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CASES DECIDED JANUARY – JUNE 2008

Administration of estates – executor dative – appointment of – letters of administration – form of – exact compliance with statutory form not required – equivalent compliance sufficient

Estate Garande v *Masaiti & Ors* HH-51-08 (Kudya J) (Judgment delivered 19 June 2008)

The letters of administration appointing the executor dative to a deceased estate are valid if they are in substantial compliance with form B, which is set out in the Second Schedule to the Administration of Estates Act [*Chapter 6:01*], as long as it serves to inform the world at large that the Master has appointed the named individual on a given date as the executor of a deceased estate. Thus, even though peremptory language is used, equivalent as opposed to exact compliance with the provisions of s 23 suffices to fulfill the aim and objectives of the section, that is, the identification of the duly appointed executor in a given deceased estate.

Appeal – noting of – effect – court or tribunal other than court of inherent jurisdiction – such court or tribunal has no power to order stay of execution – noting of appeal does not suspend operation of decision appealed against

Longman Zimbabwe (Pvt) Ltd v *Midzi & Ors* S-54-07 (Garwe JA, Sandura & Gwaunza JJA concurring) (Judgment delivered 11 March 2008)

The respondents were, in terms of the Rent Regulations1982, statutory tenants of dwellings owned by the appellant. The appellant sought their ejectment on the grounds that it required the dwellings for renovation, followed by occupation by its own employees. The Rent Board granted an application for the ejectment of the respondents and later issued a certificate permitting their ejectment. The respondents appealed against the Rent Board's decision to the Administrative Court, raising several points of law regarding the validity of the appellant's notice to quite and of the Board's certificate and order. In the mean time, the appellant applied to the High Court for an order of ejectment. The respondents opposed the application, raising the same grounds as in their appeal to the Administrative Court. The High Court upheld one of the grounds raised by the respondents, made no decision on the rest, and dismissed the application for ejectment on the grounds that the effect of the noting of the appeal by the respondents against the certificate of ejectment was to suspend the decision of the Rent Board. The appellant appealed against the High Court's decision. Apart from arguing that the High Court's decision was correct, the respondents again raised the points being raised before the Administrative Court.

Held: (1) whilst the appeal before the Administrative Court remained pending, the issues raised before the High Court and thereafter before the Supreme Court were *lis pendens*. The Administrative Court would need to address its mind to the issues raised in the appeal and thereafter make a determination.

(2) The accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. The position may now be accepted as settled in this jurisdiction that unless empowered by law to do so, an inferior court, tribunal or other authority has no power to order the suspension of its own orders or judgments and, further, that the noting of an appeal against the judgment or order of such a court, tribunal or other authority, in the absence of a statutory provision to that effect, does not have the effect of suspending the operation of the judgment or order that is sought to be appealed against.

See also Kudinga v *Dhliwayo & Anor* HH-22-08 (Makarau JP) (Judgment issued 12 March 2008) (*below, under* Appeal (Noting of – effect – whether suspends operation of decision appealed against)

Appeal – noting of – effect – interlocutory order issued by High Court – when leave to appeal against such order not required – matter relating to custody of children – includes matter relating to access by non-custodian parent

Pissas v *Pissas* HH-35-08 (Gowora J) (Judgment delivered 9 April 2008)

After her divorce from the applicant, the respondent had been awarded custody of the children, while he had access to them. She subsequently obtained an order from the High Court permitting her to take the children out of Zimbabwe and relocate with them in the United Kingdom. The applicant had opposed the granting of the order but was unsuccessful. The applicant noted an appeal against the order. Learning that it was her intention to take the children out of the country in spite of the noting of the appeal, he applied for an urgent interdict restraining her from taking the children out of the country and requiring her to deliver their passports to the Registrar of the High Court. His attitude was that whilst he did not object in principle to the children relocating to England, such relocation should be in circumstances where it is in their best interests to do so. He did not want them removed until the details on their livelihood had been established in a satisfactory manner. The respondent contended that the appeal had not been properly filed in the absence of leave from the court because the appeal was against an interlocutory order. The applicant contended that the order, although issued as a provisional order, was final in effect due to the nature of the relief granted.

In terms of s 43(2) of the High Court Act [*Chapter 7:06*], no appeal shall lie to the Supreme Court from the High Court from an interlocutory order or interlocutory judgment, without the leave of either the judge concerned or a judge of the Supreme Court, except, *inter alia*, where the custody of minors is concerned or where an interdict is granted or refused. The applicant argued that the matter concerned custody and an interdict had been granted; the respondent argued that the matter was concerned with access, not custody.

