Latest update: 25 November 2007

CASES DECIDED JANUARY – JUNE 2007

Administration of estates – executor – appointment of – estate governed by customary law – procedure for appointment – letters of administration not required

Mutyasira v *Gonyoro & Anor* S-80-06 (Sandura JA, Ziyambi & Malaba JJA concurring) (Judgment delivered 28 May 2007)

In 1976 the deceased married the first respondent in terms of the African Marriages Act [*Chapter 238*] (now the Customary Marriages Act [*Chapter 5:07*]). The deceased died intestate in 2002 and his widow had his estate registered at the Harare Magistrates Civil and Customary Law Courts. An edict meeting subsequently was held, presided over by the provincial magistrate. The first respondent was appointed the executrix dative and a document to that effect was issued to her by the magistrate, setting out her duties. A letter was also issued to her to enable her to get a statement from the deceased's bank. Just under three years later, when no distribution plan had been presented to a magistrate, the second respondent (the Master) wrote to the first respondent, requesting her to attend a special meeting to discuss all matters concerning the estate. She and the other beneficiaries of the estate attended the meeting. At the end of that meeting the Master appointed the appellant as a *curator bonis* in the estate. Thereafter, the Master, purportedly acting in terms of s 25(1) of the Administration of Estates Act [*Chapter 6:01*] ("the Act"), gave notice of an edict meeting to be held at his office. The first respondent and the other beneficiaries of the estate attended the meeting, at the end of which the appellant was appointed executor dative. The High Court, on the application of first respondent, interdicted the appellant from disposing of any of the assets of the estate and to set aside his appointment as executor dative. On appeal, it was argued for the appellant that ss 23 and 25 of the Act apply to the estates of all persons, including persons subject to customary law, and that as the first respondent was not issued with letters of administration in terms of s 23 of the Act her appointment was invalid.

Held: ss 23 and 25 are in Part III of the Act, which is headed "Estates of Deceased Persons" and governs the estates of persons who are not subject to customary law, i.e. those governed by the general law of the land; whilst Part IIIA, which is headed "Estates of Persons Subject to Customary Law", governs the estates of persons subject to customary law. It being common cause that the deceased's estate was governed by customary law, it followed that the deceased's estate was governed by Part IIIA of the Act. Accordingly, no letters of administration were required in respect of the first respondent's appointment, which was made in terms of s 68B of the Act. In terms of that section, the Master, with the concurrence of the relatives present at a meeting summoned in terms of subs (1), shall appoint a person to be the executor of the estate of the deceased person. In terms of s 68(1), the definition section in Part IIIA of the Act, "Master", for the purposes of Part IIIA, includes a magistrate or other person designated by the Minister of Justice in terms of s 68I; and "executor" means a person appointed as executor of an estate in terms of s 68B. The first respondent's appointment by the magistrate was thus valid. The appointment of the appellant was invalid, as the first respondent had not been removed from office in terms of s 117(1) of the Act, and so there was no vacancy to fill.

Administrative law – administrative decision – decision adverse to applicant – relief obtainable – proceedings under Administrative Justice Act [*Chapter10:28*] – desirability of

Administrative law – review – interference by court with administrative actions or decisions – when court will interfere – failure to place before court evidence required for exercise of administrative discretion

ANZ v *Media & Information Commission & Anor* HH-29-07 (Gowora J) (Judgment delivered 9 May 2007)

In terms of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] (AIPPA), any provider of mass media services must be registered as such with the Media and Information Commission. The applicant applied for registration, which was refused. The Administrative Court set aside the decision of the Commission and ordered that the applicant was deemed to have been registered. The Supreme Court held the Administrative Court had misdirected itself in so ordering when it had not determined the allegations by the Commission that the applicant had not complied with the Act. It set aside the Administrative Court's order. Before the application for the registration was made to the Commission, the Chairman of the Commission had written articles describing the applicant as an outlaw and saying that its application would not be considered. Although the Supreme Court found that actual bias had not been established on the part of the Chairman, it concluded that the proceedings of the Commission were voidable on the grounds of bias and ordered that the issue of the registration of the applicant be remitted to the Commission for consideration *de novo*. The applicant's subsequent application was again refused by a panel of which the Chairman was a member. The High Court set aside this decision and ordered the

matter to be heard again *de novo*. It found that not only was the Chairman biased, but that the entire Commission had exhibited bias against the application. The applicant asked the respondent Minister to appoint new commissioners as the existing ones were disabled from hearing the matter due to their bias. The Minister did not reply or take any action before the applicant applied the court for relief, seeking an order that it be deemed to be registered in terms of the Act. In response to the application, the Minister took the stance that despite the finding of he retained confidence in the Commissioners and did not wish to replace them.

The applicant argued that there was nothing in the Administrative Justice Act [*Chapter 10:28*] (the AJA) which prevented the court from declaring that the applicant was deemed to have been duly registered in terms of AIPPA. It contended further that a mandatory interdict would be appropriate as the legislation envisages registration except in limited circumstances. From the date that the Supreme Court judgment was handed down both respondents were aware that the Commission could not entertain the application for its registration by the applicant. In so far as the applicant was concerned it was clear that there was no administrative body to deal with the application.

Held: (1) The Minister's statement that he retained confidence in the members of the Commission and found no reason to displace them would be indicative of a disinclination on his part to allow the applicant to exercise its right to apply for registration in terms of the Act. The Supreme Court's and High Court's findings of bias meant that the Minister should have put in place measures for the speedy determination of the application for registration by the applicant. (2) Whilst the AJA does provide for relief against an administrative authority which has not acted in accordance with its statutory duty, it does not exclude an applicant from seeking other appropriate relief from such administrative authority. It is clear that, amongst other rights, the intention of the AJA is to provide for the right to administrative actions and decisions that are lawful and procedurally fair and to provide for relief by a competent court against administrative actions and decisions that are contrary to the provisions of the AJA. The AJA provided the best possible form of relief to a litigant aggrieved by a recalcitrant administrative authority. (3) There was no reason why the relief provided for in terms of s 4 of the AJA could not be availed to the applicant. Indeed, it would be most appropriate for an order in terms of s 4(2)(c) for the Minister to be directed to take such administrative action as would put in place conditions and a legal frame work for the application for registration by the applicant to be considered and determined. (4) Although the Commission did exist, all the Commissioners were effectively disabled by the judgments which found them to be biased against the applicant. However, to contend that there in fact no administrative body in existence was to go too far. The membership of the Commission has the lawful authority envisaged in AIPPA to carry out the administrative acts for which it has been appointed. None of the Commissioners suffered from a legal impediment as envisaged in s 40(3) of AIPPA. Their disability, being specifically to do with the applicant, did not denude the Commission of its lawful authority to do its tasks and perform the functions it was meant to perform in terms of AIPPA except as it relates to the applicant. (5) The court was being asked to place itself in the shoes of the Commission and make the decision whether or not the applicant should be granted a licence to operate a mass media service. While there was substance in the argument that AIPPA allows no discretion to the Commission to deny a licence save in certain limited circumstances, in order to be granted such licence, an applicant needs to satisfy the Commission that there has been compliance with AIPPA That issue that had not been determined by the Commission *in casu*. The question was not considered. In order to grant the relief being sought, the court would then have to consider whether the applicant had complied with AIPPA and hence itself become the licensing authority. (6) A court will not interfere in the sphere of administrative actions or decisions except in very exceptional situations, but it will normally interfere in the administrative sphere in the following circumstances: (a) where the end result is a forgone conclusion and a referral back would be a waste of time; (b) where further delay would cause unjustifiable prejudice to the applicant; (c) where the statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and (d) where the court is in as good a position to make the decision itself. *In casu*, no evidence had been placed before the court, and thus there was no way the court could know, that there had been due compliance by the applicant with the provisions of AIPPA in order to qualify for the grant of a certificate of registration. That knowledge would peculiarly be in the ambit of the Commission as the administrative authority for purposes of issuing a certificate of registration.

Administrative law – review – grounds for – legitimate expectation – limits of use of such principle – not a basis on which to found a cause of action

MDC v *President & Ors* HH-28-07 (Makarau JP) (Judgment delivered 9 May 2007)

See below, under Practice and procedure (Order – declaratory order).

Appeal – criminal case – appeal to High Court – appeal against conviction – Attorney-General not supporting conviction – procedure to be followed

S v *Sando* HH-46-07 (Uchena J, Patel J concurring) (Judgment delivered 14 June 2007)

Where an appeal in a criminal case (other than an appeal against sentence only) has been noted to the High Court, and the Attorney-General does not support the conviction, the appeal may be disposed of in chambers. The procedure that should be followed is as follows:
The Attorney-General or his representative should (a) read the appeal record and decide whether or not he supports the conviction; and (b) if he does not support the conviction, he should give notice of his decision to the registrar of the High Court, together with his reasons for that decision. He can give such notice at any time before the hearing of the appeal. The next stage is for the registrar to place the appeal record, the Attorney-General's notice and reasons before a judge. The judge will read the Attorney-General's notice and reasons, together with the appeal record. If he is satisfied that the conviction cannot stand he will allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives. The appeal will be allowed without any further participation of the parties.

Appeal – criminal case – notice of appeal – magistrate's duty to comment on matters raised in notice of appeal – not sufficient simply to adhere to decision without comment

S v *Katsiru* HH-36-07 (Bhunu J, Makarau JP concurring) (Judgment delivered 31 May 2007)

When an appeal is noted in a criminal case and the magistrate is asked for his comments, he must not take the easy way out and leave everything to State counsel and the appeal court when it is the correctness or otherwise of his decision at stake. When confronted with a notice of appeal the trial magistrate is duty bound to make an honest reassessment of his decision in the light of the notice of appeal. It is helpful to everyone concerned, particularly to the appeal court, to know whether or not the trial magistrate still abides by his decision despite the notice of appeal. If for one reason or another the trial magistrate has had a change of heart, it is more honourable to say so than to adhere to an indefensible decision or take the easy way out by declining to comment. Whatever the trial magistrate's position may be, he is duty bound to give brief and concise reasons for his position after considering the notice of appeal. In doing so he may save precious time and costs. The ends of justice cannot be served by prevaricating and being non-committal when the liberty of a citizen is at stake.

Appeal – evidence – leading of fresh evidence on appeal – evidence available at time of trial but not adduced due to error of judgment on part of legal practitioner – not a good ground on which to grant leave to adduce such evidence

Sate v *Chimbari & Ors* S-59-06 (Malaba JA, Sandura & Gwaunza JJA concurring) (Judgment delivered 23 January 2007)

An error of judgment on the part of a litigant or his legal practitioner as to the probative value of a piece of evidence is not a good ground on which an appellate court can grant leave to adduce the evidence on appeal. To do so would be tantamount to allowing a party to re-open a case as opposed to leading further evidence which was not available to the party at the time of trial but was discovered after the trial.

Appeal – further evidence – application to lead further evidence – documents required in support of application – effect of failure to provide such documents

Chitengwa v *Manase* S-55-06 (Cheda JA, in chambers) (Judgment delivered 16 January 2007)

Rule 39(4) of the Supreme Court Rules 1964 provides that an application to lead further evidence on appeal shall be accompanied by that evidence in affidavit form, as well as an affidavit from a legal practitioner as to why the evidence was not led previously. It is not enough for the applicant in his own affidavit to allege that the evidence exists, even if the other party does not dispute it. The court can only make an assessment of the evidence if the evidence is placed before it.

Arbitration – award – setting aside of – application – may only be made in terms of the Model Law – three month time limit – no extension possible

Mtetwa & Anor v *Mupamhadzi* S-35-07 (Gwaunza JA, Sandura & Garwe JJA concurring) (Judgment delivered 8 May 2007)

In terms of Article 34(1) of the UNCITRAL Model Law, which is the first Schedule to the Arbitration Act [*Chapter 7:15*], recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3). In terms of para (3), an application to set aside an award may not be made more than three months after the party seeking to have it set aside, received the award. Article 34 does not provide for a possible extension of the period for good cause shown or on any other ground. If the application is not made within the three month period, the right to have the award set aside is irrevocably lost.

Judgment of Makarau J (as she then was) in *Courtesy Connection (Pvt) Ltd* v *Mupamhadzi* HH-63-06 upheld.

