show that employee could have mitigated loss

Madyara v *Globe & Phoenix Industries (Pvt) Ltd* S-63-02 (Sandura JA, Cheda JA & Gwaunza AJA concurring)

The appellant had been unlawfully dismissed from his employment. The Labour Relations Tribunal ordered his reinstatement, alternatively damages in an amount to be assessed by the Tribunal. The appellant was not reinstated, and the Tribunal awarded damages. An application for back-pay was disallowed. The appellant appealed against the quantum of damages. Held: (1) no appeal lay against a decision of fact (and a ruling on damages was a ruling of fact) unless the decision could be said to be unreasonable. However, where there was a misdirection, an appeal may lie. In this case, the Tribunal had misdirected itself with regard to back-pay, and the appeal was properly before the court. (2) Where the wording of the order for reinstatement clearly implies retrospectivity, then the employee is entitled to back-pay and benefits. (3) The appellant was also entitled to the other allowances and benefits he would have received had he not been dismissed. (4) While an employee should mitigate his loss by taking alternative employment, the onus is on the employer to show that the employee earned or should earned some money during the period in question.

Employment — contract — termination — wrongful dismissal — damages for — assessment — requirement for dismissed person to mitigate loss by taking any reasonable alternative employment — what is reasonable time by which such employment should have been taken up

Maseko v *Jongwe Printing & Publishing Co (Pvt) Ltd* HH-191-02 (Chinhengo J)

The plaintiff was employed by the defendant as its managing director in terms of a written contract. The contract was for a fixed 3 year period. The defendant, after some 15 months, summarily terminated the plaintiff's employment. The questions to be decided in a stated case were (a) whether the plaintiff was entitled to damages for one month only or for the balance of the 3 year term; and (b) whether the plaintiff had failed to mitigate his loss. Held: (1) If a fixed term contract had not expired, employment could only be terminated in terms of the labour regulations. The fact that the contract purported to allow one month's notice to be given was irrelevant. The termination was unlawful. (2) The principles regarding mitigation of loss that applied to an indeterminate contract also applied to a fixed term contract. The plaintiff was entitled to be placed in the same position as he would have been had the contract not been terminated, but was required to mitigate his loss. It was reasonable to assume that the plaintiff could have mitigated his loss, and the damages would be based on the date when he lost his employment and the date when he could reasonably have been expected to find alternative employment. A year would be a reasonable period.

Employment — industrial agreement — Minister's power to interfere with — powers limited to amending agreement in terms of s 81 of Labour Relations Act [*Chapter 28:01*] — not competent to direct one party to ignore agreement

PTC v *Posts & Telecommunications Workers Union & Ors* S-107-02 (Cheda JA, Sandura JA & Gwaunza AJA concurring)

See above, under CONTRACT (Validity).

Employment — Labour Relations Tribunal — appeal against decision of — appeal only lies on point of law — decision by Tribunal on quantum of damages — misdirection by Tribunal — appeal competent

Madyara v *Globe & Phoenix Industries (Pvt) Ltd* S-63-02 (Sandura JA, Cheda JA & Gwaunza AJA concurring)

See above, under EMPLOYMENT (Contract — termination — unlawful)

Evidence — foreign statute — interpretation of — whether expert evidence is required

Registrar-General & Anor v *Todd* S-101-02 (Chidyausiku CJ, Malaba JA & Gwaunza AJA concurring)

Section 25 of the Civil Evidence Act [*Chapter 8:01*] does not render the Supreme Court incompetent to interpret foreign statutes.

Evidence — judicial notice — facts of which judicial notice may be taken — principles — shortage of foreign currency — not a fact of which judicial notice may be taken

Chiraga v *Msimuko* HH-167-02 (Chinhengo J)

The applicant was indebted to the respondent, a resident of Swaziland, for a sum of money lent to him. The sum advanced was in South African currency. When the applicant failed to pay on due date, the respondent obtained judgment against him, and registered a caveat against the applicant's immovable property in Zimbabwe. The applicant offered to pay the equivalent in Zimbabwean currency at the official rate of exchange. He pleaded impossibility of performance, owing to a shortage of foreign currency. He urged the court to take judicial notice of the shortage and of his own ability to source foreign currency. Held: (1) Judicial notice of a fact must be taken if the fact is notorious or where it can be clearly established without the necessity of evidence of its existence. To take judicial notice of the fact of the acute shortage of foreign currency in this country would go outside the narrow confines of the application of the doctrine of judicial notice. No evidence had been placed before the court. A certificate from the executive would suffice as proof of the shortage. The court could certainly not take notice, without evidence, of the applicant's own inability to find foreign currency. (2) It was permissible to grant a judgment sounding in foreign currency. (3) The contract was not absolutely impossible of performance, so the court was not entitled to alter it.

