Case Summaries - 2003(1)

Administration of estates – executor – delegation of functions – whether permitted – signature of documents to transfer estate property – may be delegated to another person

Shata & Anor v *Manase NO & Anor* HH-44-03 (Kamocha J)

The applicants paid a law firm the price of a house which belonged to a deceased estate. The documents were signed by a clerk and a lawyer (not the executor) in the law firm to which the executor belonged. When the applicants sought to have the sale registered, the executor claimed that the sale was not valid, not having been authorised by him, and offered to return the sale price. It subsequently emerged that he had actually sold the property to another party for a higher price. Held: an executor can authorise some other person to carry out some or all of his functions on his behalf. What an executor is prohibited to do is abdication, not delegation. The executor had authorised the signature of the documents. The Registrar of Deeds would be interdicted from transferring the property to the third party.

Administration of estates – judicial sale of deceased's property – writ of execution issued before death of deceased – sale not barred

Malawusi v *Marufu & Ors* S-1-03 (Sandura JA; Cheda & Ziyambi JJA concurring)

The first respondent had bought a property at a sale in execution conducted by the Sheriff. The writ of execution was issued in July 1999. The judgment debtor died in February 2000. The sale in execution took place in May 2001. Letters of administration in respect of the deceased estate were granted in June 2001. The first respondent sought an order compelling the transfer to him of the property. The appellant, the executrix of the estate, opposed the application, arguing that by virtue of s 44 of the Administration of Estates Act [*Chapter 6:01*], the writ of execution should not have been progressed, and accordingly that the judicial sale should have been stayed after the death of the judgment debtor. Held: s 44 only bars the issuing out and not the subsequent progress of a writ of execution. The writ was issued more than seven months before the judgment debtor died, so the sale in execution in such circumstances was legal.

Administration of estates – Master of the High Court – decision by – how may be challenged by heir – not competent for heir to bring action in terms of s 113 of Administration of Estates Act [*Chapter 6:01*] – matter should be brought on review

Pasalk & Anor v *Kuzora & Ors* S-5-03 (Ziyambi JA, Malaba & Gwaunza JJA concurring)

The appellants were dissatisfied with a decision of the Master of the High Court relating to the winding up of their late father's estate. Their legal practitioner brought an action, purporting to act in terms of s 113 of the Administration of Estates Act [*Chapter 6:01*]. Held: the appellants had no *locus standi* to bring proceedings under that section, which allowed the executor and the Master to state a case for determination by a judge. The matter should have been brought on review; however, the papers that were filed did not comply with the requirements of the rules of court, as they did not state the grounds of review.

Administrative law – review – grounds for – breach of *audi alteram partem* rule – disciplinary proceedings – employee requesting legal representation but such request refused – rule breached

Chirenga v *Delta Distribution* HH-72-03 (Smith J)

If an employee who is facing a charge of misconduct which might lead to his dismissal wishes to have legal representation, and his request is refused, the requirements of the *audi alteram partem* rule would not be met. This is so even where the code of conduct makes no mention of a right to representation.

Administrative law – review – grounds for – breach of *audi alteram partem* rule – disciplinary proceedings – steps to be taken to ensure *audi alteram* partem rule complied with

Rwodzi v *Chegutu Municipality* HH-86-03 (Mavingira J)

Where disciplinary charges are brought against an employee, there are several steps to be taken to ensure that the *audi alteram* partem rule is observed. (1) The employee should be given reasonable notice of the impending hearing. The reasonableness of the

amount of notice given will depend on factors such as the seriousness and complexity of the case. (2) The hearing must precede the decision. (3) The hearing must be timeous, to ensure that the hearing takes place when the facts are still fresh in the minds of the parties and their witnesses. However, where the employee requires time in order to prepare for the hearing or to arrange for representation, he should be given a reasonable opportunity to do so. (4) The employee must be informed of the charge(s) against him, to meet the need for adequate preparation. (5) The employee should be present at the hearing, but if he refuses to attend the hearing without good cause or has absconded the employer may be entitled to proceed with a hearing in his absence. (6) The employee must be permitted representation. (7) The presiding officer must be impartial.

Aviation – air carrier – liability – lost baggage – liability governed by Warsaw Convention

Roberts v *Air Zimbabwe Corporation* HH-28-03 (Hungwe J)

The liability of an air carrier in respect of lost baggage is governed, and limited, by the provisions of the Warsaw Convention, which are incorporated as part of the law of Zimbabwe by the Carriage by Air Act [*Chapter 13:04*]. In the absence of a special contract, an air carrier is liable to the sums stipulated by the Convention.

Bank – account – right of bank to terminate account with customer – notice which must be given – must be reasonable notice

Rowland Electro Engineering (Pvt) Ltd v *Zimbank* HH-36-03 (Guvava J)

The applicant sought an order compelling the respondent bank to keep open the applicant's accounts with the bank. The bank had given the applicant 28 days to close its accounts. The applicant had obtained an interim interdict and sought a final order. Held: (1) a bank is entitled to close an account on reasonable notice to an account holder. In the circumstances, 28 days was reasonable notice. (2) In terms of the contract between the parties, the bank could close the accounts at any time.

Bills of exchange and negotiable instruments – promissory note – validity – must be signed by maker – need for person relying on note to show that issuer had signed note

Cold Storage Co Ltd v *Rapid Discount House Ltd* S-127-02 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

The appellant company was sued by the respondent on promissory notes which were issued in the appellant's name and which were dishonoured on presentation. The appellant denied issuing the notes, saying that they were fraudulent and that their issue had not been authorised by the appellant. The notes had been issued by persons at a merchant bank which was raising money for the appellant following the appellant's privatization (it had previously been a statutory commission). To enable the merchant bank to do this the appellant's general manager had supplied his signature. His signature had been copied by computer onto the promissory notes. The respondent had loaned money to the merchant bank and received the promissory notes as security. The trial court held that, as there was nothing *ex facie* the notes to show that the signature was not authorised, there was a presumption that it was authorised and that the appellant had not discharged the onus on it. On appeal, held: (1) for a document to have the validity of a promissory note it must, amongst other things, have been signed by its maker. There is no liability on a person as a maker of the note who has not signed it as such. Once the appellant had denied that it signed the documents it could not be found liable on them until the respondent had proved, on a balance of probabilities, that the appellant signed the documents as the maker of them as promissory notes. (2) As the signature had been put in issue, the onus lay on the respondent to prove that it had been authorized. There was no evidence to this effect. (3) The correct judgment should have been for absolution.

Company – winding up – judicial management – purpose of and distinction between each – when judicial management should be ordered – inability of company to pay its debts – contingent and prospective liabilities of company

Shagelok Chemicals (Pvt) Ltd v *International Finance Corp Ltd & Ors* S-124-02 (Gwaunza JA, Chidyausiku CJ & Cheda JA concurring)

Where a company is wound up at the instance of its creditors, secured creditors are paid out of the proceeds from the disposal of the assets over which security is held, while preferent creditors are paid out of other assets in order of preference. Concurrent creditors then share anything left over on a *pro rata* basis. In the case of judicial management, the control and management of the company is placed in the hands of a judicial manager. During the period of judicial management, all actions, proceedings and executions of process against the company are stayed. The expectation is that during judicial management, conditions are created

that would enable the company to pay off its debts. There would thus be no immediate payment of the debts. If the judicial manager fails to turn the fortunes of the company around, the creditors would, in effect, have been made to unnecessarily wait for their payments.

In an application for winding up a company on the grounds of inability to pay its debts, indications that a company is unable to pay its debts are its contingent and prospective liabilities. Provisional judicial management may be ordered instead where a company is unable to pay its debts *and* there is a reasonable probability that if the company is placed under judicial management, it will be enabled to pay its debts or meet its obligations and become a successful concern, and also that it would be just and equitable to do so.

Constitutional law – citizenship – person a citizen of another country – requirement to renounce that citizenship in order to remain a citizen of Zimbabwe – person born in Zimbabwe of parents who were born in New Zealand – such person a citizen of New Zealand and required to renounce that citizenship

Registrar-General v *Todd* S-4-03 (Malaba JA; Chidyausiku CJ & Ziyambi JA concurring)

The respondent was born in Zimbabwe to parents who were born in New Zealand. The appellant claimed that because she had failed to renounce her New Zealand citizenship she ceased to be a citizen of Zimbabwe. Held: (1) in terms of the New Zealand legislation, the respondent was a citizen of New Zealand and had to renounce that citizenship in order to remain a citizen of Zimbabwe. (2) Although she had not renounced her New Zealand citizenship by the date set out in the Citizenship Act, as amended, she had instituted proceedings before that date, and this suspended the requirement to renounce by the given date.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 16 (protection from deprivation of property without compensation) – freedom of trade or economic activity – not a basic constitutional right – not property in terms of s 16 – s 21 (right to freedom of association) – right to trade with any person of one's choice – not protected by section

Frontline Marketing Services (Pvt) Ltd v *GMB & Ors* S-116-02 (Sandura JA, Chidyausiku CJ, Cheda JA, Malaba JA & Gwaunza AJA concurring)

In terms of the Grain Marketing Act [*Chapter 18:14*], the Grain Marketing Board has the monopoly of buying and selling maize. The applicant, an importer of maize, challenged that monopoly on the ground that it infringed the applicant's constitutional rights under s 16(1) and s 21(1) of the Constitution. Held: (1) freedom of trade or economic activity is not protected by s 16(1) of the Constitution. The right freely to engage in economic activity of one's choice is not one of the fundamental rights and freedoms of the individual specified in the Declaration of Rights. The applicant's right to trade in the maize commodity is not property within the meaning of, and is guaranteed by, s 16(1) of the Constitution. (2) The question of the applicant's claim that a right to trade with any person of its choice in the course of buying and selling maize was protected by s 21(1) of the Constitution thus fell away. That was because the alleged right to buy and sell maize is not protected by the Constitution and can, therefore, be regulated by law.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – no right vesting in High Court to determine constitutional issues – such issues must be referred to Supreme Court – who may bring application – only person affected by alleged constitutional infringement has *locus standi* – no right vesting in association to bring application on behalf of its affected members

Nyamandhlovu Farmers' Association v *Minister of Lands & Anor* HB-19-03 (Ndou J)

Members of the applicant association, all farmers, had received notices under the Land Acquisition Act to leave their farms by a certain date. The association brought an application before the High Court, seeking an order that various sections of the Act were invalid by reason of being in conflict with several sections of the Declaration of Rights. Held: (1) the High Court does not have original jurisdiction to deal with constitutional cases. It can only grant interim relief pending referral to the Supreme Court under s 24 of the Constitution. In such cases, the Supreme Court acts as a constitutional court. (2) The affected farmers did not file affidavits or provide other proof that the association was authorised to act on their behalf, nor did the association aver such authorisation. Not all members of the association were affected by the receipt of notices. The association itself was not affected by the receipt of notices of acquisition, and the matter was not a class action. Consequently, the association had no *locus standi* to bring the application. Only the affected members themselves could do so.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(2) – referral of matter to the Supreme Court

– matter may only be referred by High Court or court subordinate to the High Court – not competent for an administrative tribunal to refer a matter in terms of s 24(2)

In re *Gwekwerere* S-14-02 (Sandura JA, Chidyausiku CJ, Cheda JA, Malaba JA & Ziyambi JA concurring)

The applicant, a messenger of court, was charged with a criminal offence. His superior, the Provincial Magistrate for Harare, decided that there might be reason to suspend the applicant in terms of s 10(6) of the Magistrates Court Act [*Chapter 7:10*]. He ordered that an inquiry be held, to be conducted by another magistrate. The applicant's legal practitioner requested that the matter be referred to the Supreme Court in terms of s 24(2) of the Constitution for the determination of a constitutional issue which arose. Held: the only tribunals which could refer a matter in terms of s 24(2) were the High Court and any court subordinate to the High Court. The inquiry instituted by the Provincial Magistrate did not fall into the category of "proceedings in the High Court or in any court subordinate to the High Court". It was an administrative one, not a judicial proceeding. The fact that it was presided over by a provincial magistrate and that it was to be conducted in the magistrates court building made no difference to its nature. The applicant could have sought redress for his grievances by filing an application in terms of s 24(1) of the Constitution.

Contract – breach – remedy – specific performance – limited circumstances when court will refuse specific performance

Smith & Ors v *ZESA* HH-22-03 (Paradza J).

See below, under CONTRACT (Formation – mistake).