Bills of exchange – treasury bills – nature of

Standard Chartered Bank Zimbabwe Ltd v *ZRA* HH-26-07 (Kudya J) (Judgment delivered 25 April 2007)

See below, under REVENUE AND PUBLIC FINANCE (Income tax – gross income).

Company – director – acts by – validity – disposal of greater part of assets of company – requirement for specific approval of company in general meeting – directors having no power to dispose of such assets under internal regulations

Ngatibataneyi (Pvt) Ltd v *Vengenayi & Anor* S-13-07 (Malaba JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 29 May 2007)

The appellant company owned a vacant piece of land, its sole asset. One of its two directors and shareholders, apparently without the consent of the other shareholder (who was out of the country) signed a mandate instructing an estate agent to sell the stand on behalf of the appellant. Whilst purporting to represent the appellant she signed an agreement of sale in terms of which the appellant purported to sell the stand to the first respondent. The agreement of sale indicated that the seller of the stand was the appellant, represented by the director in her capacity as secretary. Words followed to the effect that she was duly authorized by resolution of an extraordinary board meeting of directors of the company. Before transfer could take place, the director wrote to the estate agent cancelling the agreement of sale on the ground that, when she purported to enter into the agreement on behalf of the appellant, she had not obtained the consent of the co-shareholder who had since refused to grant the consent to have the stand sold. The first respondent rejected the repudiation of the contract by the appellant and applied to the High Court for an order directing the appellant to transfer the stand into his name against tender of the purchase price and transfer fees. He relied on s 12(a) of the Companies Act [*Chapter 24:03*] which provides that any person having dealings with a company or with someone deriving title from a company shall be entitled to assume, and the company and anyone deriving title from it shall be estopped from denying, that the company's internal regulations have been duly complied with. The two directors averred that there had been no general meeting of the shareholders agreeing to sell the stand. Reliance was placed on s 183 of the Act, which provides that the directors of a company shall not be empowered, without the specific approval of the company in general meeting, to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company. The first respondent argued that s 183 was part of the internal regulations of the company and that he was protected by s 12(a).

Held: If s 183 formed part of the internal regulations of the company giving rise to the inference under s 12(a) of the Act by anyone dealing with the company, that its requirements had been complied with, there would have been no need for s 183 to open with the words "Notwithstanding anything in the articles…" The words can only mean that, notwithstanding the authority given to directors of a company by the articles of association (which ordinarily contain the internal regulations of a company), the directors have no power to dispose of the whole or greater part of the assets of the company without first complying with the mandatory requirements of s 183. In other words, the disposal of the whole or the greater parts of the assets of a company is not a function falling within the authority customarily given to directors under internal regulations. That authority can only be obtained from a general meeting of the company in the form of a resolution approving in its terms the specific transaction. The intention behind s 183 was to protect the assets of a company from disposal by directors without the knowledge and consent of the shareholders by placing the disposal of the whole or greater part of the assets of the company outside the ambit of the application of the rule embodied in s 12. The effect of upholding the application of s 12(a) in the circumstances of this case would be to render enforceable that which s 183 has in the public interest declared illegal or invalid.

Company – winding up – order for winding up obtained from court – staying of winding up proceedings – not necessary to apply for rescission of order – party entitled to proceed under s 227 of Companies Act [*Chapter 24:03*]

Khuzwayo v *Assistant Master & Ors* HB-8-07 (Bere J) (Judgment delivered 18 January 2007)

The third respondent has obtained a default judgment for the winding up of a company of which he and the applicant were shareholders, there being a dispute over the shareholding in the company. The applicant sought to have the proceedings stayed, in terms of s 227 of the Companies Act [*Chapter 24:03*]. Counsel for the third respondent, without taking instructions from his client, filed a notice of opposition to the application. He sought to justify his actions on the basis of the urgency of the matter. He also argued that the confirmed order could only be reversed by way of filing a proper application for rescission of the final order granted.
Held: (1) Legal practitioners are conduits through which litigants' cases are properly put before the courts for determination. They are the professional servants of their clients and can only act on specific instructions from their clients. They are the agents through which litigants' cases are dealt with because of their assumed expertise in the field of law. A legal practitioner cannot, in the absence of specific instructions from his client, speculate on the possible line of defence or position of his client. To do so would be to abuse his role vis-à-vis his client, as well as an effort to mislead the court, which looks to him, as an officer of the court, for proper and professional guidance. (2) With regard to the alleged the urgency of the matter, the rules of practice and procedure have built-in mechanisms to deal with the situation counsel was in. He could have easily sought the indulgence of the court to enable him to take proper instructions from his client. He was certainly not in such a desperate situation as to compel him to violate basic court procedure. (3) Section 227 of the Companies Act is quite explicit and requires no interpretation: it provides an alternative remedy to an application for rescission of judgment as provided for in the High Court Rules. In a proper case, where the winding up of a company is involved and where the need to stay those proceedings arises, a litigant has this option at his her disposal. If he decides to opt for this course of action, he litigant cannot be condemned for doing so.

Contract – breach – remedies – specific performance – when should be ordered – court's discretion – effect of order would be to compel one person to associate with another against his will – specific performance refused

Mufakose Housing Co-op Soc v *Magozore* HH-17-07 (Makarau JP) (Judgment delivered 28 March 2007)

The applicant was a housing cooperative society set up with the objective of providing accommodation to its members. The respondent was a member of the applicant and had been allocated a stand for his occupation. Owing to a shortage of available housing, the applicant issued an instruction to the respondent that he should share the housing unit with another person, who was a stranger to him. He refused to do so, and the applicant sought an order compelling the respondent to opens his accommodation to the person nominated by the society, failing which he be served with a notice terminating his membership of and expelling him from the applicant.

Held: although the applicant was a registered cooperative society, it was essentially a voluntary association and, in terms of legal relationships, the applicant and the respondent were bound to each other in terms of a contract. One of the terms of the contract was that the applicant would make rules for its members and the respondent as a member should abide by those rules. While this was a term to be expected as between the applicant and its members for the proper administration of the applicant, the rule made by the applicant to compel its members to share accommodation against their will and with persons selected by the applicant was not enforceable or compellable. Sharing a house is a personal matter and calls for some intimacy between the housemates. Certain amenities have to be shared and the means of gaining access into and out of the house is the same and has to be shared. The court has a discretion in compelling the performance of a personal obligation under a contract. A court should not compel a citizen to associate with another against his will even if he is so bound in contract. The right to freely associate should be upheld and the applicant should seek alternative remedies for the alleged breach of its rules.

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 18(2) — right to fair hearing — whether accused person has a right of access to investigation diary in police docket

S v *Chibaya & Ors* HH-4-07 (Gowora J) (Judgment delivered 1 February 2007)

In the course of a criminal trial, counsel for the accused applied for an order requiring the prosecution to furnish the defence with the transcript of a previous trial involving another person, as well as copies of the entries in the investigation diary forming part of the police docket.
Held: (1) the record of the other trial, whether or not it was relevant to the present proceedings, was in the public domain and the accused were entitled to obtain a copy of it. However, it was not under the control of the prosecution, so the prosecution

could not be ordered to provide it. (2) The entitlement of the accused to witness statements contained in the police docket is part of our law. He is entitled to be furnished by the State with all information that would enable him to adequately prepare for the trial and mount a defence to the charges confronting him. However, entries in the investigation diary are not evidence that will be produced at the trial. The investigation diary is a running commentary on the efforts by the police to investigate the matter, but unless the court finds that it would be fair for the accused to be given access to the diary, on the grounds that it could provide assistance to the accused in the prosecution of his defence, the accused would not be entitled to access to it.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – referral of matter to Supreme Court – need for court *a quo* to hold enquiry – need to give written notice to prosecution

S v *Njobvu* S-61-06 (Ziyambi JA; Gwaunza & Garwe JJA concurring) (Judgment delivered 27 January 2007)

Counsel for the applicant applied to the magistrate trying the applicant on a criminal charge for the matter to be referred to the Supreme Court in terms of s 24 of the Constitution on the grounds that the applicant's right to trial within a reasonable time had been infringed. The magistrate granted the application without hearing any evidence or argument, holding that the court had no discretion other than to refer the case to the Supreme Court.
Held: the matter was not properly before the Supreme Court. Before permitting the applicant to raise the question of not having been brought to trial within a reasonable time, the lower court should be satisfied that ample written notice has been given to the State, with a copy filed of record, of the intention to advance the complaint. The prosecution is entitled to be afforded the time and opportunity to investigate the cause of the delay and to be ready to adduce evidence as to the reasons therefor, if it is considered necessary to do so. Secondly, counsel was obliged to call the applicant to give evidence, as it is on the basis of the evidence led in the course of the application in the court *a quo* that the Supreme Court will conduct an inquiry into the constitutionality or otherwise of the delay. Thirdly, the magistrate is obliged to hear evidence and then refer the question to the Supreme Court for determination if he is of the opinion that the application is not frivolous or vexatious. He can only arrive at this conclusion if he has heard the evidence.

Contract – breach – damages – assessment of loss – replacement value of motor vehicle – assessment based on unofficial "parallel" rate of exchange – court refusing to award damages on that basis

Contract – validity – disclaimer clause – when may be treated as unfair in terms of Consumer Contract Act [*Chapter 8:03*] – customer leaving vehicle for repair – not fair to restrict repairer's liability for loss or damage caused – implied term of contract – when may be imported – implied term to return vehicle in a state not worse than when it was left with repairer

Mudukuti v *F C M Motors (Pvt) Ltd* HH-14-07 (Patel J) (Judgment delivered 2 April 2007)

The plaintiff sent his car to the defendant's garage for routine servicing and repairs. He had taken it to that garage on several previous occasions as the defendant was a dealer in the type of car. A job card was completed. It contained a disclaimer clause, in small print, to the effect that "[the defendant] is not liable for loss or damage to [the plaintiff's] vehicle or contents therein". He returned to the defendant's workshop on two occasions. On the first occasion, he found a mechanic strapping the engine wires together because the car had caught fire. On the second, he found that the gear-box had collapsed. About 11 months later, he was told by the defendant's foreman that the engine had seized up and that there was nothing that the defendant could do about it. The vehicle could not be repaired satisfactorily, due to its age and the availability of parts. A valuator assessed the loss at $900 million, based on the cost of a similar vehicle in South Africa and applying the unofficial, "parallel", rate of exchange, as that was the rate in fact used for most imports in the motor industry. The plaintiff claimed the repair and delivery of his car or, in the alternative, payment in the sum of $900 million as damages being the replacement value of the vehicle.
The defendant relied on the disclaimer clause.
Held: (1) the plaintiff's acceptance of the disclaimer clause immediately above his signature must be inferred from the circumstances even though the clause was not specifically drawn to his attention.
(2) The agreement was one that fell within the ambit of the Consumer Contracts Act [*Chapter 8:03*], in accordance with the definition of "consumer contract" in s 2, as being a contract for the supply of services in which the supplier is dealing in the course of business and the user is not. Under s 5(1), a consumer contract may be found to be unfair if it excludes or limits the obligations or liabilities of a party to an extent that is not reasonably necessary to protect his interests. The **clause in**

question did just that. It was also patently contrary to commonly accepted standards of fair dealing. It was unconscionable that a business enterprise engaged in motor vehicle repairs, having agreed to undertake specific repairs to a customer's vehicle and taken custody and charge of the vehicle, could simultaneously renounce all responsibility for any loss or damage to the vehicle or its contents. Such a broad and unqualified exemption is neither reasonably necessary nor congruent with acceptable standards of fair dealing in the motor repair industry. Further, under s 4, if the contract contains a "scheduled provision", the court may grant relief of various sorts. One class of scheduled provision is one whereby the supplier or services excludes or limits the liability which he would otherwise incur under any law for loss or damage caused by his negligence. The clause was also impeachable on this ground. In terms of s 4, the exemption clause under review would be cancelled and declared to be null and void for the purposes of interpreting and applying the agreement between the parties.
(3) On the facts, the defendant was entirely responsible for the parlous state of disrepair in which the vehicle ended up. The contract between the parties was for the defendant to service and repair the plaintiff's vehicle in accordance with his stated instructions. The exemption clause having been struck down, it was possible to import an implied term to return the vehicle to the plaintiff in a condition not worse than it was in when it was delivered to the defendant's garage. Such a term was necessary for business efficacy and must be implied by trade usage in the motor vehicle repair industry. It could also be implied from the facts and from the common intention of the parties as inferred from the express terms of their contract and the surrounding circumstances.
(4) The valuation was based on the unofficial parallel exchange rate, which the courts cannot recognise and give effect to and the claim for damages would have to be dismissed.
(5) However, an order for specific performance would be granted.