Exchange control — acquisition of foreign currency — payment for articles purchased — payment to be made in foreign currency — rate at which payment to be made to person acquiring the currency — payment to include premiums and other charges paid to acquire the currency

Meristem Investments (Pvt) Ltd v *NMB Bank Ltd* HH-211-02 (Smith J)

The applicant contracted to supply computers to the respondent merchant bank. It deposited funds sufficient to cover the cost of the computers at the then market rate of exchange of 387:1. The official rate stood at 55:1. When the computers were acquired and the account for them presented (the account being in foreign currency), the respondent acquired the necessary money at the prevailing market rate, which was substantially higher than when the contract was formed. It debited the cost of acquiring the foreign currency against the applicant's account; this resulted in a substantial overdraft. The applicant sued for the balance. Held: The applicant wanted the respondent to facilitate the acquisition of foreign currency which the applicant could use to purchase the computers it needed to fulfil its obligations under its contract with the respondent. It must have been well aware that the respondent would have to get the foreign currency on the parallel market. The respondent did not purchase the currency for itself and then sell it to the applicant. It merely sourced the currency on behalf of the applicant. The applicant, as the purchaser of the computers, used the currency to pay the purchase price. Accordingly, the applicant was legally bound to pay the respondent the premiums that the respondent had to pay in order to obtain the foreign currency.

Family law — child — custody — principles — parent with legal right of custody — such parent not asserting right for several years — right to object to *de facto* custodian's actions in respect of child — child's best interests paramount

Masina v *Chikowore & Anor* HB-121-02 (Ndou J)

The applicant, the maternal grandmother of an 8 year old girl, had had *de facto* custody of the child for over 4 years following the death of the child's mother. The respondent, the child's father, had done little for the child and had little contact with her. When the applicant proposed to take the child to the United States on a short holiday, the respondent would not sign the

passport application forms. Held: the respondent's rights of access would be reduced or jeopardised if the child were removed, so his consent was relevant. The question was then whether he was withholding his consent reasonably or otherwise. The interests of the child were paramount, and in the circumstances the respondent's objections were unreasonable and not in the child's best interests.

Family law — child — custody — following divorce — child's best interests paramount — custodian parent alienating children from the other parent — course to adopt

Galante v *Galante (3)* HH-177-02 (Smith J)

In determining custody of children, the court must approach the matter on the basis of what is in the best interests of the child. There is no rule that the mother is to be given preference. In this case, the mother had custody and had been alienating the children against the non-custodian father. She had also flouted court orders and removed the children from the jurisdiction. This was a matter that could be considered in determining whether she should have custody.

Family law — child — custody — following divorce — principles — best interests of specific individual child should be court's main concern — need for security and stability in child's life

Kuperman v *Posen (2)* HH-194-02 (Makarau J)

The plaintiff sued her husband for divorce. Pending the action, she left the country with the 3 children of the marriage (without telling the defendant) and went to Israel. Nearly a year later, the defendant discovered their whereabouts and got an order from an Israeli court that the plaintiff and children return to Zimbabwe. The defendant returned with the children. At the continuation of the divorce action, the main issue was the custody of the children. Held: the primary question is the best interests of the children. The court should view the custody matter as a focused inquiry into the best interests of particular children, born in certain specified circumstances and with their individual needs, sensitivities and fears. The approach should avoid viewing the children as a purely legal issue that has to be resolved by the application of one principle or another. The plaintiff clearly loved the children and her move was motivated by her strong religious convictions. However, the children's best interest was the provision and the cultivation of a sense of security and stability in their lives, by the provision of a secure and permanent home with a parent who loves them. This meant that they should stay in Zimbabwe with their father, but with their mother having rights of access exercisable in Zimbabwe.

Family law — husband and wife — divorce — distribution of matrimonial property — tacit universal partnership — when can be held to exist

Marange v *Chiroodza* HH-130-02 (Makarau J)

Marriage is a union for life in common of a man and a woman. The legal rights and obligations created by marriage include community of life and the maintenance of one common household. This is an invariable consequence of marriage. As such, the parties contribute in their different ways to the successful running of their common household. The common estate may be built by the industry of the husband and the thrift of the wife, but it belongs to them jointly, as the one could not have succeeded without the other. Where the spouses pool their resources for their common enjoyment, even if they are not involved in a commercial venture for profit, they are in a universal partnership for the purposes of their livelihood and the maintenance of their common household.

Family law — husband and wife — divorce — domicile — husband alleging domicile in another country — how domicile established

Nunes v *Nunes* HH-220-02 (Hungwe J)

The parties were born, raised and married in Zimbabwe, but had moved to Botswana some 17 years before the wife instituted an action in Zimbabwe for divorce. The husband averred that he was no longer domiciled in Zimbabwe. Held: In order to change domicile, there must be both an intention to reside indefinitely in a new country *animus manendi* and residence in that country. A person alleging a particular domicile of origin must make out a *prima facie* case and he discharges the burden of proof if he establishes facts tending to prove rather than to disprove his allegation. The facts averred by the husband showed that he had obtained a new domicile of choice, and the court thus had no jurisdiction.

