Case Summaries 2003-2

Cases decided between July 3003 - December 2003

Administrative law — fair hearing — oral hearing — requirement for witnesses to give evidence in presence of person charged — person excluded while witnesses gave evidence — procedural irregularity justifying setting aside of proceedings — recalling witnesses for cross-examination not sufficient

Mawuta v *Secretary for Finance* HH-169-03 (Hungwe J)

The applicant, a public servant, was charged with a disciplinary offence. He was denied the right to be legally represented at the hearing. When the witnesses gave evidence, he was excluded. Although he was told that the witnesses would be recalled for cross-examination, only two out of the six witnesses were recalled. Held: where an oral hearing takes place, it is must do so with the person charged being present to hear all the evidence against him so that he can, if he wishes, seek to controvert it. It was an irregularity for the disciplinary committee to have excluded the applicant from the hearing at the time when six witnesses' evidence was being led. The procedure adopted flew in the face of the spirit of an oral hearing which was the intent and purpose of the regulations. It went against the grain of what constituted a fair hearing. It offended one's sense of fairness and justice. It could not be cured by recalling each witness to afford the applicant an opportunity to cross-examine that witness. Any cross-examination that followed upon this procedure would be a sham and a travesty of justice. The proceedings were flawed by this irregularity and would be set aside.

Appeal — criminal case — lengthy delay between conviction and hearing of appeal — effect — cumulative delay to be considered

S v *Bere* HB-116-03 (Ndou J, Chiweshe J concurring)

The appellant, a former prison officer, had been sentenced to a term of imprisonment for the theft of cheques received for salaries and other disbursements. The trial began about a year after the appellant was arrested. Most of that delay could be attributed to the appellant. The trial was completed some three years after it began. The delay was caused by a combination of factors including those occasioned by the appellant, the respondent and the unavailability of the trial magistrate. Another four years passed before the appeal was heard. The delay in hearing the appeal was mainly occasioned by the appellant, although the State was to some extent guilty of acquiescence with the long period of delay. Held: The cumulative delay had to be considered. Three years was a long time to finalise the trial, even accepting that the proceedings were very long. On its own this form of delay would warrant interference with the sentence. The sentence should be set aside, not because it was not appropriate when it was imposed, but on account of the undue delay.

Appeal — execution of judgment pending appeal — when should be granted — appeal noted to gain time and to prevent applicants from using their own property

Kyriakos & Anor v *Chasi & Ors* HB-115-03 (Ndou J)

The applicants ran a mine. When the mine ran into financial difficulties, approval was given for the retrenchment of the employees and an agreement was reached with the parties concerned. The employees left the mine. Thereafter, the first two respondents forcefully evicted the applicants from the mine, accusing them of economic sabotage, and brought the former employees, the remaining respondents, back. The applicants obtained an order for eviction of the respondents. When the respondents noted an appeal against the order, the applicants sought execution pending appeal. Held: Among the factors to consider were the prospects of success on appeal, including the question as to whether the appeal was frivolous or vexatious or had been noted, not with a *bona fide* intention of seeking to reverse the judgment, but for some indirect purpose e.g. to gain time or harass the other party. It was clear that the former employees wanted to resile from the written agreement. Instead of approaching the courts for a remedy they took the law into their own hands when they went back to the mine and forced the applicants from their property. Their action did not amount to a lawful way of resiling from a written agreement. The appeal was not noted with *bona fide* intention of seeking to reverse the judgment but to gain time and harass the applicants from their lawfully acquired property. Their purpose was to unlawfully stop the applicants from conducting their mining operations. The respondents had adequate remedies available under the labour laws.

Appeal — noting of — effect — stay of execution pending appeal — whether applies to all tribunals or only to superior courts — appeal from decision of Labour Tribunal — not a bar to an application for summary judgment based on decision made under an employment code of conduct

Southdown Hldgs Ltd v *Mariwa* HH-161-03 (Hungwe J)

The respondent was dismissed from his employment with the applicant in terms of the applicable code of conduct. One of the benefits of his employment was occupation of a house on the applicant's estate. An appeal under the code of conduct failed, as did an appeal to the Labour Tribunal. The respondent noted an appeal to the Supreme Court against the decision of the Labour Tribunal. When the applicant sought the eviction of the respondent from the house, the respondent argued that noting the appeal had the effect of suspending the judgment appealed against. Held: where a party seeks to execute a judgment of an administrative authority or tribunal but the enabling statute does not provide for the suspension pending an appeal, the party may seek to make an appropriate application for such leave from the High Court. However, when the applicant sought the eviction of the respondent from its house, it based that right, not on the decision of the Labour Tribunal, but on the decision made in terms of the registered code of conduct. A decision made in terms of a code of conduct is not suspended by an appeal to the Labour Tribunal, and the decision was not suspended by noting an appeal from the Tribunal's decision.

Matanda & Ors v *- M - Packaging (Pvt) Ltd & Ors* HH-113-03 (Hungwe J)

As they had, by guaranteeing loans, undertaken personal risk in favour of a company, the directors demanded preferential treatment in the allotment of shares and voting rights. The applicants, who were shareholders, resisted preferential treatment on the allotment of shares. The matter was resolved by a shareholders' agreement that the directors enjoyed greater voting rights than the applicants. In terms of s 196(1) of the Companies Act [*Chapter 24:03*], a member of a company may apply to the High Court for an order in terms of s 198 on the ground that the company's affairs are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the interests of some part of the members including himself. The applicants sought such an order, requiring, among other things, that shareholders be allotted only one vote for each share held. Held: It is not part of the business of the court to determine the wisdom of a course adopted by a company in the management of its own affairs. There is no suggestion in the Act that the Court ought to review the opinion of the company and its directors in regard to a question which primarily at least is domestic and commercial. Accordingly, unless it was shown that the respondents acted *mala fides* in making those decisions complained of, the court could not to interfere with internal business decisions made in the proper interests of that company. The applicants could not complain that of oppressive or unfairly prejudicial conduct by the respondents on account of the voting rights of the directors, as they were signatories to the shareholders agreement and there was no allegation that their consent to that agreement was improperly obtained or that it was induced by fraud.

Conflict of laws — foreign judgment — enforcement of — Zimbabwean defendant entering appearance to defend in foreign court — service of process effected according to *lex fori* — foreign court having jurisdiction

Vehicle Delivery Svcs (Zim) (Pvt) Ltd v *Galuan Hldgs Ltd* HH-171-03 (Hungwe J)

The respondent sued the applicant in the High Court of Zambia for damages arising out of a vehicle accident that occurred in Zambia. It obtained judgment from that court and registered the judgment in Zimbabwe in terms of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*]. The applicant sought the setting aside of the order which registered the Zambian High Court judgment. It argued that the fact that applicant entered an appearance to defend in Zambia was not sufficient on its own to confer jurisdiction upon the Zambian High Court without an unequivocal consent by the applicant to the jurisdiction or an attachment of the applicant's property to confirm or found jurisdiction. The Act requires that any process issued by a foreign court be endorsed by a magistrate for service in terms of our law, if he is satisfied that such process was lawfully issued by that foreign court. Since the summons issued by the High Court of Zambia was not so endorsed by the magistrate for service or served in terms of s 13 of that Act, then such process was a nullity; and since the judgment was secured in terms of this nullity there is no judgment to speak of. Held: (1) s 13 is complementary to other methods available to parties for the service of foreign process. It does not preclude service in some other manner allowed by law. The fact that the respondent did not choose to adopt this available method of service of process was not fatal. (2) In matters of procedure the court applies the *lex fori*. The Zambian court had jurisdiction over the matter on the basis that the cause of action arose within its jurisdiction, so it was entitled to look at its law of procedure with regard to service and, if it was satisfied that service was effected, to assume jurisdiction. Service was effected on the applicant and the applicant reacted by entering appearance to defend through its Zambian legal representatives. (3) To hold that correct service was effected would enhance the efficacy of the rules of court. It is in any case within the court's discretion to condone the failure to comply with directory provision of the Act.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 12(1) — right to life — meaning — refusal

by prison authorities to transfer prisoner outside the country for medical tests — no evidence that such tests necessary — right to life not violated — s 15(1) prohibition against inhuman or degrading treatment — meaning of "inhuman" or "degrading" — refusal by prison authorities to transfer prisoner abroad for medical tests — no evidence that tests necessary — not inhuman or degrading treatment — failure by President to exercise clemency — not inhuman treatment — President entitled to exercise prerogative at any time — no reason to believe he would never do so

Woods v *Commissioner of Prisons & Anor* S-137-02 (Malaba JA, Chidyausiku CJ, Sandura, Cheda & Ziyambi JJA concurring)

The applicant was serving a life sentence for murder. He suffered from a heart condition which, he claimed, required that he be sent outside the country for tests which were not available in Zimbabwe. The medical evidence was inconclusive, and did not establish that he required the tests he claimed he did. Two petitions to the President that the prerogative of mercy be exercised had been unsuccessful. He brought an application under s 24 of the Constitution, claiming that his constitutional rights were violated: (a) his right not to be subjected to inhuman or degrading treatment was violated by the refusal by the respondents to transfer him to South Africa where he wanted to have a coronary angiogram; (b) the decision not to exercise the prerogative of mercy had destroyed in him all hope for the restitution of freedom in his lifetime and thus the life sentence he was serving into an inhuman and degrading punishment in contravention of s 15(1) of the Constitution; (c) the refusal by the respondents to transfer him to South Africa to have a coronary angiogram violated his right to life entrenched for him under s 12(1) of the Constitution. On the first ground, he sought an order that he be transferred to South Africa; and on the second two, an order for his release from prison. Held: (1) the decision of the respondents not to transfer the applicant to South Africa for the tests was based upon the medical evidence that the additional test was not necessary. That decision could not be said to constitute "inhuman" treatment or "degrading" treatment. There would have to have been deliberate indifference on the part of the prison administration to serious medical needs or serious illness of a prisoner to constitute such treatment. There would have to have been humiliation and debasement other than the general or usual element of humiliation associated with imprisonment after a criminal conviction. (2) By its very nature the President's prerogative of mercy could still be exercised in the applicant's favour at any time in future. It could not be said that he had been effectively abandoned in prison as a "thing" without any residual dignity and without any hope of restitution of freedom in his lifetime. (3) Even if the medical evidence supported the applicant, the right to life meant the right not to be intentionally killed except in the instances specified in s 12. It could not be said that when the respondents refused to transfer the applicant to South Africa where he wanted to have the medical tests they intended to bring about his death.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 13 and 18 — right to liberty and to protection of the law — arrest on reasonable suspicion of having committed an offence — discretion reposed in arresting officer — unreasonable exercise of discretion a breach of arrested person's constitutional rights

Paradza v *Minister of Justice & Ors* S-46-03 (Sandura, Ziyambi, Malaba & Gwaunza JJA; Uchena AJA)