Contract – cession – validity – cession splitting debt among several cessionaries – when valid – challenge to validity of cession – who may raise question of validity – interpretation of contract – whether a pledge or security

Liquidators, Tirzah (Pvt) Ltd & other companies v *Merchant Bank of Central Africa Ltd & Ors* S-123-02 (Ziyambi JA; Malaba JA & Gwaunza AJA concurring)

The appellant companies were part of a group of 8 companies owned by one man and his family. The companies ceded their book debts to the respondent financial institutions in consideration of monies advanced to them. When the companies went into liquidation, the liquidators collected the debts but refused to hand them to the respondents in terms of the cessions. The respondents sought a declaratory order as to the validity and enforceability of the cessions as well as an order for immediate payment to them by the appellants of the monies collected. The High Court upheld their application. The appellants argued that the cessions were invalid, as they amounted to a splitting of the debts. Alternatively, they argued that the deeds were void for vagueness, saying that it was not clear from the wording of the cessions whether the deeds constitute an out-and-out cession or cessions of a pledge. The respondents contended that even if there was a splitting and such was impermissible at law, it would render the cession unenforceable as opposed to invalid, in that the debtor could consent to it at a later date. In any event, the debtors, having paid the debts, had waived their right to raise the question of the validity of the cessions and this could not now be raised by the appellants as representatives of the cedents against the respondents. Held: (1) assuming there was a splitting of the debts, the cession could, at the instance of the debtor who proves that he is prejudiced by the cession, be declared invalid and unenforceable. The test is not the potential prejudice apparent at the time of grant of the cession but whether the cession does result in prejudice to the debtor. The debtors had not raised the issue of invalidity but, on the contrary, had made payment of the debts and been discharged from liability. (2) It was clear that the companies intended to effect a cession of pledge only. The transaction as a whole showed, by inference, this to be the intention of the parties. The transactions were accordingly not void for vagueness. (3) As to who may enforce the cessions, in the normal course of things it is the applicant who secures the order who is entitled to enforce it. In this case a departure from the norm had not been shown to be justified and, the deeds having been found to be valid, each of the respondents as joint cessionary was in a position to enforce the whole debt.

Contract – enforceability – *in pari delicto* rule – when may be relaxed – principles

Matsika v *Jumvea Zimbabwe Ltd & Anor* HH-9-03 (Chinhengo J)

The applicant paid the respondent, in US dollars, for a vehicle that the respondent was shipping from Japan. The particular vehicle was, on arrival, delivered to someone else, and a promised substitute never materialised. The applicant sought the delivery of the vehicle or a refund of the purchase price. The question arose whether a transaction in Zimbabwe in foreign currency was legal. Held: (1) the Reserve Bank of Zimbabwe Act [*Chapter 22:10*] does not prevent transactions in currency which is not legal tender. (2) The transaction was tainted by illegality because of the exchange control regulations. (3) The court may relax the *in pari delicto* rule to prevent injustice between man and man. Where public policy is not foreseeably affected by a grant of the relief claimed, a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust

enrichment. In this case, the *in pari delicto* rule should be relaxed in favour of the applicant.

Contract – formation – mistake – when may vitiate contract – no fraud, nor knowledge of mistake on part of buyer – offer already accepted by buyer when alleged mistake discovered – contract upheld

Smith & Ors v *ZESA* HH-22-03 (Paradza J).

The applicant and others, who were all employees of the respondent, were tenants of houses owned by the respondent. The respondent, as part of a commercialization exercise, resolved to sell all its "non-designated" houses to the sitting tenants, and as required by the relevant legislation, obtained Ministerial consent to the sale. Contracts of sale were drawn up, and the applicants made the necessary payments. When it came to transfer, the respondent refused to do so. It claimed that it had made an error, in that the houses should not have been classed as "non-designated". It wrote to the applicants, purporting to withdraw the offer of sale. The applicants sought an order of specific performance. Held: (1) the respondent's suggestion that there was a mistake appeared to be an afterthought. (2) Even if there was a mistake, it was not the kind of mistake that the respondent could rely on to escape from the consequences of a contract that the respondent itself, without inducement, initiated and executed through to the end. An offeror cannot escape liability arising out of a contract by saying and proving that the offer he made was wrong, particularly if that offer has been accepted. There was no mistake that the applicants could have known about, nor was there any fraud. (3) It was for the applicants, not the respondent, to choose between specific performance and damages. The court could, though, refuse to order specific performance, but in limited circumstances, as where it would operate harshly on the offeror. In this case, specific performance would be granted.

Contract – formation – option – what constitutes – letter from owner of flats to tenants indicating desire to sell and inviting tenants to purchase – not a binding option

Eastview Gardens Residents Association v *Zimbabwe Reinsurance Corp & Ors* HH-174-03 (Paradza J)

The tenants in a block of flats received a letter from the estate agents, stating that the owner intended to sell the flats by sectional title and giving the tenants until the end of the month to accept. Six days later, the estate agents sent a letter to the tenants, saying that the offer had been withdrawn and that the flats would be sold block by block, and offering the tenants the opportunity to buy from the block that was being sold at any given time. After objection from the applicant association, which represented the tenants, a second estate agent wrote to the tenants, giving them first refusal to buy the flats they occupied, and stating that if they failed to exercise the right of first refusal, the flats would be offered for sale to the public. Over a third of the tenants purchased their flats accordingly. The association argued that the first letter was binding on the owner. The respondents challenged the association's secretary's right to represent all the tenants. Held: (1) As long as the deponent places before the court enough evidence, as in this case, in the form of the Constitution of the association, that should satisfy the court that the deponent has authority to act for and on behalf of the association and its members. (2) A letter written by the owner to members of the association disclosing a desire to sell the flats to the sitting tenants at a particular price and inviting them to respond by a particular date does not amount to a binding option. It was no more than an offer to treat.

Contract – interpretation – severability – principles – one part of contract being enforceable on its own – intention of parties – ascertainment of

Sibanda & Anor v *Pentaville Investments (Pvt) Ltd & Ors* HH-14-03 (Makarau J)

The applicants bought a piece of land under a written agreement with the first respondent in terms of which they purchased title in an undivided share in land. They paid the purchase price in full. They also entered into an agreement for the construction of a housing unit on their undivided share. The two agreements were embodied in the same written agreement, under different headings. In terms of the agreement, the first respondent was to transfer title in the undivided share in the land to the applicants within a reasonable time, provided the applicants had paid the purchase price in full and the final costs of construction of the housing unit had been secured. The agreed costs of construction were also paid. When the applicants sought transfer, it was refused on the grounds that the full costs of construction could not be ascertained until construction was complete. Held: (1) It is a matter of construction whether one part of a contract can be severed from the other. If the parts of the contract, shorn of one part, can stand and be enforceable on their own, then, generally, the contract can be severed. The overriding consideration is the parties' intention. (2) The sale agreement of the undivided share of land could be severed from the construction agreement without affecting the meaning of either. This was so because the purchase price of the undivided share in the land was stipulated separately from the cost of the construction of a housing unit on the land. Separate prices create a very strong presumption in

favour of severability. (2) Undivided shares of land on which no building has yet been erected can be transferred provided the shares have been created by the registration of a notarial deed in terms of s 27 of the Deeds Registries Act. (3) The sale of an undivided share in land, coupled with the right of exclusive occupation, is no different from the sale of any other real right in land. The purchase of the real right is and can be complete before any dwelling is erected on the share. (4) The parties' intention as inferred from the agreement was for the applicants to separately purchase the land and pay for it in full and then have the land developed thereafter. It was the further inferred intention of the parties that the respondent had to be fully paid for the construction of the housing unit or to have such costs of such fully secured.

Contract – performance – when must be performed *in forma specifica* – when equivalent performance acceptable – onus on offeree to show that performance *in forma specifica* not essential

Maparanyanga v *Sheriff of the High Court & Ors* S-132-02 (Gwaunza AJA; Chidyausiku CJ & Cheda JA concurring)

See below, under PRACTICE AND PROCEDURE (Execution – sale – setting aside of).

Contract – sale – validity – purchase price paid in foreign currency – whether legal

Matsika v *Jumvea Zimbabwe Ltd & Anor* HH-9-03 (Chinhengo J)

See above, under CONTRACT (Enforceability – *in pari delicto* rule)

Contract – suretyship – surety – liability of – judgment debt arising out of principal debtor's failure to pay debt – surety's liability dependant on interpretation of contract – contract worded so as to extend liability to all sums and to judgment debts

Mandhu v *Scotfin Ltd* HH-64-03 (Garwe JP)

The applicant bound himself jointly and severally as surety *in solidium* and co-principal debtor for the payment of all sums due under a hire-purchase contract between the respondent financial institution and a transport company. The company failed to service the debts, and in 1995 the property was repossessed and the company was sued for the balance. Judgment was granted against the company in September 1999. In June 2001 the respondent instituted proceedings against the applicant and obtained default judgment 2 months later. The applicant sought to have the judgment rescinded, principally on the grounds that the debt had prescribed, the debt arising in 1995 when the transport company defaulted. The respondent argued that the cause of action was the judgment debt, which had not prescribed. Held: (1) A suretyship debt can prescribe independently of a principal debt before the institution of proceedings and the running of prescription, as regards the surety, is not delayed by any personal circumstance which delayed the running of prescription against the principal debtor. (2) The issue was the effect on the applicant of the judgment granted against the principal debtor in 1999. In the final analysis, regard must be had to the contract of suretyship and the interpretation of that contract. From the wording of the contract, it was clear the intention was not to limit the applicant's liability to the hire purchase agreement executed in 1993. Liability was extended to all sums due from time to time and to facilities to be granted in the future. A judgment debt arising from the failure to honour the terms of the hire purchase agreement was thus contemplated.

Contract – termination – cancellation due to breach of contract – notice by wronged party – must be with immediate effect – notice of cancellation to take effect in the future – such notice invalid

Waste Management Services (Pvt) Ltd v *City of Harare* S-126-02 (Sandura JA, Cheda JA concurring; Ziyambi JA dissenting)

The appellant company had entered into a five year contract to provide services to the respondent city council. Dissatisfied with the appellant's performance, the council, as it was entitled to do under the contract, wrote to the appellant stating that the contract was being terminated with effect from the following day, which was the end of the month. The appellant argued that the termination was invalid. Held: the right to resile from a contract must be exercised *ex nunc*, not from some date in the future. To be valid, a notice of cancellation must clearly and unambiguously inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract as being at an end.

Contract – validity – loan – loan made in foreign currency – provision that repayment of loan be in foreign currency – validity of provision

Lowveld Leather Products (Pvt) Ltd v *International Finance Corp & Anor* S-114-02 (Sandura JA, Cheda and Ziyambi JJA concurring)

The appellant had taken a loan in US dollars from the respondent, an international corporation. The contract specified that repayment had to be made in US dollars and no other currency. When the appellant failed to repay, the respondent obtained judgment and instituted execution proceedings. The appellant sought an order allowing it to repay the loan in local currency at the official rate of exchange which was considerably less than the realistic "parallel" rate. Held: (1) the contract allowed for payment in no other currency than US dollars and unless the appellant could prove impossibility it had to pay in that currency. (2) Although execution could not be in terms of foreign currency, the proceeds had to satisfy the judgment debt in full.

Contract – validity – mistake – recovery of money paid in error – *condictio* indebiti – when plaintiff may or may not recover such money

Tanganda Tea Co (Pvt) Ltd v *Amtec (Pvt) Ltd* HH-39-03 (Smith J)

The plaintiff sought the return of money paid to the defendant for fuel allegedly supplied by the defendant but not actually supplied. The evidence showed that one or more petrol attendants employed by the defendant found loopholes in the system whereby fuel was supplied and exploited them to steal a large amount of money. Held: under the *condictio indebiti*, a payment made by mistake to a third party can be recovered if (1) the sum paid must not have been due; (2) there must not have been a reasonable cause for the payment even if it was not due; (3) the person paying must not know that the money is not due. The mistake of fact which is relied on to justify relief in terms of the *condictio indebiti* must neither be negligent, slack nor studied; it must not be grossly negligent nor must it involve the plaintiff's own affairs or the affairs of others that are generally known. The real test for allowing recovery is whether the payer has been "inexcusably slack" or "grossly negligent". This could not be said of the plaintiff, which would be allowed to recover the money paid.

Costs – legal practitioner and client scale – when such costs should be awarded – principles

Mahembe v *Matombo* HB-13-03 (Cheda J)

Awards of legal practitioner and client costs not authorised by statute are made when, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court considers it just, by means of such an order, to ensure more effectively than it can do by means of a judgment for party to party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Considerations include: dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings themselves; malicious conduct; vexatious proceedings; reckless proceedings; and frivolous proceedings.

Court – judge – law-making function of – duty of judge to take progressive approach in order to rectify inequities

Ntini v *Masuku* HB-69-03 (Cheda J, Ndou J concurring)

See below, under CUSTOMARY LAW (Application — husband and wife).