Contract – breach – remedies – specific performance – when should be ordered – court's discretion – effect of order would be to compel one person to associate with another against his will – specific performance refused

Mufakose Housing Co-op Soc v *Magozore* HH-17-07 (Makarau JP) (Judgment delivered 28 March 2007)

The applicant was a housing cooperative society set up with the objective of providing accommodation to its members. The respondent was a member of the applicant and had been allocated a stand for his occupation. Owing to a shortage of available housing, the applicant issued an instruction to the respondent that he should share the housing unit with another person, who was a stranger to him. He refused to do so, and the applicant sought an order compelling the respondent to opens his accommodation to the person nominated by the society, failing which he be served with a notice terminating his membership of and expelling him from the applicant.

Held: although the applicant was a registered cooperative society, it was essentially a voluntary association and, in terms of legal relationships, the applicant and the respondent were bound to each other in terms of a contract. One of the terms of the contract was that the applicant would make rules for its members and the respondent as a member should abide by those rules. While this was a term to be expected as between the applicant and its members for the proper administration of the applicant, the rule made by the applicant to compel its members to share accommodation against their will and with persons selected by the applicant was not enforceable or compellable. Sharing a house is a personal matter and calls for some intimacy between the housemates. Certain amenities have to be shared and the means of gaining access into and out of the house is the same and has to be shared. The court has a discretion in compelling the performance of a personal obligation under a contract. A court should not compel a citizen to associate with another against his will even if he is so bound in contract. The right to freely associate should be upheld and the applicant should seek alternative remedies for the alleged breach of its rules.

Contract – formation – mental capacity of contracting party – tests for whether party had requisite mental capacity

Executive Hotel (Pvt) Ltd v *Bennett NO* S-77-06 (Chidyausiku CJ, Cheda & Ziyambi JJA concurring) (Judgment delivered 31 May 2007)

The deceased was an elderly man who had suffered two strokes, was affected by Parkinson's disease and was blind. His speech and his motor movement were impaired and he needed 24 hour nursing services. There was medical and other evidence that he suffered from alternating periods of clarity and mental confusion. From November 1999, shortly before he died, he was on a sedative that might have contributed to his lack of reasoning ability and would have made him drowsy. His doctor considered that the deceased was incapable of handling his own affairs.

The deceased was the majority shareholder in a company which owned a piece of land in which was erected a hotel. The hotel was leased to and run by the appellant company. A few months before he died, the deceased attended a meeting at which he purported to sell all the shares to the appellant. He did so for a price considerably below the market value. The deceased was not assisted at the meeting, whereas the appellant was represented by two directors and its legal practitioner. The executor of the deceased estate obtained an order setting aside the contract on the grounds of the deceased's mental incapacity to contract.

The judge *a quo* resolved the matter on the papers, without calling for oral evidence. Her decision to do so was attacked on appeal.

Held: (1) The question of whether the deceased had the requisite mental capacity at the time of signing the agreement of sale was a question of fact, to be decided by the court. It would have been over fastidious for the judge to insist that the doctor's evidence be tested by cross-examination. It was expert evidence which had not been challenged. No other expert evidence had been introduced to cast any doubt on its veracity. Faced with such uncontroverted expert evidence, the judge would have been shirking her responsibility not to resolve the dispute of fact in favour of the applicant. While it might have been preferable to hear evidence in regard to the disputed facts in this case, it was possible to take a robust approach to the evidence and reach a conclusion without the risk of doing an injustice to the appellant.

(2) There are 3 principles for testing the existence or otherwise of mental capacity to make a contract: (a) was the state of mind of the contracting party whose capacity is at issue such that he was incapable of estimating what was or what was not a fair and beneficial bargain? (b) was the state of mind of the contracting party whose capacity is at issue such as would in common honesty not make him liable or responsible for such act or contract?; and (c) whether the contracting party whose capacity is at issue was of such unsound mind as to be incapable of understanding and appreciating the transaction into which he purported to enter. The age, blindness and apparent poor health of the late Irwin and the ridiculously low purchase price he was asking for the shareholding should have told the appellant's representatives that all was not well and that it was desirable to have the deceased assisted either by his own legal practitioner or by someone who was managing his business affairs. Failure to appreciate this represented a very serious lapse of judgment. For this reason it could only be said that the appellant's directors were the authors of the misfortune of the appellant. They should have known better and at least attempted to ensure that a blind man of eighty-eight years in apparent poor health was assisted. The deceased was clearly confused, not only as to his shareholding, but also as to whether he had obtained his family's consent to the disposal of the company.

Contract – interpretation – "golden rule" – words to be given their ordinary meaning unless otherwise defined – "supermarket" – meaning

Metro Intl (Pvt) Ltd v *Old Mutual Property Invst Corp (Pvt) Ltd & Anor* S-83-06 (Malaba JA, Cheda & Sandura JJA concurring) (Judgment delivered 26 June 2007)

The appellant was the lessee of trading premises which had an area of just over 2000 square metres. The lease stipulated that no more than 1000 square metres of the premises, which was also used as a clothing store, could be used as a "supermarket" (a term which was not defined in the contract), without the prior permission of the lessor. When the clothing store went out of business, the appellant wanted to use the whole of the premises as a supermarket. The 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 appellant respondent argued that the word "supermarket" pertained only to the trading area.

Held: The parties did not define the word "supermarket" when they used it, so they must be presumed to have used the word in its ordinary and grammatical sense. In applying the "golden rule" of interpretation to identify the ordinary and grammatical meaning in which the word "supermarket" was used in the two lease agreements, the standard definition of the term given in an English dictionary or elsewhere can be used. The concept of a supermarket as a large self-service store occupying a large floor space and retailing a wide variety of food and household goods is the essence of the definitions given. The space where goods are displayed and paid for, *viz* the trading area, is unquestionably an essential part of a supermarket. Moreover, 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 is difficult to separate the other amenities and facilities that are usually attached to a supermarket from its trading area *per se*. In other words, a supermarket in its totality must be viewed as comprising not only its trading area but also its ancillary warehousing, refrigeration and ablution facilities. What the

appellant did was to convert the whole floor space of the leased premises into a large supermarket without prior written consent of the landlord.

Criminal law – murder – defences – justifiable killing – killing of person attempting to escape lawful arrest – reasonable force – when killing justifiable

S v *Mhomho* S-57-06 (Malaba JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 23 January 2007)

The appellant, a soldier, had been detailed, along with a policeman, to ambush a spot on the border suspected to be used by illegal border crossers. They did so at night. During the evening the deceased and another person approached the ambush spot and were challenged. The deceased attacked the accused and tried to take away his rifle but he and the other man fled when they saw the policeman. The accused fired a shot in the direction in which he could see the two men fleeing. The shot hit and killed the deceased. The appellant was charged with murder. It was argued for him that the killing was justifiable in terms of s 42(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].
Held: at the time the appellant discharged the firearm the deceased and his companion had committed the offence of assault in addition to a contravention of s 42(2) of the Immigration Act [*Chapter 4:02*]. However, for the appellant to have invoked the protection afforded by s 42(2) of the Criminal Procedure and Evidence Act, it had to be been shown that he had taken other reasonable steps in the attempt to prevent the deceased from escaping before resorting to the use of the force that killed him. This the appellant did not do: he appeared to have simply fired the shot in the direction of the two people just because they were fleeing. He clearly acted precipitately and prematurely took the drastic action of shooting the deceased. He was negligent in that he failed to take reasonable steps to ascertain the whereabouts of the deceased before discharging his firearm and thus should be convicted of culpable homicide.

Criminal procedure – jurisdiction – territorial – murder – Zimbabwe national committing murder in neighbouring country – need for some element of the crime, or the harmful effect thereof, to have occurred in Zimbabwe

S v *Nkomo* S-79-06 (Chidyausiku CJ, Ziyambi JA & Ndou AJA concurring) (Judgment delivered 31 May 2007)
The appellant, a Zimbabwean national, went to Botswana, taking a pistol with him. While there he robbed and murdered the owner of a restaurant, using the pistol. He fled to Zimbabwe, bringing with him some of the money he had stolen from the restaurant, as well as the pistol. He was convicted in the High Court. The High Court referred to the Supreme Court the question of whether it had jurisdiction to try the appellant for murder. The High Court also referred the question of whether it would have been competent for the Attorney-General to have charged the appellant with robbery, since the proceeds of the robbery were brought into Zimbabwe.
Held: (1) there is a trend, followed in Zimbabwe as well as other countries, indicating that where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements, or their harmful effect, occurred. A more flexible and realistic approach, based on the place of impact, or of intended impact, of the crime, is favoured. (2) There was no basis for the assumption of jurisdiction on the facts of this case. The connection between the crime and Zimbabwe was far too tenuous to form a basis for assuming criminal jurisdiction by a Zimbabwean court. None of the essential elements of the offence were committed on Zimbabwean soil. There was no harmful impact or effect on Zimbabwe. The fact that the appellant was a Zimbabwean and that any order given by the court would be effective was not sufficient to found criminal jurisdiction in respect of an offence committed outside Zimbabwe's borders and having no impact in Zimbabwe. The only link or connection with Zimbabwe was that the weapon used in the commission of the crime originated in Zimbabwe and was found in Zimbabwe after the offence. This, either alone or in conjunction with other factors of this case, was not sufficient to found jurisdiction in Zimbabwean courts for an offence that was committed outside its borders. (3) The appellant was not charged with robbery or theft, so there was no basis for the High Court to refer that matter to the Supreme Court.

Criminal procedure – review – purpose of – no discernable irregularity in proceedings – magistrate having misgivings about arrangements between prosecution and defence – not a ground for review

S v *Tsatsa & Anor* HB-38-07 (Ndou J) (Judgment delivered 29 March 2007)

The accused were placed on remand after the local public prosecutor, who believed there was insufficient evidence, was instructed by the Acting DPP to proceed. The accused were represented by a legal practitioner, who consented to the remand. The magistrate had misgivings about the matter and referred it to the High Court for review.

Held: Review proceedings are not for investigative purposes when there is discord in the prosecution camp. Review should be used where there is gross irregularity in the proceedings being reviewed. Once the accused persons' counsel and the prosecutor counsel agreed that the accused be placed on remand there was no issue left for determination as far as the placing of the accused on remand was concerned. The role of the court is to adjudicate on real issues and ignore technical and wholly academic points. The fact that the magistrate was suspicious of the arrangements did not make the matter reviewable. There was no discernable irregularity in the proceedings. The magistrate himself, notwithstanding his reservations, placed the accused persons on remand.

Criminal procedure – trial – conduct of – interpreter – accused being denied use of interpreter conversant with his own language – trial not fair – fatal irregularity

S v *Dikatholo* HB-36-07 (Cheda J) (Judgment delivered 8 March 2007)

The appellant, a Botswana national was charged with theft by false pretences. He pleaded not guilty. During the trial he advised the court that he would have been comfortable with a Tswana interpreter, but his request was turned down. The language employed by the magistrate and the tone of his questions was calculated to coerce the accused into accepting to use English, a language he was not proficient in.
Held: All judicial officers are expected to adjudicate on trials with the cardinal rule in mind that every accused person is entitled to a fair trial. The trial magistrate failed to accord the appellant a fair trial by depriving him of the right to conduct his defence in a language he understood best. This failure was a gross irregularity of a so gross a nature that it breached the appellant's constitutional right to a fair trial. The conviction should be set aside and the matter tried again before a different magistrate.