Held: (1) Access is an incidence of custody and the two go hand in hand where there are rights of more than one parent at stake. It cannot have been the intention of the legislature to give to parents who are engaged in issues relating to custody an automatic right of appeal to the Supreme Court, whilst not granting the right to parents wishing to enforce rights to access. Were access to be excluded in the exception to the section it would lead to an absurdity such as would not have been the intention of the legislature.

(2) Even if this approach was incorrect, part of the order from the judgment appealed against was an interdict and on that basis the appeal would qualify under the exceptions referred to in s 43(2).

(3) The noting of the judgment by the applicant had the effect of suspending the order issued by the High Court until the conclusion of the appeal and the respondent was not entitled, without having obtained leave to execute the judgment, to remove the children from the jurisdiction of the court.

Appeal – noting of – effect – whether suspends operation of decision appealed against – decisions of courts or tribunals other than the superior courts – whether suspended by noting of an appeal

Kudinga v *Dhliwayo & Anor* HH-22-08 (Makarau JP) (Judgment issued 12 March 2008)

The settled approach of the High Court – that the common law principle to the effect that the noting of an appeal suspends the decision appealed against – only applies to judgments of the superior courts. There is, however, a ruling of the Supreme Court to the effect that the operation of *any* judgment is suspended by the noting of an appeal. The correctness of that statement is questionable and the decision ought to be revisited.

Appeal – record – inspection of by parties – procedure to be followed – party and Registrar not in agreement on what should be included or omitted – procedure to follow

Bubye Minerals (Pvt) Ltd v *The Registrar & Ors* HH-49-08 (Chitakunye J) (Judgment delivered 18 June 2008)

Part of the process of preparing the record for a civil appeal is that parties, or their legal representatives, should inspect the record in order to ensure that it complies with rule 15(8a) of the Supreme Court Rules 1964 (RGN 380 of 1964). The word '"inspect" may be defined as "to look at carefully; to examine or review officially". Where such examination has occurred it is then expected the examiner will certify so. A party examining the record must of necessity append a seal in the form of a signature confirming the examination. To merely examine without such a seal would be of no relevancy to the process. Equally, merely to append one's seal by way of signature without examining the record would not be in compliance with the rules. Without that certificate the registrar cannot comply with r 15(10), which requires that after completion of the record the registrar shall certify that it is correct. This certification by the registrar is only possible where the parties have inspected the record and certified so. Where there is a dispute arising from the preparation of the record – for example, about what should or should not be included – the parties may, in terms of r 15(9), submit the dispute to a judge.

Rule 15(8b) provides that where the appellant has not inspected the record within the time given or extended, the registrar shall notify the registrar of the Supreme Court of that fact, and thereupon (meaning immediately thereafter) the appellant shall be deemed to have abandoned his appeal. Where such has occurred the appellant has to take steps to have the appeal re-instated if he is still interested in the appeal.

Appeal – set-down – notice of – appellant not receiving notice – appropriate course for court to take

Jamu v *City of Harare* S-53-07 (Malaba JA, Chidyausiku CJ & Cheda JA concurring) (Judgment delivered 4 March 2008)

The appellant had noted an appeal against a decision of the Administrative Court. Heads of argument were filed on her behalf. The appeal was set down for hearing, but on the hearing date there was no appearance for the appellant. It emerged that the appellant was not served with the notice of set down and had no knowledge of the date of the hearing of the appeal.
Held: in terms of r 36(4) of the Supreme Court Rules, where there is no appearance for the appellant and the appellant has had notice of set-down, the court has a discretion, depending on the circumstances of each case, to hear the appeal or strike it off the roll or to postpone the hearing. Where, as here, the appellant had not had notice of set-down, the sub-rule does not apply. The court is not in a position to hear the appeal and the best course to take is to strike off the appeal from the roll with no order as to costs.

Appeal – set-down – set-down on urgent basis – appeal against provisional ruling which would have effect of settling main dispute – desirability of hearing appeal before main case heard – urgent set-down ordered

Diocese of Harare v *Church of the Province of Central Africa & Anor* S-2-08 (Chidyausiku CJ, in Chambers) (Judgment delivered 13 February 2008)