Family law — husband and wife — divorce — domicile — what must be shown — husband resident in Zimbabwe for less than a year — not shown to have been domiciled here

Latif v *Latif* HH-150-02 (Adam J)

The plaintiff sought a divorce from her husband, a Pakistani citizen. She averred that he had established a domicile in Zimbabwe citizen. He had arrived in Zimbabwe in August 2001 and married the plaintiff in the same month. The action was instituted about a year later. Held: to establish domicile, it was necessary for the defendant to have been actually resident in the country for over a year and to have shown that he intended to reside here permanently.

Family law — husband and wife — divorce — property division following — law to apply — law of husband's domicile at time of marriage

Galante v *Galante (3)* HH-177-02 (Smith J)

In determining the question of division of property following divorce, the matrimonial rights of the parties *inter se* are governed by the laws of the country in which the husband was domiciled at the time of marriage.

Insolvency — act of — disposition not made for value — what is — bonuses and other payments made to employee — what may be regarded as no having been made for value

UMB Liquidators v *Katiyo* HH-127-02 (Ndou J)

The liquidator of a bank sought to have certain payments made to the defendant (who was the bank's company secretary before its liquidation) declared to be dispositions not made for value. The liquidator sought an order requiring the defendant to pay the sums back. The defendant claimed that most of the amounts were for bonuses, which had been awarded irregularly at the discretion of the then chairman. Held: (1) a disposition not made for value is one for which no benefit or value is or has been received or promised as a *quid pro quo.* The most obvious example of such a disposition is a donation. (2) Each of the payments had to be treated separately. Where a bonus was paid out of liberality inspired by some undisclosed generosity, there being no legal obligation on part of the bank to pay them, and such bonuses being paid at irregular intervals and not performance based, they were dispositions not made for value. (3) Those payments which could be regarded as part of the employee's conditions of service were dispositions made for value and need not be repaid.

Interest — liability for — agreement to pay — failure to pay when demand made — interest payable from that date

Business Equipment Corp v *Baines Imaging Group* S-78-02 (Malaba JA)

The applicant supplied medical equipment to the respondent. The equipment turned out to be faulty and the applicant agreed to refund the purchase price. When it failed to pay, the respondent demanded payment. It also claimed interest. The applicant argued that the respondent had to prove breach of contract in order to lay a foundation for its claim for the payment of interest on the purchase price. Held: by undertaking to refund the purchase price, the applicant had assumed a duty to pay. Its failure to pay when demand was made constituted *mora* and interest ran from that date.

Interest — rate of — interest in excess of rate laid down in Money Lending and Rates of Interest Act [*Chapter 14:14*] — lender not disentitled to recover debt — excess interest can be recovered by debtor — rate laid down by Act — not same as rate under Prescribed Rate of Interest Act [*Chapter 8:10*] — how rate to be ascertained

Niri v *Coleman & Ors* HH-192-02 (Chinhengo J)

The defendants were indebted to the plaintiff, having borrowed a sum of money from him. They defaulted on the loan repayments. When summary judgment was sought, they opposed it on the grounds, *inter alia*, that, as the rate of interest exceeded the maximum permitted, they had a defence to the claim. Held: (1) The fact that the rate of interest was illegal did not make the principal debt irrecoverable. The defendants could recover any interest paid over the maximum rate. (2) The rate of interest under the Money Lending and Rates of Interest Act is not the same as the rate under the Prescribed Rate of Interest Act; the latter is set out in a statutory instrument and equates to the Reserve Bank's re-discount rate as fixed from time to time.

Interest — rate — no interest rate agreed on — payment to be made in local currency — prescribed rate of interest applicable

Chisese v *Garamukanwa* S-68-02 (Gwaunza AJA, Chidyausiku CJ & Cheda JA concurring)

See above, under CONTRACT (Loan).

Land — acquisition — notice of proposal to acquire land for resettlement purposes — description of land — whether description must tally with description in title deeds — application to Administrative Court to confirm acquisition — notice to affected party — when notice must be served

C & S Werrett (Pvt) Ltd v *Minister of Lands & Anor* HH-172-02 (Hlatshwayo J)

The applicant was the owner of a farm. A notice of acquisition was gazetted, but the name and description did not precisely match that in the title deeds. An application was filed in the Administrative Court by the respondent under s 7 of the Land Acquisition Act, seeking confirmation of the acquisition. The applicant was not served with a copy of the application. It sought to have the notice of acquisition set aside as a nullity and a declaration that the delay was such as to render the acquisition process invalid. Held: (1) The purpose of describing the property in terms of s 5 of the Act is to enable interested persons to be informed of the intended acquisition and to invite them to inspect the actual map or plan of the land concerned. The initial description need not be mathematically accurate; it must merely be sufficient to adequately inform as it is subject to additional verification and specification upon examination of the map or plan required to be kept by the acquiring authority. (2) The concern in s 7(3) is for interested parties to be given due notice of the hearing at the Administrative Court. The Areasonable practicability" of the service of the notice must be interpreted in relation to the hearings. A delay in the notification may be declared unreasonable where in the totality of the circumstances the acquiring authority by the delay can be held to have evinced an intention no longer to proceed with the acquisition.