The applicant, a judge of the High Court, was arrested in his chambers on allegations of attempting to defeat or obstruct the course of justice, alternatively corruption. He was taken to a police station and held overnight before being taken to the magistrates court for remand. He sought an order declaring that his arrest, detention and remand were unconstitutional, setting aside the decision to place him on remand, and directing that the sum deposited by him as bail be refunded and that his passport be restored to him. It was argued that his arrest and detention were unconstitutional because the decision to arrest and detain him was so outrageous in its defiance of logic that no sensible person who had applied his mind to the issue could have arrived at it. Held: under s 13 of the Constitution a person may be deprived of his personal liberty if an arrest is authorised by law upon reasonable suspicion of his having committed a criminal offence. It is lawful for a peace officer to arrest a person on reasonable suspicion of having committed a First Schedule offence. This includes the common law offence of attempting to defeat or obstruct the course of justice. However, the law-maker did not intend that the power given a peace officer to arrest is always, or even ordinarily, to be exercised. He has a discretion as to whether or not to arrest the suspect. As there was no likelihood that the applicant would abscond, interfere with State witnesses, or commit further offences, the decision to arrest, detain and remand him was unreasonable.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 16 — acquisition of rural land for resettlement — requirement to give notice to person having an Ainterest" in the land — only a real interest is protected — lessee in terms of unregistered lease — not a real interest

Mgwaco Farm (Pvt) Ltd & Anor v *Pasi & Ors* HH-188-03 (Chinhengo J)

The amendment of s 5 of the Land Acquisition Act [*Chapter 20:10*] to reduce the categories of persons to whom notice of acquisition of rural land must be given does not contravene s 16 of the Constitution. Section 16 requires that notice must be given to persons who have an "interest" in the land, and such an interest must be a "real" one as opposed to a personal one. A real

interest is one which diminishes the owner's *dominium*. An unregistered lease would not constitute a real interest.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 20 — right to receive and impart information — limits to such right — publication of report of commission of inquiry — President entitled to determine that publication would fall within permitted derogation from right to receive information — s 31K — limits of justiciability of President's decisions — order compelling publication of report of commission of inquiry — grant of such order amounting to disclosure of advice received by President — an infringement of s 31K

Zimbabwe Lawyers for Human Rights & Anor v *President of Zimbabwe& Anor* S-12-03 (Cheda JA, Chidyausiku CJ, Ziyambi, Malaba & Gwauza JJA concurring)

In the 1980s the President appointed a commission of enquiry into disturbances at military camps. The commission reported to him but the report was never published. A human rights organisation sought an order compelling the publication of the report. It argued that its right to receive information was being infringed and that as 20 years had passed there was no reason not to publish the report. Held: (1) While the importance attaching to the exercise of the right to freedom of expression must never be underestimated, the rights of others are just as important and deserve protection. The interests of the State and other persons cannot be overlooked. (2) The President had determined in the circumstances that it was not the interests of defence, public safety or public order, or in the interest of the State, to publish the report. (3) To compel publication of the report would amount to disclosure of the nature of the advice the President had received, which in turn would be an infringement of s 31K of the Constitution. (4) The President was entitled to withhold publication on the grounds set out in s 20(2) of the Constitution.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 24 — application under — *locus standi* of applicant — need for applicant to show that alleged contravention of Declaration of Rights is in relation to him — need for applicant to allege which right is being infringed

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 24 — application under — *locus standi* of applicant — a matter of law which need to be pleaded

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 20 — freedom of speech — includes freedom of the press — right not limited to natural persons — derogation from right to freedom of speech — regulation of broadcasting — a permissible derogation — appointment of board of Broadcasting Authority — appointment by Minister — permissible derogation — control of licensing by Minister — not constitutional

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — interpretation of — presumption of constitutionality — meaning of

Capital Radio (Pvt) Ltd v *Broadcasting Authority of Zimbabwe & Ors* S-128-02 (Chidyausiku CJ; Sandura, Cheda, Malaba & Gwaunza JJA all delivering separate judgments, concurring in part and dissenting in part)

The applicant company wished to establish a radio station. It challenged the constitutionality of several provisions of the Broadcasting Services Act [*Chapter 12:06*]:

s 4, under which the board of the Broadcasting Authority is appointed
s 6, which makes the Minister of Information the licensing authority
parts of ss 8 and 22, which impose restrictions on non-citizens
s 9, which restricts the number of licences that may be issued to broadcasters other than the national broadcaster
s 11(1), under which conditions may be imposed on a licence
s 11(4), under which a stated percentage of the content of a television broadcast must be in a minority language
s 12(1)(f), which required a licensee to state the sources of its funding
s 12(2) and (3), which limit the period for which a licence is valid
s 15, which allows the Minister unilaterally to amend a licence
s 16, which allows the Minister to suspend or cancel a licence.

The applicant alleged that these provisions contravened the freedom of speech provisions in s 20 of the Constitution.

Held: (1) an application under s 24 of the Constitution may only be brought to the Supreme Court on relatively narrow grounds. The applicant must show that the alleged contravention of the Constitution is in relation to him. In addition, he must allege which constitutional right is being infringed. (2) If the applicant is unable to meet these requirements, it does not mean that he is without remedy: it is possible to bring the matter before the High Court, where all he must show is that he has an interest in the matter. (3) If the applicant alleges *locus standi* on narrow grounds, he may prejudice himself. *In casu*, the applicant approached the court as

an aspiring broadcaster, not as an individual whose rights were being affected. (4) Section 20 included freedom of the press, and such freedom is also enjoyed by corporate persons. (5) Regulation of broadcasting is permissible derogation. The airwaves available are limited. It is permissible to establish a broadcasting authority and to set reasonable parameters. (6) In its determination of what is reasonably justifiable in a democratic society the court has to bear in mind that there is always the presumption of constitutionality in favour of legislation. The *onus* is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not. In comparison to other countries which are accepted as being democratic, the method by which the broadcasting authority in Zimbabwe is appointed and the degree of government control over it meet the requirement that restrictions should be reasonably justifiable in a democratic society. (6) However, because it totally subordinated the regulating authority to the Minister in the process of granting of broadcasting licences, s 6 was unconstitutional. (7) By limiting the number of licences to one broadcaster other than the national broadcaster, the legislation effectively created a monopoly, which was unconstitutional. It was also unconstitutional to provide that no person should be a holder of both a broadcasting licence and a carrier licence. (8) The applicant had no *locus standi* to challenge ss 8(1), (2) and (5) or s 22(2), as it had not shown that it was adversely affected by those provisions. It had no *locus standi* to challenge s 11, which relate to television broadcasting. (9) As there was a procedure for reviewing the Minister's decisions under ss 15 and 16, those provisions were constitutional. (10) It was permissible for Parliament to stipulate the period for which a licence was valid. The periods provided were not unreasonable.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 24 — application challenging the constitutionality of a law — requirement for applicant to comply with law before bringing challenge

Associated Newspapers of Zimbabwe (Pvt) Ltd v *Minister for Information & Ors* S-20-03 (Chidyausiku CJ, Cheda, Ziyambi, Malaba and Gwaunza JJA concurring)

The applicant, the publisher of a newspaper, sought to challenge the constitutionality of several provisions of legislation which required it and its journalists to register and be accredited. It did not bring the application under s 24 of the Constitution before the deadline given for registration, and announced that it would not register. Held: the applicant had to obey the law first and then challenge its constitutionality. It was not for litigants to decide which laws are unconstitutional.

Constitutional law — Constitution of Zimbabwe 1980 — s 31I — President's prerogative of mercy — no limits at to when it may be extended

Woods v *Commissioner of Prisons & Anor* S-137-02 (Malaba JA, Chidyausiku CJ, Sandura, Cheda & Ziyambi JJA concurring)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — Declaration of Rights — s 12(1) — right to life).

Constitution law — Constitution of Zimbabwe 1980 — Attorney-General — power to institute prosecution — accused person a member of the judiciary — Attorney-General not precluded from bringing prosecution before procedure for removal of judge for misbehaviour completed

Constitutional law — Constitution of Zimbabwe 1980 — judiciary — independence of — meaning of and limitations on — judge accused of criminal conduct not associated with his adjudication of a case — not entitled to insist that procedure for removal of judge for misbehaviour be completed before criminal proceedings may be instituted

Paradza v *Minister of Justice & Ors* S-46-03 (Sandura, Ziyambi, Malaba & Gwaunza JJA; Uchena AJA)

The applicant, a judge of the High Court, was arrested in his chambers on allegations of attempting to defeat or obstruct the course of justice, alternatively corruption. He was taken to a police station and held overnight before being taken to the magistrates court for remand. He sought an order declaring that his arrest, detention and remand were unconstitutional, setting aside the decision to place him on remand, and directing that the sum deposited by him as bail be refunded and that his passport be restored to him. It was argued that his arrest and detention were unconstitutional because, *inter alia*, they violated his rights as set out in ss 79B and 87 of the Constitution. Held (Sandura JA dissenting): (1) A judge is a public officer in terms of the Prevention of Corruption Act [*Chapter 9:16*] and is liable for prosecution if he commits an act proscribed by the Act. (2) Under s 76(4)(a) of the Constitution the Attorney-General has power in any case in which he considers it desirable so to do to institute and undertake criminal proceedings before any court, not being a court established by a disciplinary law. He is not, in the exercise of those powers, subject to the direction or control of any person or authority. (3) Section 79B of the Constitution guarantees the independence of the judiciary, and s 87 provides a procedure for the removal of a judge on grounds of misbehaviour. Misbehaviour includes criminal misconduct. However, there was nothing in the Constitution which provided that the procedure for the removal of a judge

charged with a criminal offence from office must take precedence over the institution of criminal proceedings against him for the same offence. The two procedures were mutually exclusive. To hold that the procedure for removal of a judge must be followed before the Attorney-General could institute a prosecution would be a clear violation of the provisions of s 76(7). (4) The judicial independence protected by s 79B relates to adjudication of cases; it could not be argued that when a judge commits a criminal offence at a time when he is not involved in the adjudication of a case (as was alleged *in casu*) he cannot be arrested and charged with that offence on account of the principle of judicial independence.

Contract — breach — damages — purpose of award of damages — what plaintiff must prove — date at which amount of loss to be calculated
Jiawu Manufacturers v *Mitchell Cotts Freight Zimbabwe (Pvt) Ltd* HH-104-03 (Ndou J)

See below, under CONTRACT (Exemption clauses).

