Latest update: 7 May 2007

CASES DECIDED JANUARY – JUNE 2006

Administration of estates – executor – duties of – dispute over validity of will – not a reason for executor not to proceed with his duties of collecting assets of estate – joint executors – duty to act jointly – failure or refusal by joint executor to participate in administration – courses open to other executor

Mujuru NO & Ors v *Mujuru & Anor* HH-22-06 (Gowora J) (Judgment delivered 15 February 2006)

The first respondent, the widow of the testator, was appointed *curator bonis* of his estate pending acceptance of a will he drew up. The will sought to dispossess her in favour of the two sons of the deceased from previous relationships. The Master refused to uphold the will and held that the estate be administered and distributed as intestate. The first applicant and the first respondent were appointed joint executors dative. The applicants (the two others being the deceased's sons) took the Master's decision on review, but in the meantime the first respondent, acting on her own and without the participation of the first applicant, took steps to wind up the estate. She also sought the eviction of the second applicant from the house he occupied, the house being part of the estate. The applicants sought an order to interdict the first respondent and the Master from proceeding with the administration of the estate pending the finalization of the application to have the Master's decision set aside and have the will accepted as being valid.

Held: (1) under ss 38 and 42 of the Administration of Estates Acts [*Chapter 6:01*], the primary duty of an executor is to finalize as quickly as possible the administration of the estate. To this end, it is imperative that the executor take control of all the assets of the estate, and realize as many assets as is necessary to meet the liabilities of the estate before distributing the residue to the beneficiaries. The actions of the first respondent were consistent with her duties under the Act. The fact that the validity of the will was still to be determined did not justify inaction on the part of the executors in winding up the estate. Unless and until the will was upheld, the two executors had a duty in terms of the Act to do such acts as are prescribed by the Act to ensure a proper administration of the estate. Both executors had been appointed as executors to the estate. Until and unless set aside by the court, such appointments remained valid. To stop the first respondent from collecting the assets of the estate would run foul of s 42 of the Act. It was however proper to hold that the disposal and distribution of the assets of the estate should wait the determination of the application but the process of winding up and collection of assets and debts due to the estate should proceed.

(2) The position of executor is one of trust and his actions must be justifiable in terms of the indivisibility of the assets and the wishes of the heirs. The guiding principle which an executor should observe in the administration of a deceased estate is that he occupies a position of trust and his actions should be dictated by considerations which will serve best the interests of the beneficiaries. If he does not discharge those duties properly then he may be removed. It is not however the appropriate remedy to seek an interdict against the discharge by the executor of his duties as defined in the Act.

(3) Where more than one executor is appointed in an estate, they are required to act jointly. Their liability for the administration of the estate is joint and several. In the absence of consent or agreement on the part of the first applicant, the first respondent did not have the right to act as a sole executor and institute proceedings against the second applicant in the name of the estate. She should also have acted with his consent and jointly with him in all the other actions taken on behalf of the estate as she is not invested with the functions of a sole executor. In the event of an executor refusing to participate in the administration, the other executor(s) may apply to court to compel him to act, to dispense with his concurrence or have him removed from office.

Administrative law – review – grounds for – perceived bias – tribunal hearing matter – should be reconstituted

***ANZ* v *Media &Information Commission* HH-15-06 (Makarau J) (Judgment delivered 8 February 2006)**

The applicant company, which owned a newspaper, had applied to the respondent for registration as a media service provider. The application was rejected. An appeal by the applicant to the Administrative Court resulted in the respondent's decision being overturned. The Supreme Court, when the respondent appealed, set aside the Administrative Court's decision but ordered that the matter be heard by the respondent *de novo*. It found that the respondent's chairman had made remarks which were likely to create apprehension that the applicant would not receive a fair hearing. At the new hearing, the applicant's application for registration was again refused.
The applicant brought the matter on review, alleging procedural irregularities and bias on the part of the Chairman. The respondent sought to introduce a further affidavit contrary to the rules of court, and the applicant sought to introduce an affidavit in reply.
Held: (1) Leave to file additional affidavits cannot be had for the asking. The court will insist on the observance of its rules regarding the sequencing of affidavits to be filed in an application for uniformity of practice and certainty in the system, unless, in the view of the court, justice will miscarry. In particular, the court will not readily grant leave to file an additional affidavit to deal with facts that were available to the parties at the time the permitted affidavits were drawn up and deposed to. The court will not readily grant leave to file additional affidavits that seek to bring in a new cause of action or defence where the facts giving rise to such was available to the parties at the time of the filing of the traditionally recognized affidavits.
(2) As the Supreme Court had voided the decision of the respondent on the basis of perceived bias, there was merit in the applicant's submission that the commission as presently constituted was disabled from validly considering the applicant's application as its decisions would be tainted by the bias of the Chairman. However, the court did not have the power to order the appointment of a new commission as neither the issue nor the appointing authority was not before the court.

Administrative law – review – when appropriate – decision of magistrate involving exercise of a discretion – review not correct procedure to challenge that decision

***Khan* v *Provincial Magistrate, Harare, & Ors* HH-39-06 (Makarau J) (Judgment delivered 20 March 2006)**

In 1992 the applicant was sentenced by a magistrates court to a term of imprisonment on a charge of theft. He was granted bail pending appeal by a judge of the High Court. The appeal was never prosecuted and neither the applicant nor the State took any steps to finalise the matter. In 2004 the applicant was appointed chairman of the football association. An application was brought by another person to have the appointment rescinded on the grounds of the applicant's conviction. Negotiations and other legal steps were under way to reinstate the appeal. These included an application to the High Court have the matter referred to the Supreme Court on constitutional grounds, alternatively, to resuscitate the applicant's appeal and bail pending appeal. Before these steps were completed, the provincial magistrate issued a warrant of arrest and the applicant was brought before the second respondent, a magistrate. After an inquiry conducted by the second respondent, the applicant was imprisoned. The applicant brought the magistrate's order on review on the grounds that, as an appeal was under way, the magistrate had no jurisdiction to issue the warrant. Held: (1) on the facts, there was actually no appeal pending, no documents being found anywhere to indicate that an appeal had actually been noted. (2) Even if an appeal had been properly noted, the applicant was setting up his own failure to prosecute his appeal timeously to have the matter referred to the Supreme Court for relief. It was only in the alternative that he sought to regularize his appeal by seeking to have his bail recognized and his appeal deemed pending. These issues did not invalidate the sentence imposed upon him in 1992. The relief sought in the Supreme Court, if granted, might affect the sentence but until that occurred, the sentence remained valid and enforceable. The mere filing of the application with the High Court did not have the effect of stalling any proceedings to enforce the sentence imposed on the applicant.
(3) The exception of *lis pendens* is never a complete bar to further proceedings concerning the same dispute. It is a discretionary tool in the hands of the court used by the court to stay the latter proceedings, having regard to

the equities and to the balance of convenience in the matter. The magistrate had a discretion in the matter; if the applicant was dissatisfied with the manner in which she exercised that discretion, he should have appealed against the decision, not brought it on review.

Appeal – grounds of appeal – grounds seeking relief not sought in court below – when appeal court may grant relief sought on appeal

***Dynamos Football Club (Pvt) Ltd & Anor* v *ZiFA & Ors* S-93-05 (Malaba JA, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 23 March 2006)**

***See below, under* PARTNERSHIPS AND VOLUNTARY ASSOCIATIONS (Clubs).**

Appeal – grounds of appeal – points of law – raising of point of law for first time on appeal – when it may be raised

Austerlands (Pvt) Ltd v *Trade & Invstm Bank Ltd & Ors* S-92-05 (Chidyausiku CJ, Sandura & Malaba JJA concurring) (Judgment delivered 27 March 2006)

The appellant's property was sold in execution to the third respondent. It applied for the sale to be set aside on the grounds that the sale price was unreasonably low. The court proceeded to determine the application on the basis that the issue before it was the price at which the property was sold. The application was refused. In its notice of appeal, and during submissions, the appellant contended that the sale in execution was not *perfecta* by reason of the fact that the third respondent was never declared the purchaser in terms of r 356 of the High Court Rules and that there was never confirmation of the sale in terms of r 360. The suggestion that the sale in execution was not *perfecta* arose from the report of the Sheriff to the court *a quo*. The appellant also raised in its notice of appeal the ground that the court *a quo* failed to take into account the equities of this matter. Held: (1) the legal inadequacy of the sale in execution was not the cause of action set out in the founding affidavit. The general rule is that an application stands or falls on the founding affidavit and the facts alleged in it. (2) The issue of the sale being *imperfecta* was being raised for the first time on appeal. The general rule is that a question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party at whom it is directed; but an appeal court will not allow the matter to be raised unless (a) the point is covered by the pleadings; (b) there would be no unfairness to the other party; (c) the facts are common cause or well-nigh incontrovertible; and (d) there is no ground for thinking that other or further evidence would have been produced that could have affected the point. None of these applied in this case. (3) The court *a quo* was never asked to consider the equities, nor were the relevant factors placed before the court. There could be no basis for challenging the court *a quo* for not having determined something that was never placed before it to determine.

Appeal – record – deposit with Registrar of estimated cost — undertaking of payment of cost made in lieu of deposit — appellant preparing record at its own expense – failure to file letter of undertaking for payment of costs – effect

Tel-One (Pvt) Ltd v *Communication & Allied Services Workers Union* S-1-06 (Gwaunza JA, in chambers) (Judgment delivered 9 February 2006)

The applicant sought the reinstatement of an appeal it had noted. The applicant had failed to file with the Registrar of the High Court a letter of undertaking for the payment of the cost of the preparation of the appeal record. The applicant had, however, undertaken the preparation of the record at its own expense, in order to avoid the delays that were occurring in the Registrar's office due to lack of the relevant stationery and equipment.

The record had duly been completed, and that copies thereof had already been made and submitted to the Registrar. The applicant accepted that it had not technically complied with r 34 of the High Court Rules but argued that in these circumstances the requirement of the letter of undertaking had in effect become a formality. Held: the explanation tendered by the applicant for not submitting the letter of undertaking was reasonable. By taking upon itself the task of preparing the record, and not leaving it to the Registrar's Office, with all its constraints in this respect, the applicant had literally rendered r 34 irrelevant in the processing of its appeal. This did not mean that appellants should, at will, enjoy the licence of usurping the Registrar's responsibilities and then proceed to disregard the rules with impunity. The applicant's legal practitioner, being aware of the provisions of r 34, should have informed the Registrar that, rather than pay the cost of preparing the record, the applicant was itself and at its expense, going to prepare the record in question. However, even though the applicant defied a mandatory provision of the rules, the effect of this default was greatly mitigated by the fact that its action fulfilled and promoted the basic purpose of the rule in question.

Appeal – right of – appeal against process by which order made, not against order itself – not permissible

Kingstons Ltd v *L D Ineson (Pvt) Ltd* S-8-06 (Ziyambi JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 15 May 2006)

See below, under LANDLORD AND TENANT (Tenant – eviction of).

Appeal – validity – magistrates court – appeal noted without requesting written reasons for decision – such appeal valid

Muchapondwa v *Madake & Ors* HH-32-06 (Karwi J) (Judgment delivered 6 March 2006)

The applicant's house was ordered to be sold and the proceeds split between himself and the first defendant, his former lover, who had never owned or lived in the house. The magistrate gave no reasons for his decision. The applicant's legal practitioners filed a notice of appeal against that judgment. In response the first respondent filed an application for leave to execute the judgment pending the appeal, which application was granted. The order granting the application was not accompanied by any reasons. The applicant lodged a notice of appeal against the order. He also applied to the High Court for a stay of execution. The defendant argued that as the notices of appeal did not request and obtain the magistrate's reasons in terms of Order 31 r 1(1) of the Magistrates Court (Civil) Rules 1980, they were a nullity. Held: the notices of appeal were valid. When a matter is opposed and the issues have been argued it is unacceptable for a court to make an order without giving any reasons for it, since the litigants are entitled to be informed of the reasons for the decision. Further, an appeal is noted not against the reason for a judgment but against the judgment or order itself. There can be an appeal only against the substantive order made by a court, not against the reasons for judgment. Once the applicant had filed his notice of appeal, the magistrate was enjoined in terms of Order 31 r 3 to finish the written reasons for the judgment. It was the notice of appeal, not the written request, which should have triggered the provision of the written reasons for judgment by the magistrate. There would be irreparable harm to the applicant if the first respondent were allowed to execute the judgement and transfer to the third respondent were to take place.

Arbitration – award – review – application – must be brought within time limits stipulated in Arbitration Act – court has no power to extend time or grant condonation

Courtesy Connection (Pvt) Ltd v *Mupamhadzi* HH-63-06 (Makarau J) (Judgment delivered 25 May 2006)

An application to set aside an arbitral award is made under article 34 of the First Schedule to the Arbitration Act [*Chapter 7:*15] and not under ss 26 and 27 of the High Court Act. An application to set aside an arbitral award is not a review application brought under the High Court Act and rules and the Rules of the High Court are not of direct application. It is an application brought strictly in terms of the provisions of the Act and within the time limits set out in the Act. The right to bring an arbitral award before the High Court is not governed by the common law where the court has inherent jurisdiction to control its procedures. It is granted by statute and the powers of the court to grant that right are expressly provided for in the statute. The provisions of article 34 (3) provide a prescription period within which the right to set aside an arbitral award may be enjoyed. Once the prescription period runs out, the right is lost and no court has been granted the power to revive that right once it has been lost. The general power that the court has to control its procedures does not extend to granting condonation for the late filing of applications under article 34.

The Act is of international pedigree and certainty and finality of legal proceedings were paramount in its formulation. It would destroy both features if courts of the different countries adopting the Model Law were to be allowed to extend the period within which an award is to be set aside. Section 2 of the Act specifically provides that in interpreting the Model Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.