Land — acquisition — notice of proposal to acquire land for resettlement purposes — notice to affected party — not necessary that notice be served on tenant — Land Acquisition Act [*Chapter 20:10*] — ss 5 & 8 — Constitution of Zimbabwe 1980 — s 16(1)(b)

Mead v *Minister of Lands & Anor* HH-173-02 (Hlatshwayo J)

See above, under ADMINISTRATIVE LAW (Administrative decision — failure by person exercising public authority to exercise powers**)**

Land — acquisition — notice to landowner — requirement to serve notice on bondholder as well — failure to notify bondholder — effect

Tengwe Estates (Pvt) Ltd v *Min of Lands & Anor* HH-109-02 (Hungwe J)

See above, under ADMINISTRATIVE LAW (Administrative decision)

Legal practitioner — conduct and ethics — allegations of impropriety against another officer of court — practitioner's responsibilities when making such allegations — effect of failure to act responsibly

Chibanguza Motor Car Repairs & Spares (Pvt) Ltd v *Mutyasira & Ors* HH-228-02 (Smith J)

See above, under COURT (Officer — Master — allegations of impropriety made against Master)

Local government — urban council — rates and charges — objection to — procedure for dealing with objections — effect of failure to observe strict requirements of legislation

Mutare Residents' and Ratepayers' Association v *City of Mutare* HH-165-02 (Smith J)

The applicant ratepayers' association objected to certain rates and charges set by the respondent urban council. Objections had been submitted, and numerous signatures were included in a booklet. The town clerk did not attach the booklet to the agenda for the council meeting, but circulated the booklet among the councillors present at the meeting. The council meeting was convened at short notice, when 5 out of 17 members were unable to be present. No vote was taken at the meeting, the decision to implement the rates having been reached Aby consensus". The applicant argued, *inter alia*, that the provisions of the Urban Councils Act had not been complied with. Held: (1) a copy of each objection must be sent to councillors before the meeting; it was not enough to send part of the objection. (2) The Act stated that a rates increase should not come into

effect unless passed by a majority of the total membership of the council. It was not enough to reach the decision by consensus. A vote had to be taken and the number of voters in favour of the resolution recorded.

Military law — court martial — trial — when trial commences — commences with arraignment, which is effected by convening order

Ndlovu & Ors v *Minister of Defence & Ors* HB-82-02 (Kamocha J)

The applicants were members of the Army. They had been tried and convicted by court martial and sentenced to terms of imprisonment. The offences were committed just under 3 years before the convening order for the court martial was issued, but the hearing itself began more than 3 years after the offences were committed. The applicants argued that the trial was grossly irregular, in that the court martial has no jurisdiction to try a matter unless the trial is commenced within 3 years of the alleged offence. Held: a Atrial" includes the arraignment, and the applicants were arraigned by the convening order. Consequently, the proceedings were valid.

Pensions — pension benefits — withholding of — when benefits may be withheld — proof required before benefits may be withheld

ZECO Ltd's Liquidator v *Registrar of Pensions & Provident Funds & Ors* S-42-02 (Cheda JA, Ziyambi & Malaba JJA concurring)

The third respondent had been an employee of the appellant company, which was placed in liquidation in 1995. After the company had been placed in provisional liquidation, the registrar approved the withholding of pension benefits due to the third respondent, provided that the liquidator showed that the third respondent had actually been convicted of the alleged crimes of fraud and theft. Several months later, as no such evidence had been provided, the registrar instructed that the employee's pension benefits be paid to him. An application by the liquidator to set aside the registrar's instruction was refused. On appeal, held: it was clear from the legislation that pension benefits should not be interfered with unless the person has voluntarily ceded or pledged his benefits, or has been involved in clear and proven acts of dishonesty which have caused pecuniary loss to his employer. The liquidator had failed to provide proof of the standard required.

Practice and procedure — absolution from the instance — principles — court should lean in favour of case continuing

Bailey NO v *Trinity Engineering (Pvt) Ltd & Ors* HH-181-02 (Matika J)

In an application for absolution from the instance, the test to be applied is whether there is evidence upon which a reasonable court might find for the plaintiff. If so, and particularly if the defence is something peculiarly within the knowledge of the defendant, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance.

Practice and procedure — application — application seeking condonation of late noting of application for rescission of default judgment — applicant alleging dilatoriness on part of former legal practitioner — need to obtain affidavit from practitioner

Challenge Auto (Pvt) Ltd & Ors v *Standard Chartered Bank Zimbabwe Ltd* HH-221-02 (Ndou J)

The applicant for condonation of late noting of an application for rescission of a default judgment sought to blame its former legal practitioners' alleged dilatoriness in handling the matter. No proof of such dilatoriness was offered. Held: an affidavit should have been submitted from the legal practitioners. It would be wrong for the court to blame them for the delay without hearing them.