Court – jurisdiction — *peregrinus* — need for defendant to be present in Zimbabwe or have property capable of attachment– defendant company having only an indirect interest in company owning property within Zimbabwe – court having no jurisdiction

Stanmarker Mining (Pvt) Ltd v *Metallon Corporation Ltd & Ors* HH-55-03 (Chinhengo J)

Section 15 of the High Court Act [*Chapter 7:*06] altered the common law, to give the court a discretion not to order attachment of the property belonging to a peregrine defendant or to order his arrest but to elect in lieu thereof to found or confirm jurisdiction over the *peregrinus* by issue of process. However, the plaintiff still has the burden of having to satisfy the court, before the issue of process, that the *peregrinus* is present within the country for arrest or has property within the country capable of attachment. Where a corporate entity owns assets within Zimbabwe and where the defendant may only at best indirectly benefit from the business of that corporate entity, it cannot be said that the defendant has property capable of attachment.

Criminal law – common law crimes – assault with intent to do grievous bodily harm – need in most cases for medical evidence

to be adduced

S v *Mpofu & Anor* HB-41-03 (Ndou J)

In cases of assault with intent to do grievous bodily harm the State should make endeavours to obtain medical reports or evidence. In most cases this evidence is pivotal in determining whether the proper charge is one of assault with intent to do grievous or merely common assault. The State should not lightly refrain on the ground of convenience from adducing medical evidence where that evidence may assist the court.

Criminal law – common law crimes – culpable homicide – motoring case – child pedestrian – nature of driver's duty of care when aware of presence of child on or near road

S v *Nortje* HB-23-03 (Chiweshe J)

The standard of care required of a driver who sees children ahead of him is much higher than that ordinarily required of a driver approaching adult pedestrians. It is not an excuse to say that the child pedestrian acted irrationally, unexpectedly or unreasonably. Children will by nature act irrationally. It is the duty of the prudent driver to anticipate such behaviour and take such steps as may be necessary to avoid accidents. Once a motorist becomes aware of the presence of a child on or near the road ahead of him, it is incumbent upon him to prepare for any eventuality, given that children are prone to sudden and unpredictable behaviour. The motorist then has a duty to ensure that he has anticipated that kind of behaviour and must be prepared if need be to stop.

Criminal law – common law crimes – culpable homicide – role of negligence in culpable homicide – need to show what steps accused could reasonably have taken to prevent death

S v *Majarira* HH-88-03 (Chinhengo J)

The concept of negligence in culpable homicide has two components: (1) the issue of foresight that death would be a consequence of the conduct in question because the accused's blameworthiness arises from a failure to foresee the death in circumstances where the reasonable man would have foreseen it; (2) an assessment of what should have been done in order to safeguard against the death occurring. To arrive at the conclusion that the accused negligently caused the death, it must be determined what steps should reasonably have been taken to prevent the death and whether the accused in fact took those steps, because it is the accused's failure to take those reasonable steps which determines that the accused was negligent in bringing about the death.

Lay persons often have difficulty in understanding these concepts, which should be carefully explained in the event of a plea of guilty.

Criminal law – common law crimes – fraud – misrepresentation – need to show that accused made a misrepresentation – accused filling in form claiming assistance but omitting parts of form which set out basis for such claim – not a misrepresentation

S v *Moyo* HH-43-03 (Makarau J, Karwi J concurring)

The appellant was convicted of fraud. It was alleged that, with intent to defraud, she had misrepresented to the relevant vetting officers that she was a "war veteran", as defined in the War Veterans Act [*Chapter 11:15*] and had participated in the war of liberation in Mozambique. She had claimed a gratuity and pension for such participation. She left out several relevant parts of the form that had to be completed but in spite of this was accepted by the vetting officers as having been a war veteran. Held: she should not have been convicted of fraud. She did not make the misrepresentation alleged. She merely presented certain information upon which the vetting officers pronounced her a war veteran. If any misrepresentation was made, it was made by the vetting officers. Although she could have been charged with a contravention of s 24(b) of the Act, the State had chosen not to do so, and a verdict of contravening that section could not be substituted, even though her counsel agreed that would have been the right course.

Criminal law – common law crimes – indecent assault – not replaced by s 3(1) of Sexual Offences Act [*Chapter 9:12*] – when more appropriate to charge under statute rather than common law

S v *Ndlovu* HB-66-03 (Ndou J)

The accused, aged 25, was convicted of two counts of indecent assault on a boy of 5 years of age. He was sentenced to an effective term of 18 months' imprisonment. On review, held: (1) it might have been more appropriate to have charged the accused with contravening s 3(1) of the Sexual Offences Act [*Chapter 9:12*]. However, as the Act did not specifically replace the common law crime, and as the accused was aged over 16, it was proper to charge him under the common law. (2) The Act is designed to protect all young persons, not only females.

Criminal law – defences – insanity – non-pathological incapacity – when might succeed as a defence – cautious approach to be taken to such defence

S v *Munga* HB-68-03 (Ndou J)

The defence of non-pathological incapacity has to be treated with great caution as it can be raised easily by the accused but is very difficult for the State to refute. The courts should not allow this defence to succeed easily otherwise the criminal justice system would quickly become discredited. A brief emotional disturbance would not satisfy the defence, although an act preceded by a very long period of months or years in which the accused's level of emotional stress increased progressively might do so.

Criminal law – statutory offences – Sexual Offences Act [*Chapter 9:12*] – purpose of – designed to protect all young persons, not just females

S v *Ndlovu* HB-66-03 (Ndou J)

See above, under CRIMINAL LAW – Common law crimes (Indecent assault).

Criminal procedure – arrest – resisting arrest – right of police to use reasonable force to overcome resistance – what court must consider in deciding whether force used was reasonable

S v *Ncube & Ors* HB-61-03 (Ndou J, Cheda J concurring)

Where a person whose arrest is attempted resists the attempt and cannot be arrested without the use of force, the person attempting to carry out the arrest has the right to use such force as it reasonably justifiable in the circumstances to aver any resistance put up to the arrest. The court must place itself in the shoes of the accused when looking into whether or not the force applied to effect the arrest was reasonable.

Criminal procedure – arrest – without warrant – discretion given to police officer to arrest when he had reasonable suspicion that offence has been committed – factors to consider before making arrest – discretion may be interfered with when exercised grossly unreasonably

Nyatanga v *Mlambo NO & Ors* HH-85-03 (Smith J)

The police arrested the applicant, who was Master of the High Court. Some 8 years earlier, he had ordered the transfer of property, following a sale in execution. The owner of the property had initially challenged the sale but had withdrawn his challenge. After failing to achieve satisfaction through litigation, the owner made allegations of fraud against the applicant. The applicant was visited by the police, who asked him to come to the police station to make a statement in answer to the allegation of fraud. The police then arrested the applicant and proposed to detain him over the weekend. The applicant sought an order for his release. Held: a peace officer must have reasonable grounds to suspect a person of having committed a First Schedule offence before he is empowered to arrest him without a warrant. If he has such suspicion, he has a discretion to effect an arrest. Factors he should consider before doing so include (1) the possibility of escape; (ii) the prevention of further crime; and (iii) the obstruction of police enquiries. The police officer's discretion may be interfered with if exercised unreasonably, contrary to the *Wednesbury* principles. In view of all the circumstances of this case, the decision to arrest and detain the applicant flouted those principles.

Criminal procedure – bail – appeal – whether appeal court can substitute its own discretion for that of court appealed from – appeal against decision admitting person to bail – court should be slow to interfere with such a decision

A-G v *Ruturi* HH-26-03 (Chinhengo J)

The High Court, when hearing an appeal against the decision of a magistrate regarding bail, cannot substitute its own discretion, in the absence of a misdirection or irregularity. When there is an appeal against a decision to admit a person to bail, that decision should not be set aside unless there are compelling reasons to do so.

Criminal procedure – bail – appeal – whether appeal court can substitute its own discretion for that of court appealed from – whether appeal court can call for or accept additional evidence

S v *Ruturi* HH-31-03 (Makarau J)

When hearing an appeal against a decision relating to bail, an appeal court need not find a misdirection on the part of the lower court before exercising its own discretion in the matter. In the proper exercise of its discretion, the appeal court may, in a proper case and without prejudicing any one of the parties, accept or even call for additional evidence and submissions.

Criminal procedure – bail – application – bail pending appeal – principles – not sufficient to show reasonable prospects of success – applicant must show positive grounds why bail should be granted

S v *Manyange* HH-1-03 (Makarau J)

The applicant was convicted of theft a motor vehicle. He applied for bail pending appeal. The State did not oppose the application, considering that the applicant had an arguable case. Held: In an application for bail pending appeal the presumption of innocence is inoperative, as the applicant is a convicted and sentenced offender. For his application to succeed, the applicant must show that there are positive reasons why bail should be granted. In the absence of positive grounds, bail should be denied. The mere fact that there are reasonable prospects of success on appeal or that the applicant has a reasonably arguable case does not entitle him to bail. He must show that in addition to his prospects of success on appeal, the interests of justice will not be endangered if he is granted bail. This the applicant had failed to do, and bail would be refused.

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 *Micklethwait* HH-3-03 (Chinhengo J)

The appellant was charged with failing to vacate his farm, in respect of which an acquisition order had been made under s 8 of the Land Acquisition Act [*Chapter 20:10*]. He was granted bail, one of the conditions of which being that he should not return to the farm other than with a police escort or with the approval of the "Lands Committee". He appealed in respect of that condition. Held: it was not reasonable to order that he should not return to his home. He was contesting the acquisition, and until that issue had been determined by the Administrative Court, he remained the owner. A judicial officer is not empowered to evict an owner or occupier of any land the subject of a s 8 order or to do anything that amounts to an eviction, unless and until the owner or occupier has been convicted of the offence charged and the court, as it is obliged to do, has issued an order of eviction against him. A condition of bail which removes him from his property amounts to an eviction of the person concerned. Such a condition is not only against the presumption of innocence, but pre-empts the outcome of the criminal trial on the charge which the person faces. In that sense it amounts to an eviction which may be ordered only upon conviction. The appellant should continue to reside on the farm.

Criminal procedure – bail – conditions – alteration of – addition of further conditions – further offences allegedly committed while on bail – no charges brought in respect of those offences – not competent to add conditions referring to those offences

S v *Tsvangirai & Ors* HH-92-03 (Garwe JP}

The accused were on trial on charges of treason. They had been granted bail, and had not breached any of the conditions. The State applied to have further conditions added. It alleged that the accused had indulged in activities which occurred after the grant of bail and which were unlawful and bordered on treason. No charges were being brought in respect of those alleged activities. Held: (1) the grant of bail is a consequence of the arrest and remand of an accused person on a specific charge. The nature of the offence charged and other relevant considerations are factors to be taken into account in determining the grant or refusal of bail and, where such bail is granted, the conditions to be attached to the recognizance. Any conditions attached to a recognizance

must have some bearing to the offence of which the accused is charged, in particular the need (a) to secure his attendance; (b) to ensure that he does not interfere with the evidence and (c) to ensure that he does not commit further offences whilst awaiting trial. (2) The conditions added to the recognizance cannot refer to some other allegation that the accused person may possibly face in future and in respect of which he has not been charged. (3) What the State wanted was to prevent the accused from conducting themselves unlawfully. It could not do so through conditions added to bail.

Criminal procedure – bail – factors affecting whether bail should be refused – seriousness of offence – risk of accused absconding – interference with evidence – need for State to substantiate allegation
S v *Malumjwa* HB-34-03 (Ndou J)

In bail applications the court has to strike a balance between the interest of society (that the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused person (who pending the outcome of his trial is presumed to be innocent). The likelihood of a lengthy prison term being imposed (i.e. the seriousness of the offence) is a factor to be taken into account in assessing the risk of absconding. Where is has been shown that the accused has interfered with evidence, the court is justified in denying him bail. The court should, however, not refuse bail on the bare assertion of the State; there must be enough reason for such a conclusion. In other words, grounds for refusal of bail should be reasonably substantiated.

Criminal procedure – bail – grant of – principles – apprehension that accused might commit further offences – no other reason not to grant bail – bail granted on appropriate conditions

S v *Tsvangirai* HH-100-03 (Mavingira J)

The applicant, along with 2 others, was on trial on charges of treason. They had been granted bail, and had not breached any of the conditions. The State unsuccessfully applied to have further conditions added. That application was dismissed on the grounds that bail conditions cannot refer to some other allegation that the accused person may possibly face in future and in respect of which he has not been charged. The applicant was then arrested on a further charge of treason, based on statements he was alleged to have made, urging a mass stay-away as a means of removing the government from power. The State conceded that it had no reason to fear that the applicant would not stand trial or interfere with the evidence, but expressed apprehension that, if granted bail, the applicant was likely to commit or influence his supporters to commit similar crimes; that the applicant has a propensity to commit such crimes when out of custody. Held: the fact that the applicant was facing other charges previously preferred against him and for which he had not been convicted was not by itself a reason for denying him bail. However, the State's fears that he might commit similar crimes were not totally unfounded, but were not incapable of being catered for by the imposition of appropriate conditions, something the court was empowered to do. Bail would be granted on that basis.