The parties had been engaged in acrimonious litigation. The litigation followed a split within the Anglican Church in Zimbabwe. The main dispute was to which of the formations was legitimate. Access to and use of the church premises and property was hotly contested. The dispute between the parties had given rise to multiple litigation and court applications. The applicant made an urgent chamber application in the High Court wherein it sought a provisional order against the respondents. In the provisional order, the applicant sought to prevent the respondents and their adherents from using church property under control of the applicant and to interdict the second respondent from holding himself out as bishop of the Diocese of Harare. Before judgment was handed down, further orders were granted by the High Court, regulating the use of the churches in the diocese. When judgment was given in the chamber application, the effect of the judgment was that the applicant was non-existent and had no locus standi to bring the matter to court. This judgment in effect determined the issues raised in the main case between the parties. The applicant appealed against the ruling and sought to have the appeal set down on an urgent basis. It argued that the issues should not have been determined in a chamber application for the issuance of a provisional order seeking to govern the relationship between the parties in the interim period while awaiting completion of the main case; the ruling would have the effect of tying the hands of the judge deciding the main case.
Held: the dispute between the parties should be resolved as a matter of urgency. Further, the appeal against the judgment should be determined before the main trial. This gave some urgency to the set down of the appeal, and set-down on the earliest available date would be ordered.
[Note: The judgment appealed against was *Diocese of Harare* v *Church of Province of Central Africa & Anor* HH-6-08. See below, under CHURCH (Government of). – *Editor.*]

Appeal – striking out – failure to comply with Supreme Court Rules – appeal noted out of time and no application made for condonation – judge in chambers not having jurisdiction to strike out appeal

Church of the Province of Central Africa v*Kunonga & Anor* S-7-08 (Chidyausiku CJ, in chambers) (Judgment delivered 13 March 2008)

The applicant obtained an interdict from the High Court against the respondents, who filed a notice of appeal. The notice of appeal was not filed timeously in terms of r 30 of the Supreme Court Rules 1964. The applicant applied to a judge of the Supreme Court, in chambers, for the notice of appeal to be struck out. The issue for decision was whether a judge in chambers had the jurisdiction to strike out an appeal for failure to comply with the Rules.

Held: Rule 31 specifically gives a judge who dismisses an application for extension of time jurisdiction to have the notice of appeal struck out after the refusal to grant the extension of time within which to note the appeal. Where, however, there is no application for condonation, a judge who strikes a matter off the roll for non-compliance with the Rules pre-empts the discretion of the court to grant condonation or not and assumes that power. There is no provision in the Rules that authorises the dismissal of an appeal other than on the basis provided for in the Rules. Where an appeal does not comply with the Rules, it is up to the court, and not a judge in chambers, to order the striking off of the matter for failure to comply

with the Rules or to grant the indulgence for failure to comply with the Rules. A distinction must be made between those matters where the notice of appeal is invalid by reason of failure to comply with the provisions of the statutes and a situation where a notice of appeal is invalid by reason of failure to comply with the Rules. Where the notice of appeal does not comply with the provisions of an Act of Parliament, the court has no discretion in the matter and the defect is incurable. In a situation like that, it is open to the court, and indeed to a judge of the Supreme Court, to order that the appeal is a nullity and is incurably defective. However, where the notice of appeal does not comply with the Rules, it is not incurably defective because the court has a discretion to overlook the defect. A judge in chambers should not preclude the court from considering whether the failure to comply with the Rules should be condoned or not.

Bank – overdraft – when an overdraft can be said to have been agreed upon – bank continuing to honour client's cheques even when insufficient funds stood in client's account – bill deposited as security for overdraft – bank not entitled to negotiate bill

Madondo NO v *Zimbank* HH-4-08 (Garwe JA) (Judgment delivered 30 January 2008)

The applicant was the liquidator of a discount house which had an account with the respondent bank. The discount house had deposited with the bank bills issued by the Grain Marketing Board as security for its overnight loans. The bank had allowed the discount house's account to go into overdraft in an amount far exceeding the value of the bills, even though there was no formal arrangement for overdraft facilities. Early in 2004 the Reserve Bank had closed down the discount house as being an "ailing institution". Two days later, the respondent bank liquidated the GMB bills for approximately a quarter of the value of the overdraft owed. The liquidator of the discount house sought an order that the respondent bank had violated ss 42, 43 and 112 of the Insolvency Act [*Chapter 6:*04], in that it allowed itself to obtain security on a previously unsecured debt and thereafter liquidated the security in circumstances which amounted to undue preference.
Held: (1) The suggestion by the respondent that there was no overdraft in the ordinary sense was not borne out by the facts. An overdraft is money lent. A banker is obliged to let his customer overdraw only if he had agreed to do so or such agreement can be inferred from a course of business. Here, whilst there may not have been an express request for an overdraft, it is clear from the respondent's conduct that in continuing to honour the discount house's cheques when the account did not have sufficient funds the respondent was agreeable to an overdraft.
(2) The liquidation of the bills *prima facie* had the effect of preferring the respondent against the other creditors. Under s 42 of the Act, such a disposition is voidable unless it is shown that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.
(3) This disposition was not made in the ordinary course of business. Before the security was delivered, it must have been evident that the discount house was unable to pay its debts. The security that was delivered was not even sufficient to cover the discount house's indebtedness to the respondent at that stage. There was a conscious effort on the part of the respondent to ensure that it, and it alone, benefited from the liquidation of the bills even though it must have been apparent that the discount house had other creditors.
(4) The respondent had no right to deal with the bills as owner and had no preference in the event of insolvency should it come about before the security had been realized. Where a bill is deposited as security for an advance, a bank is not entitled to negotiate the bill.