Contract — compromise — when constitutes novation — acknowledgment of debt following defendant's failure to comply with original contract — validity of original contract in doubt — no effect on validity of compromise

Leader Tread Zimbabwe (Pvt) Ltd v *Smith* HH-131-03 (Ndou J)

The plaintiff reached an arrangement under which the defendant would source foreign currency for the plaintiff to pay for goods from South Africa. Under the arrangement, the plaintiff paid Zimbabwean currency to the defendant and the defendant should have ensured that the plaintiff's supplier was paid in South Africa. When the plaintiff tasked the defendant with the matter, the defendant paid part of the sum that was owed and gave an acknowledgment of debt for the balance. When the defendant failed to pay the balance, the plaintiff sued on the acknowledgment of debt. The defendant raised various defences, including the alleged illegality of the original deal. Held: Compromise may, in appropriate circumstances, constitute a novation. An acknowledgement of debt signed by the parties is a compromise which falls in this category. It constitutes a novation and as such, on failure of the defendant to comply with compromise agreement (i.e. the acknowledgement of debt), the plaintiff cannot fall back on the old obligation but must base his claim on breach of the new agreement, unless an express or implied term in the latter empowers the plaintiff to base its claim on the obligation. A compromise made about a contract, the validity of which is in doubt, cannot be upset on the ground that the contract which was compromised was invalid. The purpose is to replace uncertainty with certainty. *In casu*, the original agreement was extinguished and replaced by the new one. This was a compromise and as such any defence which the defendant might have relied upon had he been sued upon the original agreement fell away.

Contract — exemption clauses — effect — cannot be construed so as to absolve a breach going to root of contract
Redriver Development (Pvt) Ltd v *Provenance Support Co* HH-183-03 (Paradza J)

The plaintiff claimed damages for breach of contract, alleging that the defendant had failed to properly and professionally service computer software it had supplied to the plaintiff. The defendant did not specifically answer that allegation, but sought to rely on an exemption clause in the contract, arguing that the clause absolved it from liability. Held: (1) A defendant must deal effectively with all the allegations in the summons and declaration, if any. He must admit or deny them. If he denies them he automatically puts them in issue. If he fails to deny any allegation, such allegation is deemed to be admitted. If he restricts himself to answering one allegation only, his case will stand or fall on whether he does so successfully. It must be accepted as admitted that the defendant had not performed its contractual obligation. (2) The clause could not be enforced if its effect would be that that the defendant would be exonerated from liability if it failed to perform its obligations at all or if its performance proved useless, or if it committed a breach going to the root of the contract.

Contract — exemption clauses — principles applicable — when such clauses are valid — goods left in storage later found to be missing — exemption notice not timeously brought to attention of person contracting nor easily ascertainable — defendant liable for loss

Jiawu Manufacturers v *Mitchell Cotts Freight Zimbabwe (Pvt) Ltd* HH-104-03 (Ndou J)

The plaintiff claimed damages for the loss of a large number of television sets that he had left with the defendant for storage. The defendant claimed that it was not liable because of an exemption clause in the contract. It admitted that the televisions may have been stolen by its employees. The exemption clause referred to the general trading conditions for the shipping agents' association.

The plaintiff's attention was not drawn to these conditions and he did not see them. Held: (1) The excluding or limiting term must be brought to the attention of the party against whom its protection is sought or otherwise be within his knowledge. The time the excluding or limiting term is alleged to have been given is also of great importance. Such a term will not avail the *proferens* unless the other party was aware of it before the contract was entered into. A belated notice is valueless. In any case, a party cannot exempt himself from liability for the wilful misconduct or criminal or dishonest activity of himself, his servants or agents. (2) The fact that a breach of contract has occurred is not, in itself, sufficient to merit an award of damages. It must be shown, in addition, that loss has been suffered. The plaintiff must prove his damages; they will not be presumed. The court is nevertheless obliged to assess the damages as best as it can. The aggrieved party is not entitled to be put into a better position than he would have been in had the contract been performed. The date of breach is important but the extent of loss, the amount to be awarded, and the amount assessed or calculated can only be determined at a later date.

Contract — termination — cancellation — breach by one party of obligations — when other party entitled to cancel contract — breach must relate to vital or important term — whether necessary for innocent party to demand performance

Mud Man Enterprises (Pvt) Ltd v *Nechironga & Ors* HH-128-03 (Ndou J)

The applicant bought a house from the respondents. He paid part of the purchase price, but did not, as required by the contract, obtain a loan from a building society, nor did he pay the balance on time. In order to pay the balance, he purported to sell the house to a third party, at a higher price than he paid. The respondents notified him that the sale was cancelled. Held: (1) The right to resile from an agreement does not arise merely by virtue of the fact that a contracting party has failed to carry out an obligation under an agreement timeously and has received a valid notice of rescission. The breach must also relate to a vital or important term of the agreement. Whether in a particular case the breach is of such a material or substantial nature is a question which can only be satisfactorily decided after an examination of all the relevant facts. On the facts of this case, the breach was material. (2) The notice of rescission was not preceded by a demand, but this was not necessary to place the applicant *in mora*, the applicant having failed to pay in time.

Contract — validity — contract in breach of statutory provision — such contract invalid — no obligation arises from such contract — refund of money paid in pursuance of contract

Mikesome Investments (Private) Limited v *Silcocks Investments (Pvt) Ltd* HH-107-03 (Smith J)

The defendant gave the plaintiff estate agent a mandate to sell, on its behalf, certain residential stands on two farms owned by the defendant. A plan had been drawn up showing the subdivisions but approval for the subdivision as required by the Regional Town and Country Planning Act [*Chapter 29:12*] had not been obtained at the time the plaintiff executed the mandate. The approval was subsequently obtained, but the plaintiff had sold some of the stands before the approval was obtained and the defendant paid the plaintiff a sum of money as part commission on those sales. The plaintiff claimed commission for the sales and the defendant counter-claimed for the refund of the commission it had paid. Held: (1) an agreement for the change of ownership of any portion of a property, except in accordance with a permit granted under the Act which allows for a subdivision, is prohibited. As the sales were illegal, there was no valid basis for the plaintiff to claim commission on the sales it effected. (2) The enrichment of the plaintiff was without a legal cause because every sale it concluded was illegal. That being the case, the defendant was entitled to a refund of the commission by virtue of the *condictio ob turpem vel iniustam causam.* The *in pari delicto* rule did not apply in these circumstances.

Contract — voidable — contract induced by fraud — when may be rescinded at instance of wronged party — non-disclosure or silence on material fact — when may be regarded as fraudulent

PTC v *Mhaka* HH-127-03 (Ndou J)

The respondent obtained employment with the appellant corporation. One of the qualifications required of her was that she had, among other things, 5 years' relevant work experience. She claimed to have this; but actually had less than that, and the little work she did had been with her husband's company. She also gave her husband as a referee, but did not disclose that he was her husband. Held: (1) a party seeking to avoid a contract on the ground of misrepresentation must prove the following elements of his case: (a) that the misrepresentation relied upon was made; (b) that it was a representation as to a fact as opposed to a promise, prediction, opinion or estimate; (c) that the presentation was false; (d) that it was material in the sense that it was such as would have influenced a reasonable man to enter into the contract in issue; (e) that it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided; and (f) that the representation did induce the contract. (2) The false representations the applicant made did induce the respondent to employ her. (3) While non-disclosure is not necessarily fraudulent,

silence, which, by itself, does not, as a general rule, give rise to a remedy in law, comes within the rules on non-disclosure when the circumstances are such that "frank disclosure" is clearly called for or when there is a duty to disclose. In this situation, the applicant's deliberate silence or non-disclosure constituted a fraud.

Contract — waiver — by conduct — what must be shown — delay in enforcing right — not *per se* evidence of waiver by conduct

Lallemand v *Lallemand* HH-130-03 (Mavangira J)

The onus is upon a party asserting waiver to prove it, but although, as in all civil cases, the onus may be discharged on a balance of probability, it is not easily discharged. In the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue. A party does not lose his rights by mere delay, even if he is aware of the fact that another has infringed his rights. Delay or Astanding by" may be taken into consideration by the court in arriving at the conclusion as to whether or not the party did or did not lose his rights.

Court — contempt of — committal for prison for — when appropriate — procedure — onus on parties — what must be shown

Macheka v *Moyo* HB-78-03 (Ndou J)

A judgment ordering a debtor to do or to refrain from doing any act is enforceable against the person of the debtor by way of committal for contempt of court, not by execution against his property. Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. The principal object of civil contempt proceedings is to compel, by means of personal attachment and committal to gaol, the performance of the court's order. The imprisonment imposed is very often suspended pending fulfilment by the defaulter of his obligations. Committal to gaol is a very severe and rigorous way of achieving performance in respect of a civil order of the court and should not lightly be resorted to. When resorted to, committal achieves two objectives: (1) enforcing compliance and (2) protecting and upholding the dignity and respect of the court. In respect of latter objective, the applicant acts an informer who brings the contempt to the attention of the court. Before holding the respondent to have been in contempt of court, it is necessary for the court to be satisfied both that the order was not complied with and that the non-compliance was wilful on the respondent's part. The onus is on the applicant to show a disobedience of the court's order. Once this is shown, wilfulness is, in such circumstances, inferred and the onus moves to the respondent to rebut the inference of wilfulness on a balance of probabilities. Proven inability to comply with the court's order affords a respondent protection against a committal for contempt.

Criminal law — common law offences — procuring an abortion — common law crime effectively replaced by s 3 of the Termination of Pregnancy Act [*Chapter 15:10*]

S v *Ncube* HB-119-03 (Ndou J)

See below, under CRIMINAL LAW (Statutory offences) (Termination of Pregnancy Act [*Chapter 15:10*].

Criminal law — common law crimes — treason — sufficiency of evidence — number of witnesses required

S v *Tsvangirai & Ors* HH-119-03 (Garwe JP)

It is not competent for a court to convict a person of treason except on the evidence of two witnesses for each Aovert act" charged or, where two or more overt acts are charged, one witness for each overt act. There would be no compliance with the Act if, in a case where more than one overt act is charged and there is only one witness, the same witness were to give evidence on each of the overt acts. Where one overt act is charged at least two witnesses must give evidence on the overt act, although the evidence need not overlap. Where the court is relying on the evidence of only two witnesses to prove the whole overt act, the evidence of each of those witnesses must be such that, standing alone, it would, if believed, be adequate to establish that the accused committed the overt act of treason with which he is charged.

An overt act is any act manifesting the criminal intention and tending towards the accomplishment of the criminal object. It is generally is composite thing, passing through distinct stages and made up of various circumstances. Several witnesses speaking to those different stages and circumstances may be necessary.