Criminal procedure – bail – pending appeal – onus – on appellant to show that justice will not be endangered and that there is a reasonable prospect of success

S v *Labuschagne* S-21-03 (Gwaunza AJA)

The mere fact that leave to appeal has been granted does not, *per se*, entitle a convicted person to be allowed out on bail. The *onus* of establishing that justice will not be endangered and that there is a reasonable prospect of success is upon the applicant. It is improper to allow people convicted of serious crimes to be walking in the streets instead of serving their sentences when the prospects of success are non-existent. Society would lose faith in the system and revolt.

Criminal procedure – extradition – accused in custody more than two months after extradition – no good reason shown for delay in processing matter – release from custody ordered

Ncube & Aor v *Minister of Home Affairs & Anor* HB-50-03 (Cheda J)

The applicants were arrested in Zimbabwe at the behest of the South African police, who wanted them in connection with armed robbery in that country. Nearly 6 months later they applied for discharge from custody as the South African authorities had not forwarded the formal request for extradition, despite reminders to do so urgently. Held: The court can only dismiss the application if it was satisfied that no reasonable notice to the Minister of Home Affairs had been given or where good cause was shown by the Minister why the applicant should not be discharged from custody. Both the South African and the Zimbabwean authorities

had been given more than enough notice to act in this matter but had failed to do so. The alleged complexity of the case was not enough to override the general principle of freedom of the individual.

Criminal procedure – trial – confession – "admission of guilt" fine previously paid to police – circumstances indicating that such admission not genuine – admission to be disregarded

S v *Mlambo* HB-72-03 (Cheda J)

The accused signed an admission of guilt and paid a deposit fine for a traffic offence. The circumstances in which he did so were questionable, and it appeared that he was coerced by the police. He was later charged in court with the offence. Held: the admission could not be held against him. The trial should be continued without regard to the admission.

Criminal procedure – trial – irregularity – citation of wrong section of Act – not fatal unless wrong principles also applied

S v *Nduna & Anor* HB-48-03 (Cheda J)

The fact that a magistrate cited the wrong section of the Criminal Procedure and Evidence Act when giving his reasons for the way he approached the evidence was not fatal. It might have been had he in addition applied wrong principles.

Criminal procedure – trial – judgment – what should be in judgment – failure by magistrate to record reasons for decision – effect

S v *Ncube & Ors* HB-61-03 (Ndou J, Cheda J concurring)

The judgment should contain a brief summary of the facts found proved and the trial court's appraisal of the credibility of each witness, stating what evidence was accepted or rejected and giving reasons for its decision. For a magistrate not to record what he considered amounts to a gross irregularity, which will usually result in a conviction being set aside on appeal or review, although the conviction may still be upheld if the evidence on record supports it.

Criminal procedure – verdict – competent verdict – charge under common law – no alternative charge preferred – not competent to convict for statutory offence even where evidence shows that such an offence was committed

S v *Moyo* HH-43-03 (Makarau J, Karwi J concurring)

See above, under CRIMINAL LAW – common law crimes (Fraud – misrepresentation).

Criminal procedure (sentence) – general principles – fine – youthful offender not in a position to pay fine – not appropriate to impose alternative sentence of imprisonment – need for court to pass sentence that will keep offender out of prison

S v *Gumede* HB-40-03 (Cheda J)

To impose a fine, alternatively imprisonment, when it is clear that accused is not in a position to pay a fine and will end up serving the prison sentence is wrong. If the court intends to keep an accused out of custody then the sentence should be clearly focused towards that goal and not depend on the hope of someone else coming to his rescue unless there is clear evidence that a third party has volunteered to do so. The courts should regard community service as their first port of call when it comes to sentencing.

Criminal procedure (sentence) – general principles – factors affecting sentence – mitigating factors – need for judicial officer to specify amount by which sentence has been reduced because of mitigating factor – value of goods stolen – inflation – effect of – need to compare value of goods by taking inflation into account

S v *Madembe & Anor* HH-17-03 (Chinhengo J, Paradza J concurring)

Where a judicial officer has accepted any factor of mitigation he must clearly specify the amount by which he has reduced the sentence on account of that factor. In this way he will be able to avoid the criticism that he has not sufficiently taken into account any factor or factors of mitigation, and an the appellate court or a reviewing or scrutinizing judicial officer will be less inclined to

decree, rather subjectively, that the other judicial officer erred. Where sentence is being assessed according to the value of the goods involved, and a comparison is being made with sentences approved in earlier cases, it is necessary to take into account the effect of inflation so a realistic comparison can be made.

Criminal procedure (sentence) – general principles – multiple counts – approach to – counts taken separately – overall total excessive – need to make some counts run concurrently to reduce overall sentence

S v *Nyathi* HB-60-02 (Ndou J)

There are no hard and fast rules dictating whether a court should treat a number of counts separately or together for the purpose of sentence. A trial court has a very wide discretion and, provided that discretion is exercised on reasonable grounds, an appeal court or review judge will not interfere. The correct approach to sentence is either to take all counts as one for the purposes of sentence and then impose a globular sentence which the court considers appropriate in the circumstances or, alternatively, to determine an appropriate sentence for each count taken singly so that the seriousness of offence is properly reflected. The court would then determine a realistic total which is considers appropriate in the circumstances. Where necessary, the severity of the aggregate sentence on all the counts taken together may be palliated by ordering some counts to run concurrently with others.

Criminal procedure (sentence) – general principles – need for meaningful pre-sentencing investigation – need to consider community service in appropriate cases

S v *Manyevere* HB-38-03 (Ndou J)

The sentencing process is as distinct and vital a factual enquiry as the determination of the guilt of an offender. Punishment should as far as possible be individualised by conducting meaningful pre-sentencing investigations. Assessment of punishment should not be left to a haphazard guess based on no or inadequate information. Imprisonment is a severe and rigorous form of punishment which should only be imposed only as a last, and not first, resort and where no other form of punishment will do. Failure to consider community service in appropriate cases is a misdirection.

Criminal procedure (sentence) – general principles – rational approach to sentencing – factors which must be considered – need for adequate information before sentence is passed – deterrence as a factor – weight to be given to – imprisonment – should be last resort – desirability of community service

S v *Shariwa* HB-37-03 (Ndou J)

There is no room in our system for an "instinctive" approach to sentencing. Sentencing should be a rational process. The sentencing court must always strive to find a punishment which will fit both the crime and the offender. Whatever the gravity of the crime and the interests of society, the most important factors in determining the sentence are the person, and the character and circumstances of the crime. The determination of an equitable quantum of punishment must chiefly bear a relationship to the moral blameworthiness of the offender. However, there can be no injustice where in the weighing of offence, offender and the interests of society, more weight is attached to one or another of these, unless there is over-emphasis of one which leads to disregard of the other. The court should not be over-influenced by the seriousness of the type of the offence and fail to pay sufficient attention to other factors which are of no less importance in the actual case before the court. The over-emphasis of a wrongdoer's crimes and the under-estimation of his person constitute a misdirection which justifies the substitution of the sentence. Justice should also be tempered with mercy. The court should equip itself with sufficient and meaningful pre-sentencing information in order to come up with suitable punishment.

Imprisonment is a severe and rigorous form of punishment, which should be imposed only as a last resort and where no other form of punishment will do. First offenders, especially young ones, should as far as possible be kept out of prison. Community service is one way of ensuring that this objective is achieved. The trial court should carry out a full enquiry, not only as to the accused's means, but also his general suitability for community service.

The success of general deterrence is more dependent upon the relative degree of certainty that punishment will follow the commission of a crime, than upon the severity of the penalty. The prevention of crimes as a goal of society is not ultimately achieved by either crass fear or huge detention centres but by a successful communication of disapproval.

Criminal procedure (sentence) – general principles – suspended sentence – conditions on which sentence suspended – must be reasonably capable of fulfilment – sentence suspended on condition accused makes restitution – no real prospect that accused able to do so – condition should not be imposed

S v *Mukura & Ors* HH-20-03 (Hungwe J, Chinhego J concurring)
If the court proposes to suspend a sentence of imprisonment – for example, on condition that the accused makes restitution – there must be a real likelihood that the condition is reasonably capable of fulfilment; for otherwise the object of the condition, namely, to keep the accused out of prison or to reduce the length of the prison term imposed and to compensate the complainant, could be defeated. The offender will then serve imprisonment on account of his poverty and not because of any *mala fides* or negligence on his part. If the offender is unlikely to be able to meet the condition, then the condition should not be imposed.

Criminal procedure (sentence) – common law crimes – indecent assault – adult male indecent assaulting male child – appropriate sentence

S v *Ndlovu* HB-66-03 (Ndou J)
The accused, aged 25, was convicted of two counts of indecent assault on a boy of 5 years of age. He was sentenced to an effective term of 18 months' imprisonment. On review, held: The sentence was inadequate. Sexual abuse of any children should be viewed in a very serious light. An effective sentence of 5 to 6 years would have been appropriate.

Criminal procedure (sentence) – common law crimes – indecent assault – adult placing hands on breasts of young girl – appropriate sentence

S v *Zulu* HB-52-03 (Ndou J, Cheda J concurring)

The appellant was convicted of indecent assault. He had touched the breasts of a young girl aged 10. He was sentenced to a term of imprisonment. On appeal, held: factors such as the age of the complainant, acts or statements accompanying the touching of the breasts, the reaction of the complainant, the frequency of the touches etc should be taken into account in determining the seriousness of the conduct. In this case, a fine, coupled with a suspended term of imprisonment, would be appropriate.

Customary law — application — husband and wife — unregistered customary law marriage — divorce – wife's entitlement to division of estate — tacit universal partnership not established – wife granted relief on basis of unjust enrichment

Ntini v *Masuku* HB-69-03 (Cheda J, Ndou J concurring)

An unregistered customary law union on its own does not entitle a party to successfully claim his/her right under the principle of tacit universal partnership. A party so claiming must lay a foundation under general law in order for such a claim to succeed. It is upon the establishment of a legal foundation that the court can then assess the claim and thereby make its determination.

The fact that a woman carries out all the household chores and is also sent on various errands geared towards either the development or the upkeep of the home should be regarded as a contribution which should be considered at the dissolution of any marriage. The contribution should not only be confined to tangibles but intangibles where possible. Failure to do so will result in unjust enrichment.

The time has come for the courts to take a positive and progressive approach in addressing the inequities in our legal system in order, where practically possible, to assist women in their endeavour to find justice. Judges have an inherent duty to make law as they are required to meaningfully contribute to law reform and development.

Customary law – application – matter capable of resolution by either general law or customary law – rights acquired under one system not to be regarded as inferior to rights acquired under other – need to show that one system should apply to exclusion of other

Kusema v *Shamva* HH-46-03 (Makarau J)

The applicant's late father had, after the applicant's birth, married the respondent under customary law. The applicant was brought up in his mother's home. The marriage was registered. The applicant's father had been allocated a stand in a township and in due course became the holder of certain disposable rights, title and interests in the stand. The applicant's father died and the applicant

inherited all his father's property in terms of the will his father made. The respondent continued to live in the house and paid rates and other expenses for doing so. The applicant sold the house to another party and sought to evict the respondent. She claimed to be entitled to stay there, being the widow under customary law. Held: (1) where an issue is presented to the court, seemingly capable of resolution by the application of either of general or customary law, but with different results, the court has to first to decide which law is applicable. (2) No rights acquired by one party under one legal system are to be regarded as inferior to the rights acquired by the other party under the other legal system. Both sets of rights should find expression and protection at law. (3) Under general law, the applicant had a right to evict the respondent, but under customary law a widow was entitled to support and accommodation by the heir of her late husband's estate. (4) There was no basis for holding that only the general law should apply. The right of the respondent to remain in or to be removed from the house that she regarded as her permanent home by virtue of her status at customary law could only be determined by the customary law of the tribe that the deceased belonged to.

Customary law – marriage – effect – rights of father of child of such marriage – rights not affecting mother's rights under general law

Katedza v *Chunga & Anor* HH-50-03 (Smith J)

The applicant was married under customary law and had a child. The birth was registered and the child took its father's surname. The applicant separated from her husband. She changed the child's surname to her own by notarial deed. She then sought to have the birth certificate changed accordingly. The Registrar-General said that the father's consent was required. Held: the father's rights were for customary law purposes only. Under the general law, and for purposes of the general law, the child was regarded as having been born out of wedlock. The mother was the sole guardian and was entitled, among other things, to select a name for the child.