Practice and procedure — application — respondent wishing to raise point that applicant should have exhausted domestic remedies — should do so in opposing papers and not raise matter for first time in argument

Practice and procedure — application — applicant not having exhausted domestic remedies — court's discretion to hear matter

Chipunza & Ors v *Beverley Building Society* HH-133-02 (Smith J)

If the respondent in an application wishes to raise the procedural point that the applicant should have first exhausted his domestic remedies, it should do so in its opposing affidavit and not raise the matter for the first time in argument.

The fact that the applicant has not exhausted his domestic remedies does not oust the jurisdiction of the court. The court has a discretion to hear the matter. One factor is whether in the circumstances it is appropriate for the domestic tribunal to consider the matter.

Practice and procedure — application — urgent — when matter may be treated as urgent — need for applicant himself to have treated the matter as urgent

Madzivanzira & Ors v *Dexpoint Invstms (Pvt) Ltd & Anor* HH-145-02 (Ndou J)

For an application to be treated as urgent, not only must there be the danger of irreparable prejudice if the matter is not dealt with immediately, but also the applicant must himself have treated the matter as one of urgency.

Practice and procedure — execution — sale — judgment expressed in foreign currency but payable in Zimbabwe — contract providing that payment only to be made in foreign currency — effect

Lowveld Leather Products (Pvt) Ltd v *International Finance Corporation Ltd & Ors* HH-176-02 (Karwi J)

The first respondent had loaned the applicant a sum of money. The loan agreement stated that the repayments were to be in US dollars. When the loan was not repaid, the first respondent obtained judgment for the sum loaned plus interest. A writ of execution was issued. The applicant then tendered the equivalent in Zimbabwe currency at the official rate of exchange (which was substantially less than the *de facto* rate). The applicant sought an interdict to prevent execution. Held: the loan agreement specifically stated that payment could not be satisfied by the tender of anything other than US dollars. Even though the sale in execution was to be in Zimbabwe dollars, the proceeds had to be converted to US dollars by arrangement with the Government.

Practice and procedure — execution — sale — setting aside of — good grounds for doing so — facts subsequently arising — relevance

Kona & Ors v *Mudzingwa & Ors* S-71-02 (Ziyambi JA, Chidyausiku CJ & Malaba JA concurring)

The appellant's home was sold to the first respondent in execution, after the second respondent had obtained judgment against the appellant's late husband. She sought to lead evidence on appeal to show that the value of the property had been substantially increased by the fact that the city council had approved the building of Acluster" homes on the property. She also argued that the equities favoured her application. Held: (1) the evidence should be admitted. It was not available at the time of the hearing in the lower court and was materially relevant. (2) Although generally the courts will not readily interfere with a sale in execution, the equities in this case favoured the appellant and the sale would be set aside**.**

Practice and procedure — interdict — anti-dissipation interdict — when may be granted — what applicant must show

Mfune v *Mutiti & Ors* HB-122-02 (Ndou J)

The applicant sought an anti-dissipation interdict against the first and second respondents and their bankers. He had a large claim against them and, although they knew of his claim, they withdrew much of the money that was in their bank accounts. Held: an anti-dissipation interdict is a form of interlocutory interdict. Before such an interdict may be granted, the applicant must establish a *prima facie* case, even if it is open to some doubt. He must also establish an infringement, or a reasonable apprehension of an infringement, of his rights, the absence of any other satisfactory remedy and a balance of convenience in favour of granting the interdict. *In casu*, it had not been shown that the respondents were impecunious and that there was no other remedy.

See also COURT (Contempt — constructive contempt), above.

Practice and procedure — judgment — default judgment — execution following — prevention of — remedies available — interdict not appropriate remedy — rescission should be sought

ZESA Staff Pension Fund v *Mushambadzi* S-57-02 (Ziyambi JA, Sandura JA & Gwaunza AJA concurring)

The appellant obtained judgment against a bank with which it had deposited monies, which had not been repaid. The respondent, the bank's CEO, had bound himself and surety and co-principal debtor. The appellant obtained default judgment against the bank and the respondent, and sought to execute against the respondent's movable property, the bank itself having been placed in curatorship. The respondent did not apply for rescission, but sought an order returning the property and an interdict restraining the sheriff from proceeding with the auction. Held: (1) no cause of action was shown. No application for rescission was pending and the grant of the final order would effectively amount to a permanent denial of the appellant's right to execute judgment. (2) The requirements of justice did not dictate that there should be a stay of execution. (3) Neither a clear right nor a *prima facie* right having been established, there was no basis for the grant of an interdict.