Damages – assessment – breach of contract – general and special damages – distinction between – plaintiff's duties when special damages claimed – loss of profits – whether general or specific damages may be claimed

Rowland Electro Engineering (Pvt) Ltd v *Zimbank* HH-3-07 (Gowora J) (Judgment delivered 10 January 2007)

The rationale for awarding damages to an aggrieved party based on a breach of contract is to place that party in the position he would have occupied had a breach not occurred by the payment of money and without causing undue hardship to the defaulting party. A comparison is made between the patrimonial position that the plaintiff would have occupied had the breach not occurred and the position that exists as a result of the breach. The plaintiff would therefore be entitled to the difference where the former exceeds the latter.
A contractual duty to pay damages can arise only if the wrongdoer's conduct, in addition to other requirements, factually caused the harm suffered by the plaintiff. Consequently, conduct can be described as a damage causing event only with reference to the damage actually flowing from such an event. Without factual causation, no duty to pay damages can arise. Factual causation on its own, however, is not sufficient as it is undesirable to hold a person liable for all the damage which he has caused. A second enquiry then arises: whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether the loss is too remote.
General damages are the loss which a plaintiff suffers as a direct result of a breach of contract, or the intrinsic loss suffered by the plaintiff due to the diminution of the value of the subject matter of the contract or the impairment of its use. Special or extrinsic damages constitute loss flowing indirectly from the breach of the contract and extend to all the property. In the normal course special or extrinsic damages are regarded as being too remote to be recovered unless, in the special circumstances attendant upon the conclusion of the contract, it can be deduced that the parties actually or presumably foresaw that they would probably flow. In a claim for special damages it must be alleged in the pleadings and established by evidence that the loss being claimed was within the contemplation of the parties.
A claim for damages in the form of loss of profits is not necessarily special damages. Such loss of profits may be general damages. It depends on the circumstances of each case and in particular the type of loss of profits being claimed. Damages for loss of profits can only be awarded when such loss is the direct, natural or contemplated result of non-performance. The plaintiff must establish that such damages were in the contemplation of the parties when the contract was concluded.

Damages – loss of support – parent claiming damages arising out of death of child – duty on child to support parent must have existed during child's lifetime

Delict – negligence – claim – against employer by employee or dependant of employee for injury or death arising during course of employment – limitations on such action – when claim may arise out of vicarious liability

Ncube v *Wankie Colliery Co & Anor* HH-8-07 (Chatukuta J) (Judgment delivered 23 February 2007)

The plaintiff's son, who was employed by the defendant, was killed in a motor vehicle accident. The vehicle was being driven during the course of his employment by another employee of the defendant. The driver was subsequently convicted of culpable homicide arising out of the accident. The plaintiff claimed damages from the defendant, averring that the defendant was vicariously responsible for the death of her son. She stated that she was dependant on the deceased during his lifetime, starting from when her husband died in 1998. The deceased provided for her upkeep and for school feels for his siblings. At the time of his death, he was building a house for the plaintiff. She said that without his assistance she could not make a decent living. She produced a document which showed that the deceased had expressed a wish that the benefits under the defendant's insurance scheme be payable to the plaintiff.
Held: the plaintiff had no cause of action. (1) In terms of s 8 of the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice 1990 (SI 68 of 1990), no action lay at common law against the defendant. Although vicarious liability forms part of an exception as provided for in s 9 of the Notice, the driver was not a person trusted with the management, charge, or the hiring and firing of workers as defined in the section. The exception applies only where there is a claim for compensation additional to that payable under the Scheme and the plaintiff did not plead such a claim. She had collected the benefits due under the Notice. (2) In order for the plaintiff to successfully sue for loss of support, she had to prove that she could not support herself and was therefore dependant upon the support from the deceased. The duty to support the plaintiff must have arisen during the deceased's lifetime. It is not sufficient for the plaintiff to prove merely that the deceased would have supported her; she had also to prove that he would have been under a legal obligation to support her, having regard to her own indigence. The only evidence led by the plaintiff related to her incapacity to earn a living after the death of her son. The legal obligation to support a parent cannot only arise at the time of the deceased's demise. The obligation must have existed during the deceased's lifetime. The document signed by the deceased did create a duty on him to support his mother.

Delict – Aquilian action – liability – wrongfulness and fault – distinction between – need to aver and prove both
Nyaguse v *Skinners Auto Body Specialists & Anor* HH-32-07 (Patel J) (Judgment delivered 22 May 2007)

The plaintiff left his motor car with the defendants for repairs. When it was returned, he found the mileage on the odometer was excessive. He issued summons against the defendants claiming, *inter alia*, damages in respect of the excess mileage. The declaration averred that the motor vehicle was wrongfully and unlawfully used, without the authority of the owner, by the defendants or some other person in their employ. The defendants filed an exception, objecting to the plaintiff's claim as embodying no cause of action in the absence of any averment of fault. The principal issue for determination was whether fault is invariably a distinct and separate requirement which must be specifically pleaded and proven in every delictual action. The related and ancillary question was whether or not an averment of fault may be implied in the claimant's pleadings.
Held: the plaintiff in an Aquilian action for patrimonial loss must establish that (a) the defendant committed a wrongful act; (b) the plaintiff thereby suffered patrimonial loss; (c) the defendant's act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of; and (d) responsibility for the plaintiff's loss is imputable to the fault of the defendant, either in the form of *dolus* (intention) or *culpa* (negligence). Wrongfulness and fault are distinguishable: the requirement of wrongfulness entails proof of a harmful result occasioned in a legally reprehensible or unreasonable manner. The enquiry into fault focuses on the legal blameworthiness or reprehensible state of mind and conduct of the defendant. While wrongfulness is determined by reference to public policy or the legal convictions of the community, fault is determined by reference to the foreseeability and preventability of harm by the defendant in the circumstances in which he actually was. In other words, wrongfulness relates to the reprehensibility of the harmful conduct, while fault is concerned with the blameworthiness of the defendant himself. It is clear, therefore, that wrongfulness and fault are distinct legal concepts requiring specific and separate proof in order to sustain a delictual claim under the *lex Aquilia*. There are instances of liability in our law, such as damage caused by wild or domestic animals, conduct constituting nuisance and vicarious liability, where it is not necessary to prove any fault, whether by way of intention or negligence, on the part of the defendant. In these cases, fault is not a requisite element by virtue of the very nature of the harmful conduct concerned, and the defendant's liability approximates a form of strict liability. However, where fault forms an essential ingredient of liability, as in most Aquilian actions, fault on the part of the defendant must be specifically pleaded and

proven. This must be so even where the plaintiff is able to establish wrongful conduct and consequential harm and then relies on the principle of *res ipsa loquitur* to prove fault on the part of the defendant. Here, although fault might be inferable from the nature and circumstances of the harm occasioned, it would still be necessary for the plaintiff to plead some form of fault, viz. actual intention or negligence, in order to enable a reasonable inference of liability to be drawn from the proven facts. Even if fault can be implied from the peculiar circumstances of the case as a matter of *prima facie* evidence, the defendant's reprehensible intention or negligence must be explicitly articulated as a matter of pleading.

Delict – negligence – duty of care – when arises – person recommending potential customer to bank – whether such person owes duty of care to bank

Stanbic Bank Zimbabwe Ltd v *Durand* HH-54-07 (Gowora J) Judgment delivered 20 June 2007)

See below, under PRACTICE AND PROCEDURE (Pleadings – declaration – claim based on fraudulent or negligent misrepresentations).

Education – school – non-government school – fees which may be charged – whether approval of Secretary for Education required

Assn of Trust Schools & Ors v *Min of Education & Anor* HH-16-07 (Kudya J) (Judgment delivered 21 March 2007)

The old section 21(1)(a) of the Education Act [*Chapter 25:04*] was promulgated to cater for, firstly, the very first application made by a non- government school on its registration for its initial fee or levy or, secondly, the introduction of a new class of fee or levy by an already registered non-government school. There was no legal obligation on the part of the responsible authorities for non-government schools to seek approval from the Secretary for Education for an increase of already existing fees and levies, as there was no prescribed percentage to determine the increase allowable.

Employment – code of conduct – offences under – theft – definition including unauthorised use – not necessary to prove common law theft or fraud – conduct of interest – what must be shown – not necessary that actual conflict of interests occurs

ZIMASCO v *Zakeyo* S-70-06 (Malaba JA; Chidyausiku CJ & Cheda JA concurring) (Judgment delivered 8 March 2007)

It does not matter very much in cases of misconduct at workplaces what label one puts to the facts as long as they establish the conduct which the parties intended to regulate. Where an employee is charged with "theft", as defined in the employer's code of conduct, the conduct does not have to embody the essential elements of the common law crime of theft. The parties are at liberty to agree upon a definition of misconduct wider than would ordinarily be prescribed under criminal law. For example, under the common law the "unauthorised use" of property belonging to another with the intention of returning it would not constitute theft and yet could do so under a code of conduct.

The general rule regarding conflict of interest is that any person who is in a relationship where he has a duty to act in the best interests of the other party is not allowed to put himself in a position where personal interest conflicts, or might conflict, with the interests of one whom he is bound to protect. The duty to disclose does not depend upon proof of the existence of actual conflict of duty and self-interest only. It is sufficient for the purposes of enforcement of the rule that there be a potential conflict of duty and self-interest arising from the engagement entered into or about to be entered into by the employee. The application of the rule is not confined to situations where actual or potential conflict of interests is by reason of and during the actual execution or discharge of duty by the employee. The rule has its roots in the general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest. As such it has been strictly applied by the courts. Once it is established that, without disclosure, an employee enters into an engagement with a party doing business with the employer where he has a personal interest which is likely to conflict with the interests of his employer, no consideration is to be had of other matters raised as part of the defence to the charge of misconduct. The way to defeat a charge of misconduct is the defence that he entered into such an engagement with the knowledge and informed consent of the employer.

Employment – contract – termination – unlawful – damages in lieu of reinstatement – quantification by Labour Court – what Court is required to do – need to specify, in figures, the amounts that must be paid

First Mutual Life Ltd v *Muzivi* S-9-07 (Cheda JA, Ziyambi & Malaba JJA concurring) (Judgment delivered 29 May 2007)

In an application for quantification of damages, the basic principle in the assessment of damages is that the plaintiff should be placed in the position he would have been had the contract been fully performed. The Labour Court is required to assess and determine the monetary value (*quantum*) of each claim that is to be awarded to the employee. The employer is meant to be advised what exactly it is supposed to pay to the employee in figures. A mere reference to awards being made is not quantification .What is required are specific monetary awards in respect of each claim so that the employer would know how much it has to pay. Any enforcement of the order will depend on what the order says, so the order of the court should be clear enough to stand on its own.

Employment – Labour Court – exclusive jurisdiction to deal with labour matters – arbitration award – registration of with High Court – High Court not thereby given power to review award

Plaza Hotel (Pvt) Ltd v *Marimbita & Anor* HB-27-07 (Bere J) (Judgment delivered 15 February 2007)

Arbitration awards made under the Labour Act [*Chapter 28:01*] need to be registered with the High Court in order to be executed. However, this does not mean that where there is a dispute about the validity of such an award the High Court has jurisdiction to deal with the matter. In terms of s 89 of the Act, the Labour Court is given exclusive power to deal with labour matters. This includes exercising the same powers of review as would be exercised by the High Court.

Employment – Labour Court – jurisdiction – court revising upwards amount of award previously granted – previous order not set aside or appealed against – court having no jurisdiction to do so

Marcussen & Cocksedge v *Dzikiti* S-72-06 (Cheda JA, Sandura & Malaba JJA concurring) (Judgment delivered 19 March 2007)

The respondent was granted a severance package by the Labour Court following the termination of his employment. The package was based on the salary prevailing at the time he was employed. When the respondent applied to the Labour Court for execution of the judgment, he submitted a figure some 70 times higher, that being based on the inflation rate over that period. He did not consult the appellant about this figure. When the appellant disputed the figure, the Labour Court heard the matter and determined it in favour of the respondent.
Held: the Labour Court had no authority to do what it did. The matter had previously been resolved before the Labour Court by the Labour Court President. The amount to be paid had been set and accepted by the appellant. There was no legal basis for issuing a fresh order when the previous order had not been set aside or appealed against.