Delict – passing off – goodwill – right to – product manufactured by one person in one country but sold or marketed exclusively by another person in another country – meaning of goodwill – necessarily associated with an undertaking – limited circumstances where trader can acquire goodwill in respect of goods manufactured by another

Zapchem Detergent Manufacturers CC v *Polaris Zimbabwe (Pvt) Ltd* HH-67-03 (Chinhengo J)

The respondent company, a Zimbabwean company, imported detergent powder from a manufacturer in South Africa, the predecessor company to the applicant and marketed and distributed the powder in Zimbabwe. Initially the powder was sold in packaging supplied by the manufacturer but later locally printed packaging was used. The packaging indicated that the manufacturer was the applicant. A dispute arose between the parties and the respondent stopped obtaining detergent from the applicant; it changed to another supplier from another country and continued to market and sell detergent from that supplier in the packaging it had used before. The applicant sought an interdict, which the respondent opposed on the grounds that that it and not the respondent had the necessary goodwill in the product. Held: (1) The question was who has the right to the goodwill of a product manufactured by one person in one country and sold or marketed almost exclusively by another person in another country. (2) Goodwill, the attracting force of an undertaking, is determined by a multiplicity of factors – the reputation of the undertaking, the fact that it is well-known, its creditworthiness, but more particularly the undertaking's locality, the personality of the entrepreneur or another person such as an employee who is connected with the business. However goodwill is created or however it comes into existence, it cannot be created or come into existence independently of or outside the context of an undertaking. (3) The only situation in which a trader in the position of the respondent can acquire goodwill in respect of a product which is manufactured by another but sold by itself is where such a person is not a mere conduit for the goods of another but markets its own product under its own name. This was not the case here, as the packaging indicated that the goods were manufactured by the applicant.

Delict – passing off – use of distinctive word – word not descriptive of product – confusion caused

Zimbabwe Gelatine (Pvt) Ltd v *Cairns Foods (Pvt) Ltd* S-130-02 (Cheda JA; Ziyambi JA & Gwaunza AJA concurring)

The respondent produced dog food in pellet form. The food was marketed under the name "kibbles", which name had been registered as a trade mark. The appellant subsequently started to produce similar, but cheaper, dog food, which it also described as "kibbles". The respondent complained of both passing off and infringement of a registered trade mark, and obtained an interdict preventing the appellant from using that name. Held: (1) Once a trade mark is registered it gives the registered owner of the trade mark an exclusive right to use it concerning the goods for which it is registered. Persons who purchase goods with the registered trade mark associate those goods with the owner of the trade mark. Use of the trade mark on goods other than those of the owner of the trade mark is an infringement generally referred to as "passing off". It amounts to a misrepresentation. (2) A

person who believes his rights have been infringed can either proceed in terms of the Trade Marks Act if he has a registered trade mark, or at common law in an action for passing off. (3) The appellant was not entitled to manufacture a similar product and then give it the same name as that of the respondent's product. There was no reason for the appellant to use the name "kibbles"; it could have used a different name for its product, the word not being descriptive of the dog food manufactured by the parties.

Election – election petition – corrupt acts – acts committed by respondent's "agents" – meaning of "agent" – failure by candidate to take reasonable precautions to prevent corrupt practices

Gokwe South Election Petition HH-4-03 (Makarau J)

The petitioner was the unsuccessful candidate in a general election. He was been severely assaulted by supporters of the winning candidate, so much so that it was rumoured that he had died. The question arose whether there had been corrupt acts committed by the successful candidate's agents. Held: any one set in motion by the respondent to conduct the election or canvass votes on his behalf is his "agent" for the purposes of the electoral law. His supporters and members of his campaign team were his agents as their acts were meant to further his campaign and garner more votes for him. He did not take any reasonable precautions to prevent corrupt practices. The rumour had spread to the extent that it had the effect of negating free franchise in the constituency.

Election – election petition – determination of – need for trial to be held – not permissible for petition to be upheld by default – application to strike out defence for non-compliance with orders for discovery of documents – application having effect of deciding matter by default – application dismissed

Tsvangirai v *Mugabe & Ors* HH-137-03 (Mavingira J)

The applicant was bringing an election petition to have the 2002 presidential election set aside. The allegations made against the first respondent, the winning candidate, were violence and various other corrupt practices. He also sought the setting aside of the election on the basis that the second and third respondents (the Registrar-General and the Minister of Justice) did not comply with the principles of the Act, that is improper and illegal conduct of the elections themselves. A number of court orders were obtained against the Registrar-General and Minister ordering discovery of documents, in particular, the voters' rolls. The applicant alleged that they did not comply with these orders, and alleged contumacy on their part. He sought to strike out their defences in the main petition. Held: the effect of striking out their defences would be that the election petition would be decided by default. It was clear that it is only after a trial that the High Court may determine the issues raised by the applicant to enable it to make an order setting aside an election. Consequently, this would not be a proper case for the court to exercise its discretion to strike out a defence.

Elections – election petition – evidence – documents sought from Registrar-General – voters' roll relating to specific election – Registrar-General obliged to supply on request by petitioner

Tsvangirai v *Registrar-General & Anor* HH-32-03 (Guvava J)

See below, under PRACTICE AND PROCEDURE (Discovery – purpose of).

Election – election petition – determination of – need for trial to be held – not permissible for petition to be upheld by default – application to strike out defence for non-compliance with orders for discovery of documents – application having effect of deciding matter by default – application dismissed

Tsvangirai v *Mugabe & Ors* HH-137-03 (Mavangira J)

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order setting aside an election. Consequently, this would not be a proper case for the court to exercise its discretion to strike out a defence.

Employment – code of conduct – disciplinary action under – employee's right to legal representation – legal representation is requested and refused – breach of *audi alteram partem* rule

Chirenga v *Delta Distribution* HH-72-03 (Smith J)

See above, under ADMINISTRATIVE LAW (Review – grounds for – breach of *audi alteram partem* rule).

Employment – code of conduct – transfer of undertaking – employees transferred to another undertaking under same terms and conditions – not applicable to code of conduct – employees not bound by former employer's code of conduct

Chinowaita & Anor v *Air Zimbabwe (Pvt) Ltd* HH-54-03 (Smith J)

The applicants were employees of the respondent. They had been initially employed by Air Zimbabwe Corporation and transferred to the respondent when the Corporation was privatised. They were charged with offences under the code of conduct that the Corporation had registered and dismissed. Held: (1) when an undertaking in which any persons are employees is alienated or transferred, the employment of such persons shall be deemed to be transferred on terms and conditions which are not less favourable than those which applied before the transfer. However, that could not apply to an employment code of conduct; if it did, it might result in the anomaly of some employees being bound by one code of conduct and others by another code. (2) There being no applicable code of conduct, the applicants' employment could only be terminated under the labour regulations.

Employment – contract – termination – abolition of office – employee of Posts and Telecommunications Corporation – need for Corporation to proceed in terms of relevant labour regulations for retrenchment or termination of contract

Nyamainashe v *Min of Transport & Anor* HH-10-03 (Chinhengo J)

The applicant was employed by the Posts and Telecommunications Corporation on a fixed term contract. Before the contract expired, the Corporation was "unbundled" into 3 separate companies. The applicant claimed that he should have been transferred to one of those companies. The respondents claimed that his office had been abolished in terms of Corporation procedures before the "unbundling" exercise and so he could not be transferred. An exit package was offered instead. Held: The labour regulations took precedence over any internal company procedures for terminating contracts of employment. The relevant regulations for termination or retrenchment were not followed, so the termination of the applicant's employment was unlawful. The PTC had no option but to transfer the applicant to one of the successor companies. He should be paid until the time his contract would have expired.

Employment – contract – termination – benefits – farm workers – farm being compulsorily acquired by State – employer a lessee of farm – duty of employer to pay terminal benefits

A L George (Pvt) Ltd v *Min of Labour & Ors* HH-8-03 (Chinhengo J)

The applicant was the lessee of a farm. The owner of the farm had another farm, which had been listed for acquisition. The owner offered the farm leased by the applicant. Although the government did not formally respond to the offer, it allocated the farm to two individuals. The applicant's workers demanded that they receive severance packages in terms of the Labour Relations (Terminal Benefits and Entitlements of Agricultural Employees Affected by Compulsory Acquisition) Regulations 2002 (SI 6 of 2002). The applicant argued that it was entitled to pay retrenchment packages instead. It also argued that the regulations did not apply as it was not an "employer", as defined, and that the farm did not belong to it. Held: (1) it was clear that the reason for paying the employees was not retrenchment but because the farm had been seized. (2) The definition of "employer" was wide enough to cover the applicant. (3) The phrase "belonging to" in the context meant something wider than ownership, and included a relationship to the farm arising from possession, control or use.

Employment – contract – termination – on notice – employee on probation – limits on employer's right to terminate – need to warn employee of failings and give him opportunity to improve – employee in senior or managerial position – standards required of such employee

Kwangwari v *CBZ* HH-79-03 (Ndou J)

The plaintiff was employed by the defendant on probationary basis. He occupied a managerial position. Towards the end of the probationary period he was notified of the defendant's dissatisfaction with his performance. The defendant purported to unilaterally extend the probationary period for a further 3 months, pending the managing director's return. After the managing director's return, the defendant terminated the contract. The plaintiff sought back pay from the date of dismissal. Held: (1) The objective of a probationary period is not only to assess whether the employee has the technical skill and ability to do the job; it also serves the purpose of ascertaining whether the employee is a suitable employee in a much wider sense. This would include an assessment of aspects such as his ability to get on with existing employees, customers or clients, his demeanour and diligence, as well as his character and his ability to fit in. (2) The position of a probationary employee should not be equated with that of a permanent employee. An employer is entitled to terminate a probationary employee's employment provided that it does not behave grossly unfairly or arbitrarily. (3) At common law probationary clauses give the employers absolute power to terminate the contract on expiration of the probationary period. The courts, however, require employers to justify the dismissal of probationary employees in much the same way as they are required to do in the case of any other employee, although the court may be disposed to accept, in the case of the dismissal of a probationary employee, reasons slightly less compelling that they would require in the case of employees of longer standing. (4) Before dismissal is embarked upon, the general principle is that the employee should be timeously informed of his deficiency, be told how to rectify it and be given a reasonable opportunity to improve before any action is taken against him. (5) Higher standards are expected of senior or managerial employees than ordinary workers doing work of a relatively menial nature. While fair warnings should be given in cases of this kind, a duty also rests on such a senior employee independently to assess his problems and take steps to reform. (6) The plaintiff was given adequate warning and could not claim to be entitled to be employed.

Employment – contract – termination – retrenchment – procedures not followed – employees being offered and accepting voluntary redundancy package if they resigned – unlawfulness of retrenchment irrelevant

Retrenched Employees, National Breweries v *National Breweries Ltd & Anor* S-121-02 (Cheda JA, Gwaunza AJA concurring; Sandura JA dissenting)

The first respondent wished to retrench the appellant and various former employees. Retrenchment proceedings were instituted but the correct procedures were not followed. However, each affected employee was offered a redundancy package if he resigned. They all did so. The appellant brought an application to have the retrenchment declared unlawful. Held: it was not open to the appellant to claim that he was retrenched unlawfully. He tendered his resignation from the first respondent freely and collected his package. That ended his employment with the first respondent.

Employment – contract – termination – urban council employees – council entitled to proceed under Urban Councils Act – no requirement to suspend employee before dismissing him – misconduct – collective job action – applicability of Labour Relations Act to determining whether such action had occurred

Rutunga & Ors v *Chiredzi Town Council & Anor* S-117-02 (Gwaunza AJA, Sandura & Cheda JJA concurring)

The appellants, all employees of the respondent council, were suspended from work following a demonstration held by the appellants, who had grievances in connection with their employment. The council suspended them, pending an application to the Ministry of Labour to terminate their employment; but when the council realised that it could act in terms of the Urban Councils Act instead of the labour regulations, dismissed the appellants. The appellants sought the setting aside of their suspension and reinstatement to their jobs. They claimed that the demonstration did not amount to unlawful industrial action. Held: (1) s 141(2)(b) of the Urban Councils Act does not require that there be a suspension prior to dismissal, nor does it prohibit the dismissal of a worker who, before that dismissal, happened to have been on suspension. There was no need to "lift" the suspension of the appellants before summarily dismissing them in terms of the Urban Councils Act. (2) In view of the definition of collective job action in the Labour Relations Act, it was difficult to see how their demonstration, which was designed to persuade the council to accede to their demands, could be distinguished from collective job action. The requisite notice not having been given, the job action constituted misconduct justifying their dismissal.