Arbitration – award – review of – grounds – allegation that award contrary to public policy – onus on applicant – need to construe public policy narrowly

City of Harare v *Harare Municipal Workers' Assn* HH-86-06 (Chitakunye J) (Judgment delivered 15 June 2006)

When an application is made to set aside an arbitrator's award on the grounds that the decision is contrary to public policy, the applicant must show that some fundamental principle of the law or morality or justice was violated. What constitutes public policy must be narrowly construed. The approach to be adopted is to construe the public policy defence restrictively, in order to preserve and recognise the basic objective of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated. Where the arbitrator's reasoning or conclusion in an award goes beyond a mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

Arbitration – referral of matter to – need for dispute to exist – need for dispute to arise *ex facie* the pleadings – appearance to defend insufficient – need to plead as to merits

Cargill Zimbabwe v *Culvenham Trading (Pvt) Ltd* HH-42-06 (Makarau J) (Judgment delivered 29 March 2006)

The plaintiff and the defendant entered into a contract for the sale and purchase of cotton seed. It was a specific term of the agreement that in the event of any dispute of whatever nature arising in connection with the agreement, such dispute would be referred to arbitration. Over a year later the plaintiff issued summons, claiming a sum representing the alleged balance of cotton seed and jute bags delivered. An appearance to defend the claim was timeously filed. When the defendant was put on notice to file its plea or other answer to the plaintiff's claim, it filed a special plea, seeking an order staying proceedings and for the matter to be referred to arbitration in terms of the clause described above. Held: For a court to stay its proceedings and refer the matter to arbitration there must be a dispute between the parties apparent *ex facie* the pleadings. Apart from being an essential characteristic of arbitration, the existence of a dispute is necessary to render an arbitration agreement enforceable and to establish the arbitrator's jurisdiction. A dispute between the parries cannot be assumed or presumed from the mere fact of the entry of an appearance to defend, nor can it be brought to the attention of the court in the heads

of argument, as counsel cannot plead on behalf of the parties. Heads of argument are counsel's conclusions and opinion of the facts and law applicable to the facts of the matter. They are not part of the pleadings. Before raising a special plea staying proceedings and referring the matter to arbitration, it would be necessary for the defendant to file a plea as to the merits of the matter for the dispute between the parties to arise *ex facie* the pleadings. Any practice short of this would result in the special plea being dismissed as having been prematurely filed.

Bills of exchange and negotiable instruments – promissory note – whether must be presented for payment – note made payable at a particular place – note stated to be payable on presentation to the payer – when such statement regarded as being on the body of the note

Zimbank v *Trustfin Finance Ltd (2)* HH-27-06 (Kamocha J) (Judgment delivered 8 March 2006)

Negotiable certificates of deposit were issued by the defendant. They matured approximately 2 months after the date of issue and were to be presented for payment to the defendant on the endorsed maturity dates. The plaintiff, who was the bearer, did not present them on those dates but a few months later. The defendant did not pay and the plaintiff sought provisional sentence. In its plea, the defendant raised the defence that the promissory notes sued on had not been presented on the date of maturity. The plaintiff excepted to this plea, arguing that under s 93(1) of the Bills of Exchange Act [*Chapter 14:*02], the promissory notes did not have to be presented at any particular place in order to render the maker liable. The defendant argued that the two certificates were stated to be "payable on maturity upon presentation to [the defendant]" and so presentation was expressly required by the certificates themselves. Held: s 44, which relates to presentment of bills for payment, also applies *mutatis mutandis* to notes. Presentment of such notes must be made on the days they fall due. The words "payable on maturity upon presentation to [the defendant]" were in the body of the notes, being above the authorised signatures. Presentment was thus necessary in order to render the maker liable.

Editor's note: See also the judgment of Uchena J in *Zimbank* v *Trust Finance Ltd* HH-97-05.

Company – director – powers of – bringing legal proceedings on behalf of company – need for director to be specifically authorised by board meeting to do so

Madzivire & Ors v *Zvarivadza & Ors* S-10-06 (Cheda JA, Chidyausiku CJ & Sandura JA concurring) (Judgment delivered 27 June 2006)

A company, being a separate legal person from its directors, cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party. The fact that a person is the managing director of the company does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. An exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting.

Company – liquidation – provisional liquidation – sale of assets – creditors of company – no power in creditors to agree to sell assets

Nyathi v *Tagarira Bros (Pvt) Ltd & Ors* S-74-05 (Malaba JA, Sandura JA & Cheda AJA concurring) (Judgment delivered 25 January 2006)

Creditors have no power to enter into an agreement of sale of assets of a company under liquidation by a court. It would be the provisional liquidator or the liquidator, with the authority of the Master or the court, who would sell, deliver or transfer assets of a company under liquidation by a court.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(2) – right to fair hearing within reasonable time – delay of eleven years – no adequate or reasonable explanation for the delay – permanent stay of proceedings granted

S v *Watson* S-17-06 (Cheda AJA, Malaba JA & Cheda JA concurring)

The applicant, while driving his vehicle, had negligently caused the death of a pedestrian. He was initially placed on remand on a charge of culpable homicide, but later placed off remand. Eleven years later, he was summoned to appear on the same charge. Held: there was an inordinate delay by the State in bringing the applicant to trial. The explanation for the delay was neither adequate nor reasonable. The delay was, by any standards, unreasonably long and could not be supported by any court of law. The applicant's rights under s 18(2) of the Constitution to a fair hearing within a reasonable time had been infringed. Anyone arrested or detained on a criminal charge should be promptly brought before a competent court of law, which will then exercise its judicial power over him, and such trial should be held within a reasonable time. This is to ensure that the accused does not suffer unduly prolonged uncertainty and that evidence is not lost in the process. The inordinate delay caused irretrievable prejudice to the applicant and a permanent stay of proceedings would be granted.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 22(1) – right to freedom of movement – Zimbabwean citizen married to citizen of another country – foreign citizen declared prohibited immigrant – onus on citizen to show that interference with freedom of movement not reasonably justifiable – when onus may be discharged – failure by Minister to advance cogent reasons for his decision

Ngaru v *Chief Immigration Officer & Anor* S-064-05 (Gwaunza JA, Chidyausiku CJ, Sandura JA, Ziambi JA & Malaba JA concurring) (Judgment delivered 9 January 2006)

The applicant, a Zimbabwean citizen, was married to a citizen of Cameroun. She married him while he was working in Zimbabwe in terms of a work permit. When his work permit expired, the respondent Minister eventually declared the husband to be a prohibited immigrant. The applicant alleged that her constitutional right to freedom of movement, guaranteed in terms of s 22(1) of the Constitution of Zimbabwe, had been violated by the respondents' denial to her husband of a residence permit. The Supreme Court gave the Minister the opportunity to give evidence *in camera* to justify his decision. Held: the Court was not satisfied that the reasons the Minister gave carried sufficient weight to justify the interference with the applicant's right to freedom of movement. Although the applicant bore the onus of proving that the interference with her fundamental rights and freedoms that she alleged was not reasonably justifiable in a democratic society, the respondents' failure to advance cogent reasons for declaring the applicant's husband a prohibited immigrant, and given his evidence regarding his work in Zimbabwe, (which evidence had not been controverted), the applicant had properly discharged the onus that she bore.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1) – application to High Court to have matter referred to Supreme Court – effect on proceedings which are subject matter of application

***Khan* v *Provincial Magistrate, Harare, & Ors* HH-39-06 (Makarau J) (Judgment delivered 20 March 2006)**

***See above, under* ADMINISTRATIVE LAW (Review – when appropriate).**

Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1) – application to Supreme Court – application made during the course of "proceedings" in High Court – meaning – when proceedings are pending – requirement to proceed under s 24(2) – procedure to adopt when court not actually sitting – not permissible to apply directly to Supreme Court in terms of s 24(1) unless application under s 24(2) dismissed in bad faith or for improper motives

Tsvangirai v *Mugabe & Anor* S-84-05 (Malaba JA, Chidyausiku CJ, Sandura JA, Cheda JA & Ziyambi JA concurring) (Judgment delivered 14 Feburary 2006)

The applicant was the petitioner in an election petition brought following the Presidential election held in March 2002. Amongst the grounds on which the petition was based was the allegation that s 158 of the Electoral Act [*Chapter 2:01*] and certain statutory instruments enacted thereunder, in terms of which the election was conducted, were constitutionally invalid. Several months after the petition was lodged, and after urging from the applicant, a pre-trial conference was held, at which the parties agreed that the trial of the election petition would deal first with submissions and argument on the constitutional validity of s 158 and the statutory instruments and orders made under its authority. The trial finally commenced about a year later, after the applicant had obtained a writ of *mandamus* compelling the Registrar to set the matter down for trial. The judge heard submissions and argument on the constitutional issues and reserved judgment on these issues. Seven months after judgment was reserved, the judge issued an order, in terms of which the contentions advanced on behalf of the applicant were dismissed. No reasons were given in spite of a promise to do so within two weeks. There was no appeal noted by the applicant against the order within fifteen days of the date it was given, as required by r 30 of the Rules of the Supreme Court. A month later, the resumed trial was set down for a date in September 2004. In August 2004 the applicant asked for a postponement of the trial because it was necessary to examine ballot papers and other election material the production of which had been ordered by the court. In the mean time, the applicant continued to seek the judge's reasons for his decision although it was not until February 2005 that it was made clear that he was seeking the judge's reasons in order to decide whether or not to appeal. No reasons having been forthcoming by July 2005, the applicant approached the Supreme Court for redress in terms of s 24(1) of the Constitution, alleging that the rights to protection of the law and to a fair hearing within a reasonable time, guaranteed to him and protected against infringement under ss 18(1) and 18(9) of the Constitution respectively, had been contravened by the High Court. He sought an order setting aside the judge's order and putting the matter before the Supreme Court for decision. It was argued on behalf of the first respondent that the matter was not properly before the Supreme Court because the constitutional question arose in the proceedings in the High Court and as such the applicant was obliged to comply with the procedure prescribed in s 24(2). The applicant argued that there were no proceedings in the High Court, the only proceedings being the hearing on the constitutional argument, and thus he was not obliged to request the judge to refer the constitutional issue to the Supreme Court in terms of s 24(2). In addition, as the judge was accused of being the principal cause of the delay, by reason of his continued failure in the hearing and determination of the election petition by failing to give reasons, he would have become a judge in his own cause in breach of the rules of natural justice.

Held: (1) The word "proceedings" in s 24(2) is a general term, referring to the action or application itself and the formal and significant steps taken by the parties in compliance with procedures laid down by the law for the purpose of arriving at a final judgment on the matter in dispute. There are proceedings in being in the High Court from the moment an action is commenced or an application made until termination of the matter in dispute or withdrawal of the action or application. There was no need to limit the very general words of s 24(2) by saying that the question as to the contravention of the Declaration of Rights arises only when the court is actually sitting. The proceedings in the High Court were still pending. Whilst the request for the reference of the question to the Supreme Court must be made to the judge whilst he is actually sitting in court, the question itself does not have to arise when the court is sitting. It may arise on the pleadings or from the circumstances of the case. The applicant should have had the application for reference of the question set down for hearing by the judge. (2) The argument that the judge would have become a judge in his own cause had the request been made of him to refer the question to the Supreme Court for determination ignores the fact that compliance with the procedure prescribed in s 24(2) is mandatory. If the judge had, out of selfish interest and in bad faith, held that the raising of the

question by the applicant was merely frivolous or vexatious, he would have infringed the applicant's right to the protection of the law guaranteed under s 18(1). The applicant would then have been entitled to apply to the Supreme Court for redress in terms of s 24(1) of the Constitution. He would have discharged his duty to comply with the procedure prescribed in s 24(2).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 15(1) – inhuman or degrading punishment – includes punishment that is grossly disproportionate – member of Parliament being imprisoned for serious instance of contempt of Parliament – punishment not close to maximum permissible – not grossly disproportionate

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18 – right to a fair trial – trial of member of Parliament for contempt – not criminal or civil proceedings – status of Parliament when sitting as a court

Constitutional law – Constitution of Zimbabwe 1980 – s 49 – Parliament – judicial power vested in Parliament – right of Parliament to imprison members for contempt – Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] – s 3

Constitutional law – Parliament – Parliament sitting as court to adjudicate on matter of privilege or contempt – not sitting as court of law and not bound to follow procedures of court of law

Bennett v *Mnangagwa NO & Ors* S-75-05 (Chidyausiku CJ, Cheda JA, Malaba JA & Gwaunza JA concurring; Sandura JA dissenting) (Judgment delivered 9 March 2006)

The applicant was an opposition member of Parliament. He had been a farmer until he was unlawfully forced off his farm. This followed a long period of harassment and other unlawful actions by state agencies, the police and military forces, as well as others. Legal proceedings brought no relief, and no action was taken against any of the perpetrators. During a debate on an amendment to the Stock Theft Act, on which the applicant had made a contribution, the Minister of Justice made a series of insulting remarks about white farmers, which implied that they were thieves who had stolen the land, and said that he would ensure that the applicant would never set foot on his farm again. The applicant was goaded by these remarks into going to the table where the Minister was addressing the House and shoving him to the ground. He also pushed another minister who intervened. Shortly after the incident, a motion raising the question of privilege on the conduct of the applicant was moved in Parliament. A committee consisting of five members of Parliament was appointed to enquire into the matter. Three belonged to the governing party and two to the opposition party, of which the applicant was a member. The committee's task was to conduct an enquiry and make recommendations to Parliament in accordance with the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] on whether or not the conduct of the applicant amounted to contempt of Parliament in terms of s 21 of the Act. It decided to proceed in an inquisitorial rather than an accusatorial manner. The applicant was legally represented. After hearing evidence and seeing video clips, committee unanimously concluded that the applicant was guilty of contempt of Parliament. It held that the defence of provocation was not sustainable; if the applicant had felt offended by the Minister's language he should have sought the protection of the Chair. The committee recommended that the applicant be imprisoned for 15 months, of which 3 would be suspended. This decision was made along party lines. The recommendation was accepted by the House, which voted along party lines.