Church – government of – church's constitution – members and clergy bound by such constitution – effect of failure to follow procedures laid down in constitution – diocese purportedly withdrawing from province to which it belonged – diocese not following laid down procedures – legal action instituted in name of diocese – applicant having no *locus standi*

Diocese of Harare v *Church of Province of Central Africa & Anor* HH-6-08 (Hungwe J) (Judgment delivered 30 January 2008)

The applicant sought an urgent spoliation order against the first respondent, the Anglican Church's Province of Central Africa, and the second respondent, the bishop recognised by the Province as the Bishop of Harare. The applicant claimed to have broken away from the Province and thus sought to prevent the respondents from using the churches on the diocese and holding the second respondent out as being the Bishop of Harare.
There are 15 dioceses, including the applicant, which make up the first respondent. The Province is spread over Botswana, Malawi, Zambia and Zimbabwe. It is governed by a Constitution and other canons. Where a diocese wishes to withdraw from its Province to join another Province, that diocese must act in terms of the Constitution and obtain the relevant approval for its intended course of action. The former Bishop of Harare and his group did not follow the laid down procedures in order for their move to obtain the requisite approval for their withdrawal from the Province.

The respondents claimed that the applicant's "withdrawal" was unprocedural and therefore illegal as it was never endorsed by the relevant church organs as is required by the Constitution. Accordingly, the Diocese of Harare remained an integral part of first respondent as it has always been in the past. The other bishop could not claim to have taken the diocese out of the Province. As such, the second respondent contended, the Diocese had not instituted this action. Further, the respondents disputed that the applicant was in possession of the various church premises. These were owned by the first respondent which exercised its ownership through the Provincial Synod and, at diocese level, the individual Diocesan Trusts. The Diocesan Trusts thus held ownership for and on behalf of the first respondent. The possession and physical control of the church buildings, however, was vested in church wardens of the individual churches who are elected by the parishioners of the area. It is these wardens who were in physical possession and control of the churches and accordingly only church wardens could, in appropriate circumstances, bring an application for spoliation.

The applicant argued that in an application for spoliation the issue is whether there has been or has not been unlawful dispossession. The court therefore ought not to consider the issue of *locus standi*. The applicant also argued that it was entitled to a *mandament* in respect of the incorporeal right it had to minister to the faithful of the diocese. It claimed that the second respondent, by preaching in church premises under the Diocese of Harare, committed acts which amount to spoliation.

Held: (1) the applicant had no *locus standi in judicio* to bring the application. The applicant, through its agents in the person of the former bishop, elected not to follow the laid down procedures for withdrawing from the Province, thereby putting itself out of court. At law the applicant did not exist and therefore lacked capacity to sue.

(2) The question of *locus standi* was central to the determination of the availability of the remedy to the parties before a court. If the applicant's argument were taken to its logical conclusion it would mean that anyone could claim spoliation on behalf of a juristic person without the issue of that party's *locus standi* being inquired into. This would result in untenable situations and produce unintended consequences.

(3) A church is a voluntary association and the general principles applicable to such associations should apply. A voluntary association was founded on the basis of mutual agreement which entailed an intention to associate and consensus on the essential characteristics of the objectives of the association. The constitution of a voluntary association, which, together with its rules or regulations constituted the agreement entered into by its members not only determined the nature and scope of the association's existence but also prescribed and demarcated the powers of the association and its office-bearers. By accepting appointment to the office within the church, a minister or bishop, like any other officer-bearer, impliedly undertakes and affirms his wish to be bound by the constitution of that church. Conversely, the church, by accepting the membership of its office-bearers also impliedly confirms its obligation to act in terms of its own constitution in the event that there is dispute regarding any aspect of the administration of the church. The applicant could not exist outside the constitution of first respondent. It had no separate constitution of its own and had no structures of its own other than those set out in the constitution.

(4) In any event, the applicant did not meet the requirements for a *mandament van spolie*. Civil possession, which is physical possession, *detentio*, accompanied by intention to hold such possession to the exclusion of everyone else, *animus possidendi*, would certainly qualify an applicant for the *mandament.* An applicant for the *mandament* must demonstrate that he was in exclusive possession of the property before he is entitled to the *mandament.* It should be recalled that the real purpose of the *mandament* was to prevent breaches of the peace. It was intended to protect possession not access. Assuming that the applicant was in possession of the church premises in issue, a church organ, such as the applicant, could not possess church premises to the total exclusion of other church organs and its membership, such as the respondents. By their very nature, it is inconceivable that the applicant and first respondent could competently claim the *mandament* over church premises as neither can possess a church building to the total exclusion of the other.