Practice and procedure — judgment — summary judgment — defence to — need to establish legal defence, not a moral one — not sufficient to show that, for reasons beyond defendant's control, he was unable to pay the debt

Niri v *Coleman & Ors* HH-192-02 (Chinhengo J)

The defendants were indebted to the plaintiff, having borrowed a sum of money from him. They defaulted on the loan repayments, at least in part because their farm was invaded by "war veterans" who prevented them from farming and who stole the crop with which they hoped to pay the debt. When summary judgment was sought, they opposed it on the grounds that there was a verbal agreement varying the contract. Held: there had to be a *bona fide* and legal defence, not a moral one. Any variation to the contract of debt had to be reduced to writing, and this had not been done.

Practice and procedure — order — party's duty to comply with — party alleging order to be erroneous — duty to obey order until it is set aside — disobedience to order constituting contempt

Beverley Building Society v *Min of the Public Service* HH-143-02 (Smith J)

During the course of retrenchment proceedings, a court order was issued directing the employer to submit an application for retrenchment to the responsible Minister, for the Minister to determine on the basis that the employees did not object to retrenchment. The Minister had withdrawn his initial opposition to the granting of the order. The Minister did not consider the matter within the time limit specified in the regulations, and the employer sought to have him committed for contempt of court. An affidavit was submitted from an Acting Minister (who had not himself been involved in the earlier proceedings), disputing aspects of the order. In particular, he claimed that he had to hear the views of the employees. He sought to have the order set aside. Held: (1) there was no basis under r 449 of the High Court Rules for setting aside the order. (2) The Acting Minister's affidavit contained untruths, in that he deposed to matters which had actually been done by the substantive Minister. (3) If the Acting Minister considered that the court order was erroneously granted, he should have acted promptly to have it set aside, rather than waiting until an application was made to have him committed for contempt. Where a party considers a court order to be in error, his duty is to obey it until it is set aside. Failure to do so amounts to contempt.

Practice and procedure — parties — class action — representative — duty of court to appoint representative if applicant not a suitable person — notice to class of persons to be represented — duty of court to specify how notice to be given

Petho v *Registrar-General* S-80-02 (Sandura JA, Cheda JA & Gwaunza AJA concurring)

Where the High Court grants leave to institute a class action, the court must specify the manner in which the representative must give notice to the members of the class to be represented. It is not for the applicant or representative to do so. If the applicant himself is found to be unsuitable to be a representative, that is not the end of the matter: the court must appoint some other suitable person.

Practice and procedure — parties — company director — when personal liability occurs — documents not showing words "Private" or "Limited" — director not personally liable

Chizungu Group of Mberengwa v *Shoniwa* HB-102-02 (Chiweshe J)

The plaintiff sued the defendant personally as representing an entity called Greenwich Electrical. The entity was in fact registered as a company, of which the defendant was a director. The receipts and other documents did not use any words indicating that Greenwich Electrical was a company. Held: in the absence of fraud, a director of a company does not become personally liable simply because he deals with clients without displaying the words "Private" or "Limited".

Practice and procedure — parties — fugitive from justice — limited circumstances where court will hear a fugitive from justice

S v *Sylow* HH-136-02 (Adam J, Mavangira J concurring)

See above, under APPEAL (Criminal appeal — appellant absenting himself)

Practice and procedure — parties — *locus standi* — agent — agent bringing application purportedly on behalf of principal — need to establish authority to do so

Practice and procedure — parties — need to approach court with clean hands — party having obtained provisional order requiring action to have been brought — party bringing application instead — court declining to hear party

Masenga v *Guthrie & Ors* HH-146-02 (Ndou J)

See above, under AGENCY (Agent — authority)

Practice and procedure — parties — Zimbabwe Broadcasting Corporation — whether an organ of the State — property of the Corporation — liability to attachment

Fawcett Security Operations (Pvt) Ltd v *ZBC & Ors* HH-169-02 (Chinhengo J)

See above, under CONSTITUTIONAL LAW (State C statutory corporation)

Practice and procedure — postponement — application for — grant of — principles

Registrar-General & Anor v *Todd* S-101-02 (Chidyausiku CJ, Malaba JA & Gwaunza AJA concurring)

A court should be slow to refuse to grant a 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 he should have further time for the purpose of presenting his case. If these requirements are met, the postponement should be granted.

Practice and procedure — pre-trial conference — purpose of — judge's function — desirability of reaching settlement

Marijeni v *Mupfudze & Ors* HH-195-02 (Makarau J)

The role of the judge presiding at a pre-trial conference is to engage the parties and their lawyers meaningfully, and to assist towards a settlement. He can give directions in the matter. The judge is not a mere observer. He should be an active participant at the conference. Where opportunities to settle the matter arise, he must point them out to the parties. It is the practice that the judge who presides at the pr-trial conference will not preside over the matter if and when it comes to trial, so he can take an active part in the proceedings without being accused of pre-judging the matter.