The applicant brought an application under s 24 of the Constitution, alleging that his rights has been infringed in a number of ways: (1) the proceedings violated his constitutional and fundamental right to a fair hearing by an independent and impartial court or other adjudicating body protected by s 18(1),(2) and (9) of the Constitution; (2) he was discriminated against on grounds of race and political opinion contrary to the provisions of s 23; (3) the punishment imposed on him was inhuman or degrading and violated his fundamental right protected under by s 15(1); and (4) s 16 of the Privileges, Immunities and Powers of Parliament Act was *ultra vires* the Constitution, in particular s 49.

Held: (1) The applicant was charged with contempt of Parliament. Parliament is a separate and distinct entity from the governing party. When Parliament sits as a court it is not sitting as a court of law or an adjudicating

authority, but as a court of its own kind, created by the Constitution itself. Failure by Parliament, when sitting as a court, to follow certain procedures that are followed in a court of law does not necessarily mean that such hearing is not fair or impartial. The procedures in the two courts are fundamentally different. In the court of Parliament due process is satisfied by the mere moving of a motion setting out the allegation, debate and voting on the motion. At the end of the debate the question of a verdict and punishment is determined by a majority vote of the members of Parliament. Such voting more often than not is along party lines.
(2) Whilst the Minister's remarks could give rise to an inference of racism, those remarks can only reflect his own views or attitude. They cannot be ascribed to or attributed to either members of the committee or to Parliament. The motion passed by Parliament specifically directed the committee to investigate the allegation of contempt of Parliament by the applicant. It did not authorise an investigation of either of the Ministers involved. The applicant or his party should have moved an amendment to the motion to widen the committee's mandate to include an inquiry into the Ministers' conduct.
(3) A punishment that is "grossly disproportionate" to the transgression constitutes a violation of s 15(1) of the Constitution, that is to say, is inhuman or degrading. It makes no difference whether the punishment is imposed by a court of law or by Parliament. In terms of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] s 21, Parliament has power to either impose a level seven fine or imprisonment up to two years. In arriving at an appropriate punishment the committee took into account all the relevant factors, that is, the mitigating and the aggravating factors. The reasoning process of the committee could not be faulted. The punishment imposed on the applicant was severe, even when one takes into account as did both the committee and the House that this was the worst case of contempt of Parliament, and was not a punishment that the court would have imposed on the facts of this case. However, the court could only set aside a punishment imposed by Parliament if such punishment was "grossly disproportionate" to the contempt of Parliament committed. The punishment imposed in this case was way below the maximum penalty permissible under the law.
(4) There is no conflict in between Chapter VIII of the Constitution, which vests judicial authority in the courts, and ss 49 and 13(2)(b). Section 79 clearly vests judicial power in the courts. Sections 49 and 13(2)(b) clearly vests some very limited judicial power in Parliament. One could say that ss 49 and 13(2)(b) vest concurrent judicial power on Parliament in respect of contempt of Parliament. This clearly was the intention of Parliament when it enacted the provisions in question. The doctrine of separation of powers should not be used as a basis for overriding the explicit language of ss 49 and s 13(2)(b). There is nothing in the language of s 49 that prohibits Parliament either expressly or by implication from making a law providing for punitive punishment for contempt of Parliament. Section 13(2)(b) provides for the deprivation of liberty in execution of an order of Parliament punishing a person for contempt of Parliament; it explicitly states that Parliament can issue an order for imprisonment as punishment for contempt of Parliament.
(5) As of 18 April 1980 the privileges, immunities and powers of the Parliament of the United Kingdom, including the punitive power to punish for contempt, were conferred on the Zimbabwean Parliament by s 3 of the Act. That section had not been impugned.

Contract – breach – liability for – servants of party – servants performing acts in breach of contract – when party can be said to have breached contract – vicarious liability – not a basis for liability for breach of contract – party failing to exercise proper controls over actions of servants – such failure constituting breach of agreement

Mobil Oil Zimbabwe (Pvt) Ltd v *Mashoko* S-86-05 (Gwaunza JA, Ziyambi & Malaba JJA concurring) (Judgment delivered 27 February 2006)

The appellant oil company entered into a lease agreement with the respondent, in pursuance of which the latter leased a service station belonging to the appellant. It was a condition of the lease agreement that the respondent would acquire all its fuel, lubricants and related products from the appellant and sell only these, from the leased premises. In direct violation of this condition, the respondent's senior employees clandestinely bought fuel from a third party and arranged for it to be delivered at the leased premises in question. Their intention was to later sell it without the knowledge of either the appellant or the respondent. A representative of the appellant was alerted

to this plan and caught the respondent's employees red-handed while they were taking delivery of the fuel in the middle of the night. Money paid by the employees to the third party for the fuel had been stolen from the respondent.

The appellant attributed the conduct of the respondent's employees to lack of control over them by the respondent and purported to cancel the agreement of lease, prompting the respondent to have recourse to the High Court. The appellant's papers imputed "vicarious liability" to the respondent, on the main ground that he had failed to exercise adequate control over the conduct of his employees; and since he had contracted to be wholly responsible for the control and conduct of his employees, as specified in the lease agreement, the appellant contended that he had breached a material term of the contract. The thrust of the respondent's defence was his denial of any vicarious liability – in the sense that the term is usually understood in delict – for the actions taken by his employees.

Held: the appellant's case against the respondent was actually not one of vicarious liability in contract, but rather that he had failed to control the conduct of his employees as he had contracted to do. The parties' intention as shown in the contract was to make the respondent responsible for the control and conduct of his employees at the premises. To suggest otherwise would mean that the respondent would engage the services of the various employees he needed to effectively run the business, and then leave them to do whatever they liked without any control from him. The essence of the contract was that only the appellant's products were to be sold at the premises, 24 hours a day. It followed that the control that the respondent contracted to exercise over the conduct of his employees had to be continuous, day and night. Whatever measures the respondent might have put in place in this respect clearly were not adequate and it was difficult to escape the conclusion that there was an obvious laxity in whatever controls the respondent may have put in place to supervise the conduct of his employees. That laxity constituted a breach of a very material term of the contract and the appellant was within its rights to cancel the lease agreement.

Note: the judgment appealed against was *Mashoko* v *Mobil Oil Zimbabwe (Pvt) Ltd* HH-51-05 (a judgment of Makarau J, delivered 15 June 2005). – *Editor.*

Contract — conditional – sale of rights in immoveable property — seller a shareholder in association owning property — sale conditional on association agreeing to issue certificate – association declining to issue share certificate to buyer – not a breach by seller of his obligations — condition precedent not met

Okete v *M Duro & Co (Pvt) Ltd* HH-71-06 (Makarau J) (Judgment delivered 21 June 2006)

The plaintiff purchased the defendant's rights to a flat in a block of flats owned and managed by an association. After the purchase price had been paid, the estate agency handling the transaction wrote to the association requesting it to issue a certificate in favour of the plaintiff. The request was unanimously turned down by the association, on the grounds of the plaintiff's foreign origin. The defendant instructed the agents to cancel the sale to the plaintiff and offered the property to a Zimbabwean national, who was accepted by the association and was duly issued with a certificate. The plaintiff issued summons against the defendant for breach of contract, claiming a sum equal to the purchase price of an equivalent flat as damages. The plaintiff specifically averred that the defendant sold the property to a third party thereby prejudicing the plaintiff's rights in the agreement of sale. The defendant admitted that it sold the property to a third party but averred that the subsequent sale was not concluded with the intention to breach the sale agreement with the plaintiff but only after the association had declined to issue a certificate in favour of the plaintiff.

Held: the plaintiff did not buy the immovable property on which the flat was situated; he simply bought the right to exclusively occupy the flat subject to the approval of the owner of the piece of land. The share certificate was not proof of ownership, only proof of shareholding in the entity owning the property. The rights of the parties were derived from and attached to the agreement between the parties and did not necessarily attach to the immovable property itself as there was no registration of such rights against the title of the immovable property. Such rights, though not real, can be sold and bought and can be ceded to the purchaser with the consent of the

person enjoying real rights in the land. The plaintiff as purchaser could not compel the defendant to pass title to him as the defendant was not possessed of such title. It was impliedly accepted by the parties that the sale would only be complete once the plaintiff was issued with a certificate in respect of the flat. Then the defendant would be entitled to the purchase price. When the consent of the association was withheld, the sale of rights as between the plaintiff and the defendant could not be enforced and thus fell though. The defendant could not be in breach of a conditional sale that fell through when the condition precedent was not met. The refusal by the association to issue a certificate in favour of the plaintiff was not a breach of the sale agreement or of any other obligation the defendant had, giving rise to a cause of action in contract to the plaintiff.

Contract – interpretation – *contra proferentem* rule – when applicable – used of extrinsic evidence to resolve ambiguities – specific words – "supermarket"

Old Mutual Properties Invstms v *Metro Intl (Pvt) Ltd & Anor* HH-53-06 (Patel J) (Judgment delivered 11 May 2006)

The first respondent was the lessee of trading premises. The lease stipulated that no more than 1000 square metres of the premises could be used as a "supermarket", a term which was not defined in the contract. The supermarket trading floor *per se* consisted of 960 square metres. This area, combined with the coffee shop, take-aways, refrigerators and bulkheads, all of which were open to public access, comprised a total of 1215 square metres. The remainder of the leased premises, which was not accessible to the public, constituted 1135 square metres assigned to storage and service facilities ancillary to the supermarket. The first respondent argued that the word "supermarket" pertained only to the trading area. It argued that the *contra proferentem* rule should apply in favour of the first respondent. The second respondent, a lessee of a larger premises in the same complex, argued that the word included all the ancillary areas.
Held: (1) the *contra proferentem* rule is generally applicable where the party that drafted the document under dispute is the dominant party, allowing for minimal or purely perfunctory input from the other party, as invariably occurs in the case of contracts of insurance. The rule ought not to be applied where the parties are relatively equal in their respective bargaining positions. In the present case, both lease agreements were negotiated at the same time and only concluded by the parties after lengthy and detailed negotiations. It could not be said that the applicant or either of the respondents was the dominant player in the course of negotiating and concluding the lease agreements.
(2) Using dictionary definitions of the words "supermarket" and "store", the storage facilities of a supermarket, as well as the areas where services are provided, form as much an integral part of the supermarket as its trading area. It would be difficult to separate the other amenities and facilities that are usually attached to a supermarket from its trading area *per se*. A supermarket in its totality must be viewed as comprising not only its trading area but also its ancillary warehousing, refrigeration and ablution facilities.
(3) The courts may have regard to extrinsic evidence pertaining to the circumstances surrounding a written agreement in order to resolve any ambiguity in the interpretation of the agreement. In this case, both lease agreements were negotiated about the same time, and it was accepted that the second respondent would operate the principal supermarket in the complex.

Contract – validity – contract providing that loan be repaid in foreign currency – valid if party can show that judgment in foreign currency would most fully compensate for his loss

Contract – performance – impossibility – when party may plead impossibility – need to show that impossibility was not foreseen or was not fault of party

Watergate (Pvt) Ltd v *Commercial Bank of Zimbabwe* S-78-05 (Sandura JA, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 12 January 2006)

The appellant company operated a farm. The proceeds of the farm were sold outside the country, generating foreign currency. The appellant had taken out a loan with the respondent bank, Due to the rising interest rate, it requested the bank to convert the loan into one in foreign currency, which attracted a much lower interest rate. The loan was to be repaid in foreign currency from the currency generated by the sales outside the country. The bank agreed to the request and the agreement was reduced to writing. A handwritten addendum provided that if the Reserve Bank did permit the repayment of the loan in foreign currency, the repayment date would be extended by a year. The Reserve Bank did not give its approval and the repayment date was accordingly extended. Before the repayment date, the appellant offered to repay the loan in local currency at the official rate of exchange. The bank rejected the offer and secured judgment against the appellant in the High Court for the repayment in foreign currency. The questions for decision on appeal were whether the bank was entitled to payment in foreign currency and whether the appellant was prevented from repaying the loan in foreign currency by a supervening impossibility that it had not foreseen, or in respect of which it was not at fault. Held: (1) a party is entitled to payment in a foreign currency if he can show that a judgment in that currency would most truly express his loss and, therefore, most fully compensate him for that loss. The agreement between the parties provided that the bank would be paid in United States dollars, and did not provide for payment in local currency and both parties stood to benefit from that agreement. As far as the bank was concerned, it was the repayment of the loan in foreign currency that was at the heart of the agreement. A judgment in foreign currency would most fully compensate the bank for that loss. (2) Impossibility of performance in general excuses the performance of a contract, but does not do so in all cases. The court must then look to the nature of the contract, the relation of the parties, the circumstances of the case and the nature of the impossibility to see whether the general rule ought, in the particular circumstances of the case, to be applied. (3) The first argument – that the appellant failed to repay the loan to the bank in foreign currency because the RBZ did not authorise the payment out of the foreign currency it earned from the sale of its products – was not a valid, because the parties foresaw the possibility that the RBZ might not grant such authority, and made provision for that eventuality. There must have been another source from which the appellant believed it would raise the foreign currency it had agreed to pay. (4) The second – that by the time the RBZ reversed its policy and allowed companies to use the foreign currency they earned to pay their foreign currency loans, the appellant had already pledged the whole of its crop to another company in return for financial assistance – was also invalid, because it simply indicated that the appellant had only itself to blame for its inability to repay the loan to the bank in foreign currency. By pledging its crop to the other company, the appellant deliberately put it beyond its power to repay the loan in foreign currency. The appellant was, therefore, not prevented from repaying the loan in foreign currency by a supervening impossibility that it had not foreseen, or in respect of which Watergate was not at fault.

Contract – performance – impossibility – temporary or final – distinction between – when party claiming impossibility is excused

NUST v *NUST Academic Staff & Ors* HB-7-06 (Cheda J) (Judgment delivered 3 February 2006)

The applicant, a university which received its funding from the State through the third respondent, was in dispute with the first two respondents over salaries payable to the staff. The dispute was resolved through voluntary arbitration, the arbitrator ruling in favour of the first two respondents. The applicant brought the matter on review, arguing that it had no financial capacity to honour the determination since the third respondent was responsible for funding it. Held: a party can claim that a contract is impossible of fulfilment, but only where the impossibility is final is that party is exempted or excused from performance e.g. if the party required to perform dies or there has been intervention by a *vis major or actus Dei* but where the impossibility is temporary the offending party cannot and should not be excused. If the impossibility of performance is not final but only temporary the obligation may, according to the nature of the contract, be suspended but it is not extinguished. *In casu*, the applicant had not proved that the impossibility of performance was final, so it could only be construed as temporary; and it was temporary it could be cured by subsequent budgetary allocations.