Employment – unfair labour practice – failure to promote person from acting to substantive position – whether promotion a right – legitimate expectation – doctrine not applicable where person not qualified for post, irrespective of experience

Mudarikwa & Anor v *Director of Housing & Anor* S-56-06 (Malaba JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 23 January 2007)

The appellants had been acting in as district officers in the municipality. A recommendation was made to the second respondent's Executive Committee by the first respondent, their immediate superior, that they be confirmed in their positions but the recommendation was withdrawn when it was found that they did not have the educational qualifications required for the posts. The posts were then advertised in the media and a notice inviting applications for the vacancies was circulated internally. The appellants responded by submitting their applications. Some of the applicants were called for interviews but the appellants were not invited to the interview.
The appellants applied unsuccessfully to the High Court for an interdict preventing the municipality from appointing anyone else to the posts and an order for promotion. They claimed that even though they did not have the required

educational qualifications, they had the experience entitling them to promotion to the posts. They would not have been employed in the acting capacity for so long if were they not qualified for the post. Further, they claimed they were entitled to be promoted into the posts in which they were acting because other employees in similar positions had been promoted and that they had a legitimate expectation of being promoted. Finally, should the respondents not be interdicted from appointing any other persons other than themselves and ordered to promote them to the posts in which they were acting, they would suffer prejudice in the form of loss of their existing jobs. On appeal:
Held: (1) The appellants did not have a right to be promoted. Promotion was not automatic and did not depend entirely on the duration and competence in the performance of the duties of the office in which the appellants had been acting. They did not have the specific educational qualifications which the first respondent was required to consider when deciding whether or not to recommend their promotion to the Executive Committee. Even if a recommendation had been made that the appellants be promoted, the Executive Committee would not have been bound by it. It would have been free to reject the recommendation. Where, as was the case here, the promotion of an employee is not automatic but is on the basis of educational qualifications-cum-merit so that the employer is free to promote or not to promote, an order to promote cannot be made. The reason is that the promotion is discretionary. (2) As to legitimate expectation, there was nothing which the repository of the power to promote did which could constitute an assurance to the appellants that they would be promoted upon recommendation by the first respondent. The second respondent, through the Executive Committee, reserved its right to reject the recommendation that the appellants be promoted. Nor could the appellants derive legitimate expectation to be promoted from the fact that other employees in similar positions had been promoted, if the Executive Committee acted on recommendations made on the basis of a misapprehension by the first respondent of the factors to be taken into account in making them. There could be no legitimate expectation to be appointed to a post for which they were not qualified, irrespective of their experience.

Evidence – criminal matter – police investigation diary – whether accused entitled to receive copies of entries in diary

S v *Chibaya & Ors* HH-4-07 (Gowora J) (Judgment delivered 1 February 2007)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 — Declaration of Rights — s 18(2) — right to fair hearing).

Family law – husband and wife – divorce – division of matrimonial assets – normal practice is to claim a percentage – undesirability of awarding specific sum, particularly in an inflationary environment – sole use of matrimonial home by one party after separation – effect to be given to – length of time during which contributions were made – effect of

Masiwa v *Masiwa* S-74-06 (Gwaunza JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 22 March 2007)

When claiming a share of the matrimonial property following a divorce, a claim for a percentage of the value of the property is the normal practice. It is also appropriate, particularly given the fact that property values, in a highly inflationary environment like that obtaining in Zimbabwe, are constantly appreciating. The correctness of an award expressed in terms of a percentage of the value of the property would be easier to determine at the appeal stage than a specific figure, the basis of whose computation has not been explained.
A direct contribution does not count for nothing when it comes to assessing the parties' contributions to the matrimonial home, merely because it is regarded as minimal. To the extent that a party's claim is premised on both direct and indirect contributions, the court should combine the assessed values of the two types of contribution made by that party, in order to determine her entitlement. This would accord with the spirit of s 7 of the Matrimonial Causes Act [*Chapter 5:*13], which specifically refers to "direct and indirect contributions". Where one party enjoys the benefit of staying in the matrimonial home after the parties have separated, that should also be taken into account. In considering matters concerning direct and indirect contributions in marriage, the question of the length of time during which such contributions were made is pertinent. This is particularly so where one party's initial contribution far outweighed the other party's. The shorter the marriage, the more important it is to have made direct contributions.

Family law – husband and wife – divorce – distribution of assets – unregistered customary law marriage – approach to be followed in magistrates courts

Feremba v *Matika* HH-33-07 (Makarau JP, Bhunu J concurring) (Judgment delivered 29 May 2007)

Trial magistrates should not approach the distribution of assets of parties in an unregistered customary union as if they are apportioning the assets of a couple that is divorcing in terms of the Matrimonial Causes Act [*Chapter 5:13*]. Legal practitioners should always plead a recognized cause of action for the distribution of assets of parties in an unregistered customary union. Where one party to an unregistered union seeks to have the joint estate distributed before a magistrates court, a justification for not applying customary law must be made and accepted by the court, using the choice of law considerations listed in s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*]. When the general law is the correct choice, a recognized cause of action must be pleaded. Such a cause of action may be unjust enrichment, a tacit universal partnership or joint ownership. An averment merely to the effect that the parties were in an unregistered customary union is not sufficient to found a cause of action at general law. Trial magistrates must be wary of this procedural aspect of the matter. If the court is to entertain the matter on the basis of any of the above principles, then its general monetary jurisdiction limits apply. It therefore becomes imperative for the court to be aware of the value of the estate involved and to then ascertain whether it has the requisite jurisdiction in the matter.

Family law – husband and wife – divorce – domicile – loss of – when domicile of origin can be said to be abandoned – mere fact of residence in another country not proof of intention to remain indefinitely

Chikwenengere v *Chikwenengere* S-75-09 (Garwe JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 3 April 2007)

The appellant, a Zimbabwean citizen by birth, went to the United Kingdom in 2002 after securing a visa for that country. He was accompanied by his minor children and they all joined the respondent, his wife, who had earlier entered the United Kingdom. His visa was valid until 2007 but in terms of the law in that country he was eligible to apply for indefinite leave to remain in the country or citizenship after having remained there for 4 years. He was employed in the United Kingdom and purchased a house property to accommodate himself and the minor children who were attending school in that country. He and the respondent were the joint owners of an undeveloped stand in Harare. It was his intention to develop the stand in Harare so that when he came back he would have somewhere to come back to. It was also his evidence that his desire was that his children remain Zimbabwean.

Some 3 years after his arrival in the United Kingdom, he instituted an action in the High Court, Harare, for divorce. The court *mero motu* found that it did not have jurisdiction on the grounds that the only inference to be drawn was that the appellant had decided to abandon his Zimbabwean domicile and settle in the United Kingdom indefinitely.

Held: The jurisdiction of the court in divorce matters depends on the domicile of the husband *at the time* when the action is instituted. It is the date of service of the summons and not simply the date of issue which is relevant. Factors occurring after the action is instituted are irrelevant. Domicile of choice is acquired by a person who, having the necessary legal capacity, in the exercise of his free will, establishes residence in a place with the intention of remaining there permanently. To acquire this domicile, three requirements must be satisfied. These are (a) the *factum* of residence; (b) the *animus manendi* or intention of remaining permanently; and (c) freedom of volition. Mere residence in a particular place is not, in the absence of an intention to permanently stay in that place, proof of an intention to adopt a domicile of choice. In order to establish a domicile of choice it must be established that the person concerned has abandoned his domicile of origin and has in fact acquired a domicile of choice in another place by arriving at that place and intending to remain there. He must intend to reside in the place of his choice indefinitely; he must not have the present intention of leaving on the occurrence of some feasible or reasonably likely event. A change of domicile is a serious matter and may involve far-reaching consequences in regard to succession and distribution and other things that depend on domicile. There is usually a strong presumption or probability against a person abandoning his domicile of origin for a foreign origin. The onus of establishing his intention is no more than on a balance of probabilities. The facts did not support the conclusion that the appellant had formed an intention to permanently stay in the United Kingdom. In this day and age persons leave their countries and stay in other countries for years whilst pursuing their education or professional careers. His desire to keep the children in the United Kingdom if granted custody was not in order to stay there permanently, but rather to ensure that his children's education was not disrupted. The acquisition of a house did not on its own establish an intention to abandon his domicile of origin and acquire a new domicile.

Intellectual property – copyright – ownership of – recording commissioned by artiste – when ownership vests in artiste – lien over recording – whether person making recording entitled to retain it until price paid in full

Gramma Records (Pvt) Ltd & Anor v *Chimusoro* HH-22-07 (Gowora J) (Judgment delivered 21 February 2007)

The respondent agreed to record a concert given by the second respondent and to produce a DVD of the concert. After the concert, the second respondent attended the respondent's studio to rectify the errors in the audio recording. The applicants paid part of the agreed price and tendered payment of the balance on delivery of the recording. The respondent refused to release the recording to the applicants until he had been paid for the extra studio time as well as the balance of the price of the live recording. He considered that he had a lien on the recording. The applicants argued that they had copyright in the recording and that the respondent had no right to retain it. They contended that by not delivering to them the copyright as demanded the respondent was in violation of ss 51(2)(a)(iii) and 51(2)(b)(iii) of the Copyright and Neighbouring Rights Act [*Chapter 26:05*], thus entitling the applicants to the remedies provided for in s 52. They further contended that, by his possession of the copyright material, the respondent was in breach of s 59(1)(a)(iii), for which criminal sanctions are provided.
Held: although under the common law the respondent would have a lien over the recording, the common law is specifically ousted in respect of the law of copyright by virtue of s 128 of the Act. The entire law of copyright is now contained in the Act and no copyright or right in the nature of a lien subsists except as provided for in the Act. When one examines s 14(4) of the Act, it is clear that the Act does not envision the existence of a lien. Ownership is assured once one pays or agrees to pay for the commissioned copyright. Under s 51(2)(a)(iii) a copyright is infringed if, a person, in the course of business, possesses it or exhibits it in public or distributes it. There was no evidence that the respondent had exhibited the copyright in public or that he had distributed it. Having produced the copyright material, the respondent's possession of it was lawful until the dispute between the parties was resolved.

Legal practitioner – conduct and ethics – legal practitioner filing notice of opposition to application without taking instructions from client – impropriety of – legal practitioner's role in relation to client and court

Khuzwayo v *Assistant Master & Ors* HB-8-07 (Bere J) (Judgment delivered 18 January 2007)

See above, under COMPANY (Winding up).

Legal practitioner – conduct and ethics – use of intemperate language – need to use appropriate language to attack decision of judge *a quo*

Global Electrical Mfrs (Pvt) Ltd v *Nexbak Invstms (Pvt) Ltd & Ors* S-76-06 (Garwe JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 3 April 2007)

Whilst legal practitioners act on instructions, the use of intemperate language is not in keeping with the ethics of the profession and must be censured. To suggest that the trial judge "irrationally" upheld the other party's claim or that he "undeservedly" found for the other party has no place in a courtroom. Whilst legal practitioners are entitled to attack court decisions they are not happy with, that they should employ appropriate language in the process. To suggest that a judge has acted irrationally is to make a most serious allegation. The need for legal practitioners to moderate their use of language becomes even more pronounced in a case where the attack is found to be completely without foundation.