Practice and procedure — recognisance — meaning

Tsvangirai v *Mugabe & Ors* HH-114-02 (Gowora J)

See above, under ELECTION (Election petition — recognisances by petitioner)

Practice and procedure — *res judicata* — requirements for — same subject matter — meaning

Practice and procedure — *res judicata* — whether can be raised by plaintiff against a defence raised by defendant

Tsvangirai & Ors v *Registrar-General* S-93-02 (Gwaunza JA, Ziyambi & Malaba JJA concurring)

The defence of *res judicata* has three requirements, all of which must be present. 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. *Quaere*: whether *res judicata* can be raised by a plaintiff in answer to a defence raised by a defendant.

Practice and procedure — spoliation order — requirements — shared possession of property — such possession adequate as against co-possessor — seizure of property by police during course of investigations — not spoliation

Geza v *Khumalo & Anor* HH-140-02 (Ndou J)

The applicant sold a car to the second respondent. Several months later, the second respondent returned the purchase price and made a complaint to the police that the applicant had stolen the car. The parties agreed that the car should, pending resolution of the dispute, be kept at the applicant's lawyers' office, while the second respondent's lawyers would keep the keys. The first respondent, a police officer, took the vehicle and handed it back to the second respondent, on condition that she brought it to court on the date of any criminal trial. The applicant sought a spoliation order. Held (after outlining the nature of and requirements for a spoliation order): (1) the applicant had co-possession with the second respondent, and this was sufficient. (2) The police officer was entitled, in the course of investigation, to seize the car to be used as an exhibit. Such seizure did not amount to spoliation. He may have been unwise in entrusting it to the second respondent, but this was a matter within his discretion.

Prescription — extinctive — interruption of — application for winding up of debtor company — does not interrupt prescription

Apotex Inc v *Surgimed (Pvt) Ltd* S-100-02 (Cheda JA, Chidyausiku CJ & Gwaunza AJA concurring)

An application for a winding-up order is not a legal proceeding for the enforcement of a right relating to the applicant's debt and it is not a process whereby the applicant claims that debt. The service of such an application does not have the effect of interrupting the running of the prescription of the debt.

Prescription — extinctive — when begins to run — when cause of action arises or accrues

Old Mutual Property Investment Corporation (Pvt) Ltd v *GMB* HH-216-02 (Ndou J)

Prescription begins to run when the plaintiff's cause of action reaches completion. It cannot begin to run against him before his cause of action is fully accrued, that is, before he is able to pursue his claim. In order to be able to institute action for the recovery of a debt the creditor must have a complete cause of action in respect of it. A cause of action is the entire set of facts which given rise to an enforceable claim and includes every fact which is material to be proved to entitle the plaintiff to succeed in his claim. A cause of action does not arise or accrue until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.

Public service — public servant — employment — termination — resignation — circular issued stating that public servant would be deemed to have resigned in certain circumstances — no regulation to that effect — circular invalid

Muzenda v *Public Service Commission & Anor* HH-189-02 (Paradza J)

The applicant, a public servant, submitted his nomination as an independent candidate for a parliamentary election. Before the election, he became aware of circulars issued by the Public Service Commission which stated that a public servant who wished to stand for parliament had to seek his Minister's authority to do so, but would also be required to resign from the Public Service. If he stood without authority, he was deemed to have resigned. A second circular stated that a public servant was forbidden from becoming a member of a political party or organisation. The applicant was told by the Commission that he was deemed to have resigned. Held: a circular cannot have the force of law, and in particular could not substitute legal instruments. A circular could not state that a public servant was deemed to have resigned. The regulations provided for the procedure to be followed if misconduct was alleged. The applicant would be reinstated without loss of pay or benefits.

Review — application — grounds — grounds given being effectively grounds of appeal — application dismissed

Muroiwa v *Delta Operations Ltd & Anor* S-135-01 (Chidyausiku CJ, Ebrahim & Malaba JJA concurring)

The appellant was charged with several counts of misconduct arising from the misuse of his employer's vehicles. His dismissal was recommended. He appealed under the code of conduct, and fresh proceedings were ordered on the grounds that the disciplinary committee had not been properly constituted. Although a new code of conduct had in the meantime been introduced, the proceedings were held under the previous one. The appellant's dismissal was once again ordered. More than two years after his dismissal, he launched review proceedings in the High Court. The judge dismissed the application on the ground that it was made out of time and that there was no basis for granting the application for condonation. Held: the judge had not misdirected himself in refusing to grant condonation. The delay was inordinate and the grounds given were unsatisfactory. The grounds given for review were effectively grounds of appeal.