(5) In assessing whether any act of spoliation has been committed, the court has to balance the constitutional rights of the parishioners to worship, their right to be ministered by one of theirs, and their right to enjoy communion against the alleged unlawful invasion of the bishop's right to minister his flock. The inquiry must confine itself to whether, by preaching at various churches the second respondent committed an unlawful dispossession of a legally recognized right held by the bishop. It could not be said that, where a bishop of one diocese is invited by the faithful to minister in a different diocese and accepts that invitation, the services he may conduct amount to unlawful dispossession of whatever rights are held by the ordained bishop for the locality.

Companies – liquidation – liquidation and distribution accounts – when may be re-opened – account confirmed and creditors already paid – account may not be re-opened – procedure to be followed where person aggrieved by decision of Master – necessary to bring matter on review – need to follow normal review procedures

Zimbabwe Development Bank & Anor v *Scott NO & Anor* HH-25-08 (Gowora J) (Judgment delivered 23 January 2008)

The applicants sought to have the liquidation and distribution accounts of a company which had been placed in liquidation

set aside and re-opened. They had, in August 2003, petitioned that the company be placed under liquidation. The first respondent was appointed liquidator. They proved claims which were stated in US dollars. The second respondent paid out the creditors' proven claims in local currency. The applicants returned the cheques, claiming that the second respondent had erred by using a conversion rate against the US Dollar which was prevailing at the time of liquidation instead of the rate prevailing when payment was actually effected. The applicant therefore sought an order to have the distribution account re-opened and for the recalculation of the Zimbabwe dollar equivalent of their claims.

Held: the applicants could only rely on the provisions of the Companies Act [*Chapter 24:03*] for whatever relief they sought. The effect of placing a company in liquidation is to replace contractual rights that existed prior to liquidation with special rights created and governed by the Companies Act. They had to look to the Act in seeking redress in the event that the liquidator had not performed the duties required of him by the Act. The right they sought to be exercised was derived from s 283 of the Act. In terms of s 296, any person aggrieved by any decision, ruling, order, appointment or taxation of the Master under the Act may bring it under review by the court. As the Act does not make provision for the manner in which the review proceedings must be launched, proceedings for review have to done in accordance with the High Court Rules. Under the Rules, an application for review must be brought within a period of eight weeks from the date on which the suit, action or decision being complained of occurred. The applicants had only launched proceedings over a year after becoming aware of the decision.

In casu, all the creditors had been paid and the account was confirmed some fourteen or so months before the applicants thought of launching proceedings. Before a distribution account can be set aside it must be re-opened, and the applicants can only have it re-opened in terms of the Act. Section 283 of the Act precludes the re-opening of a final distribution account where there has been payment of a dividend.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 16B – acquisition of agricultural land by the State – removes right to challenge acquisition – s 18 impliedly repealed to that extent – power of legislature to amend Constitution – may amend in any way provided procedures for amendment fully complied with – s 23 – protection against discrimination – nothing on acquisition notices or s 16B referring to race of persons dispossessed of land – section not contravened

Mike Campbell (Pvt) Ltd & Anor v *Min of National Security & Ors* S-49-07 (Malaba JA, Chidyausiku CJ, Ziyambi, Gwaunza & Garwe JJA concurring) (Judgment delivered 22 January 2008)

The applicants were owners of a farm which had been compulsorily acquired as being necessary for implementation of the land reform program. The acquisition was challenged on a number of grounds, including that allegation that the applicants were deprived of their rights under s 18 of the Constitution and that the provisions of s 23, which prohibits discrimination on, among other things, grounds of race, were bring infringed.

Held: (1) there was nothing in s s 16B(2)(a)(i) of the Constitution and the acquisitions of the pieces of agricultural land which resulted from its operation which referred to the race or colour of the owners of the pieces of land acquired, so there was no question of violation of s 23 of the Constitution to be considered.

(2) Underlying s 16B is the principle, which is almost a universal law, that every sovereign state has an inherent right to compulsorily acquire private property within its territory for public purposes with an obligation to pay fair compensation for the property acquired. The makers of our Constitution proceeded from the position that as the power to compulsorily acquire private property for public purposes is inherent in the state, the duty on the legislature was to determine the restrictions or conditions under which the power was to be exercised. As a result of the operation of this fundamental principle two separate but related procedures underlie the provisions of s 16B. The first relates to the actual acquisition of the land, whilst the second procedure relates to the right to payment of fair compensation. Under the first procedure, the acquisition is made to depend on the existence of a state of facts established by purely administrative acts of the acquiring authority. These facts are that the Minister whom the President has appointed as an acquiring authority publishes a notice in the *Gazette* identifying the agricultural land to be acquired and stating therein the purpose for which the land is required.