Criminal law (statutory offences) — Concealment of Birth Act [*Chapter 9:04*] — s 2 — hiding live infant with intent to conceal

birth — offence committed — same conduct could be charged under other statutes

S v *Kademaunga* HH-126-03 (Smith J)

The accused had given birth to a child. Wishing to conceal the birth, she put the infant in an anthill. The child was found alive a day or so later. She was charged with contravening s 2 of the Concealment of Birth Act [*Chapter 9:04*], that is, by secret burial or other disposal of the body of the child, endeavouring to conceal the birth thereof. The scrutinising regional magistrate queried the appropriateness of the charge. Held: it was no longer necessary to show that the accused had disposed of the dead body of her child. The 1969 amendment to the legislation was to the effect that if the woman disposes of the body in an endeavour to conceal the birth, whether the baby is dead or alive at the time, she has committed the offence. However, a charge of attempting to contravene s 2 of the Infanticide Act [*Chapter 9:12*] or of contravening s 7(e) of the Children's Protection and Adoption Act [*Chapter 9:04*] (leaving left an infant unattended in circumstances which were likely to cause the infant physical or mental distress or harm) would have been equally competent. Criminal law — statutory offences — Termination of Pregnancy Act [*Chapter 15:10*] — procuring an abortion — need for mdicla evidence to be led

Criminal law — statutory offences — Termination of Pregnancy Act [*Chapter 15:10*] — s 3 — procuring an abortion — need for medical evidence to be led

S v *Ncube* HB-119-03 (Ndou J)

The accused was convicted on a charge of procuring an abortion. The charge was laid under the common law. The girl gave evidence but was not treated by the magistrate as an accomplice. It was common cause that the girl was pregnant though the accused denied that he was responsible. No medical evidence was led. Held: (1) the charge should have been laid under the Termination of Pregnancy Act [*Chapter 15:10*], as the Act had effectively, though not expressly, replaced the common law crime. (2) Because the accused had admitted that the girl was about four months pregnant when she was examined at a hospital, the lack of medical evidence was not fatal. (3) Because no prejudice would be caused to the accused, the conviction would be altered to one of contravening the Act.

Criminal procedure — arrest — seizure of goods found on arrested person — right of police to continue to hold goods even if person released, provided charges still to be brought

Mazunga & Ors v *Minister of Home Affairs & Ors* HB-98-03 (Ndou J)

The applicants were arrested on suspicion of dealing illegally with foreign currency. They were taken to the police station, where they were searched. Sums of money, mostly in local currency, were taken from them. No formal charges were brought and the applicants were released. When an application was brought to compel the return of the money, the police indicated the nature of the charges on which they proposed to summon the applicants, but with few specifics. Held: under s 49 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the police making the arrest were empowered to seize any article referred to in the section which is in the possession or control of the arrested person. The fact that the applicants were not placed on remand did not affect the right of the police to seize the money. Although the State case appeared weak, it was not appropriate for the court to make a finding to that effect. There were no grounds shown for ordering the release of the money.

Criminal procedure — discharge at close of State case — when may be granted — State evidence utterly unreliable — rarity of cases where such a finding could be made

S v *Tsvangirai & Ors* HH-119-03 (Garwe JP)

The court shall return a verdict of not guilty if at the close of the State case the court considers that there is no evidence that the accused committed the offence charged (or any other offence with which he could be convicted on that charge). Thus, the court must discharge the accused at the close of the case for the prosecution where (a) there is no evidence to prove an essential element of the offence; (b) there is no evidence on which a reasonable court, acting carefully, might properly convict; (c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it. Instances of the last such cases will be rare; it would only in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed.

Criminal procedure — legal representation — right to — limits to right — when court may order trial to proceed without accused having legal representation

S v *Nyathi* HB-90-03 (Ndou J)

The accused had been convicted and sentenced to a term of imprisonment. The proceedings had been confirmed on review. His legal practitioner sought to bring the matter on review again. He attacked the conviction and, in addition, submitted that the proceedings were defective. He alleged that the magistrate had not allowed the accused to secure legal representation. The accused had wished to secure the services of a particular practitioner, but the practitioner died before the trial began. It was also alleged that the magistrate had not granted a postponement to enable a defence witness to be called. Held: (1) Other than in very exceptional cases, the accused is not allowed to use the review procedure to attack the conviction. He should appeal against the conviction. The circumstances of this case did not warrant making an exception. (2) While every person who is charged with a criminal offence is permitted to defend himself, at his own expense, by a legal practitioner of his own choice, the trial court has a discretion, in appropriate cases, to order that the trial should proceed. Before exercising this discretion, the court must clarify whether the absence of the accused person's legal practitioner is the fault of the accused or of the legal representative. The right to legal representation imposes an obligation to permit, not to ensure, legal representation. The accused had sufficient time to secure services of another legal practitioner or request a postponement to secure one. He was dilatory in securing legal representation. He should have requested for a postponement in order to do so. (3) Not every refusal of an adjournment or postponement of a trial to give the defence time to call a witness who is not available at court constitutes a gross irregularity. The question is whether in refusing the adjournment all the material facts were taken into consideration. In this case, the accused abandoned his intention to call his witness after two postponements failed to secure the attendance of the witness.

Criminal procedure — review — procedure — use of — should not be used where conviction attacked

S v *Nyathi* HB-90-03 (Ndou J)

See above, under CRIMINAL PROCEDURE (Legal representation)

Criminal procedure — seizure of articles — seizure without warrant — when lawful — need for police to show that they believed, on reasonable grounds, that a warrant would be issued if it was applied for and the delay in obtaining a warrant would prevent the seizure or defeat the object of the search — effect of failure to show this

Associated Newspapers of Zimbabwe (Pvt) Ltd v *Madzingo NO & Anor* HH-157-03 (Omerjee J)

The applicant, a newspaper publisher, had applied for registration under s 93 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*]. It had done so after the Supreme Court declined to hear its constitutional application against the requirement to register. In spite of the applicant having applied to register, the police had seized a large quantity of the applicant's property and placed a blockade around the applicant's premises. The police claimed that they had seized the property in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The applicant sought an order for the return of the property and for the removal of the police from the premises. Held: (1) as no warrant had been issued for the seizure of the material, the police would have to show that they believed, on reasonable grounds, that a warrant would be issued if it was applied for and the delay in obtaining a warrant would prevent the seizure or defeat the object of the search. As they had produced no evidence to that effect, the seizure was unlawful. (2) Section 8 (2) of the Regulations dealing with registration provided that, once a person had submitted an application for registration, that person was permitted to carry on the activities in question whilst the application was being considered. There was no time limit; the provision was open-ended. The applicant was entitled to continue publishing and the police were not entitled to prevent it from doing so.

Criminal procedure — trial — irregularity — failure to allow legal representation — failure by accused to secure legal representation or to apply for postponement for that purpose — court entitled to order trial to proceed

Criminal procedure — trial — irregularity — failure to grant postponement to allow defence witness to be obtained — when court entitled to refuse postponement

S v *Nyathi* HB-90-03 (Ndou J)

See above, under CRIMINAL PROCEDURE (Legal representation)

Criminal procedure (sentence) — appeal — factors to be considered — lengthy delay between trial and hearing of appeal — delays partly due to appellant and partly to other factors — cumulative delay to be considered

S v *Bere* HB-116-03 (Ndou J, Chiweshe J concurring)

See above, under APPEAL (Criminal case — lengthy delay between conviction and hearing of appeal).

Criminal procedure (sentence) — community service — community service order — need for court to specify hours to work and times of starting and ending work — convicted person full-time student or in full-time employment — need to take that factor into account

S v *Sithole & Anor* HH-101-03 (Guvava J)

Where a person is in employment or is a full-time student, a court imposing a community service order must allow community service to be carried out over week-ends or after working hours, by arrangement with the institution concerned. The number of hours should be reduced from what it might otherwise have been. It is the duty of the trial magistrate to state the hours which the accused must work and the times when the service should be commenced and completed. Where the hours fixed by the court become inconvenient either to the institution or to the accused, then the court must be approached to vary the conditions imposed in the order. It is not for the institution to allow the accused time off.

Criminal procedure (sentence) — common law crimes — assault with intent to do grievous bodily harm — imprisonment not only appropriate punishment — factors to be considered

S v *Dangarembwa* HH-123-03 (Chinhengo J)

The tendency to regard all cases of violence and, in particular, those of assault with intent to cause grievous bodily harm as falling within the scope of those offences where prison sentences are desirable must be avoided. In order to properly exercise his discretion in such cases, the judicial officer will often be guided by such factors as the weapon used, the seriousness of the injury, the nature of the degree of violence and the medical evidence. The factors of mitigation as put forward by the accused will also have to be considered. Imprisonment is not the only sentence which can be imposed in such cases.

Criminal procedure (sentence) — common law crimes — theft — by a police officer — small amount stolen and most recovered — community service appropriate

S v *Murembwe* HH-144-03 (Makoni J, Makarau J concurring)

Policemen who are appointed to uphold the law must perform their duties in an exemplary manner and should not themselves resort to criminal acts. Ordinarily the theft of a small amount by a first offender would not attract a custodial sentence, but when a policeman turns to theft, he must expect to be sent to prison. However, where there are special mitigatory factors, community service instead of imprisonment may be appropriate.

Customary law — marriage — formalities required — strict adherence to ritual not essential — undissolved previous marriage under Marriage Act — second marriage void — division of matrimonial property

Muringaniza v *Munyikwa* HB-102-03 (Ndou J)

The defendant married the plaintiff under customary law, having been told by him that his previous marriage had been dissolved. In fact it had not been dissolved. The parties' customary law marriage was not registered. They set up home and had a child. She contributed financially to the acquisition of their home. The parties became estranged and separated. The plaintiff sought the eviction of the defendant from the home. He claimed that there was no customary law marriage because *roora* had not been paid and because the marriage to his first wife subsisted. Held: (1) in customary law, strict adherence to ritual *formulae* is never absolutely essential for the validity of a marriage. There was evidence that *roora* had been paid, though not in the normal way. (2) In such cases, customary law should apply unless the justice of the case demands otherwise. As a claim for division of the matrimonial assets was not recognised under customary law, the general law should apply. If customary law were to apply, then it would not be possible to extend any relief to the defendant beyond her traditional entitlements of *umai* or *mowoko* property. In

the circumstances, this would have been unjust. (3) Because the plaintiff's first marriage had not been dissolved, the marriage to the defendant was bigamous. Nonetheless, in these circumstances the court could divide the property in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*], and thus the claim for ejectment must fail.

Damages — assessment — *action injuriarum* — defamation — legal practitioner — incorrect publication of plaintiff's name in gazette of bad debtors — failure to immediately withdraw publication when true position pointed out

Kawonde v *Dun & Bradstreet (Pvt) Ltd* HH-158-03 (Karwi J)

The plaintiff's name was published in the defendant's gazette of debtors after he had default judgment entered against him. In fact he had paid the debt to the creditor as soon as he had received the summons, so he obtained rescission of the judgment. The defendant did not immediately publish the fact that judgment had been rescinded. It was only several months later, when the plaintiff tried to obtain credit, that he discovered that his name was in the gazette. Although he drew the defendant's attention to the true position, the defendant did not correct the error for another six months. The plaintiff claimed damages for defamation. Held: (1) when the defendant first published the information complained of, that publication was privileged by virtue of the fact that the judgment in question had not been rescinded and also that the defendant did not know and had no way of ascertaining that payment of the capital and costs associated with the claim had been effected prior to the granting of the default judgment. However, once notified that its publication was not justified, the defendant had an obligation from then on to expunge the plaintiff's name from its list of bad debtors. Any continued publication of the information complained of became wrongful, unlawful and defamatory because it was not true (the judgment had been rescinded) and the defendant had been made fully aware of that fact. That publication lowered the plaintiff in the estimation of others and injured his standing and reputation. (2) With regard to the quantum of damages, it was relevant to consider that although the defendant's initial publication was privileged, he did not take measures to stop the continued publication or continued appearance of the offensive publication after he was advised and requested to stop. The plaintiff was a registered legal practitioner. There was no apology. He had to take legal action to protect his reputation. The matter was contested to the end.