Legal practitioner – conduct and ethics – public prosecutor – interfering in civil dispute – irregular and unbecoming conduct

Lien – loss of – voluntary hand over or surrender of disputed property – property being taken by police in contravention of Criminal Procedure & Evidence Act – not a voluntary surrender – lien restored

Deven Engineering (Pvt) Ltd v *Chiyangwa & Ors* HH-1-07 (Bhunu J) (Judgment delivered 24 January 2007)

The applicant had done some refurbishment to a bus belonging to the first respondent and exercised a lien over the bus when a dispute arose about what was owed for the work. The first respondent reported the matter to the police, who took the view that this was a civil matter. However, they consulted the fifth respondent, the local public prosecutor, who in great haste determined that the applicant and its directors were guilty of attempted extortion. She then ordered the police to confiscate the bus under the pretext that she wanted the bus as an exhibit. She later ordered the police to release the bus to the first respondent thereby effectively depriving the applicant of its lien. When a director of the applicant asserted his

right to a lien over the bus he was threatened with arrest and detention by a police sergeant. The applicant sought an order restoring the bus to it and thereby restoring its lien. The first respondent argued that the lien had been lost because the applicant voluntarily gave it up.
Held: (1) The public prosecutor's ignorance and failure to recognise that this was essentially a civil dispute where the applicant was entitled to retain the bus under the workman's lien or hypothec was amazing if not frightening. The mere fact that the prosecution is *dominus litis* in respect of criminal trials does not give a public prosecutor the right to negate and ride rough shod over other people's civil rights with impunity. While the public prosecutor may have been entitled to prosecute, she was certainly not entitled to order the release of the disputed bus to the first respondent with the full knowledge that the first respondent was not disputing that the applicant had a valid lien over the bus in question. By her conduct in this respect she was clearly usurping the functions of the civil courts if not abusing her prosecution powers.
(2) Zimbabwean law does not penalize anyone for the application of legitimate force or pressure. It is only illegitimate force or pressure which constitutes extortion.
(3) The police did not lawfully dispossess the applicant of its bus in terms of s 49 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. They seized the bus in circumstances where they did not believe that it had been used in the commission or suspected commission of any offence. A voluntary handover and surrender of a lien takes place when the person handing over or waiving his right to a lien enjoys a free choice either to handover or not to do so. Where force, fraud or undue means are used, the lien holder's lien will be restored. Here, the applicant did not voluntarily waive or give up his possession of the lien; he merely succumbed to irresistible superior force. He was therefore entitled to restoration of that right.

Local government – councillors – suspension of councillors by Minister of Local Government – appointment by Minister of commissioners to run affairs of city – limited nature of such appointment – re-appointment of councillors unlawful – legislation not meant to allow Minister of avoid having a general election of councillors

Chideya v *Makwavarara & Ors* HH-13-07 (Kamocha J) (Judgment delivered 2 March 2007)

The applicant was purportedly suspended from his post with the Harare City Council by the first respondent. She was a commissioner, one of a number appointed by the Minister of Local Government to run the affairs of the city after he had suspended the elected mayor and councillors. She also purported to appoint a committee of enquiry into the applicant's suspension. The commissioners had been re-appointed for a fourth consecutive time by the Minister. The applicant sought an order setting aside his suspension and the appointment of the committee of enquiry on the grounds that (1) the re-appointment of the commissioners was unlawful; and (2) the functions purportedly exercised by the first respondent were functions which could only be lawfully appointed by an elected mayor.
The main issues for decision were (a) whether or not the Minister could avoid having a general election of councillors by continually re-appointing the commissioners; and (b) whether or not the judgment of the Supreme Court in *Stevenson v Min of Local Govt & Ors* 2002 (1) ZLR 498 (S) was *obiter dictum*. That decision, like two decisions of the High Court, was to the effect that s 80 of the Urban Councils Act [*Chapter 29:15*], in terms of which the commissioners were appointed by the Minister, was not meant to be a vehicle for the postponement of a general election of councillors, nor to allow the Minister to continually re-appoint commissioners.
Held: (1) *Obiter dicta* may be described as judges' opinions upon points of law which may not be necessary for the decision of the case. *Obiter dicta*, even of the highest tribunal in the land, are not binding on any court, however humble, but if made by an eminent judge they are most valuable as reasoned statements, and they may very well influence the courts on a later occasion. In the *Stevenson* case, the pronouncements of the court were necessary for the issue to be decided.
(2) In any event, even if the Supreme Court's reasoning was *obiter*, the conclusion reached in that and the other cases was inescapable. The Minister cannot lawfully reappoint commissioners *ad infinitum.* Any such re-appointment is illegal.

Local government – election – elections of mayor and councillors – when such elections must be held – by-election – distinction from general election – postponement of elections – grounds for – ward and city boundaries not delineated

Stringer v *Chrmn, Zimbabwe Electoral Commission & Ors* HH-41-07 (Uchena J) (Judgment delivered 13 June 2007)

The applicant, a resident of the City of Harare and a registered voter for an area falling under the City of Harare, was aggrieved by the first respondent's failure to conduct elections for Councillors and the Mayor for the City of Harare, which he claimed should have been held in August 2006, the last election of councillors having been held in March 2002. **He**

sought an order compelling the first respondent to give notice in terms of s 124 of the Electoral Act [*Chapter 2:13*] of the holding of elections for Councillors and the Mayor of the City of Harare. The tenth respondent (the responsible Minister) admitted that elections were not held in August 2006, but said that elections could not be held due to circumstances beyond his control.

A general election to elect Councillors for the City of Harare was held in August 1995. The elected Councillors were all suspended by the then Minister in February 1999. In terms of the then existing law the Minister should have caused a general election to be held in August 1999. An election was not held then, but instead Commissioners were repeatedly appointed to run the affairs of the city until March 2002. The councillors and Mayor elected at that time were once again suspended and then dismissed by the Minister, who again repeatedly appointed a commission to run the city.

In terms of s 121 of the Act, a general election of Councillors must be held in every fourth year on any day in August fixed by the Commission

The respondents submitted that the applicant's failure to cite the Registrar-General, even though he is the officer charged with the responsibility of preparing the voters roll in terms of s 117 of the Act, was fatal to the applicant's application. They also argued that the determining date for fixing a general election of councillors was August 1999 and that elections were thus not due until August 2007, so the application, they said, was premature. They argued that the March 2002 elections were by-elections, which did not affect the date in which a general election must be held.

The Minister argued that, although he was not opposed to the holding of election, it was not possible to do so as the boundaries of the city had changed and it was necessary to change the boundaries of existing wards.

Held: (1) The clear meaning of s 18(2) of the Electoral Act, as read with s 4(1)(b) of the Zimbabwe Electoral Commission Act[*Chapter 2:12*], was that the Registrar-General performs and exercises his functions under the direction and control of the Commission. The non-joinder of the Registrar-General was thus is not fatal to the applicant's application as the first respondent could ensure that the Registrar-General co-operates with it in complying with any order which required it and the Registrar-General to do anything in connection with the holding of an election.

(2) The previous Electoral Act and the current Electoral Act clearly established that the four year periods during which general elections for councillors should have been held should be reckoned from August 1999, when they were due because of the lapsing of the four year period from August 1995. The appointment and re-appointment of commissioners did not remove the requirement to hold elections. If the March 2002 elections were a by-election, then they could not be used to reckon the date of the next election. August 1999 could not be used to reckon the date of the next general election because no general election was held during that period and the four year periods are reckoned from one general election to another general election.

(3) Under s 121(3)(c), a by-election can be held to fill vacancies in the seats of all councillors. A by-election is meant to fill a casual vacancy or special vacancy or a vacancy arising from a ward or wards being added to a council area or the number of councillors per ward or council area being increased. The by-election must be held not less than thirty-five days, nor more than ninety days, after the vacancy occurred. There was no evidence that the vacancies of councillors fell vacant not less than thirty-five days, nor more than ninety days, before the March 2002 elections were held. In fact, no election for councillors was held between August 1999 and the elections held in March 2002.

All the seats of councillors were vacant since all the councillors who were elected into office in 1995 had been suspended until their terms of office expired. When the next elections, due in August 1999, were not held those posts remained vacant. It could not have been intended by the Act that if elections are not held in the fourth year, or during the next year by reason of a postponement, then the next elections would remain pending until August of the next fourth year and that by-elections could be held in between, in spite of the posts of councillors having remained vacant. A general election due in August 1999 could lawfully have been postponed to no later than August 2000. No elections were held up to August 2000 or at any time in 2001. The elections therefore remained due from August 1999 to March 2002, when an election was held. The election held in March 2002 was thus a general election, as the failure to hold elections between August 1999 and August 2000 did not mean a general election could not be held thereafter in any subsequent year. That being the case, the election should have been held in August 2006, with the possibility of postponement under August 2007.

(4) Elections are serious events during which citizens exercise their right to choose their representatives to manage the affairs of their city or country. The citizen's or resident's right to vote can be lost if elections are held at a time when his area is not covered in a constituency or ward. It can also be lost if his name is not in a voter's roll. The effect of holding elections under such circumstances would be to disenfranchise those whose wards have not been created or made ready for an election. The absence of ward and city boundaries in a city for which local authority elections are due to be held would be a good reason for the Commission to postpone the elections for up to a year in terms of s 123 and therefore a reason for the court not to order that they be held.

Partnership – formation – essentials for an agreement to create a partnership – need to show that business was being carried out for joint benefit of both parties

Metallon Corp Ltd v *Stanmarker Mining (Pvt) Ltd* S-82-06 (Sandura JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 23 May 2007)

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, after the three month period had expired, acquired the shares for itself. The plaintiff claimed damages for breach of contract but later claimed that the "heads of agreement" constituted a partnership and claimed damages for breach of the partnership agreement. The defendant denied that there was a partnership agreement.
Held: (1) in determining whether the heads constituted a partnership between the only provisions to consider were the legally binding provisions. The rest of the provisions were irrelevant because they were not legally binding on the parties, and the existence of the partnership was in dispute. (2) The essential ingredients of a partnership agreement are that (a) each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill; (b) the business should be carried on for the joint benefit of both parties; and (c) that the object should be to make profit. The second of these ingredients is crucial. (3) None of the legally binding clauses of the heads indicated that any business was to be carried on for the joint benefit of both parties during the relevant period. The heads were nothing more than a set of principles which formed the basis of the negotiation and conclusion of a future shareholders agreement. (4) There being no partnership agreement, the parties had no obligations to each other after the restraint period was over.

Practice and procedure – action – cause of action – whether action may be based on international instrument signed by President but not incorporated into municipal law

MDC v *President & Ors* HH-28-07 (Makarau JP) (Judgment delivered 9 May 2007)

See below, under Practice and procedure (Order – declaratory order).

Practice and procedure – appearance to defend – matrimonial case – defendant not entering appearance to defend – should be given opportunity to purge his default and plead

Tarumbwa v *Tarumbwa* HH-19-07 (Makoni J) (Judgment delivered 4 April 2007)

In ordinary cases a defendant can apply for rescission of a default judgment without any difficulty. The same cannot be said of matrimonial matters. A party would have moved on and maybe contracted another marriage. What then would be the effect on such a marriage when the other party applies for rescission of the default judgment? Granting a default judgment would be an injustice to the defendant. The new form 30A, which is used when proceedings in terms of r 269A of the High Court Rules, does not state a date of set down or invite the defendant to plead if he wishes to defend the matter. This was clearly an oversight on the part of the draftsmen. If a divorce action is initiated under r 272, the court the is required to ensure that a defendant instituted ordinarily is given every opportunity to defend the action, including being given an opportunity to appear in court on the set down date and to defend the action at that late hour. It is anomalous that the court cannot afford the same rights and protection to defendants served with a Form 30A summons when such a summons now has no features safeguarding the protection afforded by r 272 (as used to be the case before the Form was amended). Pending revision of the Form, the court can fall back on its inherent powers to control its own procedures and fulfil its core mandate of doing justice to all, and order that the defendant be served with a notice to plead in terms of r 272.

Practice and procedure – application – grounds for – domestic remedies available under relevant legislation – when court will withhold jurisdiction – legislation providing adequate procedures to resolve dispute

Rateyiwa v *Kambuzuma Housing Co-op &Anor* HH-52-07 (Gowora J) (Judgment delivered 23 May 2007)

The applicant was a member of the respondent housing co-operative society. He was suspended, then expelled from membership of the society on the grounds that he had, while chairman of the society, sold one of the stands being developed by the respondent without knowledge of the general membership. The sale was in effect to himself. He applied for an order for specific performance to enforce the sale. In addition, he claimed that his expulsion was improper. The respondent argued *in limine* that in view of the provisions of s 115 of the Co-operative Societies Act [*Chapter 24:05*], the matter should have been referred to the Registrar of Co-operative Societies and that therefore the applicant had approached the wrong forum and should have exhausted his domestic remedies before approaching the High Court. The respondent also argued that the sale was illegal in terms of s 80 of the Act.