Editor's note: **this decision should be compared to that in *Midlands State University Council* v *MSU Lecturers' Assn* S-42-05.**

Court – contempt – contempt *in facie curiae* – magistrates court – contempt may only be committed at gazetted place of sitting of court or if court is elsewhere as part of court proceedings – magistrate's powers when offence committed in his presence

***S* v *Machona* HH-41-06 (Uchena J) (Judgment delivered 23 March 2006)**

A magistrate, while travelling with his official party back from a place where he had been holding a circuit court, stopped at a business centre. There he saw the accused assaulting a woman. Prison officers travelling with the magistrate attempted to arrest the accused, who resisted and insulted the officers. The magistrate warned the accused that he would be punished for contempt of court. When the accused continued to resist arrest, the magistrate ordered that he be imprisoned. On review, held: (1) the magistrate was not holding court at a gazetted court sitting place. Section 71(1)(a) of the Magistrates Court Act [*Chapter 7:06*], which provides for summary contempt trials, does not provide for contempt trials by the roadside. Contempt of court *in facie curiae* is committed when a person who is inside the court insults the presiding judicial officer while the court is engaged in its proceedings or, as it is sometimes said, in open court. The magistrate and the court officials had not gone to the business centre in furtherance of the court's business. If they had gone there to hold an inspection *in loco* then it could have been said the court was sitting and court proceedings were in progress. It was therefore not possible for the accused to have committed contempt in the face of the court, in terms of s 71(1)(a) of the Act. (2) In terms of s 24 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the magistrate, on seeing the accused assaulting the woman, was entitled to act, but merely to arrest the offender or verbally order his arrest. While a magistrate may personally effect the arrest, where there are others present, he can order them to do so for him, and thus will preserve the dignity of his office if he takes a back seat as suggested by subs (2).

Court – High Court – jurisdiction – labour matter – court's jurisdiction ousted, even in case previously pending before the court

Mawere & Ors v *AFC* HH-46-06 (Makoni J) (Judgment delivered 29 March 2006)

The plaintiffs instituted proceedings in the High Court challenging their retrenchment. After all pre-trial procedures were completed, amending legislation was promulgated, ousting the jurisdiction of the High Court in labour matters. The defendant argued that the matter should now be dealt with by the Labour Court. Held: as a general rule, all statutes must be taken to apply to the future and cannot be held to have retrospective effect in their operation unless that is specifically or impliedly provided in the statute itself. This general rule is qualified in procedural matters: procedural statutes, once they are in operation, necessarily govern the procedure in every suit which comes to trial after the date of promulgation. The High Court's jurisdiction was ousted by the amendment with effect from the date it came into force and the legislation stripped the court of its powers to commence, hear or determine labour matters. The legislature provided jurisdictional savings in respect of specific matters, bodies and tribunals in s 47(5), but did not list the High Court as one of the courts where jurisdictional savings had been made in relation to any case, pending or otherwise.

Court – High Court – jurisdiction – labour matter – High Court having already granted warrant of execution – effect of amendment to Labour Act conferring exclusive jurisdiction in labour matters on Labour Court

***Belle's Creations & Ors* v *Mutombwa & Ors* S-21-06 (Cheda JA, in chambers) (Judgment delivered 28 June 2006)**

The amendment to the Labour Act [*Chapter 28:01*], by which exclusive jurisdiction in labour matters was given to the Labour Court, does not have retrospective effect. Where the High Court was already dealing with a matter and had granted a warrant of execution and the respondents already had vested rights in the matter before the amendment came into effect, it is not correct to say that the amendment ousted the jurisdiction of the High Court.

Court – High Court – jurisdiction – labour matters – High Court's jurisdiction not completely ousted – matters which High Court can entertain

***Chawora* v *RBZ* HH-59-06 (Karwi J) (Judgment delivered 28 June 2006)**

The applicant was suspended from duty with her employer on various disciplinary charges. She brought an application to the High Court, ostensibly for a declaratory order, declaring her suspension to be a nullity. The respondent argued that, as a result of the amendment to the Labour Act [*Chapter 28:01*], under which the Labour Court was created, the High Court had no jurisdiction to hear the matter. Held: the High Court, by virtue of its inherent jurisdiction, can do anything except that which is specifically prohibited by law, whereas the Labour Court can only do those things that it is specifically permitted by law. Superior courts will jealously guard their jurisdiction and there exists a presumption against the ouster of the court's jurisdiction unless the legislative states so in very clear terms. Thus it is imperative that in any statute or contract that purports to oust the jurisdiction of the courts must be restrictively interpreted. There is no specific provision in the Labour Act that ousts the High Court's jurisdiction. The High Court has review jurisdiction in labour matters and the jurisdiction to issue declaratory orders. However, what the applicant sought was an order, which ought properly in terms of s 89 of the Act to be sought from of the Labour Court in the first instance.

Criminal law – statutory offences – Official Secrets Act [*Chapter 11:09*] – s 4(1)(d) – disclosure of information by public servant – absolute nature of offence – irrelevance of prejudice to State – s 4(2) – disclosure of information relating to "security of Zimbabwe" – wide meaning of phrase – includes political, economic and financial well-being of the country – s 11 – Attorney-General's authority to prosecute – requirement for – reason for requiring authority – authority granted for prosecution under one section but accused charged under another – not necessarily a fatal defect

S v *Dzvairo & Ors* HH-2-06 (Patel J) (Judgment delivered 12 January 2006)

The offence created by s 4(1)(d) of the Official Secrets Act [*Chapter 11:*09] entails simply that the accused divulged to unauthorised persons information obtained by him as a State servant. It does not require that the information should be of a military or security nature, nor that such communication should involve any prejudice to Zimbabwe. The essence of the offence, which is in the nature of an absolute offence, is the unauthorised disclosure of official information. The motive for the disclosure in question is irrelevant as is the question of prejudice to the State.

The second and third applicants, who were not public servants, were charged with contravening s 4(2) of the Act, which makes it an offence for any person who has in his possession any document or information which relates to the preservation of the security of Zimbabwe or the maintenance of law and order by the Police Force or any other State security body or organization to publish or communicate such document or information to any person in any manner or for any purpose prejudicial to the safety or interests of Zimbabwe. The second applicant was employed by a financial institution and the third by the ruling party. The second applicant had supplied information to foreign agents on matters relating to Zimbabwe's economic and monetary affairs, bilateral relations with neighbouring states, and reports from Zimbabwe's foreign missions located in specified African cities. The third applicant had supplied foreign agents with political and economic information relating to the internal politics and divisions within the ruling party, the conduct of domestic elections, as well as the land issue.

Held: To establish a contravention of s 4(2), except where the act averred in itself evinces prejudice to the safety or interests of the State, it is essential to establish that the manner in which or the purpose for which the accused communicated the information was prejudicial to Zimbabwe. Where information communicated is already well known, its disclosure cannot normally operate to the prejudice of the safety or interests of the State. In the context of s 4(2), the interests of the State denote the interests of the State according to the policies laid down for it by its recognised organs of government and authority. Anything which prejudices those policies is "prejudicial to the interests or safety of Zimbabwe" within the meaning of the Act. The "security of Zimbabwe" is a concept of exceedingly wide connotation and includes a broad range of matters embracing not only physical security but also the political, economic and financial well-being of the country. Ostensibly, the matters divulged by the second and third applicants would not invariably and necessarily relate to State security under normal circumstances. However, the court must take judicial notice of the unquestionably abnormal political and economic circumstances that presently applied to Zimbabwe, both domestically and internationally. In this context, and without succumbing to the excesses of political paranoia, it is not inconceivable that the information and reports transmitted by the applicants did relate to the preservation of State security and that their covert disclosure to the foreign agents concerned was effected in a manner prejudicial to the safety or interests of Zimbabwe.
The first applicant, a public servant, was charged under s 4(1) of the Act but the Attorney-General's authority to prosecute, required under s 11, was for a prosecution for contravening s 4(2). The applicant argued that the proceedings were thus invalid. Held: the purpose of s 11 is to require the Attorney-General to personally consider each case on its merits and to determine whether or not the matter should in fact be prosecuted. This is so because of the very broad and wide-ranging nature of the offences created under the Act. The object of Parliament in requiring the Attorney-General's personal attention to each case was to obviate the possibility of unnecessary or vexatious prosecutions at the instance of over-zealous police officers or public prosecutors. It had to be assumed on the basis of his certificate that the Attorney-General did in fact consider the specific allegations against the first applicant. He then proceeded to authorise the latter's prosecution on those allegations, albeit erroneously under a different provision of the Act. It could not be said that he did not apply his mind to the case against the first applicant. In view of the first applicant's plea of guilty and admissions, non-compliance with s 11 would not have occasioned any material prejudice to him or entailed any miscarriage of justice in his eventual conviction and sentence.

Criminal law – statutory offences – Prevention of Corruption Act [*Chapter 9:16*] – s 4(a) – public officer acting contrary to duties as such for purpose of showing favour or disfavour – inciting a public officer to commit such offence – not necessary that any inducement be offered – judge urging fellow judge to act in a way that would result in favour being shown to himself or a business colleague

S v *Paradza* HH-7-06 (Mtambanengwe AJ and assessors) (Judgment delivered 10 January 2006)

The accused, a judge of the High Court, was charged with two counts of incitement to contravene s 4(a) of the Prevention of Corruption Act [*Chapter 9:16*]. The evidence accepted by the court after a lengthy trial was that he had he had, as alleged by the State, contacted two of his fellow judges and asked them to intercede to obtain the release of the passport of the accused's business partner. The man in question was on bail on a charge of murder, one of the bail conditions being that he surrender his passport. The accused told his fellow judges that the man needed it to go outside the country on business and that he (the accused) stood to lose a lot of money if the man did not do so. No inducement was offered to the other judges to intercede. The court accepted that he approached the judges in his personal capacity, as a businessman.
Held: inducement or the offer of a reward was not an element of the offence of corruption in terms of s 4(a) of *Chapter 9:16*. The requirement of a benefit to be given or promised is an essential element only of the common law crime of bribery. It would be sufficient if the accused's intention in approaching the two judges was that they, contrary to their duties or inconsistent with their duties as public officers, did the accused's colleague a favour by releasing his passport, or did the accused the favour of releasing his colleague's passport. In terms of s 360(2)(b) of the Criminal Procedure and Evidence Act it was irrelevant whether the accused himself was a public officer, or whether he approached the two judges in his private capacity. The presumption in s 15(2)(e) of the Prevention

of Corruption Act would oblige the accused to adduce evidence to satisfy the court on a balance of probability that his intention in approaching the two judges to exercise favour to him or to his colleague was an innocent one. On the evidence, the accused was seeking to get the judges show favour to his business colleague and thereby to have a favour done to himself. Incitement is not merely making a request: an element of persuasion or inducement is necessary. The decisive question was whether the accused reached and sought to influence the mind of the other judges toward the commission of a crime. The mere act by a judge who should know better, of approaching another judge to ask him to exercise his discretion in entertaining an application coming before him, or arranging for him to entertain an application which is not before him, coupled with statement or expression of what he stood to lose if an unfavourable or negative result should ensue, was no less than an urging or request for the other judge to exercise his discretion in a particular way; in other words to do an act which is contrary to or inconsistent with his duties as such.

Criminal procedure – arrest – detention beyond period of 48 hours after arrest – unlawful without warrant for further detention – need for warrant to be produced

Nyamhoko & Ors v *OC ZRP Manicaland Province & Ors* HH-37-06 (Hungwe J) (Judgment delivered 14 March 2006)

The applicants were arrested by the police on allegations of committing offences under the Public Order and Security Act. They were maltreated while in custody and denied access to their legal practitioners. State counsel who tried to intercede were threatened by the police and had to flee the district. The applicants sought a declaratur that their detention, which had been for more than 48 hours, was unlawful, as well as an order for the return of property taken from them. No warrant for further detention was shown to the court. Held: where an applicant has been held beyond the 48 hour period, it is competent to declare the whole detention period illegal. Even assuming in favour of the respondents that somewhere in their offices warrants for further detention lay unattended, the facts before the court required that the detention be declared illegal.

Criminal procedure – plea – questioning by magistrate in terms of s 271(2)(b) of Criminal Procedure and Evidence Act [*Chapter 9:07*] – responses by accused not amounting to irrevocable admission of essential elements of offence – plea of not guilty should be recorded

Criminal procedure – trial – recusal of judicial officer – application – when judicial officer should recuse himself – application on grounds of judicial officer's reputation for imposing severe sentences – not an indication of bias

S v *Mutizwa* HB-4-06 (Ndou J) (Judgment delivered 19 January 2006)

The accused in a criminal trial asked the magistrate to recuse herself, as he had heard, through prison talk, that she had a reputation for imposing harsh sentences. The magistrate dismissed the application. When the accused was asked to plead to a charge of theft of a vehicle, he indicated that he did not intend to deprive the owner permanently of the vehicle. The magistrate did not seem to accept this defence and embarked on further questioning of the accused, but the accused gave the impression that he was sticking to that defence. Held: (1) An impartial judicial officer is a fundamental prerequisite for the fair trial and a judicial office should not hesitate to recuse himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial. The duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he may not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception

of the parties as to his impartiality that is important. The issue of actual bias does not arise. *In casu* the accused had not established an appearance or apprehension of bias; the basis for the application is that the magistrate is known for imposing severe sentences. The accused sought recusal so that he could be tried by a magistrate who was perceived to impose lenient sentences. This "fishing" for judicial officers is not what this principle is intended to achieve. Severe sentences are not indicative of bias, nor are lenient sentences indicative of fairness or lack of bias. It is the competence of the sentence that matters, and the judicial officer has wide discretion on the question of punishment. (2) The responses proffered by an accused as a result of the inquiry conducted in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] should amount to an irrevocable admission of the essential elements of the offence charged. Where there is uncertainty as to what accused is admitting to the court must probe further and satisfy itself that all the essential elements of the offence have been admitted. Where the court has any doubts or the accused raises a defence, the court is obliged to alter the plea to that of not guilty and order that a trial be held to determine the contentious issues.