Damages — delictual — mitigation of — no duty on plaintiff to mitigate loss — limit to defendant's liability — onus on defendant to show that loss due to plaintiff's unreasonable actions

Magoge v *Zimnat Lion Insurance Co Ltd & Anor* HH-190-03 (Smith J)

There is no duty on a plaintiff who is claiming delictual damages to mitigate his loss. The so-called mitigation rule is an application of the general principle that a plaintiff should not be the author of his own loss. A defendant is not liable for all loss suffered by the plaintiff; he is only liable for such part of the plaintiff's loss as is properly caused by the defendant's breach of duty. The mitigation Arule" relates not to what the plaintiff in fact did, but to what he should have done. It is in essence a claim based on negligence — his failure to do what a reasonable man would do if placed in the position of the person claiming damages. There is thus a duty on a plaintiff not to aggravate his damages by his own wanton or careless conduct. If he does so aggravate his loss, then he will not be entitled to recover damages in respect of the damage attributable to such conduct on his part. The *onus* of establishing such aggravation lies upon the defendant.

Delict — defamation — what is — incorrect publication of plaintiff's name in list of bad debtors — failure to correct error when it was pointed out — continued publication defamatory

Kawonde v *Dun & Bradstreet (Pvt) Ltd* HH-158-03 (Karwi J)

See above, under DAMAGES (Assessment — *action injuriarum* — defamation).

Delict — liability — vicarious liability — employee — when person can be said to be employee of another — test applicable as to whether person is a servant or an independent contractor

Banda v *Gamegone (Pvt) Ltd & Anor* HH-133-03 (Smith J)

The vicarious liability of employers for the delicts of employees does not extend to independent contractors. The test as to whether a person is an employee or an independent contractor is the existence of a right of control over the person in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer;

an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it. The usual test is the "supervision and control" test. Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted. However, while the questions of control and supervision are important factors in determining the issue, they are not the sole criteria; all the circumstances surrounding the contract must be considered in order to determine the issue, and no single factor could be treated as the sole basis of determining the issue.

Delict — liability — vicarious liability — rationale behind doctrine of vicarious liability — employee acting contrary to instructions — question is whether instructions limit scope of employment or relate to conduct within sphere of employment

Mungofa v *Muderede & Ors* HH-129-03 (Ndou J)

The plaintiff was injured in a bus accident caused by the negligence of the first defendant, the driver of the bus. The driver was a part-time employee of the second defendant. The second defendant's employees, the bus crew, permitted the first defendant to drive the omnibus with fare paying passengers. The bus crew member who allowed the first defendant to drive was obviously permitting him to drive the omnibus Adoing his master's work in pursuing his master's ends". Held: (1) the doctrine of vicarious liability of employers for the delicts of employees is based on social policy. The most important considerations are the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source of recompense than his servant, who is apt to be a man of straw; and that the rule promotes wide distribution of delictual losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices. (2) The fact that the bus crew member may have acted contrary to the second defendant's instructions did not necessarily take the conduct out of the scope of his employment. The question is whether the instructions given to the employee limit the scope of his employment or merely relate to conduct within that sphere. It may be that the employee is carrying out his assignment in a manner which was contrary to his instructions, but he is nevertheless carrying out that assignment and none other. (3) Here there was no express prohibition; at most there was an implied prohibition. The use of first defendant was wholly in pursuance of the second defendant's interests, so the second defendant was liable for the delict perpetrated by the first defendant on the plaintiff.

Delict — negligence — duty of care — legal practitioner — duty of care owed by legal practitioner to third parties — when legal practitioner liable

Tinarwo v *Hove & Ors* HH-138-03 (Smith J)

See below, under LEGAL PRACTITIONER (Conduct and ethics — duty of care).

Elections — election petition — failure by petitioner to appear on trial date — procedure to be followed — absolution from instance granted

Murehwa South Election Petition HH-103-03 (Ndou J)

The petitioner, who was challenging the election in his constituency, failed to appear personally on the date set for the trial of the matter. There had already been a number of postponements at his request. No reason was proffered for his absence. Held: there being no provision in the Electoral Act dealing with this situation, it should be decided in accordance with the procedure governing the non-appearance of the plaintiff in a civil suit. This is to the effect that if, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant is entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfy the court that final judgment should be granted in his favour, and the court, if so satisfied, may grant such a judgment. *In casu,* absolution from the instance was called for, with costs to be paid on the higher scale.

Elections — constituency registrars — transmission of ballot papers and other electoral material following election to Registrar-General — Registrar-General's duty to ensure that materials transmitted

Registrar-General v *Tsvangirai* HH-142-03 (Chinhengo J)

See below, under PRACTICE AND PROCEDURE (Judgment — default judgment — rescission).

Elections — urban council election — candidate for election as councillor — disqualification — whether candidate disqualified because not resident in ward

Mugadzahweta v *Banda & Ors* HH-74-03 (Hungwe J)

There is no requirement in the Electoral Act that a person seeking election as a town councillor must reside within the ward in which he is seeking election. It is sufficient if he is resident within the council area and enrolled on the voters' roll for that area.

Elections — urban council election — mayor — qualifications for election as mayor — O-level passes, including one in English — includes pass in English literature

Mnkandla v *Mudzviti & Anor* HB-92-03 (Ndou J)

A candidate for the post of mayor is required to have at least 5 passes at O-level, including one in English. The applicant's opponent had a pass in English literature, but not one in English language. Held: the legislature was aware of the existence of the two subjects, and chose not to specify one or the other. It could thus be held to have intended that either English language or English literature would be acceptable.

Employment — code of conduct — decision made under — not suspended pending appeal to Labour Tribunal — not suspended by taking Labour Tribunal's decision on appeal

Southdown Hldgs Ltd v *Mariwa* HH-161-03 (Hungwe J)

See above, under APPEAL (Noting of — effect).

Employment — code of conduct — determinations made by negotiating committee — enforcement of — may not be made an order of court

Nyakambangwe v *Jaggers Trador (Pvt) Ltd* HH-146-03 (Mavangira J)

Determinations by labour relations officers and senior labour relations officers may be registered as judgments of the magistrates court, but there is no procedure, statutory provision or other law whereby a determination of the negotiating committee of the commercial sectors of Zimbabwe may be registered as a civil judgment, be it of the High Court or magistrates court, and be enforced as such. The intention of the legislature was that the *status quo* be frozen and maintained pending the exhaustion of the appeal process.

Employment — contract — termination — on notice — code of conduct in existence — termination not for disciplinary reasons — not necessary for employer to obtain Ministerial approval for termination of contract

Employment — contract — termination — on notice — termination not for misconduct — *audi alteram partem* rule — not applicable — any remedy lies under law of contract

Chirasasa & Ors v *Nhamo NO & Ors* S-135-03 (Malaba JA, Chidyausiku CJ, Sandura, Ziyambi & Gwaunza JJA concurring)

The appellants were branch managers employed by the second respondent, an insurance company. When the company got into financial difficulties, it embarked on a rationalisation of its structures. It determined that branch managers should go onto a different pay system. After lengthy negotiations, the appellants refused to accept the new terms. The company then terminated their employment in terms of their contracts, one the terms of which was that the contract was terminable by the giving of one month's notice by either side. The appellants argued that, even though there was an employment code of conduct in existence, their employment could not be terminated without Ministerial permission. In any event, they argued, the *audi alteram partem* rule had not been observed. Held: (1) upon a proper construction of s 1A of the Regulations, an employer could terminate a contract of employment on notice without obtaining the prior written approval of the Minister where there was in existence in the undertaking an employment code of conduct, the provisions of which applied to the employee, and no allegations of misconduct were made against him. Where misconduct was alleged, the employer had to comply with the disciplinary procedures set out in

the code of conduct; but where there was no question of misconduct, the employer was not under a duty to obtain prior written approval of the Minister to terminate the contract of employment on notice. (2) There is a presumption in favour of the application of the *audi* rule when the decision is made in the exercise of a statutory power unless the rule is expressly excluded. There is no similar presumption when a decision is taken in the exercise of a contractual right, because the question in the area of contract is whether or not failure to hear the other party constituted a breach of contract. A party cannot be in breach of an obligation which has not been made an express or implied term of the contract. An obligation to afford a hearing was not implied in the pure contract of master and servant in respect of the latter's dismissal.

Employment — contract — termination — unlawful — damages for — how to be calculated — requirement to mitigate loss — no entitlement to retrenchment package

PTC v *Swabata* S-42-03 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

The respondent was unlawfully dismissed by the appellant. The Labour Tribunal ordered that the appellant pay the applicant damages in lieu of reinstatement equivalent to his salary and benefits from the date of dismissal to the date he would have been retrenched had he remained in employment, plus the retrenchment package he would have been paid had he not been unlawfully dismissed. The respondent claimed that co-employees had been retrenched and received a retrenchment package. Held: the Labour Tribunal had erred. (1) The damages should be the direct or probable consequence of the wrongful dismissal of the employee. The measure of the damages is the amount of wages or salary and benefits the employee would have been entitled to receive but for the wrongful termination of employment. The damages are assessed from the date of wrongful dismissal to the date of the order of reinstatement. (2) The employee must mitigate his damages immediately after he is wrongfully dismissed. The obligation on the employee is to look for and take alternative employment if available. The onus is on the employer to show that the employee did not look for alternative employment or that he did not take up a good job when it was offered to him. Only where there is evidence that the employee did not look for alternative employment that the damages would be calculated from the date of wrongful dismissal to the date he would reasonably have been expected to find alternative employment. (3) There is no principle which makes reference to a date the employee would have been retrenched, because it would not be known whether or when the employee would have been retrenched. In any case, retrenchment is not an entitlement which the employee would have lost by reason of wrongful dismissal to which he was contractually entitled.

Employment — employee — injuries sustained in course of employment — action to recover damages or compensation — National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice, 1990 (SI 68 of 1990) — effect on right of action under common law

Sibanda v *Independence Gold Mining Zimbabwe (Pvt) Ltd & Anor* HH-139-03 (Smith J)

The plaintiff was seriously injured in an accident at the mine where he worked. The accident was caused by the negligence of the second defendant, who was a junior employee. The plaintiff sued his employer and the second defendant for damages and for pain and suffering. The amount of damages claimed constituted the difference between what he was paid under the National Social Security Authority scheme for compensation for injuries caused at work and what he said he would have earned over the same period had he not been injured. Held: (1) in terms of the compensation scheme, any common law rights he would have had against the mining company were removed. The Scheme did not provide for payment for pain and suffering and precluded the worker from pursuing any such claim against his employer, save in very limited circumstances, which did not apply in this case. (2) The scheme specifically provided that no proceedings to recover damages from a third party may be taken by the worker until the General Manager of the Scheme has been so notified. There was nothing in the papers to show that the General Manager of the Scheme was notified of these proceedings and so the claim against the second defendant could not be recognized.