Evidence – accomplice – who is – person committing an illegal act other than that which is being charged – not an accomplice

Evidence – single witness – approach to – discrepancies in such witness's evidence – relevance of

S v *Nduna & Anor* HB-48-03 (Cheda J)

Where a conviction relies on the evidence of a single witness, discrepancies in the witness's evidence are not necessarily fatal. The discrepancies must be of such magnitude and value that it goes to the root of the matter to such an extent that their presence would no doubt give a different complexion of the matter altogether. Discrepancies whose presence do not usher in that change should be regarded as immaterial and as such of no value in the determination of the truth or otherwise of the matter at hand.

The fact that the single witness is himself guilty of some unlawful conduct does not make him an accomplice in the crime which is charged. Where the accused, who were policemen, arrested and robbed a person who was crossing the border illegally, that person was not an accomplice.

Evidence – foreign statute – court interpreting such statute

Registrar-General v *Todd* S-4-03 (Malaba JA; Chidyausiku CJ & Ziyambi JA concurring)

See above, under CONSTITUTIONAL LAW (Citizenship).

Family law – child – custody – awarding custody to person other than parents – grounds for doing so – when such course permissible

Makumbe v *Chikwenhere* HB-42-03 (Ndou J)

The High Court has the common law power to look after the interests of all minors, and if necessary, interfere with the exercise of parental power. The interests of the minor in such matters are always the decisive factor. The courts will not readily deprive the mother of lawful custody without good cause shown. The court always has the power in a proper case to deprive parents of custody and award this right to a third party, usually a relative. The special grounds for doing so include detrimental or undesirable effects or influences upon the physical, moral psychological or educational welfare of a child. The test is still not whether a third party can provide better materially or possesses more desirable attributes, but whether the parent or parents should be deprived of custody for any reason involving harm or danger to the child's welfare.

Family law – child – custody – factors to consider in awarding custody – custodian mother wishing to take child out of jurisdiction – move in child's best interests – application granted

Jere v *Chitsunge* HB-10-03 (Cheda J)

The applicant and respondent were formerly married. When they separated, the applicant sought to remove the child of the marriage to England, where she had a job. Her application was granted. The respondent appealed against the order. The applicant sought leave to execute the order pending the appeal. Held: The likelihood of irreparable harm being suffered by respondent if leave to execute pending appeal is granted should also be considered in relation to the child. The interests of the child being paramount, the interests of the parents are secondary. In considering the factors that ought to be taken into account in deciding which parent should have custody, the applicant had several in her favour. Her move to England was in the child's interests. No irreparable harm would befall the respondent that could not be cured if the appeal went in his favour.

Family law – child – custody – mother entitled to custody unless good cause shown – weight to be given to wishes of parents – interests of child overriding other considerations

De Montille v *de Montille* HB-20-03 (Ndou J)

The applicant and respondent were married to each other. While the marriage still subsisted, they made arrangements to emigrate to Australia. Before they moved there, they separated. The applicant made her own arrangements to emigrate there, and arranged child care service there for their 3 year old son. The respondent objected to the child being removed from Zimbabwe and appealed against an order allowing the child to get a passport and the applicant to take the child away. Held: The attitude of the courts is that they will not readily deprive the mother of lawful custody without good cause being shown. The mother enjoys a built-in advantage. The respondent's concern was the intended removal of the child from Zimbabwe. The court had to be careful not to let such parental claims and interests overshadow the interest of the child. The question is one of relative weight to be given to the wishes and claims of the natural father against those of the minor. This involves a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances, are taken into account and weighed, the

course to be followed will be that which is most in the interests of the child. The claims of parent-hood are only relevant in so far as they indicate what will be best for the child. Adequate assurances could be obtained to ensure the return of the child should the court grant custody to the respondent. The order appealed against could therefore be executed pending appeal.

Family law – child – name – child born out of wedlock – child born out of customary law marriage – right of mother to exercise rights of guardianship and select name

Katedza v *Chunga & Anor* HH-50-03 (Smith J)

See above, under CUSTOMARY LAW (Marriage).

Family law – husband and wife – divorce – division of assets following – customary law marriage – when tacit universal partnership may be relied on – unjust enrichment – intangible contributions to development and upkeep of home – may be regarded as contribution

Ntini v *Masuku* HB-69-03 (Cheda J, Ndou J concurring)

See above, under CUSTOMARY LAW (Application — husband and wife).

Family law – husband and wife – divorce – property division following divorce – housewife – how to quantify contribution by non-earning housewife during subsistence of long marriage

Usayi v *Usayi* S-11-03 (Ziyambi JA)

It is not possible to quantify in monetary terms the contribution of a wife and mother who for many years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, and day and night nurse for her husband and children. It is not possible to place a monetary value on the love, thoughtfulness and attention to detail that she put into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy; nor can one measure in monetary terms the creation of a home and therein an atmosphere from which both husband and children can function to the best of their ability. In the light of these many and various duties, one cannot say, as is often remarked: "throughout the marriage she was a housewife. She never worked." It is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the "direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties".

Intellectual property – trade mark – registration – infringement of registered trade mark – right of affected party to proceed under Trade Marks Act or under common law for passing off

Zimbabwe Gelatine (Pvt) Ltd v *Cairns Foods (Pvt) Ltd* S-130-02 (Cheda JA; Ziyambi JA & Gwaunza AJA concurring)

See above, under DELICT (Passing off).

Interpretation of statutes – amending legislation – duty of court to interpret so as to give effect to what legislature had in mind

WLSA & Ors v *Mandaza & Ors* HH-71-03 (Smith J)

When interpreting an amendment to a statute or other legal instrument it is a court's duty to so interpret it as to give effect to what the legislature or the maker of the instrument had in mind in order to realise the purpose of the amendment.

Interpretation of statutes – schedules to an enactment – effect of – interpretation of – schedule in conflict with substantive section – latter prevailing

Strydom v *Strydom* HB-44-03 (Ndou J)

The extent to which schedules can and will be regarded as an intra-textual, structural parts of an enactment will have to

be determined with reference to their nature and intended function relative to the context of the legislation or enactment as a whole. Schedules are treated, at least, as intra-textual sources of clarification and elucidation which are not necessarily only consulted in instances of uncertainty and ambiguity, but also as complements to or further explanations of the apparently clear and unambiguous sections contained in the body of the enactment. However, should a schedule be in clear conflict with a section or sections, the latter must prevail.

Land – acquisition – notice of – validity – depends on validity of preliminary notice of intention to acquire land

Nicolle v *Minister of Lands & Anor* HH-34-03 (Garwe JP)

The applicant owned and operated a farm. The Minister of Lands issued a preliminary notice of intention to acquire the land in terms of s 5 of the Land Acquisition Act. The notice was not served on the bond holders. A notice of acquisition in terms of s 8 of the Act was then issued. Subsequently, a further notice in terms of s 8 was issued, and the land "allocated" to a judge of the High Court. The farmer owner sought to remove the judge. Held: (1) The preliminary notice of acquisition was bad, and the notice under s 8 was therefore a nullity. (2) If the applicant wished to challenge the validity of the subsequent notice, he should bring an action against the Minister, not against the judge, whose rights and interest in the property had been acquired through the Minister.

Land – sectional title – registration of notarial agreement – transfer of undivided shares of land on which no building erected – transfer permissible

Sibanda & Anor v *Pentaville Investments (Pvt) Ltd & Ors* HH-14-03 (Makarau J)

See above, under CONTRACT (Interpretation – severability).

Legal practitioner – admission – notice to Law Society of intention to apply for admission – certificate by Society that such notice had been given – Law Society intending to oppose application – Society not entitled to refuse to issue certificate – Society not the arbiter of who should be admitted – correct procedure where Society intends to oppose application

Mavaza v *Law Society, Zimbabwe* HH-80-03 (Chinhengo J)

The applicant sought admission as a legal practitioner. He submitted to the Law Society the necessary notice of intention to apply for admission. The Society intended to oppose his admission, and did not issue its certificate that the requisite notice had been given. The applicant sought an order (a) compelling the Society to issue the certificate and (b) admitting him as a legal practitioner. Held: (1) the Law Society was not entitled to refuse to issue the certificate. The correct procedure was that upon receiving a notice of intention to apply to be registered as a legal practitioner, the Law Society should issue the required certificate and then, after an application for admission had been lodged, an opposition may be lodged. It was not for the Law Society to decide that the applicant was not a fit and proper person to be admitted: it is the High Court alone which determines whether or not an applicant may be registered as a legal practitioner. (2) There was no material on the basis of which the court could issue an order that the applicant be registered. The court would have to be satisfied that the applicant met all the other requirements for admission set out in the Act.

Legal practitioner – conduct and ethics – duty of confidentiality to client – extent of duty – applies even after client has withdrawn from legal practitioner

Masulani v *Masulani & Ors* HH-68-03 (Makarau J)

The confidence of a client is absolute and must be preserved by the legal practitioner. Confidentiality between a client and his legal practitioner is much wider than privilege, which is a concept of the law of evidence. Information that may not be privileged for the purposes of the law of evidence must be kept confidential by the legal practitioner to maintain the integrity attaching to the office of the legal practitioner. The confidentiality reposing in a legal practitioner remains even after a client has withdrawn from the legal practitioner, for whatever reason.

Legal practitioner – conduct and ethics – trust account – monies held in trust account – conveyancer holding deposit on price of house pending transfer – paying deposit to money before transfer – conveyancer liable to buyer for loss

Manhando v *Mtetwa & Anor* HH-25-03 (Hungwe J)

The plaintiff had entered into a contract to buy a house from the first defendant, and had paid nearly 50% of the purchase price

to the defendant's legal practitioners, pending transfer. There was litigation about the house preventing transfer, and the sale was cancelled. Nonetheless, the legal practitioner, instead of keeping the money in a trust account, paid it to the first defendant. The plaintiff sought the return of the money from the first defendant and the legal practitioner. Held: For a conveyancer to release a deposit to a seller paid by a buyer before transfer is effected in favour of a buyer is an act attendant with the utmost hazard. The position of the conveyancer was a fiduciary one requiring the utmost good faith. A legal practitioner who ignores a specific request which, if it had been complied with, was intended to safeguard the rights of a client and ought to be visited with costs on a higher scale.

Local government – city council – standing committee of council – membership of – tenure of such membership – member not having security of tenure – may be replaced when council conducts review of committee's work

Mudehwe NO & Anor v *Dembaremba & Ors* S-15-03 (Cheda JA, Chidyausiku CJ & Ziyambi JA concurring)

Following their election as city councillors in 1999, the four respondents were appointed as chairmen of various standing committees of the council. In 2001 a meeting was called at which the membership of the various committees would be reviewed. New appointments were made at that meeting. The respondents argued that they could not be replaced as chairmen during their tenure of office as councillors. Held: Section 96(8) of the Urban Councils Act [*Chapter 29:*15] provides for review of the work of a standing committee in the previous year. When this is done, the Council can either re-appoint the same members to the standing committee or elect new and different members. This means that those who were on the committee cease to be members of the standing committee concerned and revert to positions of ordinary councillors. It is not correct to say that members of standing committees must be replaced at each such meeting; the same people can be re-appointed. It is also incorrect to suggest that membership of a standing committee only ceases after the general election held for the Council. A member of such a committee does not have tenure of office.

Local government – urban council – rates and charges – objection to – procedure for dealing with objections – need for majority of total membership to agree on rates – when majority can be said to have agreed

City of Mutare v *Mutare Residents and Ratepayers Association* S-13-03 (Sandura JA, Cheda & Malaba JJA concurring)

The respondent ratepayers' association objected to certain increases in the rates and charges set by the appellant urban council. The council meeting to deal with the objections was convened at short notice, when 6 out of 17 members were unable to be present. Six of the councillors present spoke on favour of the increases, none against. It was resolved that the increases be ratified. The High Court held that the strict provisions of the Urban Councils Act had not been complied with, in 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. On appeal, held: that would apply where there was disagreement amongst the councillors present at the meeting. In that situation, a vote must be taken in order to determine whether a majority of the total membership of the Council is in favour of the resolution. Here, however, there was no such disagreement and the practical need for voting did not exist. In the circumstances, the resolution was unanimously passed by the eleven councillors and there was no need for a vote. The resolution was, therefore, passed by a majority of the total membership of the Council as required by the Urban Councils Act.