Held: (1) A claim by a member for a debt, whether admitted or not, is a dispute for the purposes of s 115. It followed that the claim for specific performance was a dispute within the ambit of the operation of s 115 and therefore should be dealt with in accordance with the requirements of the section. Section 115(1) provides in no uncertain terms for a dispute between the society and its members to be referred to the Registrar for his decision. The dispute envisaged under the section is that of the claim, not the expulsion. The referral of the dispute to the Registrar is provided for in terms which are peremptory in and admitting of no discretion in the manner in which the dispute is to be resolved. (2) The Act did not, however, specifically oust the jurisdiction of the court. The court had the discretion to withhold its jurisdiction to a litigant even where there was no ouster of jurisdiction. In deciding whether or not to withhold its jurisdiction and insist that a litigant first exhaust the domestic remedies provided for, the court has to have regard to a number of factors. Amongst these are the subject matter of the statute, the body of persons who make the initial decision and the bases on which it is to be made, the body of persons who exercise appellate jurisdiction and the manner in which that jurisdiction is to be exercised including the ambit of any rehearing on appeal, the powers of the appellate tribunal, including its power to redress or cure the wrongs of a reviewable character, and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains. (4) The procedures provided for in the Act were adequate to resolve the dispute. The powers conferred upon the registrar in resolving the dispute were quite wide and gave him the discretion to effectively conduct a hearing on the circumstances surrounding the dispute. The procedures were also informal and would provide a cheaper and more effective remedy than was available in the application procedure. The registrar also had the power to refer the matter to arbitration. There was an appeal process provided for in the Act. This was therefore an appropriate case for the court to withhold its jurisdiction. (5) Section 80(1) of the Act prohibits the sale of any movable or immovable property owned by a co-operative society without the prior approval of the registrar. The property sold by the applicant did not fall within any of the exceptions set out in subs (2) and the sale was thus unlawful.

Practice and procedure – application – motion proceedings – desirability of deciding matter without hearing evidence

Executive Hotel (Pvt) Ltd v *Bennett NO* S-77-06 (Chidyausiku CJ, Cheda & Ziyambi JJA concurring) (Judgment delivered 31 May 2007)

See above, under CONTRACT (Formation – mental capacity of contracting party).

Practice and procedure – application – urgent – what constitutes urgency – when court should allow matter to be heard as a matter of urgency

Triple C Pigs & Anor v *Commissioner-General, ZRA* HH-7-07 (Gowora J) (Judgment delivered 18 January 2007)

Every litigant appearing before the courts wishes to have his matter heard on an urgent basis, because the longer it takes to obtain relief, the more it seems that justice is being delayed and thus denied. Equally, the courts, in order to ensure the delivery of justice, would endeavour to hear matters as soon as is reasonably practicable. This is not always possible, however, and in order to give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. The courts have to consider, in the exercise of their discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest, if not redressed immediately, would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen*.

Practice and procedure – execution – sale – setting aside of – sale confirmed but various irregularities attendant on sale – effect – whether equities nonetheless favoured *bona fide* buyer

Kanoyangwa v *Messenger of Court & Ors* S-68-06 (Gwaunza JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 6 March 2007)

The appellant's house had been sold in execution of judgment. The sale took place in January 2002. The sale was confirmed and the second respondent took transfer in July 2002. Five months later, the appellant applied to the High Court for the sale to be set aside, citing such irregularities as failure to advertise the sale in accordance with the rules of court and failure by the messenger of court and magistrate to send notices to the Secretary for Housing.
Held: this was a situation where, on the one hand, there was a judgment debtor who was aware of the impending sale of his property by public auction, even though some requisite pre-sale formalities concerning advertisement of, and the service of certain notices concerning, the sale, were not observed by the relevant officials. Against this, the sale had been successfully concluded and confirmed in accordance with rules; the buyer in good faith took transfer of the property after duly paying the purchase price and other related charges; and the proceeds were paid to the judgment creditor. Additionally, these events had happened 4 years earlier. While the appellant might, had he made as a timeous objection to the sale and its confirmation, have been entitled to the relief that he sought, in weighing his interests against those of the respondents and a *bona fide* purchaser who had taken transfer of property after the sale had been properly confirmed, the equities clearly favoured the buyer. The appellant was to an extent the author of his own misfortune: the property was under attachment for at least one year, but he took no steps to avert its sale. After the sale, he did nothing to stop its confirmation and subsequent transfer into the name of the second respondent. The blatant disregard of rules governing judicial sales, by the officers whose mandate it is to uphold the rules, could not be condoned as it would have the undesirable effect of bringing judicial sales into disrepute. In these circumstances, it would not be fair and just to order the appellant to pay the costs of the other respondents except the second respondent's.

Practice and procedure – judgment – default judgment – not a decision on the merits – decision can be revisited – effect of execution – mere fact of execution does not render court *functus officio*

Chahwanda v *Dube & Anor* HB-6-07 (Ndou J) (Judgment delivered 11 January 2007)

The defendant obtained default judgment against the applicant and the judgment was executed. The applicant sought rescission of the judgment. *Inter alia*, the respondent argued that the court was *functus officio*.
Held: It is a general principle of our law that once a court has duly pronounced a final judgment, it has itself no authority to correct, alter or supplement it. The court becomes *functus officio*, its jurisdiction in the case having been fully and finally exercised, and its authority over the subject matter ceases. The order was granted by default and executed. Here, the judgment was not given on the merits, so it could not be final. The fact that the judgment had been executed did not make the order a final one. The court had not fully and finally exercised its authority on the matter, and mere execution would not render the court *functus officio*.

Practice and procedure – judgment – summary judgment – founding affidavit – must be based on personal knowledge not on hearsay

Bubye Minerals (Pvt) Ltd & Anor v *Rani International Ltd* S-60-06 (Cheda JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 18 January 2007)

In an application for summary judgment, which was granted by the court *a quo*, a senior official of the respondent company (then the applicant) deposed in the founding affidavit that he had personal knowledge of the facts stated in the affidavit. It emerged that the official was not employed by the company at the relevant time and that his knowledge was obtained from company records and correspondence.
Held: the affidavit did not comply with the requirements of r 64(2) of the High Court Rules. The official's allegations were hearsay. If material allegations in the affidavit are hearsay, the affidavit is defective and the application is bad.

Practice and procedure – order – declaratory order – what applicant for such an order must establish – court may not issue order relating to factual issues

MDC v *President & Ors* HH-28-07 (Makarau JP) (Judgment delivered 9 May 2007)

At the summit meeting of the Southern Africa Development Community (SADC) held in Mauritius in 2004, certain principles and guidelines governing democratic elections for the member countries were adopted ("the SADC Principles and Guidelines"). The President, acting on behalf of Zimbabwe, approved the guidelines and gave Zimbabwe's assent thereto. The Zimbabwe Electoral Commission Act [*Chapter 2:12*] and the Electoral Act [*Chapter 2:13*] were enacted to give effect to these principles. In the application brought by the applicant shortly before the general election held in March 2005, some provisions of these Acts and of the Public Order and Security Act [*Chapter 11:17*], the Access to Information and Protection of Privacy Act [*Chapter 10:27*] and the Broadcasting Act [*Chapter 12:06*] were attacked as being inconsistent with the fundamental principles set out in the SADC Principles and Guidelines. The applicant also sought an order that the decision by the Delimitation Commission to reduce the number of parliamentary seats in certain provinces and to increase the number of seats in others be set aside. The applicant sought a declaration that the Electoral Supervisory Commission was not properly constituted in terms of s 61 of the Constitution Zimbabwe and was therefore unlawful.

Held: (1) there is no legal principle that makes a regional instrument in the nature of the SADC Principles and Guidelines binding on member states. Such an instrument gives no more than guiding principles. They set forth the principles and guidelines upon which election legislation is to be modelled by member countries, but, being a model, the document has no binding nature and cannot be enforced in its format. The agreement entered into by the first respondent and his counterparts in 2004 setting out principles and guidelines for the holding of democratic elections is not a direct source of rights and obligations under our law. While the signing of the agreement by the first respondent acts to indicate to the national and to the international community that his government ascribes to the minimum standards set out in the guidelines, it does not give the applicant or any other citizen of Zimbabwe a cause of action that is enforceable in a domestic law court based on the guidelines. (2) The doctrine of legitimate expectation, which the applicant argued could be used as a basis for holding that the provisions of the guidelines were relevant and applicable in the court, is primarily used in administrative law to protect procedural fairness before an administrative action is taken. (3) The applicant failed to establish a factual basis to challenge the decision of the Delimitation Commission. It is not sufficient to simply show that the figures it used may have been incorrect. A basis or ground for review, recognized at law, had to be established before the court could interfere with the discretion of the second respondent. The applicant had to show that the findings of the Commission were tainted by illegality, irregularity or were irrational. No such basis had been laid out. (4) The Electoral Supervisory Commission having been abolished before the general election, it was not competent for the court to issue a declaratory order. A declaratory order only relates to legal rights and not to factual issues. (5) An applicant for a declaratory order must show that (a) it is an interested person; (b) there is a right or obligation which becomes the object of the inquiry; (c) it is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter; (d) there must be interested parties upon which the declaration will be binding; and (e) considerations of public policy favour the issuance of the order. *In casu*, all the declaratory orders sought did not relate to a right. Nowhere had the applicant, as a political party with the majority of opposition seats in parliament, contended that its rights were in issue and what those rights were. The court will not give a futile and academic opinion, nor will it give an opinion on matters where there is no dispute between the parties, no matter how topical that issue is. It is not the place or the function of the court to participate in public debates and give opinions on such debates. The court has no opinion other than on the law and on a dispute referred to it. Further, the other interested parties in the form of the serving legislators hade not been sufficiently identified in the application and had not been afforded a chance to be heard before an decision on issues that might affect the validity of their tenure in parliament. Finally, the opinions sought from the court by the applicant were not in the interests of public policy considerations. Some legislators had been elected and would want to keep their seats. Candidates who lost during the elections challenged the results under the law. In view of the developments that had taken place since the election, it was not necessary that *declaraturs* about what the situation was like be issued as they would serve no practical value.

Practice and procedure – parties – joinder of – action against Electoral Commission – failure to join Registrar-General not fatal

Stringer v *Chrmn, Zimbabwe Electoral Commission & Ors* (Uchena J) (Judgment delivered 13 June 2007)

See above, under LOCAL GOVERNMENT (Election – elections of mayor and councillors).

Practice and procedure – pleadings – declaration – claim based on fraudulent or negligent misrepresentations – what declaration must aver – need to aver that misrepresentation induced plaintiff to act to his detriment

Stanbic Bank Zimbabwe Ltd v *Durand* HH-54-07 (Gowora J) Judgment delivered 20 June 2007)

The plaintiff bank, acting on the recommendations of the defendant, opened an account for a new customer. Subsequently, a branch manager paid certain sums of money to persons outside the country on the strength of cheques presented by the customer. The cheques were supposedly drawn against an international account. The cheques were not met and turned out to be fraudulent. The bank sued the defendant for the sums lost, basing its claim on allegedly fraudulent misrepresentations by the defendant, which induced it to open the account. The defendant excepted to the bank's declaration as disclosing no cause of action. The defendant contended that all that could be read from the declaration was that the plaintiff was induced into entering into a contract of customer and banker with the customer, yet what caused the loss to the plaintiff was that the branch manager had treated as cash an uncleared cheque. There was no averment that the defendant induced the plaintiff to treat such cheques as cash or that the defendant knew about the cheques. The plaintiff also relied on a duty of care owed by the defendant.

Held: (1) A plaintiff who bases his cause of action on a misrepresentation must have been induced to act to his detriment. What the declaration stated was that the plaintiff was induced into entering a contract of banker and customer. Even on the pleadings, that was not the cause of the plaintiff's loss. What caused the loss was the payment of the cheques without clearance from the paying bank. The loss that the plaintiff alleged it suffered could not be due to the misrepresentations averred, which dealt solely with the manner of opening of the accounts. (2) A duty of care would arise where there is a legal relationship between the parties which would give rise to an obligation on the part of the defendant to exercise such duty in relation to the plaintiff. No such relationship was alleged. All that the plaintiff averred was that there were transactions between the parties, without specifying what those transactions constituted or entailed. (3) A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that, in a practical business sense, the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him would be mutually recognized by honest men in the circumstances.

Practice and procedure – pleadings – declaration – delictual action – need to aver fault as well as wrongfulness on part of defendant

Nyaguse v *Skinners Auto Body Specialists & Anor* HH-32-07 (Patel J) (Judgment delivered 22 May 2007)

See above, under DELICT (Aquilian action – liability).