Criminal procedure – prosecutor – *dominus litis* – limits to – court's power to ensure suitable charges are preferred

S v *Thebe* HB-16-06 (Cheda J) (Judgment delivered March 2006)

While the prosecutor is *dominus litis*, this rule is not absolute. The trial court, as a trier of facts whose main object is to do justice between man and man, therefore has inherent powers to ensure that suitable charges are preferred against those who appear before it. It is, therefore, within its power to prevent the State from proceeding on a lesser charge where justice clearly requires a more serious one.

Editor's note: See *S* v *Chidodo & Anor* 1988 (1) ZLR 299(H), where it was held that the judge's powers are limited to withholding his certificate on review.

Criminal procedure – verdict or sentence – alteration – when verdict or sentence may be altered by trial court

S v *Masundulwane* HB-22-06 (Ndou J) (Judgment delivered 16 March 2006)

In passing sentence on a charge of theft, a magistrate sentenced the accused to one month's imprisonment, wholly suspended on appropriate conditions, plus a fine or in default a period of imprisonment. After sentence was passed the accused asked to magistrate to consider community service because he could not afford the fine, whereupon the magistrate purported to "convert" the fine to a period of community service. This he did by amending the sentence to delete the fine and impose a further 30 days' imprisonment suspended on condition that the accused undertake community service. Held: (1) The trial court does not have authority to pass two sentences for one offence. Section 358(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] does not enable the trial court to impose two sentences for one offence. The sentence for the offence remains one, which is either wholly or partially suspended on appropriate conditions. (2) A magistrate is not entitled to alter either his verdict or his sentence after is has been pronounced. The only exception is provided for in s 201(2) of the Criminal Procedure and Evidence Act, which allows the court to amend a wrong verdict or sentence delivered "by mistake". That implies a misunderstanding or an inadvertency resulting in an order not intended, or a wrong calculation. A verdict or sentence, however, much open to criticism, cannot be altered if it was deliberately given or imposed. The correction must be done immediately on the same day preferably before the magistrate leaves the bench. *In casu*, the sentence was not delivered by mistake: it was deliberately imposed.

Criminal procedure (sentence) – imprisonment – suspension – single offence – not permissible to pass two sentences of imprisonment, each suspended on different conditions

S v *Masundulwane* HB-22-06 (Ndou J) (Judgment delivered 16 March 2006)

See above, under CRIMINAL PROCEDURE (Verdict or sentence – alteration).

Criminal procedure (sentence) – statutory offences – exchange control – purchasing foreign currency without exchange control authority – company buying foreign currency on black market due to unavailability of foreign currency on official market – currency required to service debts and keep company in business – "special reasons" shown for not imposing mandatory minimum sentence

S v *Telecel Zimbabwe (Pvt) Ltd* HH-55-06 (Kudya J, Omerjee J concurring) (Judgment delivered 24 May 2006)

The appellant company was charged with a number of offences under the exchange control regulations. It had bought foreign currency on the unofficial, "parallel", market in order to service its debts outside the country, to pay for capital equipment and make other payments essential to keep the company in business. The *court a quo* found no special reasons in the particular case which would result in the imposition of a fine of not less than the value of the currency involved. Held: save in those situations where the legislation in question contains a definition of "special reasons" or "special circumstances" and that definition specifically confines the determination of such reasons or circumstances to the commission of the offence to the exclusion of the offender, the broad approach is preferable, which allows the court to consider the triad of the offender, the offence and the interests of society, the factors which any sentencer must always bear in mind, to arrive at an appropriate sentence. The appellant had two choices: either it had to behave in an ethical manner and search for foreign currency on the official market, where it was unavailable, and thereby commit corporate suicide or it had to enter the parallel market and survive. It chose life instead of death. It was necessary for its survival to purchase foreign currency from unauthorised dealers without Exchange Control authority at parallel market rates. Special reasons therefore existed not to impose the minimum sentence.

Criminal procedure (sentence) – statutory offences – stock theft – penalties applicable – person committing offence before but being convicted after penalties increased – Stock Theft Act [*Chapter 9:18*] – s 12

S v *Mzanywa & Ors* HB-9-06 (Ndou J) (Judgment delivered 23 February 2006)

The various accused were convicted of stock theft, the offences having been committed before but the convictions occurring after an amendment to the Stock Theft Act came into operation. That amendment introduced a mandatory minimum sentence of imprisonment unless special circumstances were found. The magistrates based their various sentences on the penalties applicable before the amendment came into effect. Held: By using the phrase "who is convicted" as opposed to "who has committed" in the relevant section the legislature clearly intended that the section should have retroactive operation. The date of conviction was the decisive date; the date of the commission of the offence was irrelevant. The sentences should have been based on the section as amended.

Editor's note: This decision, with respect, appears in conflict with s 18(5) of the Constitution, the relevant portion of which provides that "no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence *at the time when it was committed*" (emphasis supplied).

Customary law – headmen – vacation of position – how headman should convey his resignation

Gweru Rural Election Petition HB-113-05 (Cheda J) (Judgment delivered 16 March 2006)

There is no provision in the Traditional Leaders Act [*Chapter 29:17*] of what steps a traditional leader should take to vacate his traditional position. A headman is nominated by the chief and is appointed by the Minister in

terms of s 8 of the Act. In the absence of any provision stipulating the method of resignation, he is expected to merely notify the chief of his resignation. He is enjoined to do so because the position in question is a traditional position and logically it must first be handled traditionally.

Editor's note: The date given on the judgment is 16 March 2005 but this must be an error.

Customary law – prescription – not applicable to claim under customary law – claim may be brought at any time if it is clear and acceptable – effect of delay in bringing claim

Muwalo v *Mugunga* HH-60-06 (Bhunu J, Gowora J concurring) (Judgment delivered 14 June 2006)

The concept of extinctive prescription is unknown to customary law and the Prescription Act [*Chapter 8:*11] expressly provides that the Act does not apply to matters determinable in terms of customary law. However, delay in bringing an action reacts detrimentally to the plaintiff unless his claim is clear and acceptable. When an obligation is disputed, delay vitiates to vanishing point any claim not brought within a reasonable time.

Damages – delict – adultery committed with plaintiff's wife – loss of *consortium* – damages for loss of *consortium* not awardable where marriage subsists and adultery has been condoned – *contumelia* – damages for – factors to take into account

Nyandoro v *Tizirai* HH-012-06 (Kudya J) (Judgment delivered 8 February 2006)

The plaintiff claimed damages from the defendant for *contumelia* and disruption of *consortium* due to the adultery committed by the defendant with the plaintiff's wife. The marriage still subsisted in spite of the adultery. Held: no damages could be awarded for loss of *consortium*. Adultery damages are awarded only for *contumelia* and not for both *contumelia* and loss of *consortium* where there is no loss of *consortium* due to the plaintiff's condonation of the adultery by the respondent. In assessing the damages for *contumelia*, the court should take into account (a) the character of the woman/man involved; (b) the social economic status of the plaintiff and the defendant; (c) whether the defendant has shown contrition and has apologized; (d) the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse; and (e) the level of awards in similar cases.

Delict – animal – *action de pauperie* – requirements for – defences available – normally docile horse reacting to external stimulus – not acting *contra naturam*

Odendaal v *Inn on the Ruparara* HH-013-06 (Bhunu J) (Judgment delivered 3 January 2006)

The plaintiff was severely injured when the horse she hired bolted, having been frightened, possibly by a wild animal. Held: for the plaintiff to succeed she must establish that

- the defendant was the owner of the animal when damage was inflicted
- the animal which inflicted the damage is a domestic animal
- the plaintiff was lawfully present at the location where damage was inflicted
- the animal acted *contra naturam sui generis,* that is to say contrary to its nature or class. From an objective point of view the animal must have acted contrary to what may be expected of a decent and well behaved animal of its kind
- the animal must have caused the damage spontaneously from an inward excitement or vice.

The animal does not act contrary to its nature if it is reacting to external stimuli.
The defences open to the defendant can be summarized as

- *vis major*
- culpable conduct on the part of the injured person or a third party
- provocation by another animal.

These defences exclude liability because they establish that the animal did not act from inward excitement or vice and therefore did not act *contra naturam sui generis.*

In this case, the horse allocated to the plaintiff was a docile, well behaved domesticated animal. She took it into an area which she knew was infested with dangerous animals, birds and snakes. She was aware that a wild animal had previously killed and eaten a foal in the paddock where the horses were kept. She must therefore have appreciated that that event could have unsettled the horses and made them extremely nervous. She was sure that when the horse bolted it was reacting to external stimuli, either a wild animal or the scent of such animal. It was the nature of a horse to bolt when spooked, for the sake of self preservation and no fault could be attributed to the owner.

Delict – defamation – plaintiff – trust – whether a trust may be defamed

Gold Mining & Minerals Development Trust v *Zimbabwe Miners' Federation* HH-24-06 (Makarau J) (Judgment delivered 22 February 2006)

See below, under TRUST (Nature of).

Delict – liability – vicarious liability – principles – when employer will be held liable for acts of employee – soldiers sent to assist police assaulting civilians – acting outside scope of employment

Munengami v *Min of Defence* HH-45-06 (Patel J) (Judgment delivered 6 April 2006)

An employer is liable for those acts of his employee that have been authorised by the employer and for those acts which he has not authorised but which are so connected with authorised acts as to be regarded as improper or wrongful modes of doing them. An employer can be held liable for his servant's negligence or inefficiency as well as his abuses and excesses. However, for liability to attach to the employer such conduct must still be within the scope of the servant's employment or closely connected therewith. The fact that the employee uses equipment or material provided by the employer in carrying out his wrongful action is irrelevant. The critical enquiry is whether or not the employee was exercising the functions to which he was appointed and whether there was a close link between his conduct and his duties. If the employee was acting for his own interests and purposes, the employer is not liable. If there is a sufficiently close link between the employee's acts for his own interests and the business of the employer, the latter may yet be liable. This is so if the employee's acts are connected with the employer's business, whether subjectively or objectively viewed. The question resolves itself into one of degree. Was the employee's digression from his appointed duty so great in space and time that it cannot reasonably be said that he still exercised the functions to which he was appointed? To put it differently, did the employee's departure from the path of duty constitute such an abandonment or deviation from his prescribed task as to dissociate his wrong from the risk created by his employment and to exonerate his employer from liability?

The normal peace time function of the Army would be to constitute a disciplined force which is prepared and ready to defend national borders against external armed threats and, when necessary, to supplement other State authorities in the maintenance of internal security. Within the purview of the latter, the Army may be called upon to assist the police in times of civil disorder for the purpose of maintaining law and order. *In casu*, it was the latter function that the Army was invited to perform at the time when the assaults giving rise to the plaintiff's claim took occurred. The soldiers' actions had nothing to do with the business of the Army or the Ministry of Defence. It could not be said that they were involved in defending the nation or assisting the police in maintaining law and order. What they did was not calculated to advance their employer's interests but purely to further their own nefarious designs. The Minister of Defence could not be held vicariously liable.

Editor's note: compare *Gweshe* v *Min of Defence* HH-28-06, where the vicarious liability of the Minister for other assaults on the same occasion was not disputed.

Employment – contract – termination – application for authority to dismiss – application containing additional grounds to those set out in letter of suspension – main ground identical – application valid Employment – contract – termination – employee of urban council – allegation of misconduct – no requirement that employee be suspended before enquiry into allegation may take place

City of Harare v *Rusvingo* S-073-05 (Malaba JA, Sandura & Gwaunza JJA concurring) (Judgment delivered 25 January 2006)

The respondent, an employee of the appellant council, was charged with conduct unbecoming of an employee after he had used coarse and insulting language in reply to a letter of reprimand. After investigation, he was found guilty and reduced in grade and transferred. An application to the High Court to set aside the proceedings on review succeeded on the grounds that the Executive Committee had conducted the inquiry into the allegations of misconduct levelled against the respondent without him having been first suspended from duty by the head of department, as required by s 141(4) of the Urban Councils Act [*Chapter 29:15*]. Held: suspension is not required in a case where the employee's head of department does not consider that the employee was guilty of such conduct that it is desirable that the employee should not be permitted to carry on his work. The council may proceed in terms of s 141(2)(b) of the Act. The fact that the subsection provides for summary dismissal where allegations of misconduct are of a serious nature does not exclude the holding of an inquiry, considering the applicability of the principles of natural justice to decisions of public bodies such as the appellant. There was nothing procedurally irregular in the appellant having an inquiry carried out into the allegations of misconduct levelled against the respondent without him having been suspended by the head of the department and, after discovering that the degree of seriousness of the misconduct did not justify summary discharge, imposing some other appropriate penalty.

Employment – contract – termination – grounds – wilful disobedience to lawful order – serious nature of offence, even if moral excuse exists

Zimbabwe Alloys Ltd v *Muchohonyi* S-7-06 (Sandura JA, Chidyausiku CJ & CHeda JA concurring) (Judgment delivered 30 March 2006)

See below, under EMPLOYMENT (Labour Court – factors Court should take into account in determining penalty)

Employment – contract – termination – retrenchment – failure to comply with peremptory requirements of relevant regulations – retrenchment invalid – retrenchment committee – role in retrenchment process – must play an active role in securing agreement between parties

Stanbic Bank Zimbabwe Ltd v *Charamba* S-77-05 (Sandura JA, Chidyausiku CJ & Cheda JA concurring) (Judgment delivered 30 January 2006)

The appellant bank proposed to make the respondent redundant, having undergone a restructuring exercise and finding that his post was no longer required. The respondent disagreed that retrenchment was justified. As at the relevant time the Bank did not have a works council or an employment council which catered for managerial employees, the Bank, acting in terms of the proviso to s 3(1) of the Labour Relations (Retrenchment) Regulations

1990 (SI 404 of 1990), sent the notice of its intention to retrench the respondent to the retrenchment committee. About 5 weeks later, the retrenchment committee held a meeting, at which the parties made their submissions. After hearing the submissions, the committee adjourned the meeting and directed the parties to go and negotiate and try to reach a settlement. Four months later, the parties having failed to reach an agreement, the committee held another meeting. It decided that retrenchment was justified and two months later recommended to the Minister of Labour that the respondent be retrenched on the basis of a certain severance package. About a month after that, the Minister in due course approved the retrenchment. The Labour Court, on appeal by the respondent, set aside the retrenchment on the grounds that the peremptory provisions of the Regulations had not been complied with.