Media – right of reply – article published in which alleged falsehoods appear – what party alleging falsehood must show – need to specify untruths and submit counter-statement – no right to insist that counter-statement appears unedited

Tsvangirai & Anor v *The Editor, The Herald & Anor* HH-58-03 (Hlatshwayo J)

Section 83 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] introduces a new concept in the law relating to the media, the right of reply to alleged untruths. However, a party alleging that an article is untruthful must show directly or indirectly in what way the information published is untruthful or that it impinges on its rights or lawful interests. It may do so by spelling out the untruths in the offending article or by submitting a counterstatement that sets the record straight and exposes the mischief in the impugned article. It is not enough to merely allege grave falsehoods without specifying them or submitting a counterstatement. There is no right to insist that the counter-statement be published unedited; to hold that there was would be to make unwarranted inroads into editorial control in respect of the quality of the material published, and the way in which issues of public interest are treated. It would also impinge on the constitutional freedom of others to impart ideas and information without interference.

Person – *universitas* – what is – characteristics of – when can be said to exist apart from its members – cannot be created by other artificial persons

Privatization Agency of Zimbabwe & Anor v *Ukumbana Kubatana Investments Ltd & Anor* S-9-03 (Gwaunza JA, Chidyausiku CJ & Cheda JA concurring)

The Government had adopted a policy of privatising parastatals and disposing of shares in State-owned companies. It had established the appellant agency within the President's Office for this purpose. The agency advertised the sale of the shares in 3 companies that were being privatised. The respondent submitted a bid; its applicant's tender was the highest received. The agency subsequently purported to terminate the tender process, without having announced any winners. The respondent obtained an order to compel the agency to announce the winning bidders and to allot shares to the winners. One of the points taken by the agency was that it was not a separate legal *persona* and that the respondent should have proceeded in terms of the State Liabilities Act. Held: In order to determine whether an association of individuals is a corporate body which can sue in its own name, the court has to consider the nature and objects of the association as well as its constitution, and if these show that it possesses the characteristics of a corporation or *universitas*, then it can sue and be sued in its own name. A *universitas* is an aggregation of individuals forming a *persona* or entity having the capacity of acquiring rights and incurring obligations to as great an extent as a human being. The main characteristics of a *universitas* are the capacity to acquire certain rights as apart from the rights of the individuals forming it, and perpetual succession. The right to hold property in its own name is often given as one of its features. A *universitas* cannot be created by an association of artificial persons. The appellant was created by the Government, itself an artificial person. The appellant was not autonomous; persons working within it were employed by the Government; and it had no right to hold property in its own name. The appellant should not have been cited as a party.

Practice and procedure – application – decision of Master relating to winding up of estate – not competent for heirs to bring action under s 113 of the Administration of Estates Act [*Chapter 6:01*] – matter should be brought on review

Pasalk & Anor v *Kuzora & Ors* S-5-03 (Ziyambi JA, Malaba & Gwaunza JJA concurring)

See above, under ADMINISTRATION OF ESTATES (Master of the High Court).

Practice and procedure – attachment – to found or confirm jurisdiction – when may be dispensed with – requirement to show that peregrine defendant is present within country or has property capable of attachment – defendant company having only an indirect interest in company owning property within Zimbabwe – court having no jurisdiction

Stanmarker Mining (Pvt) Ltd v *Metallon Corporation Ltd & Ors* HH-55-03 (Chinhengo J)

See above, under COURT (Jurisdiction – *peregrinus*) .

Practice and procedure – bar – party in default – application to uplift bar – when automatic bar may be uplifted – principles

Stuttafords Holdings Ltd v *Madzudzu* HH-33-03 (Makarau J)
While the grounds upon which a court may withhold judgment to enable a technically defaulting party to put its house in order are varied and each case should be determined on its merits, the following are some of the reasons that may influence the court's discretion:
there must be an indication that the defaulting party intends to oppose the granting of the judgment or application;
the delay resulting in the technical default must not be inordinate;
the reason for the delay must be reasonable;
the filing of the opposition or entry of appearance to defend must be a genuine attempt to defend the proceedings and must not be an attempt to delay or frustrate the granting of the relief sought.

Practice and procedure – condonation – late application for review — relevance of prospects of success — form of application —application not in compliance with Rules

Mambo v *MRZ & Anor* HH-41-03 (Smith J)

More than a year after he had been dismissed by the respondent, the applicant sought an order setting aside the dismissal. Held: the application was out of time; it should have been filed within 8 weeks of the dismissal. Where the delay in filing a review

application exceeds 6 months, the court should refuse to condone the late filing unless there are very compelling reasons. It will not be necessary for the court to consider the prospects of success if the delay in making the application has been unreasonably long and the reasons proffered by the applicant for the delay are unacceptable. Not only had there been an inordinate delay, but the applicant had failed to comply with r 257 of the High Court Rules, which rule requires that an application for review must state, shortly and clearly, the grounds on which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. Non-compliance with this rule will bar the grant of relief. The costs associated with such non-compliance should be paid by the legal practitioner.

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

Matabeleland Zambezi Water Trust v *Zimbabwe Newspapers (1980) Ltd & Anor* S-3-03 (Cheda JA; Chidyausiku CJ & Ziyambi JA concurring)

A newspaper owned by the respondent published a series of articles in which it alleged that employees of the appellant had defrauded the appellant of sums of money. The appellant denied the allegations, claiming that they were defamatory. Although it said it did not intend to sue the respondent, it sought discovery of the documents in possession of the newspaper which would apparently have substantiated the allegations. Held: discovery can only be granted in aid of some existing proceedings, or at the most in aid of intended proceedings. Even where a party intends to sue, it cannot start by demanding information in order to found a claim against its opponent. The court cannot order the other party to provide information that will open it to legal action by the party asking for information. The court can only make an order for disclosure where action has been commenced and the suing party needs the information during the pleadings under the Rules on requests for further particulars. It is also permissible to seek disclosure of information but only where the party actually intends to take action.

Practice and procedure – discovery – purpose of – what documents a party is entitled to demand discovery of – further discovery – when may be demanded – when it might be concluded that further documents exist – opposition to application – grounds for – privilege – correct procedure where privilege is asserted

Tsvangirai v *Registrar-General & Anor* HH-32-03 (Guvava J)

The applicant was bringing an election petition arising out of the 2002 presidential election. He brought 3 inter-related applications. The first was for an order that the Registrar-General should make available for inspection the voters roll for the 2002 Presidential Election and the ballot papers which were used in that election. This was opposed on the grounds that the documents had been sealed in accordance with s 78 of the Electoral Act [*Chapter 2:01*] and could not be opened without the authority of the court. In the second two applications he sought further discovery, after some documents had been supplied by the respondents. The applications listed, without specifying, all documents and memoranda issued by the Registrar-General or from his office. These applications were opposed on the grounds that the application was not sufficiently particular and that the documents were privileged. Held: (1) s 78 of the Electoral Act does not apply to the voters roll, and that should be supplied. (2) The purpose of discovery is to ensure that no party to any proceedings is taken by surprise at trial as all documents relating to the matter between them would have been disclosed. A party is entitled to request that the other party disclose the nature of documents in his possession as long as they are relevant to the dispute. All the documents being sought must be relevant to the case being dealt with. The test for relevance is extremely wide and includes not only documents which are directly relevant but also those that may indirectly assist the party seeking discovery. The applicant was entitled to request full and complete discovery by the respondents and the respondents were obliged to make full discovery. (3) Where further discovery is sought, a discovery affidavit is considered conclusive unless it can be shown from the discovery affidavit itself or from documents referred to in the discovery affidavit or from pleadings or admissions made by the party making the discovery affidavit or from the nature of the case and documents in issue that there are reasonable grounds for believing that the party has other relevant documents in their possession or power. In the circumstances, and based on what had been stated by the respondents, the court could properly conclude that the respondents might very well have other documents in their possession which had not been discovered. (4) Although the applicant had asked for "all directives", some of these could have been verbal. He was only entitled to documents, tapes and correspondence, and the application should be amended to read "written directives". (5) Where the respondent relied on privilege, he must state, on affidavit, that such documents, which he does not wish to make available for inspection, are privileged and specify the ground upon which the claim for privilege is based.

Practice and procedure – execution – debt payable in foreign currency – execution levied in local currency but proceeds required to satisfy debt in full

Lowveld Leather Products (Pvt) Ltd v *International Finance Corp & Anor* S-114-02 (Sandura JA, Cheda and Ziyambi JJA concurring)

See above, under CONTRACT (Validity – loan)

Practice and procedure – execution – Deputy Sheriff's entitlement to commission – execution stayed by court order after property attached – Deputy Sheriff not entitled to commission, only to fees relating to disbursements

Bailey NO v *Deputy Sheriff, Harare* HH-12-03 (Guvava J)

The question for determination was whether or not the Deputy Sheriff is entitled to claim and be paid commission in respect of a writ of execution where he has effected attachment but before the sale in execution, in circumstances where there has been an order for stay of execution and a court order rescinding the judgment to which the writ of execution relates. Held: (1) under the rules, the Deputy Sheriff was entitled to 3% of the value of the property attached as commission in the event that a writ of execution is withdrawn after attachment but before the sale is carried out. (2) Applying the ordinary interpretation to the word "withdraw" in the context of the rule, it means the judgment creditor must cancel or retract the order given to the Deputy Sheriff. (3) The writ was not withdrawn by the applicant but execution was stayed in terms of a court order. A judgment creditor cannot be penalized by being required to pay the commission of the Deputy Sheriff in circumstances, where in effect, he is complying with a court order. The Deputy Sheriff was however entitled to the fees relating to his disbursements.

Practice and procedure – execution – sale – cancellation – grounds for cancellation – sale not genuine – effect would be to unjustly enrich debtor

Karigambe & Anor v *Jogi & Ors* S-111-02 (Cheda JA, Sandura JA & Gwaunza AJA concurring)

The appellants owed money to a building society, which attached their property in execution of the judgment obtained. The appellants, aware of the attachment, sold the property to the first respondent, who paid part of the purchase price so that the appellants could settle their debts with the building society. The appellants did not do so. The building society refused to cancel the sale in execution, which went ahead. The first respondent put in a bid, to protect his interest. His bid was the highest. He subsequently applied for the sale in execution to be cancelled. Held: a sale in execution can be set aside on any ground. In this case, the sale was not genuine; the purpose of the first respondent attending the sale and bidding was to protect his interest. It was not to purchase the property for the second time. The previous sale to the first respondent remained the proper and valid sale. If the sale in execution were not cancelled, the appellants would be paid more than what they had agreed to in the previous agreement of sale.

Practice and procedure – execution – sale – dwelling house – postponement or suspension of sale – grounds on which may be ordered – need to show "great hardship" – meaning – need to show reasonable offer to settle debt – balancing of two requirements

Masendeke v *CABS & Anor* HH-7-03 (Chinhengo J)

At hearing of an application to suspend or postponement the sale in execution of a dwelling house, the judge must satisfy himself: (1) that the dwelling is occupied by the execution debtor or his family and that it is likely that he or his family will suffer great hardship if the dwelling is sold or they are evicted from it. The hardship must be great in that it results in the execution debtor being rendered homeless or destitute. (2) that the execution debtor had made a reasonable offer to settle the judgment debt or that the occupants require a reasonable period in which to find other accommodation or that there is some other good ground for postponing or suspending the sale of the dwelling concerned or the eviction of its occupants, as the case may be. If one requirement is eminently met then the fact that the other requirement has not been fully met does not necessarily debar the applicant from obtaining the order of postponement or suspension of the sale.

Practice and procedure – execution – sale – judgment debtor dying – writ of execution issued before death – sale not barred

Malawusi v *Marufu & Ors* S-1-03 (Sandura JA; Cheda & Ziyambi JJA concurring)

See above, under ADMINISTRATION OF ESTATES (Judicial sale of deceased's property).

Practice and procedure – execution – pending appeal – court's discretion – when may be exercised – principles

Masukume v *Mbona NO & Anor* HB-46-03 (Ndou J)

The applicant was charged with an act of indiscipline by the college at which he was studying and found guilty. The High Court ordered that his punishment of suspension be set aside and fresh proceedings instituted. The college noted an appeal against the court's order. The applicant sought to leave to execute the order pending appeal. Held: (1) The noting of the appeal by the respondents automatically suspended the execution of the judgment unless the court directs otherwise. (2) Execution of judgment pending appeal is by way of an exception to this common law rule. (3) The court has a discretion to allow execution pending appeal, based on well established principles. The respondents had not satisfied the court that the object of the appeal would be completely defeated if the application were granted. Their fear of ill discipline being encouraged on the campus was unfounded: this is not irreparable damage. On the other hand, the applicant would be irreparably damaged if he were to be suspended and the respondents' appeal were subsequently to fail.