(3) Acquisition in terms of s 16B(2)(a) of the Constitution is a lawful acquisition of the agricultural land affected. As the acquisition of agricultural land is lawful, s 16B(3) provides that subss 18 (1) and (9) of the Constitution, which provide the right to protection of law and appropriate remedies against unlawful interference with or infringements of fundamental rights, shall not apply to the acquisition.

(4) The fundamental rights set out in Chapter III of the Constitution are not immutable. The Constitution does not have any provision which entrenches any of the provisions of fundamental rights beyond the reach of the exercise of the legislature to amend, add to or repeal any of the provisions of the Constitution. All the provisions of the Constitution, including those relating to fundamental rights, share one common feature of being liable to alteration or repeal. The duty of the court is limited to determining whether in enacting s 16B the legislature complied with the prescribed procedural and substantive

requirements under s 52(1).
(5) Section 52(1) empowers the legislature to enact any law the effect of which is the taking away of any of the fundamental rights specified in the Declaration of Rights, provided the restrictions or conditions of the exercise of that power prescribed thereunder are complied with. In enacting s 16B of the Constitution, the legislature complied with all the requirements of the special procedure for making fundamental law prescribed under s 52(1) of the Constitution. The section is a legitimate exercise of the legislative power to determine the conditions under which the power inherent in the State to compulsorily acquire private property in agricultural land for public purposes can be validly exercised.
(6) The clear intention of the legislature in enacting s 16B(3) was to modify the provision of subss 18 (1) and (9) of the Constitution with respect to any challenges of the acquisition of agricultural land effected in terms of s 16B(2)(a). However, the right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away.
(7) The question what protection an individual should be afforded under the Constitution in the use and enjoyment of private property is a question of a political and legislative character. It not a judicial question. The general principle is that provisions of the Constitution should not be construed so as to take away the jurisdiction of courts of law. It is however subject to the first of all principles of construction that when in clear and unambiguous language the legislature in the proper exercise of its powers has provided that courts of law shall not have jurisdiction in a specific class of cases not pending before the courts at the time the ouster is made operational, the intention of the legislature must be respected and enforced.
(8) The right to protection of law under s 18(1), which includes the right of access to a court of justice, is intended to be an effective remedy at the disposal of an individual against an unlawful exercise of the legislative, executive or judicial power of the State. It is not meant to protect the individual against the lawful exercise of power under the Constitution. Once the state of facts required to be in existence by s 16B(2)(a) does exist, the owner of the agricultural land identified in the notice published in the Gazette has no right not to have the land acquired. The question whether an expropriation is in terms of s 16B(2)(a) and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. If the purported acquisition is, on the face of the record, not in accordance with the terms of s 16B(2)(a) a court is under a duty to uphold the Constitution and declare it null and void.
(9) Payment of fair compensation for improvements effected on such land within a reasonable time after the acquisition is not a pre-condition for the acquisition.

Constitutional law – Constitution of Zimbabwe 1980 – s 24 – enforcement of protective provisions – application to Supreme Court under s 24(1) – may not be made where applicant is party to proceedings in High Court or subordinate court – exceptions

Mann v *Republic of Equatorial Guinea* S-1-08 (Chidyausiku CJ, in chambers) (Judgment delivered 30 January 2008)

It is not open to a party in proceedings in the High Court or a subordinate court to apply to the Supreme Court in terms of s 24(1) of the Constitution except where the presiding officer violates the applicant's right in the process of considering the application for referral. If, for example, he had, out of selfish interest and in bad faith held that the raising of constitutional question by the applicant was merely frivolous or vexatious, he would have infringed the applicant's right to the protection of the law guaranteed under s 18(1) and an application could be made under s 24(1). Otherwise, the applicant's recourse is to apply under s 24(2) for the presiding officer to refer to constitutional question to the Supreme Court.