Held: (1) the retrenchment committee did not appreciate that when it received the notice it, or a person authorised by it or the Minister, was obliged to undertake the functions of an authority in terms of s 3(1) of the Regulations, because the Bank did not have a works council or an employment council which catered for managerial employees. (2) After receiving the notice the retrenchment committee, acting as the authority in terms of s 3(1), was obliged to "forthwith" attempt to secure agreement between the Bank and the respondent as to whether or not he should be retrenched and, if he was, the terms and conditions on which he was to be retrenched. The authority is obliged to play an active rôle, not a passive one, in attempting to secure an agreement between the parties concerned. Its rôle is that of a mediator. The committee failed to do this. (3) The committee did not act "forthwith", not doing anything for 37 days after it had the notice. (4) The retrenchment committee was obliged to attempt to secure agreement on the possibility of implementing measures to avoid the respondent's retrenchment. It failed to do so. (5) It also failed to have regard to the factors referred to in s 7 of the Regulations when attempting to secure an agreement on whether or not the respondent was to be retrenched. (6) It failed to keep proper minutes of its meetings. (7) After receiving the notice the retrenchment committee had only one month within which to secure an agreement between the parties. If it failed to secure an agreement within that period, it had only another two weeks within which to recommend to the Minister whether or not the retrenchment should be permitted and, if so, the terms and conditions on which it was to be effected. The committee took nearly 6 months to make its recommendations. (8) The Minister was obliged to consider, without delay, any recommendation on retrenchment submitted to him and, within two weeks, to approve or refuse to approve the proposed retrenchment. He took over a month to reach a decision. (9) The respondent's retrenchment was thus not carried out in terms of the Regulations and was of no effect whatsoever.

Employment – Labour Court – assessment of penalty – when Court may substitute its own penalty – disciplinary matter arising before introduction of s 12B of Labour Act [*Chapter 28:01*] – Court having no power to substitute its own penalty

N E I Zimbabwe v *Makuzva* S-24-06 (Cheda JA, Chidyausiku CJ & Malaba JA concurring) (Judgment delivered 18 May 2006)

In terms of s 12B(4) of the Labour Act [*Chapter 28:01*], which came into effect in March 2003, the Labour Court is obliged to consider whether there is any mitigation of the misconduct which would avail to an extent that action other than dismissal would be justified. In effect, the Court has the discretion to set aside the decision of a disciplinary authority and substitute its own where an employee is clearly guilty of misconduct. However, this would not apply to disciplinary matters determined before the amendment was made. The amendment does not have retrospective effect.

Employment – Labour Court – factors Court should take into account in determining penalty – obliged to take into account aggravating factors as well as mitigating ones

Zimbabwe Alloys Ltd v *Muchohonyi* S-7-06 (Sandura JA, Chidyausiku CJ & Cheda JA concurring) (Judgment delivered 30 March 2006)

In terms of s 12B(4) of the Labour Act [*Chapter 28:01*] the Labour Court is obliged to take into account, not only the mitigating factors in the case, but also the aggravating ones, such as the fact that the employee had previously been disciplined for the same offence. The offence of wilful disobedience to a lawful order given by the employer is a very serious one, because it undermines the relationship between the employer and the employee, and goes to the very root of the contract of employment. The existence of a moral excuse for such disobedience will not make the disobedience any less wilful or the order any less lawful.

Employment – Labour Court – jurisdiction – exclusive jurisdiction in labour matters, even if case previously pending before the High Court

Mawere & Ors v *AFC* HH-46-06 (Makoni J) (Judgment delivered 29 March 2006)

See above, under COURT (High Court – jurisdiction – labour matter).

Employment – strike – action by employer – employer not obliged to seek show cause order – entitled to application for authority to terminate striking workers' employment

Marondera RDC v *Morris & Ors* S-76-05 (Sandura JA, Chidyausiku CJ & Malaba JA concurring) (Judgment delivered 16 January 2006)

The respondents, employees of the appellant council, threatened to strike on a stated date if demands for increased wages were not met. A meeting was held at which the employees agreed to call off the planned strike. The respondents arrived for work for a few hours on the stated date, then went on strike. The council suspended the respondents and applied to a labour relations officer for permission to terminate their services and was successful. The main ground relied upon in the letter of suspension and in the application for the authority to dismiss the employees was that they were guilty of an act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of their contracts of employment, in that, having given an undertaking to the Council that they would call off the proposed collective job action, they subsequently reneged on that agreement for no good reason. The Labour Court, on appeal, found for the respondents. On appeal to the Supreme Court, held: (1) under the then provisions of the Labour Relations Act, a strike was unlawful if the employees did not seek redress in respect of the dispute concerned in terms of Part XII of the Act. As the respondents had not sought such redress, the collective job action was clearly unlawful. (2) The fact that the application for the authority to dismiss the employees relied upon additional grounds, such as wilful disobedience to a lawful order and absence from work for five or more working days without reasonable excuse, which were not in the letter of suspension, made no difference. Although the application for the authority to dismiss the employees included grounds not set out in the letter of suspension, the main ground relied upon in the letter of suspension was the same as the main ground relied upon in the application. (3) The Council was not obliged to apply for a show cause order under s 206(1) of the Act. It was entitled, instead, to apply for authority to dismiss the striking workers.

Employment – trade union – registration – matter to be taken into consideration by Registrar – discretion vested in Registrar – when discretion may be interfered with

Automotive & Allied Workers' Union v *Motor Trade Workers' Union* S-16-06 (Chidyausiku CJ, Cheda JA & Malaba JA concurring) (Judgment delivered 19 June 2006)

When a trade union applies for registration, the Registrar is obliged to take into account all the considerations listed in s 45 of the Labour Relations Act [*Chapter 28:01*]. Provided he does so, whether he came to the correct conclusion after taking into account the relevant factors is an issue of the exercise of the registrar's discretion. The exercise of the registrar's discretion can only be interfered with on appeal on the basis that it was so grossly unreasonable that no registrar, applying his mind to the facts before him, could have come to the conclusion that he did without having taken leave of his senses.

Employment – wrongful dismissal – damages for – how to be assessed – relevance of back-pay in assessing damages – rate of compensation – rate should be that applicable at the time – time taken to obtain alternative employment – other sources of income – need for evidence

Olivine Industries (Pvt) Ltd v *Nharara* S-88-05 (Cheda JA, Malaba & Gwaunza JJA concuirring) (Judgment delivered 7 March 2006)

The Labour Relations Tribunal made an order for the reinstatement of the respondent to his employment by the appellant. Part of the order provided that if reinstatement was no longer an option the respondent was hereby ordered to pay the appellant damages in lieu of reinstatement. If the parties failed to agree on the *quantum*, they could approach the Tribunal for quantification. The appellant paid back pay. After the parties failed to agree on damages, the Tribunal ordered payment of back-pay and benefits plus interest, and in addition 18 months' pay at "today's rates". Held: If an employee proves wrongful dismissal, but is not reinstated, he will be entitled to damages, a major element of which will be assessed by reference to the back-pay lost. Here the back-pay will be limited to a period from the date of wrongful dismissal to a date by which the employee could, with reasonable diligence, have obtained alternative employment. The back-pay and benefits should represent what the employee should have received had he not been wrongfully dismissed. The award should take into account the period he should have taken to obtain alternative employment and other sources of income the employee might have. On these points evidence is required. The employee can only be compensated by an amount that should be calculated at the rates applicable at the time and not at "today's rates" or some future unknown rates.

Evidence – extra-curial statement – admissibility – challenge to – multiple accused – desirability of determining admissibility of all challenged statements in one trial within trial rather than piecemeal

S v *Gumbo & Ors* HB-46-06 (Ndou J) (Judgment delivered 10 May 2006)

Where there is more than one accused person challenging the admissibility of an extra-curial statement, the admissibility of all the challenged statements should be determined at one trial within trial, rather than dealing with the statements piecemeal. This practice is calculated to ensure that the judicial officer has all relevant evidence before him when giving his rulings on admissibility. It may happen that the necessity for holding a trial within a trial arises quite unexpectedly or at a time when it would be inconvenient or impracticable to consolidate such a trial within similar trials. Departures from the general practice must be left to the good sense and judicial discretion of the presiding officer.

Family law – husband and wife – divorce – grounds for – one party not desiring divorce – relevance of – need to show that parties reconciled – judicial separation – may no longer be granted

Kumirai v *Kumirai* HH-17-06 (Makarau J) (Judgment delivered 9 February 2006)

Since 1985, the sole grounds for the grant of a divorce are irretrievable breakdown and/or mental illness or continuous unconsciousness. The irretrievable of a marriage is objectively assessed by the court. Invariably, where the plaintiff persists on the day of the trial that he or she is no longer desirous of continuing in the

relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. To satisfy the court that the marriage still has some life in it, the party has to adduce evidence to the effect that, after the filing of the summons, the parties have reconciled and are living after the manner of husband and wife. In changing the law thus, the legislature also effectively took away the power of the court to order judicial separation for a given period. If the court is satisfied on the evidence that the marriage can be restored, it will simply decline to grant the divorce. The court cannot, however, order judicial separation in the sense the term used to be known, to give the marriage a chance, failing which the innocent spouse will be granted the divorce. That practice is inconsistent with the irretrievable breakdown principle.

Insolvency — sequestration — rights of creditors — purchaser of land — transfer not effected before sequestration — no right to claim transfer of land

Moyo v *Fraser NO & Ors* S-5-06 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 9 March 2006)

See below, under LAND (Ownership – land sold by instalments).

Intellectual property – trade mark – registered trade mark – infringement – similarity likely to lead to confusion – test – normal, average person – use of designs – unacceptable monopoly should not be created

First Mutual Life Assurance Soc of Zimbabwe v *Intermarket Hldgs Ltd & Ors* HH-8-06 (Hlatshwayo J) (Judgment delivered 17 January 2006)

The applicant and respondent groups of companies were both operating in the financial sector, although the applicant had been in business longer. The applicant was the proprietor of a registered trade mark, the design of which was based on triangles, with one inverted triangle being contained within another triangle. The respondent's logo was also based on the use of triangles, but arranged in a different manner. Where colour was used, the internal triangles in the two logos were different. The applicant contended that the respondent's logo infringed the applicant's registered trade mark. Held: the test as to whether there has been an infringement depends essentially on whether there is a sufficient similarity which is likely to lead to confusion. The test as to deception or confusion is that of the normal, average person. The concept of similarity should not be construed so widely as to create unacceptable monopoly in the use of designs, in this case incorporating the use of triangles. Registered trade marks do not create monopolies in relation to concepts or ideas. The word "similar" had to have its ordinary meaning, that is a "marked resemblance or likeness", "marked" meaning "easy to recognize". Applying those considerations, the logo used by the respondents was not identical with or so nearly resembling the registered mark of the applicant as to be likely to deceive or cause confusion, as required by s 8(1) of the Trade Marks Act [*Chapter 26:04*].

Interest – date from which interest begins – *in duplum* rule – interest ceases once double has reached, irrespective of whether summons issued – interest begins to run on judgment debt as from date of judgment

Zimbabwe Development Bank v *Naga Salons & Ors* HH-43-06 (Kudya J) (Judgment delivered 5 April 2006)

The plaintiff bank lent a sum of money to the defendant company, of which the second and third defendants were directors and guarantors of the loan. The loan was not repaid and the interest accumulated up to the amount of the original loan. The bank claimed interest on the total owing, as from the date of the summons. The

question *in casu* was whether or not after the double is reached, interest commences to run afresh, and if so at which stage and on which amount. Held: The *in duplum* rule remains part of our law. Interest, whether it accrues as simple or as compound interest, ceases to accumulate upon any amount of capital owing once the accrued interest attains the amount of capital outstanding. The rule enunciates a policy to protect a debtor who has not serviced his loan from facing an unconscionable claim for accumulated interest and to enforce sound fiscal discipline upon a creditor. The danger in holding that interest runs from the date of summons is that an unscrupulous creditor only has to institute action to defeat the *in duplum* rule. There is nothing against the public interest or the interest of modern finance if the *in duplum* rule operates to hold that once the double has been reached, interest must stop to run, regardless of the institution of proceedings or that the stage of *litis contestatio* has been reached. Upon judgment being given, however, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which the cause of action was instituted.

Interpretation of statutes – interpretation of a subsection – subsection apparently of general application – must be interpreted in the context of the section of which it is a part

Sagitarian (Pvt) Ltd v *Workers' Committee, Sagitarian (Pvt) Ltd* S-83-05 (Gwaunza JA, Sandura & Cheda JJA concurring) (Judgment delivered 6 February 2006)

The appellant noted an appeal to the Labour Court against an arbitral award. The respondent applied for the enforcement of the arbitral award, in terms of the old s 97(4) of the Labour Relations Act [*Chapter 28:01*]. The Labour Court *a quo* made an order for the partial payment of the award to the respondent. The appellant argued that subs (4) referred only to an appeal filed in terms of s 97(1), which set out the context in which certain specific appeals to the Labour Court were to be prosecuted. The arbitral award was made in terms of s 98 of the Act and therefore fell outside the ambit of subs (4). The respondent contended that subs (4), which did not refer to subs (1), therefore referred to all appeals filed with the Labour Court under the Act and not only those filed under subs (1).
Held: the matter did not fall to be determined solely on the simple grammatical meaning of the words employed in subs (4), which in the face of them were of general application. The character of the provision in question, being a subsection as opposed to a section, raised the need to consider other "non-linguistic" aids in order to ascertain the true intention of the legislature. A subsection is part of a section and in interpreting a subsection the court must read it in the context, first of all, of the section. If the interpretation placed on the subsection is in contextual harmony with the rest of the section and does not offend against or contradict any other provisions of the statute it should be accorded that interpretation. Restricting subs (4) of s 97 to appeals made in terms of subs (1) of the same section would have been in perfect harmony with the other subsections of s 97 and would not have led to any absurdity. Separate subsections must all have some relevance to the central theme which characterises the section. The central theme characterising s 97 were the appeals specified in subs (1), so subs (4) fell to be interpreted in such a way that it had relevance to this theme. The purpose of s 97 was to set out the context in which certain specific appeals to the Labour Court were to be prosecuted. The legislature did not intend subs (4) to be given an interpretation that embraced situations falling outside of this context. Appeals filed with the Labour Court in terms of s 98 of the Act, as was the one *in casu*, clearly fell outside the context set out in s 97.