Practice and procedure – execution – sale – setting aside of – grounds for – breach of contract in terms of which immovable property sold – rights of judgment debtor and creditor – when breach material – contract specifying that payment had to be made in full – Sheriff and purchaser making arrangements for payment over a period – a material breach of contract – equivalent performance not permissible

Maparanyanga v *Sheriff of the High Court & Ors* S-132-02 (Gwaunza AJA; Chidyausiku CJ & Cheda JA concurring)

The second respondent was the successful bidder at a sale in execution of the appellant's house. Contrary to the standard form agreement of sale, he did not pay the full price at once, but only a portion, hoping to get a mortgage for the balance. He took occupation of the house. The appellant applied for the sale to be set aside. Among the grounds advanced was that the sale was invalid because the full price had not been paid. The application was refused. While the appeal was pending, the second respondent paid the full price and took transfer. He was prevented by third parties from taking occupation. Held: (1) The main issue was whether the sale was valid, given that the second respondent did not comply with the terms of the sale. (2) The fact that cash buyers of immovable property were rare, that mortgage finance, normally paid upon transfer, was consequently the norm and that the Sheriff had been satisfied that payment of the balance of the purchase price had been adequately guaranteed, was irrelevant. Having signed the contract, both parties were bound by and obliged to adhere to its terms. What was arranged between the Sheriff and the second respondent was a breach of the contract. (3) While normally a third party cannot complain of a breach of contract, in this situation the judgment debtor and judgment creditor were interested parties. In negotiating a sale of immovable property by private treaty, the Sheriff must always be conscious of the vested interest and rights that other people have in the property that he sells in execution, including that sold in a private treaty. (4) Where a contract provides for performance in a particular manner, the onus is on the offeree to show that performance *per aequipollens* is permissible. This was not the case here.

Practice and procedure – interdict – application – final order – what applicant must show – need to establish clear right of action

Rowland Electro Engineering (Pvt) Ltd v *Zimbank* HH-36-03 (Guvava J)

The applicant sought an order compelling the respondent bank to keep open the applicant's accounts with the bank. The bank had given the applicant 28 days to close its accounts. The applicant had obtained an interim interdict and sought a final order. Held: When seeking a final order for an interdict, an applicant must show that he has a clear right of action; that there is no alternative remedy; that he will suffer irreparable harm; and that the balance of convenience lies with him. In this case, the applicant had not established a clear right, and there was the alternative remedy of an action for damages.

Practice and procedure – judgment – by consent – setting aside of judgment – principles to be applied before such judgment will be set aside – no difference whether judgment granted in terms of rules of court or under common law

Masulani v *Masulani* HH-68-03 (Makarau J)

An application to rescind a judgment given by consent enjoins the court to have regard to (a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered; (b) the *bona fides* of the application for rescission; and (c) the *bona fides* of the defence on the merits of the case which *prima facie* carries some prospects of success; a balance of probability need not be established. Too much emphasis should not be placed on any one of these factors. They must be viewed in conjunction with each other and with the application as a whole. A very strong defence on the merits may strengthen an unsatisfactory explanation. The same considerations apply whether the judgment was granted in terms

of the rules or at common law.

Practice and procedure – matrimonial matter – strict observance of rules not insisted on – duty of court to ascertain truth – desirability of adjudicating upon all marital problems in same action

Phiri v *Phiri* HB-45-03 (Ndou J)

The married status should as far as possible, as long as possible and whenever possible be maintained. The task of a party who seeks to have a marriage dissolved is not a light one. For this reason, the court will not insist upon strict observance of the formalities but will seek to ascertain the truth regardless of technicalities.

It is desirable that the marital problems be adjudicated upon in one and the same action, rather than dealing with some first and others later.

Practice and procedure – order – interlocutory order – variation of – when court will grant variation – need for new facts to be shown

Registrar-General v *Tsvangirai* HH-37-03 (Mavingira J)

The respondent, who was bringing an election petition challenging the outcome of the 2002 presidential election, had obtained an order against the applicant (the Registrar-General) to make available for inspection, by the respondent's legal practitioners, the voters' rolls used for that election. After the date by which he should have complied with the order, the applicant brought an application seeking a postponement of the production of the rolls. He claimed that for the inspection to take place, presiding officers, constituency registrars and political parties' representatives must all be present. Some of those officials were not immediately available. The applicant produced a programme, spanning over 7 months, for the purposes of inspection of the voters' roll. Held: (1) In the absence of fresh facts, courts will not lightly vary their own orders, even though they may be of an interlocutory character. There were no fresh facts which were not placed before the judge who granted the order. (2) The applicant's conduct revealed an element of tardiness and a lack of willingness to give effect to court orders previously granted. No sound or cogent reasons had been given for a postponement. (3) The applicant was the custodian of the voters' rolls and what was sought was simply to make the voters' rolls available for inspection. He did not need to gather a large array of presiding officers to make the voters' rolls available; he was competent to make the voters' rolls available himself.

Practice and procedure – parties – citation – employee bringing application for review against employer – enough to cite employer and not other employees whose decision is being brought on review

Chirenga v *Delta Distribution* HH-72-03 (Smith J)

Where an employee who has been dismissed wishes to bring under review the decision or proceedings of an employee or a committee consisting of employees of his employer which led to his dismissal, it would be adequate if the employer is cited. It is not necessary to cite the employees or committee as well.

Practice and procedure – parties – joinder of – joinder by order of court – when court may order joinder *mero motu* – necessary party with direct and substantial interest in the order that court might make – Ministry of Health – not proper to cite Ministry – Minister should be cited instead –State Procurement Board – whether may be cited in its own name

Anabas Services (Pvt) Ltd v *Ministry of Health & Ors* HB-21-03 (Ndou J)

The applicant company brought an action against the Ministry of Health and the State Procurement Board after its cleaning contract at a hospital in Bulawayo was cancelled at short notice. The respondents took the point *in limine* that the application was defective due to wrong citation of the parties. Held: (1) as the hospital superintendent had signed the contract with applicant, she should be joined as a party. She had an interest in the outcome. The court had power *mero motu* to order joinder. (2) The Minister of Health, not the Ministry, should have been cited. (3) It was proper for the applicant to cite the State Procurement Board as a respondent, the Board being a body corporate under the Act that created it.

Practice and procedure – parties – judge of the High Court – action against – need to apply for leave before instituting

proceedings – procedure to be followed

Nicolle v *Minister of Lands & Anor* HH-34-03 (Garwe JP)

The applicant owned and operated a farm. The Minister of Lands issued a preliminary notice of intention to acquire the land in terms of s 5 of the Land Acquisition Act. The notice was not served on the bond holders. A notice of acquisition in terms of s 8 of the Act was then issued. Subsequently, a further notice in terms of s 8 was issued, and the land allocated to a judge of the High Court. The farmer owner sought to remove the judge. Held: (1) leave must be sought first before proceedings for substantive relief are filed against a judge. The applicant applying for such leave must provide a proper basis upon which such leave should be granted. This might entail disclosing the basis upon which the judge in question should be made answerable. Only in the event of leave being granted could the applicant then properly file civil proceedings seeking specified relief against the judge. (2) The preliminary notice of acquisition was bad, and the notice under s 8 was therefore a nullity. (3) If the applicant wished to challenge the validity of the subsequent notice, he should bring an action against the Minister, not against the judge, whose rights and interest in the property had been acquired through the Minister.

Practice and procedure – parties – *locus standi* – association representing members – not all members affected by matter in issue – need for association to show it was authorised to represent affected members – constitutional application – only affected person may bring application

Nyamandhlovu Farmers' Association v *Minister of Lands & Anor* HB-19-03 (Ndou J)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 24).

Practice and procedure – parties – *locus standi* – heirs to deceased estate – no *locus standi* to bring action in terms of s 113 of Administration of Estates Act [*Chapter 6:01*] – matter should be brought on review

Pasalk & Anor v *Kuzora & Ors* S-5-03 (Ziyambi JA, Malaba & Gwaunza JJA concurring)

See above, under ADMINISTRATION OF ESTATES (Master of the High Court).

Practice and procedure – parties – representation – secretary of association – whether entitled to bring action on behalf of members of association – constitution of association permitting him to do so

Eastview Gardens Residents Association v *Zimbabwe Reinsurance Corp & Ors* HH-174-03 (Paradza J)

See above, under CONTRACT (Formation – option).

Practice and procedure – parties – trust – not a legal person – cannot appear as a party – action must be brought by trustee

WLSA & Ors v *Mandaza & Ors* HH-71-03 (Smith J)

A trust is not a legal person and an action cannot be brought in the name of a trust.

Practice and procedure – set-down – notice of – matrimonial matter – must be served on defendant even where matter is unopposed

Strydom v *Strydom* HB-44-03 (Ndou J)

The repeal and replacement of form 30A to the High Court Rules does not affect the requirement of r 272(2)(b), that personal notice of set-down must be served on the defendant in a case of a claim for a final order of divorce, for judicial separation or for nullity of marriage.

Prescription – extinctive – running of – when interrupted – surety – debt due under suretyship can prescribe independently of principal debt

Mandhu v *Scotfin Ltd* HH-64-03 (Garwe JP)

See above, under CONTRACT (Suretyship – surety)

Prescription – extinctive – when begins to run – when "debt" becomes due – cause of action only arising on occurrence of last of facts material to be proved – plaintiff unaware of identity of debtor and facts from which debt arose

Kunene v *Lobels Biscuits (Pvt) Ltd* HB-62-03 (Ndou J)

The plaintiff was injured in an industrial accident, which resulted in him being in a coma for about two weeks. The accident occurred on 8 February 1998. Summons was served on 9 February 2001. The defendant raised a special plea of prescription. Held: Prescription cannot begin to run against a creditor before his cause of action is fully accrued i.e. before he is able to pursue his claim. A debt can only be said to be claimable immediately if the creditor has the right to immediately institute an action for its recovery. During the period he was unconscious, the plaintiff was not aware of the "identity of the debtor and of the facts from which the debt arises" as required by s 16(3) of the Prescription Act [*Chapter 8:11*]. Prescription began to run only when he gained consciousness and became aware that he was injured through the negligence of the defendant.

Property and real rights – spoliation order – when may be granted – delay in seeking remedy – when may disable court from granting relief

Best of Zimbabwe Lodges (Pvt) Ltd & Anor v *Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd & Ors* HH-6-03 (Makarau J)

Any action that results in a party parting with possession without his consent and outside the legal process can found an application for spoliation. However, the remedy is not to be used for settling contractual disputes. For any delay to operate to disable the court from granting relief to the applicant, it must be consistent only with a finding that the applicant acquiesced in the dispossession and further, must be so extensive as to disable the court from granting practical relief.

Revenue and public finance – Commissioner of Taxes – duties – duty to act fairly – must act fairly both to taxpayer and to fiscus – duty to collect tax – no right to refrain from collecting tax legally due – mistake of law made by Commissioner – whether taxpayer entitled to rely on such mistake

Revenue and public finance – sales tax – taxpayer – who is – trader is taxpayer – Sales Tax Act [*Chapter 23:08*] – s 5(1)(b)

Commissioner of Taxes v *Astra Holdings (Pvt) Ltd* S-131-02 (Malaba JA, Chidyausiku CJ & Cheda JA concurring)

Acting on what was stated in letters written by the tax authorities to other motor car dealers, the respondent did not charge sales tax on on motor vehicles sold in Zimbabwe and paid for in foreign currency. The respondent did not hide the fact, and in its returns had stated that the transactions were "exempt". The Commissioner of Taxes disallowed the objection by the respondent to a later demand for sales tax, stating that the letter contained an error in law; and in any event, could not be relied on by the respondent as it was addressed to another dealer. The respondent argued that it was not the taxpayer, and that it merely collected tax from the customers on behalf of the revenue authorities. It also argued that it was unfair for the Commissioner to change "policy" without prior notice of its intention to do so and then backdate the claim for the unpaid tax. Held: (1) under s 5(1)(b) of the Sales Tax Act, the motor car dealer, not the customer, was the taxpayer. (2) The Commissioner's fundamental duty under the Act is to collect the tax created and imposed on the taxpayer by Parliament for the benefit of the fiscus. In exercising the powers conferred upon him for the proper discharge of the statutory duty the Commissioner is required, by public law, to act fairly towards taxpayers as a body or as individuals. He also has a duty to act fairly to the fiscus. There had been an error of law and the Commissioner could not have discharged his statutory duty if he had acted on the letter containing the error. The Commissioner's decision to exercise the power to require the respondent to pay the unpaid tax was not driven by improper motives. Its purpose was to achieve the very objective for which the power was conferred upon him. (3) The Commissioner could not be said to be breaching a contract made with the taxpayer not to collect tax that was legally due; such an arrangement would have been void *ab initio*. (4) The respondent could not rely on any "legitimate expectation" that it would not be taxed by mistake of law.

Words and phrases – "withdraw" (writ of execution)

Bailey NO v *Deputy Sheriff, Harare* HH-12-03 (Guvava J)

See under, under PRACTICE AND PROCEDURE (Execution – Deputy Sheriff's entitlement to commission)