Exchange control — Exchange Control Regulations 1996 (SI 109 of 1996) — s 11 — payment by Zimbabwean resident in foreign currency to non-resident — need for both agreement to pay and payment itself to be authorised by exchange control authorities

Barker v *African Homesteads Touring & Safaris (Pvt) Ltd & Anor* S-18-03 (Sandura JA, Ziyambi & Malaba JJA concurring)

The respondent company entered into an agreement to buy a property from the appellant, who had emigrated from Zimbabwe. Part of the total price was to be paid in Zimbabwean currency and part in US dollars. The appellant sought to resile from the

contract as he had subsequently had a better offer. The respondent obtained an order from the High Court restraining the appellant from selling the property to anyone else. On appeal, held: in terms of s 11(1)(a) and (b) of the Exchange Control Regulations, as read with s 11(2), both an actual payment and an agreement to make payment outside Zimbabwe require authorization by the exchange control authority, except where the act is done by an individual (as opposed to a company, for example) with free funds available to him at the time of the act concerned. There being so such authorization, the agreement was illegal and unenforceable. In addition, there was no question of the terms of payment of the purchase price of in Zimbabwean currency being severable.

Evidence — circumstantial — when may be said to have established guilt of accused — approach to be taken to individual items of evidence

Evidence — identity — factors to be considered in assessing reliability of evidence of identity — approach when witness and accused previously known to each other

S v *Vhera* HB-74-03 (Ndou J)

Direct evidence of identification based upon a witness' recollections of a person's appearance is dangerously unreliable unless supported by other evidence. It is not uncommon for a credible witness to make a genuine error on the question of identity. The accuracy of such evidence depends upon the trustworthiness of the witness's observation, recollection and narration. These elements are affected by various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and the evidence by or on behalf of the accused. Where the accused and the witness were previously known to each other, the questions of identifying marks, of facial characteristics and of clothing are much less important than in cases where there was no previous acquaintance. What is important in such cases is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.

The cogency of circumstantial evidence usually arises from the number of independent circumstances which all point to the same conclusion. The court can convict on wholly circumstantial evidence provided it is sufficient to preclude every reasonable inference of the innocence of the accused. Where the accused tells lies, the court may infer that there is something which he wishes to hide; but it is not entitled to say that because he has been proved to be a liar, he is therefore likely to be a criminal. It is not necessary that every piece of evidence must be tested in isolation and found to be proved beyond reasonable doubt. Each item of evidence should be looked at as in the context of the evidence as a whole.

Evidence — sexual cases — approach to — need to consider nature and circumstances of offence carefully — need for satisfactory explanation for unsatisfactory parts of complainant's conduct

Evidence — sexual cases — complaint — when admissible — reason why such evidence admitted

S v *Nyirenda* HB-86-03 (Ndou J, Chiweshe J concurring)

To justify the conclusion that the assessment made by a trial court of the credibility of the witnesses is wrong, an appellate court must be persuaded that the finding defies reason and common sense. The fact that a witness lied in some respects does not mean that the trier of fact has to disregard her evidence *in toto*. The trier of fact is entitled to consider her explanations for the unsatisfactory parts of her conduct. In a rape case, her testimony should be assessed on the basis that there is no standard reaction to a rape. Although the courts have moved away from the two-pronged Acautionary" test, the nature and circumstances of the alleged sexual offence must be considered carefully. The areas in respect of which the complainant moved away from the truth were areas fundamental to her story as a whole and it would be a serious misdirection for the magistrate to say that he finds the truth to lie somewhere else. In such a situation, the court does not find where the truth lies, it decides whether the witness on whose evidence the court is asked to rely is telling the truth.

Complaints in sexual cases are admitted to show consistency and to negative a defence of consent, but not as proof of their contents, nor to corroborate the complainant. For the complaint to be admitted it must meet the following requirements: (a) it must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating character; (b) it must have been made without undue delay but at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complaint could reasonably be expected to make; and (c) the complainant must give evidence.

Family law — customary marriage — marriage null and void on the grounds that it was bigamous — woman unaware that marriage bigamous — court may nonetheless order division of matrimonial property

Muringaniza v *Munyikwa* HB-102-03 (Ndou J)

See above, under CUSTOMARY LAW (Marriage).

Interpretation of statutes — ambiguity — ascertaining intention of legislature — word capable of two meanings

Mnkandla v *Mudzviti & Anor* HB-92-03 (Ndou J)

See above, under ELECTION (Urban council election).

Judge — independence of — meaning of and limitations on — judge accused of criminal conduct not associated with his adjudication of a case — not entitled to insist that procedure for removal of judge for misbehaviour be completed before criminal proceedings may be instituted

Paradza v *Minister of Justice & Ors* S-46-03 (Sandura, Ziyambi, Malaba & Gwaunza JJA; Uchena AJA)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — judiciary — independence of — meaning of and limitations on).

Land — acquisition — notice of — requirement to publish preliminary notice in Gazette on same date as publication in newspaper — effect of failure to publish notice in Gazette — acquisition invalid — Land Acquisition Act [*Chapter 20:10*] — s 5(1)(a)

Land — acquisition — land subject to Hippo Valley Agreement Act [*Chapter 20:08*] — such land not subject to acquisition in terms of Land Acquisition Act [*Chapter 20:10*]

Bon Espoir (Pvt) Ltd v *Chabata & Ors* S-45-03 (Sandura JA, Cheda & Gwaunza JJA concurring)

The Minister of Agriculture published a notice in a newspaper of his intention to acquire the appellant's farm for resettlement but did not publish a notice in the Gazette at the same time. The Minister then purported to acquire the land and allocated it to the first respondent. The appellant sought an eviction order against the first respondent. It was argued that the acquisition was invalid because no proper notice had been given in terms of s 5(1)(a) of the Land Acquisition Act. In addition, the land was subject to the Hippo Valley Agreement Act, and the Land Acquisition Act did not override the specific provisions of the former Act. Held: (1) the first notice of acquisition in the newspaper must be published on the same day as a similar notice is published in the Gazette. Compliance with the provisions of the section is peremptory and failure to comply invalidated the purported acquisition. The date of publication of the preliminary notice in the Gazette is of crucial importance. In addition, the consequences which stem from the publication of the notice in the Gazette are so serious that compliance with s 5(1)(a) can only be imperative. (2) There was nothing in the Land Acquisition Act which manifested the legislature's intention to repeal or amend the Hippo Valley Agreement Act. The Land Acquisition Act did not override the Hippo Valley Agreement Act. Any acquisition should have been in terms of the latter Act, which required compensation to be paid.

Land — acquisition — notice of — requirement for acquiring authority to give notice to person having an Ainterest" in the land — only a real interest is protected — lessee in terms of unregistered lease — not a real interest

Mgwaco Farm (Pvt) Ltd & Anor v *Pasi & Ors* HH-188-03 (Chinhengo J)

The amendment of s 5 of the Land Acquisition Act [*Chapter 20:10*] to reduce the categories of persons to whom notice of acquisition of rural land must be given does not contravene s 16 of the Constitution. Section 16 requires that notice must be given to persons who have an Ainterest" in the land, and such an interest must be a Areal" one as opposed to a personal one. A real interest is one which diminishes the owner's *dominium*. An unregistered lease would not constitute a real interest.

Land — acquisition — notice of intention to acquire issued in terms of s 5 of Land Acquisition Act — landowner lodging objection with Administrative Court — effect — notice not thereby stayed — acquiring authority entitled to issue notice of acquisition under s 8

Volunteer Farms (Pvt) Ltd v *Mpofu & Ors* HB-96-03 (Cheda J)

Where a notice of intention to acquire rural land for resettlement has been issued in terms of s 5 of the Land Acquisition Act, and the landowner has lodged an objection, the objection does not have the effect of staying the notice. The acquiring authority may still issue an order under s 8 making it the owner of the land. It might be otherwise if the legislation had provided for an appeal.

Land — agricultural land — allocation of lease over land — requirement that application for lease be referred to Agricultural Land Settlement Board — failure to refer such an application — allocation invalid

Mgwaco Farm (Pvt) Ltd & Anor v *Pasi & Ors* HH-188-03 (Chinhengo J)

Where the Minister of Lands allocates a lease over land acquired by the State, the provisions of s 9 of the Agricultural Land Settlement Act [*Chapter 20:01*] must be complied with. The section requires that an application for a lease must be referred to the Board, which must then make its recommendations to the Minister. Failure to refer the application to the Board renders the allocation of a lease invalid.

Land — registration — right to ownership acquired from person who is dead, mentally incapacitated, insolvent or absent from Zimbabwe — procedure for effecting registration — inapplicability of procedure to a legal *persona*

Masenda v *Masawi & Anor* HH-124-03 (Chinhengo J)

Section 3 of the Titles Registration and Derelicts Lands Act [*Chapter 20:*20] is concerned, as is the concern of the whole Act, with ensuring that a person who has acquired the just and lawful right to the ownership of any immovable property the owner of which is either dead, or is mentally incapacitated or insolvent or is absent from Zimbabwe, is enabled to register the property in his name upon application to the High Court. The prerequisites for such an order are clear: (a) the applicant must have acquired the just and lawful right to ownership of the property in question; (b) the person in whose name the property is registered is either dead, or mentally incapacitated, or insolvent or is absent from Zimbabwe; (c) any other cause. Evidence must establish that the applicant acquired the just and lawful right to ownership of the house and that the person from whom the applicant purports to have acquired the right was himself possessed of that right. It must also show that the person in whose name the house is registered is either dead, mentally incapacitated, insolvent or absent from Zimbabwe; or it must establish any other sufficient cause. The previous owner must be a natural being, a human being who may be absent from Zimbabwe or may die, become mentally incapacitated or insolvent. A local authority, being a legal persona, cannot be the subject of the criteria set out in section 3 of the Act.

Legal practitioner — conduct and ethics — avoidance of offensive and abusive language — need to ensure that documents do not contain such language

Spring Grange Farm (Pvt) Ltd & Anor v *Minister Of Lands & Ors* HB-94-03 (Cheda J)**2*Spring Grange Farm (Pvt) Ltd & Anor* v *Minister Of Lands & Ors* HB-94-03 (Cheda J)02*Spring Grange Farm (Pvt) Ltd & Anor* v *Minister Of Lands & Ors* HB-94-03 (Cheda J)**

In order to preserve the dignity of the court, and to avoid misunderstanding and animosity between the parties, legal practitioners should where necessary edit their clients' offensive language, which can easily be done without deviating from the input of their necessary averments.