Interpretation of statutes – retrospectivity – when may be construed – criminal statute increasing penalties – used of word "convicted"

S v *Mzanywa & Ors* HB-9-06 (Ndou J) (Judgment delivered 23 February 2006)

See above, under CRIMINAL PROCEDURE (SENTENCE) – statutory offences – stock theft. – *Editor.*

Land – acquisition – agricultural land compulsorily acquired under s 8(1) of Land Acquisition Act [*Chapter 20:10*] – former owner continuing to occupy farm – 17th amendment to Constitution – effect – valid acquisition orders previously issued not affected

Pondoro (Pvt) Ltd v *Min of State & Anor* HH-33-06 (Kudya J) (Judgment delivered 15 March 2006)

The applicants had continued to occupy their farm after the issue of an acquisition order in terms of s 8 of the Land Acquisition Act, due to political intervention in their favour by the Vice President. Some 3 years after the issue of the order the Acting Chief Land Officer of the Province requested the police to evict the applicants from the farm. The applicants sought an interdict preventing the police from evicting them. It was argued that since the State had become owner of all agricultural land by virtue of the 17th amendment to the Constitution, the farm was only acquired on the date on which the amendment came into effect. Consequently, no law was yet in place governing the removal of the former owner from the property which relates to the period of adequate notice for such removal, nor was there any law in place to criminalize these former owners who remain on the property after the appointed day. Held: The applicants' continued stay on the farm became illegal on the expiry of the periods stated in the acquisition order. The Constitutional amendment did not strike down valid s 8(1) orders issued before the appointed day. All it did was remove judicial oversight of the process of acquisition.

Land – ownership – land sold by instalments – instalment agreement not registered – rights of buyer – seller's estate being sequestrated before full payment made –buyer having no right to transfer of land

Moyo v *Fraser NO & Ors* S-5-06 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 9 March 2006)

The seller, the registered owner of a certain property, which was a sub-division of a larger portion of land owned by him, sold the property was sold to the appellant. The purchase price was paid in full, by way of instalments. The seller became insolvent before performing the personal obligation of transferring the immovable property to the appellant. The first respondent, the liquidator and trustee, then sold property belonging to the insolvent estate, including the property in question, to various purchasers. The property in question was not sold to the appellant but to a third party. The appellant sought an order compelling the trustee to transfer the land to him. Held: A purchaser of land on instalments who has not registered the agreement of sale in terms of s 64 of the Deeds Registries Act [*Chapter 20:05*] cannot interdict the trustee of an insolvent estate from selling such land to a third party. Had an endorsement been made in terms of that section and all the other requirements prescribed thereunder met, the appellant would have had a statutory right to take transfer of the land, subject to the payment of the outstanding balance under the prior real right secured by the registered mortgage bond. His failure to register the agreement meant that he had only a personal claim against the seller.

Note: the judgment appealed from was reported as *Moyo* v *Fraser NO & Anor* 2000 (1) ZLR 142 (H), a judgment of Malaba J (as he then was). – *Editor.*

Landlord and tenant — tenant — eviction of — Commercial Premises (Rent) Regulations 1983 — s 22(2) — lessor to have "good and sufficient" grounds for seeking recovery of commercial premises — what evidence is required of landlord to establish claim and of tenant refute claim

Kingstons Ltd v *L D Ineson (Pvt) Ltd* S-8-06 (Ziyambi JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 15 May 2006)

The respondent obtained summary judgment against the appellant for ejectment from the premises the appellant was leasing from the respondent. The respondent claimed that it wished to use the premises itself as its existing premises next door were too small and it needed both premises to accommodate its business. The appellant claimed that it was entitled to resist ejectment as it was a statutory tenant and that the respondent had not established good and sufficient grounds for ejectment. It also alleged, without providing any evidence, that the respondent did not genuinely want the premises for itself and wished to lease them to another tenant at a higher rent. The respondent had sought to introduce a supplementary affidavit dealing with points raised by the appellant in its opposing affidavit, but the trial judge refused the application. Nonetheless the trial judge granted the application for ejectment.

Held: (1) the landlord need do no more than assert his reasons in good faith and then to bring some small measure of evidence to demonstrate the genuineness of his assertion and it rests upon the lessee who resists ejectment to bring forward circumstances casting doubt on the genuineness of the landlord's claim. In determining what constitutes good and sufficient grounds, the court makes a value judgment which, if arrived at without caprice, bias, or the wrong application of principle, will not lightly be set aside on appeal.

(2) In deciding whether the defendant has raised a triable issue, care must be taken not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejectment is sought to raise fictitious issues of fact, thereby delaying the resolution of the matter to the detriment of the lessor. If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of *bona fides*. The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts.

(3) An appeal can only be noted against the substantive order made by a court and not against the reasons for making, or the process by which it arrives at, the order. The dismissal of the application to introduce a supplementary affidavit was not a substantive order since it did not affect the decision which was arrived by the court *a quo*. Because summary judgment is a drastic remedy, strict adherence to the rules of court is required. The trial court's discretion was properly exercised having regard to the evidence placed before it and the conclusion arrived at was appropriate.

Legal practitioner – conduct and ethics – authorities against one's client – obligation to disclose such authorities to court – diligence expected of legal practitioner – includes checking of authorities cited by opposing counsel – authorities should not be accepted at their face value

Kawondera v *Mandebvu* S-12-06 (Ziyambi JA, Chidyausiku CJ & Malaba JA concurring) (Judgment delivered 6 February 2006)

The ethics of the legal profession demand that if there is an authority which is against his client, counsel is obliged to disclose it to the court. Not to do so but to attempt to hoodwink the court is improper conduct. A high degree of diligence is expected of a legal practitioner in the exercise of his duty to his client. Every reference made by the opposing party must be checked for its accuracy and for the purpose of ascertaining whether that authority truly supports the opposition's case and, if it does not, to so advise the court with the appropriate submissions. It is certainly not in the interests of one's client, and indeed could amount to a disservice, to accept quotations and case references at face value without checking their accuracy and whether there is, arising from that quotation, an argument in favour of one's client.

Legal practitioner — conduct and ethics — conflict of interests — client of legal practitioner involved in litigation against former client of the same legal practitioner — whether ethical for legal practitioner to act

Longhurst NO v *Lee & Ors* HB-29-06 (Ndou J) (Judgment delivered 23 March 2006)

Counsel for the applicant had formerly drafted heads of argument on behalf of the third respondent. She did so from pleadings filed of record. She did not, however, have access to the instructing legal practitioner's files. She did not interview the third respondent. In the current application she was instructed to appear on behalf of the applicant who was suing, *inter alios*, the third respondent concerning the same property and the same facts placed before her on behalf of the third respondent. Held: it is manifestly incorrect for a legal practitioner to utilise in favour of one client information gleaned from another client. While having confidence that the applicant's counsel would not use information gleaned from the third respondent to advance the applicant's case, nothing should be done which creates even a suspicion that there has been an improper interference with the course of justice. The courts have to regulate the conduct of legal practitioners and ensure that they comply with the high standards that are required of them. Justice must not only be done but it must manifestly be seen to be done. A legal practitioner must therefore decline or cease to act, not only where the interests of a former client are actually prejudiced if the legal practitioner continues to act for the other client, but also where the former client's interests might appear to be prejudiced.

Local government – urban council – employee – allegation of misconduct – procedure – no requirement that employee be suspended before enquiry into allegation may take place

City of Harare v *Rusvingo* S-073-05 (Malaba JA, Sandura & Gwaunza JJA concurring) (Judgment delivered 25 January 2006)

See above, under EMPLOYMENT (Contract – termination – employee of urban council).

Partnership – formation – essentials for an agreement to create a partnership – extent of contribution by particular party required – element of "gain" – not restricted to commercial profits – includes acquisition – whether contrary intention revealed by contract – need to consider contract as a whole – nature of partnership agreement – one of good faith – when party liable to former partner after termination of partnership

Stanmarker Mining (Pvt) Ltd v *Metallon Corp Ltd* HH-36-06 (Omerjee J) (Judgment delivered 22 March 2006)

The plaintiff was a Zimbabwean registered mining company and the defendant a South African mining company. Both had separately entered into negotiations with a British company to acquire that company's shares in another Zimbabwean company which owned five mines in Zimbabwe. The plaintiff and defendant met with a view to making a joint bid for the shares. They drew up "heads of agreement", most of which were stated not to be binding once a formal contract was concluded. They agreed that the defendant would negotiate with the British company to acquire the shares, while the plaintiff would facilitate matters in Zimbabwe. They agreed that for a period of three months neither would negotiate with anyone else for the purpose of acquiring the shares. The plaintiff claimed that in spite of the agreement the defendant, during the three month period, acquired the shares for itself. The plaintiff claimed the sum of US$12 million as damages for the breach of the partnership agreement, this sum being the value of the shares the plaintiff would have acquired. The defendant denied that there was a partnership agreement. It also disputed the amount claimed and argued that the plaintiff was not in any event entitled to judgment in foreign currency.

Held: (1) There are three essentials that must be present in order for an agreement to create a partnership, unless the contract reveals a contrary intention. These are that (a) that each of the partners brings something into the partnership or binds himself to bring something into it, whether it be money, or labour or skill; (b) the business should be carried on for the joint benefit of both parties; and (c) the object should be to make profit or for some other gain. All these elements were present *in casu*. A joint venture even in respect of a single transaction is still a partnership, if these three essentials are present. It was not necessary, when considering a party's contribution, that the contribution should be "substantive". With regard to "gain", it does not mean merely commercial profits. It includes acquisition. (2) The contract had to be looked at as a whole to see whether there was a contrary intention revealed; separate clauses should not be looked at in isolation. No such intention was shown when the contract and the surrounding circumstances were considered. (4) A partnership agreement is one *uberrimae fidei*. The duty of good faith, whether arising out of the express terms of a contract or by operation of law, covers a wide range of conduct between contracting parties and/or partners. A partner who continues in business after the dissolution of a partnership and makes use of either the former partnership's assets or a business connection derived out of the former partnership assets or connection is accountable to his former partner or partners for the profits attributable thereto. Any transaction or business conducted or instituted by one partner on behalf of the partnership, during its subsistence, does not terminate or cease on the effluxion of the partnership: the duty of good faith in respect to unfinished partnership business continues beyond the *de facto* termination of a partnership agreement. On the facts, the defendant was in breach of its duty of good faith as created by the agreement it entered into with the plaintiff. From very early in the negotiations the defendant failed to disclose or communicate important information and this stance was maintained throughout the three months restraint period. (5) The evidence showed that the value of the assets the plaintiff would have acquired was US$7.4 million. (6) It is permissible to award a judgment sounding in foreign currency if that will most truly express the plaintiff's loss and accordingly most fully and exactly compensate him for that loss. This was the situation *in casu*.

Partnerships and voluntary associations – clubs – legal basis of – changes to club constitution – may only be made in accordance with procedures laid down in constitution

***Dynamos Football Club (Pvt) Ltd & Anor* v *ZiFA & Ors* S-93-05 (Malaba JA, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 23 March 2006)**

The second appellant, a football club, was formed in 1963. The first respondent was a body formed to co-ordinate, promote and control the game of soccer. Membership of the club was restricted initially to the individuals who, by accepting the constitution, became the founder members, and anyone who became a former player of the club's team at any given time. Any other person could become a member of the club at the discretion of the board of trustees, provided the decision received the unanimous approval of members at an annual general meeting. Supporters and fans of the club were not members and could not attend and vote at the club's general meetings. Only founder members and former players had the right to attend and vote at the general meetings. Members exercised control over the operations of the club during the year through annual general meetings. It was only at an annual general meeting that amendments to the club's constitution could be made, provided that the procedures relating to notice to the members had been followed.

In 1990 a meeting attended by supporters of the club was held, convened by the association. At the meeting, which was attended by non-members of the club, amendments to the clauses of the constitution dealing with membership and the right to attend meetings were proposed and passed. The effect of the purported amendments was that supporters and fans could become members of the club, with the right to attend and vote at the club's annual general meetings for any office bearer. The meeting had been convened by the executive committee of the respondent association. Further amendments were purportedly made in 1994, effectively giving the club a new constitution.

The changes made to the constitution split the members of the club into two factions, one comprising some of the founder members and former players who objected to the changes, the other consisting of the remaining founder members and former players and those persons who had acquired membership as a result of the amendments

adopted at the meeting in 1990, who wanted to have the affairs of the club run in terms of the amended rules. Citing the existence of what it described as "anarchy" in the administration of the club, the association purported to dissolve the club's executive committee and to appoint its own committees to carry out the day-to-day management of the affairs of the club. The appellants applied to the High Court for an order declaring the participation by the association in the management of the affairs of the club unlawful and interdicting it from continuing to do so. The association claimed that by virtue of its own constitution it was entitled to do so. The High Court granted the order, but with provisos against which the appellants appealed. The relief claimed in the notice of appeal was not sought in the court below and was being claimed for the first time on appeal.