Review — application — proceedings pending in lower tribunal — when High Court will hear matter — principles — tribunal's lack of jurisdiction to decide matter in issue — grounds for High Court to consider matter

Bvunzabwaya & Ors v *Commissioner of Prisons & Ors* HH-225-02 (Makarau J)

The applicants, all prison officers, were charged before a prisons disciplinary board on allegations that they had contravened various provisions of the Prisons Act and Regulations by taking part in political activities. They brought the matter on review before the High Court, claiming that their constitutional rights were being violated. Held: (1) the court should hear the matter, as the disciplinary tribunal could not determine the matter being raised before the court. (2) There was no current provision in the Prisons Act which prohibited political activities, although such a provision had been in the Act before the current edition was published. Accordingly, any regulatory provisions which purported to do so must be regarded as *pro non scripto*.

Sale — breach of warranty against eviction — claim against seller — whether buyer must put up *virilis defensio* against claim by third party — third party having no valid claim — duty of buyer to resist claim

Marimo v *Brancos & Anor* HH-142-02 (Chinhengo J)

See above, under CONTRACT (Terms — tacit or implied)

Sport — regulation of — Sport and Recreation Commission — interim committee appointed to administer sport after de-registration of sporting association — status of such committee — new association formed — no right to claim levies payable to former association

Moyo & Anor v *Athletics Zimbabwe* HH-205-02 (Smith J)

The applicants, professional athletes, were members of sports clubs indirectly affiliated to the respondent. The respondent was registered in June 2002 in terms of s 29 of the Sports and Recreation Commission Act [*Chapter 25:15*]. Until December 2001 athletics had been controlled by another association, which had been de-registered at that time. An interim committee was appointed by the Sports and Recreation Commission to administer athletics until a new body was formed. The interim committee demanded that the applicants pay to it 10% of the prize moneys won at a competition in Angola. The applicants' participation had been sanctioned and organised by the association before it was de-registered. When they refused, they were suspended from participation in official athletics meetings. Held: a committee appointed in terms of s 30 of the Act is not a separate *persona* with its own corporate status. It merely replaces the governing body of the association concerned. Any payment was due to the former association, not to the interim committee. The respondent did not exist at the time of the competition in Angola and could not demand any levy. It therefore could not suspend the applicants from participation in other competitions.

Statutes — Criminal Penalties Amendment Act 2001 — provision whereby level of fines prescribed by Minister not effective until approved by Parliament — Act coming into effect but level of fines not approved — effect

S v *Chandafira* HH-137-02 (Smith J)

See above, under CRIMINAL PROCEDURE (SENTENCE) (General principles — fine)

Statutes — Prisons Act [*Chapter 7:11*] — s 28 — prohibited activities — no prohibition against participation in political activities — invalidity of regulations proscribing such activities

Bvunzabwaya & Ors v *Commissioner of Prisons & Ors* HH-225-02 (Makarau J)

See above, under REVIEW (Application — proceedings pending in lower tribunal).

Statutes — Urban Councils Act [*Chapter 29:05*] — s 219 — procedure for dealing with objections to proposed charges

Mutare Residents' and Ratepayers' Association v *City of Mutare* HH-165-02 (Smith J)

See above, under LOCAL GOVERNMENT (Urban council — rates and charges).

Town planning — master plan — change of use — factors which may be taken into account — only sound town planning principles may be considered — not proper to consider "wider social and political implications" such as desirability of having indigenous businesses in the area

Delta Pension Fund Trustees & Anor v *Harare City Council & Ors* HH-132-02 (Adam J)

The applicant was the owner of a prestigious office building in an office park, next to which were three stands which had been set aside as open space, in which there was indigenous woodland. In that woodland there was a small selection of antelope and other fauna and flora. The city council granted a change of use over one of the three stands on the recommendation of its advisory board to allow another company to build office accommodation. The reason given by the board for the change of use were the Awider social and political implications" and the desirability of Ahaving successful indigenous business enterprises move into the neighbourhood to be next to their established business counterparts". Despite objections by the applicant and others, the respondent Minister approved the recommendation for change of use. The applicant asserted that the reasons given by the advisory board had nothing to do with town planning. The Minister argued that he did not have to confine himself to town planning considerations. Held: once a master plan had been approved and was in operation, the Minister's powers were prescribed by the Act. Change of use had to be in accordance with sound town planning principles. The Minister's decision was open to review on the grounds of unreasonableness. The advisory board, and the Minister, took into account factors which should not have been considered and did not give due consideration to town planning principles.

Will — validity — subsequent marriage of testator — effect on will

Dube NO & Anor v *Logan & Ors* HH-117-02 (Ndou J)

See above, under CONTRACT (Donation).

Words and phrases — "circular"

Muzenda v *Public Service Commission & Anor* HH-189-02 (Paradza J)

See above, under PUBLIC SERVICE (Public servant — employment)

Words and phrases — "implementation"

Artcraft Furniture Mfg v *Tokozani (Pvt) Ltd & Ors* HB-98-02 (Cheda J)

See above, under ARBITRATION (Contract — arbitration clause)

Words and phrases — "recognisance"

Tsvangirai v *Mugabe & Ors* HH-114-02 (Gowora J)

See above, under ELECTION (Election petition — recognisances by petitioner)