Contract – compromise – what is – effect of compromise on original cause of action

Moyo & Anor v *Intermarket Discount House Ltd* S-60-07 (Ziyambi JA, Cheda & Garwe JJA concurring) (Judgment delivered 9 April 2008)

The respondent sued the appellants for a sum of money, based on an acknowledgment of debt. The respondent had lent the appellants a sum of money which had not been repaid. The amount owing had increased due to interest. After negotiations, the appellants signed the acknowledgment of debt, but when the respondent sued, the appellants paid the original sum owed, plus interest up to the double, claimed that the balance due under the acknowledgment of debt was illegal interest, as it offended against the *in duplum* rule. In its replication, the respondent claimed that the principal debt had been novated. At the trial, counsel for the respondent advised the court that he would be relying not on the principle of novation but on that of compromise, it being the respondent's stance that the principal debt had been compromised and was

therefore recoverable. The trial judge found on the facts that indeed a compromise had been arrived at and accordingly gave judgment in favour of the respondent. The appellants argued on appeal that the trial court should not have found that the respondent's claim against the appellants was based on a compromise, because in the summons and particulars of claim, the respondent had based its claim on the basis of an alleged novation.
Held: (1) the rules relating to pleadings require that a party pleads the facts on which his case is based and not the law applicable or the evidence by which he intends to establish those facts. Parties will be bound by their pleadings where any departure would be prejudicial to the other party or prevent a full enquiry. However, the courts have a wide discretion, and where there has been full investigation of a matter and there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. Here the court *a quo* had before it all the facts which were necessary to determine the real issue which arose before it, which was whether the agreement amounted to a compromise or a novation.
(2) Compromise is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something either diminishing his claim or increasing his liability. A party sued on a compromise is not entitled to raise defences to the original cause of action. On the facts, the trial court's conclusion – that there had been a compromise – was correct.

Contract – mistake – unilateral mistake by offeror – when will entitle offeror to escape liability

Contract – waiver – delay in enforcing rights – when may be construed as waiver of right

Agribank v *Nachingaifa & Anor* S-61-08 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 17 March 2008)

The respondents were employed in managerial positions by the respondent bank. In 2000 they signed revised contracts of employment. Among the provisions of the contract was one relating to the use of motor vehicles. This provided that the employees could purchase a car under the bank's scheme and claim for the use of it when on duty. They were also entitled to a fixed monthly allowance based on 4000 km a month. The following year the bank wrote to the affected employees and told them that the car scheme had been changed. The benefits were substantially less. The respondents almost immediately raised the question of the monthly allowance and were told that the bank could not afford it. After more correspondence, the bank told the respondents that the allowance had been included by mistake. Following this statement, the respondents sought a *declaratur* that they were entitled to the allowance. The High Court granted the application. On appeal, the bank raised 4 issues: (1) that the inclusion of the allowance in question was the result of a mistake; (2) that the respondents had waived their rights by not bringing up the matter to court timeously; (3) that in terms of the contract of employment agreed to by the respondents, the appellant could change its policies and procedures; and (4) that the court *a quo* had no jurisdiction to determine what was essentially a labour dispute contrary to the provisions of s 89(6) of the Labour Act [*Chapter 29:01*].
Held: (1) the High Court's inherent jurisdiction to grant declaratory orders in labour matters had not been ousted. The only issue for determination was whether the case was a proper one for the exercise of discretion under s 14 of the High Court Act. The fact that the dispute could well have been determined in the Labour Court was not the determining factor.
(2) There is a presumption, even in some cases a strong one, against waiver. This means not only that the *onus* is upon the party asserting waiver to prove it, but that although, as in all civil cases, the *onus* may be discharged on a balance of probability, it is not easily discharged. *In casu*, the correspondence showed that the respondents immediately complained and even threatened to take legal action. In any event, delay in enforcing a contractual right is not necessarily a waiver of the right. Delay, of itself and without more, can never deprive a party of a contractual right except by prescription.
(3) A party to a contract relying on an error of judgment, who can go further and show that at the time of the contract he was labouring under some misapprehension, may escape liability under a contract. The *onus* however is not easy to discharge. Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man he ought to have known of it, or that he caused it, the *onus* of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge. However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract and in fact in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is iustus. In this case, when the appellant made provision for this allowance in the contract of employment, there was no question of mistake at that stage. That allowance was what the appellant was prepared to offer the respondents. Later, however, the appellant had a change of heart because it considered the allowances as too high and unsustainable. An offeror cannot escape liability

by establishing that he has made a wrong offer which was accepted.
(4) Although the respondents undertook to subscribe to the bank's policies and procedures currently in use and as revised and amended from time to time, this did not mean that the bank was empowered to remove, without reference to the respondents, such a fundamental right as the entitlement to payment of a monthly mileage allowance. If the appellant's argument were to be taken to its logical conclusion, even the respondents' salaries could have been reduced. The bank, in amending its policies and procedures, was not empowered to alter clearly defined contractual rights to payment of a salary and allowances.