Legal practitioner — conduct and ethics — duty of care — duty owed by legal practitioner to third parties — when legal practitioner liable

Legal practitioner — duty to client — duty to exercise professional competence and diligence — failure to protect client's interests by serving papers on all relevant parties

Tinarwo v *Hove & Ors* HH-138-03 (Smith J)

The plaintiff's property was sold in execution when he failed to service a mortgage bond. The building society had instructed a

firm of legal practitioners to sue the plaintiff. Default judgment was taken against the plaintiff and the messenger of court removed the plaintiff's goods for sale. The plaintiff instructed his own legal practitioners to apply for rescission and for the sale in execution to be stayed. By consent, rescission was granted but the messenger of court was not informed; he proceeded with the sale. The plaintiff claimed for the loss from the building society and its legal practitioners, claiming that they should have advised the messenger of court. Their failure to do so constituted a breach of a duty of care they owed him. Held: (1) the legal practitioners were agents of the building society. (2) A legal practitioner who is instructed by his client to carry out a transaction that will affect an identified third party owes a duty of care towards that third party in carrying out the transaction, since such a third party is a person within the legal practitioner's direct contemplation as someone who is likely to be so closely and directly hurt by his acts or omissions. The legal practitioner can reasonably foresee that the third party is likely to be injured by those acts or omissions. (3) The plaintiff's own legal practitioners brought the application for rescission against, *inter alios*, the messenger of court. It was for them to do their duty towards the plaintiff and to protect his interests by having the papers served on the messenger. They failed to do so.

Local government — employee — senior employee — appointment of — procedure for — effect of failure by council and Local Government Board to comply with procedures

City of Harare v *Gwindi* HH-147-03 (Mavangira J)

While the affairs of the City of Harare were being run by a commission appointed by the Minister, advertisements were placed in the media for a public relations manager for the City. The post was not regarded as a senior one. About 20 applications were received. The commission decided not to appoint any of the candidates, but directly appointed the respondent, who had not even applied for the position and who was not interviewed for it. The grade and salary he was offered were those for a senior employee. After an elected council was appointed, it resolved to dismiss the respondent and applied for an order compelling him to hand over, among other things, the car he had received. The respondent counter-applied for reinstatement, arguing that a binding contract existed. Held: the legislation made it clear that the process for appointing a senior employee is started off by the council recommending to the Local Government Board the names of suitable candidates for appointment. The Board is then required to interview every person whose name has been so submitted. It may approve a person so recommended. The council then appoints the person(s) who has or have been approved by the Local Government Board. This procedure had not been followed. Even if the Board had the power to condone the council's failure to comply with the Act, there is no indication that the Board had power to condone its own failure to comply with the Act. The appointment of the respondent was thus invalid and he could not be reinstated.

Media — public broadcaster — control of broadcasting — constitutionality of — Ministerial control over issue of licences — not constitutional — Broadcasting Services Act [*Chapter 12:01*] — provisions relating to licensing of broadcaster and regulation of broadcasting — constitutionality of

Capital Radio (Pvt) Ltd v *Broadcasting Authority of Zimbabwe & Ors* S-128-02 (Chidyausiku CJ; Sandura, Cheda, Malaba & Gwaunza JJA all delivering separate judgments, concurring in part and dissenting in part)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — Declaration of Rights — s 20 — freedom of speech).

Media — requirement for provider of mass media services to register under Access to Information and Protection of Privacy Act [*Chapter 10:27*] — publisher of newspaper making application — entitled to continue publishing until application considered

Associated Newspapers of Zimbabwe (Pvt) Ltd v *Madzingo NO & Anor* HH-157-03 (Omerjee J)

See above, under CRIMINAL PROCEDURE (Seizure of articles).

Practice and procedure — application — urgent application — application made either *ex parte* or at very short notice — necessity for applicant to act with the utmost good faith and lay all relevant facts before the court

Bulawayo Dialogue Institute v *Matyatya NO & Ors* HB-87-03 (Ndou J)

The applicant wished to hold a public meeting and notified the police of its intention to do so, adding a request to Agrant the authority". The response of the police, which was received two days before the meeting was to be held, stated that the Aapplication was not approved". The applicant sought an urgent *ex parte* interdict to prevent the police from interfering with the meeting. In its papers, the applicant did not disclose that a meeting had been held with the police, at which the police's reasons for objecting

to the meeting were given. Held: (1) in an urgent *ex parte* application, utmost good faith must be shown by the applicant to lay all relevant facts before the court, so that the court may have full knowledge of all the circumstances of the case before making its order. In view of the very short notice at which the application was brought, the applicant should have mentioned the fact that discussions had been held with the police. (2) The application did not seem to appreciate the powers of the police under the Public Order and Security Act. These were, once they had been notified of a public meeting, either to control the meeting, under s 25, or prohibit it, under s 26. (3) In order to succeed in obtaining a final prohibitory interdict the applicant must establish (a) a clear right; (b) an injury actually committed or reasonably apprehended and (c) the absence of similar protection by any other ordinary remedy. The applicant had not claimed that the police did the wrong thing, acted in the wrong manner or acted on the wrong grounds. The applicant seemed to have based the application on the premise that the police did not have the powers that the Act actually gives them. (4) If the applicant's case was premised on judicial review of the police's administrative actions, a proper legal foundation must be laid for the relief sought.

Practice and procedure — execution — pending appeal — appeal noted out of time — application before Supreme Court for condonation — execution refused

dos Santos v *de Andrade* HB-101-03 (Cheda J)

The respondent obtained judgment against the applicant and sought to execute the judgment. The applicant had, in the meantime, belatedly noted an appeal against the judgment. He applied to the Supreme Court for condonation of the late noting of the appeal and for leave to appeal, and to the High Court for an order staying execution. The respondent argued that since the Supreme Court had to determine the validity of application for condonation, there was technically no appeal before the Supreme Court. Held: as the applications were pending before the Supreme Court, the court had no right to determine the validity of the reasons for the dilatoriness on the part of the applicant. As long as there was an issue for determination by the Supreme Court, the High Court had no power to entertain an issue the result of which would render the issue before the Supreme Court irrelevant.

Practice and procedure — interdict — application for — final prohibitory interdict — what applicant must establish

Bulawayo Dialogue Institute v *Matyatya NO & Ors* HB-87-03 (Ndou J)

See above, under PRACTICE AND PROCEDURE (Application — urgent application).

Practice and procedure — joinder — when may be ordered — nature of right that party seeking joinder must show — need to show a direct legal relationship or a real right in subject matter of dispute

Burdock Investments (Pvt) Ltd v *Time Bank Zimbabwe Ltd & Ors* HH-194-03 (Makarau J)

The first defendant, a bank, obtained judgment against a debtor. A piece of land, mortgaged by the debtor to the bank, was declared to be executable. Two years earlier, the applicant had bought the land from the debtor and subdivided it as part of a housing scheme. When it became aware of the sale in execution, the applicant approached the bank with an offer to pay the debt, and the sale in execution was cancelled. The registrar of deeds had, when the judgment was obtained, placed a caveat against the title deeds to the property. The applicant sought an order uplifting the caveat against receipt of a certain sum of money. There was no explanation as to how the sum was arrived at. The bank challenged the applicant's *locus standi*. Held: joinder of parties, and thus *locus standi,* follows as of right from the joint legal relationship between the parties, as decision affecting the rights of one necessarily affects the right of the other because of the special legal relationship between partners and joint owners or contractors. Where joinder cannot be demanded as of right, it may be granted if the court is satisfied that the applicant has a legal interest in the subject matter of the action that could be prejudicially affected by the judgment. A real right in property may be a sufficient and direct interest upon which *locus standi* can be grounded, but not every right will be sufficient to establish *locus standi*. The interest must be legal and direct. A legal right is not merely a financial interest in the matter. The right must be a legal obligation or position that can be held, enforced, or defended against all the parties to the litigation in which joinder is sought. An interest that is sufficient to found *locus standi* must be based on a direct legal relationship between the parties. The legal interest must be such that to proceed without the party seeking joinder or intervention amounts to denying that party the right of audience before the court passes a judgment that adversely affects the legal position of that party. In this case, the applicant could not claim as of right that it ought to have been joined to the initial proceedings under which a judgment was obtained against the debtor by the bank. It had no joint proprietary interest with the debtor in the property nor did it have a direct legal relationship with the bank. Its interest in the property was a financial one only.

Practice and procedure — judgment — enforcement — committal for contempt of court — when committal procedure appropriate — what applicant must show

Macheka v *Moyo* HB-78-03 (Ndou J)

See above, under COURT (Contempt of).

Practice and procedure — judgment — default judgment — rescission — final order granted in default — applicant claiming good prospects of success due to inability to comply with court's interim order — statutory duty on him to perform acts which were subject of order — not open to him to rely on inability to comply

Registrar-General v *Tsvangirai* HH-142-03 (Chinhengo J)

In October 2002 an interim order was granted against the applicant. The order required that, as from 16 October 2002, the presidential election material (ballot papers) mentioned in the order were to be preserved in sealed packets and transmitted by the constituency registrars to the applicant forthwith for him to hold in safe custody. A final order was granted without opposition the next month, but the applicant failed to comply with it. Instead, he sought to have the order rescinded. He also lodged an application to stay execution of the final order. An order had also been granted, prohibiting the applicant from destroying the material associated with the election. The applicant claimed that he intended to oppose final order but his legal practitioners had failed to submit the necessary papers. Held: (1) The explanation for the default was inadequate as it did not tell what actually happened leading to the failure to file the opposing affidavit. There was dilatoriness on the part of the applicant himself and on the part of his legal practitioner. The handling of the case indicated unconcern or insouciance which the court could not condone or approve of. (2) The applicant's lack of *bona fides* was shown by the various unsuccessful applications he had made. The failure to comply with the interim order indicated an initial unwillingness to comply with the terms of the provisional order. (3) Section 78 of the Electoral Act [*Chapter 2:*01] made it clear that the constituency registrars were obliged to keep election materials referred to in that section in sealed packets and not to open any such packets whilst in their custody. They were required to send the election materials to the Registrar-General in Harare after making certain endorsements on each packet. It was not open to him to claim that it was not possible to comply with the court's order, as there was a statutory duty on him to do so. It was an administrative function which was part and parcel of and ancillary to the election process for which the applicant should have provided for at the time of holding elections.

Practice and procedure — judgment — foreign judgment — enforcement of — Zimbabwean defendant entering appearance to defend in foreign court — must be taken to have consented to jurisdiction of that court — not then necessary that summons be served in Zimbabwe in terms of Civil Matters (Mutual Assistance) Act [*Chapter 8:02*] — judgment enforceable in Zimbabwe under Act

Vehicle Delivery Svcs (Zim) (Pvt) Ltd v *Galuan Hldgs Ltd* HH-171-03 (Hungwe J)

See above, under CONFLICT OF LAWS (Foreign judgment — enforcement of).