Practice and procedure – process – service – must be served after filing with Registrar – service before filing with Registrar – not proper service

Mandaza v *Mzilikazi Invstms (Pvt) Ltd* HB-23-07 (Ndou J) (Judgment delivered 8 February 2007)

All process must be filed with the Registrar and thereafter, a copy served on the other party in the manner set out in the various rules. Where a notice to discover was served and thereafter filed with the Registrar, the notice was not properly issued process at the time of the service, and a default judgment could not be obtained on the strength of it.

Practice and procedure – record – application – chambers application – record of proceedings – what record must consist of – no requirement that extensive recording be made of everything that happens before the judge

Bubye Minerals (Pvt) Ltd v *Min of Mines & Ors* HH-31-07 (Gowora J) (Judgment delivered 9 May 2007)

Although the High Court, in terms of the Constitution, is a court of record, the High Court Act does not require that all proceedings before a judge be recorded by means of a mechanical device or that in the absence of such device that the judge should record all the proceedings in long hand. In a trial, judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available have a duty to write down completely, clearly and accurately, everything that is said and happens before them which can be of relevance to the merits of the case. They must ensure that

they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says they must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done.
An application is different. Various documents, including heads of argument, must, in terms of the Rules of the High Court, be laid before the judge. In addition, the rules provide that each of the parties shall be heard in argument unless the judge requires otherwise. Oral submissions, though, are made in support of an application which is before the court and where the evidence has been captured in affidavit form. The practice of the High Court is that the judge listens to counsel in support of their presentations and decides on what to record. The discretion is entirely that of the judge. The manner of note keeping is also the preserve of the judge, based entirely on convenience and ability to recall. It cannot have been the intention of the legislature, in decreeing that the court be a court of record, that a duty be imposed upon a judge to record all submissions made before such judge without regard to whether such arguments are relevant to the issues in point or not. Nor do the Rules provide for the extensive recording of everything that happens before a judge in an application.

Practice and procedure – record – review proceedings – need to obtain record – effect of failure to do so – courses open to court

Zimbabwe Newspapers (1980) Ltd Workers' Cttee & Anor v *Musariri NO & Ors* S-78-06 (Chidyausiku CJ, Cheda & Malaba JJA concurring) (Judgment delivered 17 May 2007)

A record of the proceedings under review is an essential part of the record required by the High Court in terms of r 260(1) of the High Court Rules. The obligation to prepare the record is placed fairly and squarely on the registrar of the inferior court whose proceedings are under review. If the registrar fails to do so, the remedy available to an applicant for review is to apply for a *mandamus* compelling the registrar of the inferior court to prepare the record. This should be done prior to the hearing of the substantial application for review on the merits. Where an applicant does not follow this procedure but has the matter set down for hearing on the merits, the court has the discretion to postpone the matter pending the provision of the record, dismiss the application or order any other relief. An appeal court will not interfere with the exercise of such a discretion unless the exercise of the discretion was grossly unreasonable.

Practice and procedure – review – application – application filed late – no application for condonation made – respondent not making issue of matter – not open to court to extend period *mero motu*

Shoko & Ors v *Min of Local Govt* HH-12-07 (Makarau JP) (Judgment delivered 28 February 2007)

The first applicant was the elected mayor of Chitungwiza. He was suspended from office by the respondent Minister. The first applicant brought an application for review some 3 months after he had been suspended. The respondent's counsel did not make an issue of the fact that the application was brought late, neither did the applicants' counsel apply for condonation.
Held: the court may extend the period for lodging an application for review on application and upon good cause being shown, but "good cause shown" as stated in r 259 of the High Court Rules means good cause shown by the applicant either in a written application or verbally or with the consent of the opposing party. It cannot mean good cause as seen by the court *mero motu*.

Practice and procedure – *stare decisis* – *obiter dicta* – when a statement may be said to be *obiter* – effect of *obiter* statements

Chideya v *Makwavarara & Ors* HH-13-07 (Kamocha J) (Judgment delivered 2 March 2007)

See above, under LOCAL GOVERNMENT (Councillors – suspension of councillors by Minister of Local Government).

Practice and procedure – stay of proceedings – court's inherent jurisdiction to stay proceedings – stay of proceedings in order to allow an administrative function or decision to be completed

Ismael v *Registrar-General & Anor* HH-25-07 (Makarau JP) (Judgment delivered 25 April 2007)

The applicant was granted citizenship of Zimbabwe in 1987, having entered the country in 1980. He was issued a passport which was still valid at the time of the proceedings, though nearly full. In 1996 the Minister of Home Affairs (the second respondent), having received certain information from security agencies, served the applicant with a notice depriving him of his citizenship. On the same day the notice was served, the applicant launched an application for an order compelling the respondents to issue him with a new passport within 5 days of the granting of the order. The application was opposed on the basis that the second respondent had deprived the applicant of citizenship. A month later the applicant challenged the procedure by which the notice depriving him of his citizenship had been issued. The second respondent then commenced fresh procedures against the applicant, which procedures were still under way at the date of the hearing of the application.
Held: (1) pending conclusion of the deprivation procedures against the applicant, the applicant remained a citizen and was entitled to remain in possession of the passport issued to him. He was also entitled to be issued with a new passport. (2) The issue of a passport is an incidence of and is ancillary to citizenship and cannot be compelled independent of an inquiry into the citizenship of the applicant. In *casu*, the status of the applicant as a citizen was under review and was actually threatened by the second respondent. (3) The court had inherent jurisdiction to stay its own proceedings in appropriate cases, pending the completion of some administrative function and decision. In exercising that power, the court may, in the interests of justice, place a period within which the administrative function and decision must be undertaken and completed. *In casu*, a period of sixty days would be adequate for the second respondent to lawfully complete the procedures he had commenced against the applicant.

Property – spoliation order – when may be granted – relevance of lawfulness of applicant's possession of the property in question

Karori (Pvt) Ltd & Anor v *Mujaji* HH-23-07 (Kudya J) (Judgment delivered 23 February 2007)

The applicants were the owners of a farm which was the subject of acquisition by the State. They remained in peaceful and undisturbed occupation of the farm, no attempt being made by the acquiring authority to evict them. The respondent, a senior army officer, forcibly evicted the applicants and took over the farm for himself. He had no court order or other lawful pretext for doing so. The applicants sought a spoliation order.
Held: whatever the applicants' legal status was in respect of the farm, they were entitled to a spoliation order. In spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. The lawfulness or otherwise of the applicant's possession of the property does not fall for consideration at all. Even a squatter is generally regarded to be in peaceful possession of the place he is squatting on and a proper eviction order must be taken against him for his removal. If the respondent believed that he had better rights to the farm than the applicants then he would have to follow due process to get vacant possession. He must not resort to self-help.

Regulations – validity – Minister's powers to make regulations – Act specifying particular subjects in respect of which regulations may be made – Act also giving Minister power to make regulations concerning anything which he considers necessary or convenient to prescribe – wide discretion thereby given to Minister

Trust Ins Brokers (Pvt) Ltd v *Min of Finance & Anor* HB-13-07 (Kamocha J) (Judgment delivered 1 February 2007)

Section 89(1) of the Insurance Act [*Chapter 24:07*] gives the Minister of Finance power to make regulation concerning anything which under the Act is to be prescribed or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to the Act. The list of subjects in s 89(2) is not exhaustive: the Minister is vested with wide powers and discretion to prescribe anything which in his opinion is necessary or convenient to be prescribed.

Revenue and public finance – income tax – gross income – interest accruing on treasury bills – interest not actually received – whether taxable

Standard Chartered Bank Zimbabwe Ltd v *ZRA* HH-26-07 (Kudya J) (Judgment delivered 25 April 2007)

Treasury bills are freely negotiable financial instruments which fall into the same class as promissory notes, bankers' acceptances and bills of exchange. They are freely negotiable bearer debt instruments which are sold at a discount of their face value. They are used to finance commercial operations from their sale at a discount and payment is made at their face value on maturity. They may, of course, further be sold for less than their face value by any holder before maturity. While interest is often received before the capital is redeemed, that is, separately, discount is receipted on redemption, that is, indivisibly with the capital. Interest is often associated with a loan, while discount is concerned with the purchase by the holder of the treasury bill of a contingent right. Both the seller of the original treasury bill and the borrower receive an immediate sum of money, while the holder of the bill and the lender receive an entitlement or the right to the future fruits of the bill and the loan.

In terms of s 8 (1) of the Income Tax Act [*Chapter 23:06*], "gross income" means "received by or accrued to or in favour of a person or deemed to have been received by or accrued to or in favour of a person in any year of assessment…", while s 10(7) states that where a taxpayer becomes entitled to an amount in the first year of assessment, which is due and payable in a future year, he is deemed to have accrued it in that first year.

The applicant bank sought a declaration that the income earned by a purchaser of a treasury bill only accrues for tax purposes on the maturity date of the bill. The respondent argued that such bills instruments accrue interest on a daily basis and therefore the applicant also accrued the interest (income) on a daily basis for accounting purposes.

The applicant argued that treasury bills do not bear interest; they are only payable on maturity and then to the bearer and the only income that is earned on treasury bills is the income which one receives by way of a discount once the bills are paid out on maturity date. The bills are paid out to the person who is then the owner of those bills, namely, the bearer at maturity and no income accrues to holders of treasury bills until the maturity date. The applicant did not always hold them to maturity and often sold them before the maturity date. The applicant submitted that an amount only accrues in terms of s 8 of the Income Tax Act when an entitlement to payment arises and that where payment is subject to conditions an entitlement to payment only arises when the conditions are fulfilled. Lastly, it submitted that those accounting procedures which may be followed by a taxpayer do not create a right which does not otherwise exist.

The respondent argued that the maturity of the treasury bills and other related financial instruments is only a condition of payment and not an accrual of interest and therefore the holder of the bill becomes entitled to income from it from the date of purchase. It argued that the fact that the applicant had in its commercial accounts credited earned but not yet received discount demonstrated that it had in truth and in fact calculated the income represented by the pro-rata amount of the discount received for each year of assessment despite the fact that actual maturity dates for the various investments would occur later.

Held: (1) "discount", in relation to a bill of exchange, carries a technical meaning which is synonymous with interest. A discount, from its definition, is in reality no more than disguised but deferred interest. That is the true nature of all the freely negotiable bearer debt instruments such as treasury bills. (2) The applicant taxpayer had done all that was required of it to earn the money payable. The applicant's accounting procedures did not create a right which otherwise did not exist. The manner in which the it compiled its statutory accounts in order to demonstrate a true and fair view to its shareholders may not have been indicative of the discount that it in fact had earned. (3) The phrase "entitlement to an amount" means accrual of the amount. It does not entitlement to payment. The value of the right appears earlier than the redemption of the discount. It takes place, where the taxpayer still holds the bill, at the end of the first and at the end of all subsequent tax years in which the tax payer holds the bill.

Statutes – Co-operative Societies Act [*Chapter 24:05*] – s 80 – sale of society's property without Registrar's approval – unlawfulness of – s 115 – dispute between society and member – requirement to refer dispute to Registrar for decision

Rateyiwa v *Kambuzuma Housing Co-op &Anor* HH-52-07 (Gowora J) (Judgment delivered 23 May 2007)

See above, under PRACTICE AND PROCEDURE (Application – grounds for – domestic remedies available under relevant legislation).

Statutes – validity – international instruments – effect on domestic law – no rights given to establish cause of action

MDC v *President & Ors* HH-28-07 (Makarau JP) (Judgment delivered 9 May 2007)

See above, under PRACTICE AND PROCEDURE (Order – declaratory order).

Words and phrases – "any" ("charge any fee or levy") – Education Act [*Chapter25:04*] – s 21(1)(a) (before 2006 amendment)

Assn of Trust Schools & Ors v *Min of Education & Anor* HH-16-07 (Kudya J) (Judgment delivered 21 March 2007)

See above, under EDUCATION (School – non-government school).

Words and phrases – "supermarket"

Metro Intl (Pvt) Ltd v *Old Mutual Property Invst Corp (Pvt) Ltd & Anor* S-83-06 (Malaba JA, Cheda & Sandura JJA concurring) (Judgment delivered 26 June 2007)

***See above, under* CONTRACT (Interpretation – "golden rule").**