Held: (1) the legal basis of an unincorporated voluntary association of persons such as a social club is the contract between and amongst the associates. The duty of the court is to determine whether what is claimed to have been done is in fact what was prescribed by the members of the club in strict compliance with the procedure they laid down for validity to attach to those acts. Changes or additions which are not made in accordance with the prescribed procedures and without the preconditions having been met are null and void. This was the situation here. A meeting which was not an annual general meeting of founder members and former players, convened by an outsider and attended by non-members of the club, was a void and unauthorised act. It would not have been a properly convened meeting for the purpose of effecting a valid amendment to the 1963 constitution. Even if the founder members and former players acquiesced in the purported amendment by not challenging its validity over a long period of time (which was not the case), they could not have acquiesced in what was at law a nullity.

(2) An appeal court has a discretion in appropriate cases to grant relief claimed for the first time on appeal if it is satisfied that all the facts on which the court of first instance would have decided the matter, had it been raised, with it were available for its consideration and such facts as are essential to the decision are common cause or well-nigh incontrovertible. *In casu*, the necessary foundation was laid in the founding affidavit and a decision on the validity of the acts of the meeting in 1990 could be made on the admitted facts.

Police – action against – police officer acting in obedience to warrant – defective warrant – when police officer protected against suit

***Coltart* v *Min of Home Affairs & Ors* HH-67-06 (Bere J) (Judgment delivered 29 June 2006)**

***See below, under* PRACTICE AND PROCEDURE (Summons – amendment).**

Practice and procedure – affidavits – filing – party seeking to file further affidavit after answering affidavit filed – leave required – when leave may be granted

***ANZ* v *Media &Information Commission* HH-15-06 (Makarau J) (Judgment delivered 8 February 2006)**

***See above, under* ADMINISTRATIVE LAW (Review – grounds for).**

Practice and procedure – application – use of application procedure – when may be used – not appropriate where will lead to an injustice – claim based on oral agreement whose terms are disputed – claim for damages arising from breach of contract – matters on which evidence must be led and credibility of witnesses assessed

***Ex-Combatants Security Co* v *Midlands State University* HH-80-06 (Makarau J) (Judgment delivered 28 June 2006)**

The superior courts have repeatedly decried the practice by some legal practitioners to use motion proceedings for matters that ought to proceed by way of trial. The court has a discretion to refuse an applicant the use of application procedure where in the view of the court the use of the procedure will lead to an injustice. This discretion is part of the inherent powers that the court has over its own procedures to avoid injustices. Our courts have adopted the approach that they will be robust and try and do justice between the parties and resolve matters brought on application procedures even where disputes of fact are manifest, provided that the court is convinced there is no real possibility of any resolution doing an injustice to the other party concerned. The resolution of the dispute without doing an injustice to the other party is to be one of the prime considerations in allowing or disallowing the use of application procedures.

A claim based on an alleged oral agreement whose terms are disputed cannot be resolved on the basis of affidavits without doing an injustice to one of the parties. A disputed oral agreement, by its very nature, existing as it does in the memories of the contracting parties, cannot be proved other than by a comparison of the credibility of those in whose memories the agreement resides. Such an agreement can only be established by the word of those witnesses whose words the court believes. The advantages inherent in a trial will be lost to the court. Similarly, a claim for damages, arising from an alleged breach of contract, unless the damages are pre-set and agreed to between the parties, should not be brought on application procedure. A claim for damages by its very nature always puts in dispute the quantum of damages that are due to the applicant even where the defendant has not defended the matter. The assessment of damages for breach of contract involves an investigation by the court into the financial position the plaintiff is in on account of the breach and the position he would have been had there been proper performance of the contract.

Practice and procedure – documents – power of attorney – authentication of – requirements for power of attorney to be signed by notary public – person admitted as solicitor in England not necessarily a notary public

Tawanda v *Ndebele* HB-27-06 (Cheda J) (Judgment delivered 6 April 2006)

Rule 3 of the High Court (Authentication of Documents) Rules 1971 (RGN 995 of 1971) provides that any document executed outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is authenticated by a notary public, mayor or person holding judicial office. A power of attorney authenticated by a solicitor in England does not, in the absence of evidence that he is also registered as a notary public, comply with this requirement.

Practice and procedure – exception – *lis alibi pendens* – not a complete bar – court's discretion as to whether to uphold the exception

***Khan* v *Provincial Magistrate, Harare, & Ors* HH-39-06 (Makarau J) (Judgment delivered 20 March 2006)**

***See above, under* ADMINISTRATIVE LAW (Review – when appropriate).**

Practice and procedure – execution – sale – sale by public auction – sale confirmed by Sheriff – Sheriff subsequently realising sale price unreasonably low – when Sheriff entitled to set aside sale and resort to sale by private treaty

***Teesdale* v *Reed & Ors* S-22-06 (Gwaunza JA, in chambers) (Judgment delivered 29 June 2006)**

The appellant's property was first sold in execution by public auction. The Sheriff, although he did so after initially confirming the sale and after an application had been made to court to set the sale aside, realised and was satisfied that the price that the property had fetched at the public auction sale was unreasonably low. The property was then sold to the third respondent by private treaty. Held: no time limits are imposed by of r 358(2) as to when the decision by the Sheriff to reject a sale by public auction and resort to a sale by private treaty should be made. The confirmation by the Sheriff of the sale by public auction did not bar him from dealing with the property under r 358(2). The situation might, however, have been otherwise had the initial purchaser not agreed to the setting aside of the sale, and proceeded to take transfer of the property in question.

Practice and procedure – heads of argument – respondent's heads of argument – when must be filed

***Vera* v *Imperial Asset Mgmt Co* HH-50-06 (Makarau J) (Judgment delivered 26 April 2006)**

The respondent must file his heads of argument within 10 days of being served with the applicant's heads (with some allowances for when the court is on vacation). However, if the respondent has been served with the applicant's heads close to the set down date, he does not have the benefit of the full 10 day period within which to file and serve heads but must do so five clear days before the set down date.

Practice and procedure – judgment expressed in foreign currency – when permissible – such judgment most fully and accurately compensating for loss

Stanmarker Mining (Pvt) Ltd v *Metallon Corp Ltd* HH-36-06 (Omerjee J) (Judgment delivered 22 March 2006)

***See above, under* PARTNERSHIP (Formation – essentials for an agreement to create a partnership).**

Practice and procedure – parties – police officer – action against – police officer acting in obedience to warrant – defective warrant – when police officer protected against suit

***Coltart* v *Min of Home Affairs & Ors* HH-67-06 (Bere J) (Judgment delivered 29 June 2006)**

***See below, under* PRACTICE AND PROCEDURE (Summons – amendment).**

Practice and procedure – *res judicata* – requirements for plea – person not a party to original action – when bound by earlier decision – person allowing matter to be fought by party professing to act in his interests

Kawondera v *Mandebvu* S-12-06 (Ziyambi JA, Chidyausiku CJ & Malaba JA concurring) (Judgment delivered 6 February 2006)

The requisites for a successful plea of *res judicata* based on a judgment *in personam* are threefold, namely, that the prior action (a) must have been between the same parties or their privies; (b) must have concerned the same

subject matter; and (c) must have been founded on the same cause of action. For the purposes of estoppel *per rem judicatam*, a party means not only a person named as such, but also one who intervenes and takes part in the proceedings, after lawful citation, in whatever character he is cited to appear, or who, though not named as a party, insists on being made so, and obtains leave of the court for that purpose or who, being cognizant of the proceedings, and of the fact that a party thereto is professing to act in his interests, allows his battle to be fought by that party, intending to take the benefit of his championship in the event of success.

Practice and procedure – review – application – to set aside arbitrator's award – application must be made in terms of Arbitration Act and time limits set out in Act must be strictly followed

Courtesy Connection (Pvt) Ltd v *Mupamhadzi* HH-63-06 (Makarau J) (Judgment delivered 25 May 2006)

See above, under ARBITRATION (Award – review – application).

Practice and procedure – summary judgment – application – defendant raising triable issue – what is required of defendant before summary judgment may be refused – vague generalities insufficient

Kingstons Ltd v *L D Ineson (Pvt) Ltd* S-8-06 (Ziyambi JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 15 May 2006)

See above, under LANDLORD AND TENANT (Tenant – eviction of).

Practice and procedure – summons – amendment – application to increase amount of damages being claimed – long delay since summons issued, through no fault of plaintiff – original claim now unrealistically low due to hyper-inflation – application granted

***Coltart* v *Min of Home Affairs & Ors* HH-67-06 (Bere J) (Judgment delivered 29 June 2006)**

The plaintiff was a legal practitioner and a Member of Parliament. He was a director of a company that sought to establish an independent radio station. The Government had been taking steps to prevent the radio station from operating. The Supreme Court ruled that it was entitled to do so and the High Court granted an interdict restraining the responsible Minister and the Commissioner of Police from interfering with the company's right to operate. A senior police officer in Harare had obtained a search warrant from a magistrate in Harare, alleging that plaintiff, in his capacity as director of the company, was suspected of breaching s 13 of the Radio Communication Services Act [*Chapter 12:04*]. The interdict had specifically stated that s 13 did not apply to the company. The plaintiff's home in Bulawayo was searched. A facsimile copy of the search warrant was shown to the plaintiff. He sought damages for *contumelia* and the unlawful search. The defendants claimed they were unaware of the interdict. The officers carrying out the search the witnesses said that they believed their function was merely to execute the warrant faxed to them by their senior officer in Harare.

The original summons was issued in early 2001 and the claim was for $100000. The trial began in May 2005 and the day before the trial the plaintiff sought to amend the summons to claim the sum of $10 000 000, the value of the local currency having dropped sharply due to high inflation. He had been trying unsuccessfully to have the matter heard expeditiously.

Held: (1) while damages must be assessed as at the time of the wrong or breach, that approach is only sustainable in a normal economic environment. There is a general acknowledgement in this country that our economic situation is on the decline, due to continuous and systematic rising of inflation, currently pegged at over 1 000%. The delay in hearing this matter was through no fault of the plaintiff. The court has a discretion to allow a litigant to amend his pleadings at any time before judgment, and given the peculiar circumstances of our situation, the

application for amendment was well founded. It would have to be in extremely exceptional circumstances where such an application is denied, particularly where it is apparent that the other party would not be prejudiced.
(2) On the facts, the interdict was granted at about the time the search was concluded and the police could thus not have been aware of the interdict.
(3) There could be no argument that the search warrant used by the officers who carried out the search was defective in that it had been issued by a magistrate who did not have jurisdiction in Bulawayo. The authority of the magistrate who issued was limited to his province.
(4) It could be assumed that the magistrate who issued the warrant must have been satisfied from information given under oath that the plaintiff had under his control the items listed on the warrant. However, s 67 of the Police Act [*Chapter 11:10*] provides wide protection to members of the force who execute their duties on the strength of a warrant which turns out to be defective. Other than in proceedings for unlawful arrest or detention, a member of the police force, acting in obedience to a warrant purporting to be issued by a judge, magistrate or justice of the peace, is not liable for any irregularity in the issuing of the warrant or for lack of jurisdiction on the part of the person issuing the warrant, provided that the officer acts *bona fide*. *Mala* fides was not shown in this case. On this ground as well the claim must fail.

Prescription – extinctive – not applicable to matter determinable in terms of customary law

Muwalo v *Mugunga* HH-60-06 (Bhunu J, Gowora J concurring) (Judgment delivered 14 June 2006)

See above, under CUSTOMARY LAW (Prescription).

Statutes – Public Order and Security Act [*Chapter 11:17*] – s 37 – members of the Defence Forces deployed in support of the police – delicts committed by – Minister responsible for police not vicariously liable

Gweshe v *Min of Defence* HH-28-06 (Makarau J) (Judgment delivered 1 March 2006)

The plaintiff claimed damages from the Minister of Defence for assaults on her by members of the Army. Units of the Army had been deployed in the high-density suburbs of Harare in support of the police, in terms of s 37 of the Public Order and Security Act [*Chapter 11:17*]. It was argued that the Minister was wrongly cited and that the Minister of Home Affairs, who was responsible for the police, should have been cited as defendant. Held: section 37(2)(b), which makes provision for the powers and responsibilities of soldiers seconded to the police, puts soldiers on secondment on the same footing as members of the police in as far as powers, responsibilities and discipline are concerned. It makes no further provision as to the liability of the requesting authority (the police) for the delicts of soldiers while on secondment and does not expressly hold the requesting authority liable for delicts committed by members of the Defence Forces while acting under the command of the requesting authority. If that was the intention of Parliament, it would have said so.

Trust – nature of – whether a legal *persona* separate from its trustees

Gold Mining & Minerals Development Trust v *Zimbabwe Miners' Federation* HH-24-06 (Makarau J) (Judgment delivered 22 February 2006)

A trust, in the wide sense, is any legal arrangement by which one person is to administer property, whether as an officer holder or not, for another or for some impersonal object. In the narrow sense, a "trust" exists when the creator of the trust hands over or is bound to hand over the control of an asset which, is to be administered by another for the benefit of some person other than the trustee or for some impersonal object. It is a legal

relationship, not a separate legal entity such as a corporation or *universitas,* even though the trustees may together form a board akin to a board of a company or of a voluntary association. Our law of trusts has not sufficiently grown to recognize a limited separate personality of a trust, even though some trusts operate more or less on the same lines as a voluntary organization of incorporated company. In such cases, the trust has evolved a personality of sorts that appears separate from the personality of the trustees. A trust is not a legal person and therefore cannot be defamed, although the trustees themselves retain the capacity to sue for damages for their injured *fama,* collectively or individually.

Words and phrases – "similar" (in relation to trade marks and designs)

First Mutual Life Assurance Soc of Zimbabwe v *Intermarket Hldgs Ltd & Ors* HH-8-06 (Hlatshwayo J) (Judgment delivered 17 January 2006)

See above, under INTELLECTUAL PROPERTY (Trade mark – registered trade mark – infringement).

Words and phrases – "supermarket"

Old Mutual Properties Invstms v *Metro Intl (Pvt) Ltd & Anor* HH-53-06 (Patel J) (Judgment delivered 11 May 2006)

See above, under CONTRACT (Interpretation).