Practice and procedure — parties — company — authority to represent and to sign founding affidavit — need for evidence to show that deponent is authorised to sign — deponent having represented company in previous dealings with other party — effect

Air Zimbabwe Corporation & Others v *Zimbabwe Revenue Authority* HH-96-03 (Chinhengo J)

See below, under REVENUE AND PUBLIC FINANCE (Withholding tax).

Practice and procedure — parties — *locus standi* — applicant not a party to dispute — need to show that could have obtained order for joinder

Burdock Investments (Pvt) Ltd v *Time Bank Zimbabwe Ltd & Ors* HH-194-03 (Makarau J)

See above, under PRACTICE AND PROCEDURE (Joinder).

Practice and procedure — pleadings — need for defendant to deal with every allegation in summons or declaration — effect of failure to do so — effect of relying on single issue

Redriver Development (Pvt) Ltd v *Provenance Support Co* HH-183-03 (Paradza J)

See above, under CONTRACT (Exemption clauses — effect)

Practice and procedure — special plea — *lis* pendens — not an absolute bar — court may disregard defence when it is just and equitable to do so — delay affecting deceased estate and prejudicing beneficiaries — plea dismissed

Chizura v *Chiweshe* HB-80-03 (Cheda J)

The applicant was the executor of a deceased estate. The respondent was tenant of premises owned by the estate. The applicant sought the eviction of the respondent for failure to pay rent. The respondent raised the defence of *lis pendens*, on the grounds that the applicant had brought similar proceedings already, which had not been finalised. Held: the principle of *lis pendens* is not an absolute bar. It is discretionary upon the court to decide whether it is just and equitable that it must be allowed to proceed. This matter involved a deceased estate, which should receive the court's sympathetic hearing and urgent attention, for failure to do so will result in beneficiaries suffering. It would be unjust and inequitable that the finalisation of this matter be suspended by a defence of *lis alibi pendens.*

Property and real rights — land — interest in — meaning of — need for owner's *dominium* to be diminished

Mgwaco Farm (Pvt) Ltd & Anor v *Pasi & Ors* HH-188-03 (Chinhengo J)

Section 16 of the Constitution requires that notice of acquisition must be given to persons who have an Ainterest" in the land, and such an interest must be a Areal" one as opposed to a personal one. A real interest is one which diminishes the owner's *dominium*. An unregistered lease would not constitute a real interest.

Property and real rights — servitude — right of access to grave (*iter ad sepulchrum*) — whether exists in modern law — what person seeking right of access to grave must show

Masedza v *Gospel of God Church* HH-164-03 (Hungwe J)

The plaintiff's late father was buried on the property of the church of which the deceased had been head and from which the plaintiff had seceded. He sought to establish a right to visit his father's grave (which had become a shrine for the church), arguing that the old Roman servitude of *iter ad sepulchrum* existed and applied to him. Held: a real servitude over land cannot exist on its own. It was necessary for the plaintiff to show that he was the owner or occupier of a dominant tenement or at least that the right of access reposed in him personally as *ius in re aliena.* This he had failed to show. In addition, even if the Roman law would have given a limited right of access to one's parent's grave, in this case the grave was more than a mere grave: it was a shrine, a place of worship which was capable of ownership.

Revenue and public finance — income tax — employer — liability to withhold and pay employees' tax — reduction of salaries — scheme to reduce employees' tax burden — when genuine — tax — recovery of — Revenue Authority's right to appoint taxpayer's bank as its agent — when tax due — salary or tax liquidated or readily ascertainable — Authority entitled to act under s 58

Medix Pharmacies (Pvt) Ltd & Ors v *Commissioner-General, ZRA & Anor* HH-102-03 (Chinhengo J)

The applicant companies set up a scheme to reduce the tax burden on their higher level employees. The scheme involved the employees accepting a lower salary, but having money paid into an investment scheme, from which they would receive a loan, which was taxed at a lower rate than salaries would be. There was a close relationship between the applicants and the company administering the investments. The respondent, the Zimbabwe Revenue Authority (ZRA), took the view that the arrangement was a tax evasion scheme. It invoked s 58 of the Income Tax Act, appointed the applicants' bank as its agent and uplifted the amounts from the applicants' bank accounts on the grounds that the applicants had failed to withhold the correct amount of PAYE from the employees. The amounts taken included a penalty and interest. The applicants contended (1) that the ZRA was not

entitled to invoke s 58 powers until or unless it has been determined that any tax is due by an employer; (2) the scheme was a legitimate method by which the applicants' employees were able to take advantage of favourable tax provisions in the Act; (3) the salary sacrifice made by the employees was permissible, as was the payment of the loan subsidy by the employer in order to enable the employee to obtain a loan at a non-taxable rate of interest; (4) if the ZRA's action were not declared to be unlawful, it would result in double taxation of the employees as they would be taxed on the income which they are said to have received and on the investment income which they received in terms of the scheme; (5) the ZRA's calculations were erroneous; (6) the ZRA should have awaited the outcome of the consultations which were ongoing before it uplifted monies from the bank. The ZRA argued: (1) it had the option to proceed in terms of s 58 and recover unremitted tax by way of a garnishee order or to proceed by court action in order to recover the tax; (2) the scheme was a tax evasion scheme, the purported salary sacrifice being actually just a salary split resulting in only one part of the salary going through the payroll.
Held: (1) the amount of the salary sacrifice made by employees assumed the appearance of investment income and was given that label when it was ultimately paid to and received by the employees, but the loan transactions were not genuine. (2) The ZRA was entitled to resort to the use of s 58 where tax was due. (3) There are two types of amounts in respect of which an employer becomes personally liable to the ZRA. The first arises from a failure by the employer to withhold employees' tax either because he has not calculated what it is or because he has simply neglected to withhold it even though he was aware what that amount was. The second type arises from a failure by the employer to pay or remit the employees' tax to the Commissioner-General after he had withheld it, i.e. after he has deducted it from the employees' salary. This type is invariably always readily ascertainable as the employer will have already determined what it is and has deducted it from the employee's salary but has for some reason, or for no reason at all, simply failed to pay or remit it to the ZRA. In respect of this type the ZRA may act in terms of s 58 of the Act to recover it from the employer. The amount would be sufficiently liquidated such that the ZRA could obtain summary judgment on it. (4) The ZRA had erred in its calculation of what was due it.

Revenue and public finance — withholding tax — taxpayer — failure to pay taxes — liability to pay interest on taxes not paid — not liable to pay interest unless specific provision for it — not liable to pay interest as well as penalty

Air Zimbabwe Corporation & Others v *Zimbabwe Revenue Authority* HH-96-03 (Chinhengo J)

The applicant companies had failed to pay withholding tax as required by the Income Tax Act [*Chapter 23:06*]. The Revenue Authority assessed that the applicants were each liable to pay penalties and interest in respect of withholding taxes which they did not pay or which they paid late. The applicants sought an order that the Authority was not entitled to charge interest. Their founding affidavit was signed by a chartered accountant who was dealing with their tax affairs and who had negotiated with the Authority on those matters. The respondent challenged the accountant's authority to represent the applicants, averring that no resolution or supporting affidavit by any of the applicants was attached to the founding affidavit to show that the accountant was authorised to make the application on behalf of the applicants. Held: (1) where there is nothing before the court to show that an artificial person has duly authorised the institution of a court application, the respondent may object to the agent's authority. Here, the prior dealings between the accountant's firm and the Authority provided sufficient evidence that when the accountant instituted the proceedings he was acting on the authority of the applicants. (2) Tax legislation in this country has since 1918 proceeded on the assumption that *mora* interest at common law was not payable by either the taxpayer or the Commissioner of Taxes. From that time the question of interest has been dealt with exclusively in terms of the tax legislation. The fact that interest is specifically provided for indicates that it is not otherwise due. (3) A taxpayer who defaults in paying any tax due is subjected either to a penalty or to the payment of interest but not both except in the instances specifically provided for in the Act.

Sale — terms — agreement that purchase price be free of deductions to the seller — meaning — only such deductions as reasonably in contemplation of parties included

Mudungwe NO v *Wood& Ors* HH-141-03 (Mavangira J)

An agreement of sale which provides that the purchase price shall be paid Afree of deduction to the seller" does not mean that the seller necessarily receives the purchase price with no deductions at all. The words should be confined to such deductions as might reasonably have been in the contemplation of the parties at the time when the contract was made. It is highly unlikely that such costs or deductions as the balance owed the building society by the seller, what capital gains tax was due by the seller, the costs of cancellation of the bond and the like were in the contemplation of the parties when they entered into the agreement of sale.

Statutes — Commissions of Enquiry Act [*Chapter 10:07*] — inquiry in terms of — whether President obliged to publish report after submission to him

Zimbabwe Lawyers for Human Rights & Anor v *President of Zimbabwe& Anor* S-12-03 (Cheda JA, Chidyausiku CJ, Ziyambi,

Malaba & Gwauza JJA concurring)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — Declaration of Rights — s 20).

Statutes — Public Order and Security Act [*Chapter 11:17*] — ss 24, 25 & 26 — power of police to control or prohibit public gatherings

Bulawayo Dialogue Institute v *Matyatya NO & Ors* HB-87-03 (Ndou J)

See above, under PRACTICE AND PROCEDURE (Application — urgent application).

Words and phrases

"Inhuman or degrading treatment"

Woods v *Commissioner of Prisons & Anor* S-137-02 (Malaba JA, Chidyausiku CJ, Sandura, Cheda & Ziyambi JJA concurring)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — Declaration of Rights — s 12(1) — right to life).

"Interest" (in land)

Mgwaco Farm (Pvt) Ltd & Anor v *Pasi & Ors* HH-188-03 (Chinhengo J)

See above, under PROPERTY AND REAL RIGHTS (Land — interest in).

}"" "Legal right"

Burdock Investments (Pvt) Ltd v *Time Bank Zimbabwe Ltd & Ors* HH-194-03 (Makarau J)

See above, under PRACTICE AND PROCEDURE (Joinder).

"Misbehaviour"

Paradza v *Minister of Justice & Ors* S-46-03 (Sandura, Ziyambi, Malaba & Gwaunza JJA; Uchena AJA)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — judiciary — independence of — meaning of and limitations on).

"Pass in English"

Mnkandla v *Mudzviti & Anor* HB-92-03 (Ndou J)

See above, under ELECTION (Urban council election).

"Overt act"

S v *Tsvangirai & Ors* HH-119-03 (Garwe JP)

See above, under CRIMINAL LAW Common law crimes (Treason).

"Transmit" — requirement to Atransmit" election materials to Registrar-General

Registrar-General v *Tsvangirai* HH-142-03 (Chinhengo J)

See above, under PRACTICE AND PROCEDURE (Judgment — default judgment — rescission).