Contract – performance – impossibility – when extinguishes obligations under contract – parties contemplating situation giving rise to impossibility – defendant not able to rely on impossibility to avoid obligations

Contract – performance – reciprocity – when party sued on contract entitled to rely on reciprocity by other party – principle of reciprocity may be excluded by contract itself

Beitbridge-Bulawayo Railway (Pvt) Ltd v *Commercial Union Ins Co of Zimbabwe Ltd* S-57-07 (Garwe JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 11 March 2008)

The appellant acquired the sole right to the use of the Beitbridge-Bulawayo railway line for, inter alia, the carriage of goods, including petrol, for the National Oil Company of Zimbabwe (NOCZIM). The respondent insured the appellant against any loss of gross profit resulting from any interruption of or interference with its business during a 12-month period. For part of this period, the appellant's business was interrupted by a cyclone which rendered the railway line from South Africa to Beitbridge impassable and as a consequence goods could not be carried on the line. As a result the appellant suffered certain losses. All the losses were made good by the respondent save for loss of gross profit in respect of NOCZIM traffic. It was agreed by the parties that the respondent would be liable to pay this amount unless, despite the appellant's inability to convey petrol belonging to NOCZIM, NOCZIM was obliged to make payment for the minimum volume of traffic it was obliged to procure on the railway line in terms of an agreement between the appellant and NOCZIM.
The High Court found that, despite the cyclone, NOCZIM was liable, in terms of the agreement between itself and the appellant, to pay the minimum amount due in terms of the agreement and consequently the appellant should have looked to NOCZIM for payment of the amount in question.
The appellant argued that that NOCZIM's obligation to make the payment for the minimum volume of petrol had been suspended by reason of the supervening impossibility and frustration that arose as a result of the closure of the railway line due to the cyclone. It was further argued that this was a case where the principle of reciprocity applies: where the one party has not performed for whatever reason, the other cannot demand performance.
Held: The general rule is that if, as a result of vis major or other supervening physical or legal act, performance of a contract has become impossible through no fault of the debtor, the obligations under the contract are extinguished. There are, however, exceptions. If it is clear that the parties contemplated the situation which gave rise to the impossibility, then the general rule would not apply. Regard must therefore be had to the agreement between the parties, as it is from the provisions of the agreement that the court can determine whether or not supervening impossibility or frustration has the effect of extinguishing obligations under that agreement. It was clear from the relevant provisions of the agreement that the parties were aware that intervening impossibility could prevent a party either wholly or in part from fulfilling its obligations under the contract. In the knowledge of the possibility of such an event, they had agreed that all obligations would be suspended for the duration of such an event except the obligation to make payment due under the agreement.
The principle of reciprocity recognizes the fact that in many contracts the common intention of the parties is that there should be an exchange of performances, and the exception gives effect to the recognition of this fact by serving as a defence for the defendant who is sued on the contract by a plaintiff who has not yet performed or tendered to perform. Whether the contract is one to which the principle of reciprocity would apply is a question of interpretation. The presumption is that in any bilateral contract the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations. However, general principles may be excluded by the contract itself. *In casu*, the parties had agreed that in the event that either party was prevented from fulfilling its obligations, the agreement would be suspended for the duration of the event causing such impossibility, except the obligation to make payment due under the agreement. The defence that would otherwise have been available to the appellant was by agreement expressly excluded.

Court – High Court – jurisdiction – labour matters – application for declaration – only labour matter over which High Court has jurisdiction – need for court to examine precise nature of relief sought

Mushoriwa v *Zimbank* HH-23-08 (Gowora J) (Judgment delivered 23 January 2008)

In terms of 89(6) of the Labour Act [*Chapter 28:02*], no court, other than the Labour Court, has jurisdiction in the first instance to hear and determine any application, appeal or matter regarding labour matters. This includes seeking a review in regard to a labour matter. However, the power to issue a declaratory order is specific to the High Court. The Labour Court, unlike the High Court, has not been specifically empowered to issue declaratory orders and cannot create such a relief or the procedure for granting such relief as it is not a court of inherent jurisdiction. Consequently, if the relief that an applicant seeks is in the nature of a declaratory order, the High Court would have original jurisdiction as that power has not been specifically ousted by statute.

An exercise undertaken by the court to examine the manner in which the respondent effected the dismissal of the applicant would be no more than a review of that process. Any argument by the applicant that what he seeks is a declaration of nullity does not detract from the nature of the relief sought by the applicant. In determining the nature of the relief that is sought by a litigant a court is bound to examine the process by which the relief being sought can be achieved. A draft order cannot *per se* be the determining factor of the nature of such relief, as the draft order is achieved or arrived at through a process. Where one cannot determine the matter without subjecting the conduct of the respondent to scrutiny in light of the provisions of s 12 of the Act, such process, no matter what the applicant may choose to name it, is a process of review. Where a declaration of nullity can only come about after a process of review, the court would not have jurisdiction.

Court – High Court – jurisdiction – labour matters – declaratory order – High Court retaining jurisdiction to grant such order

Agribank v *Nachingaifa & Anor* S-61-08 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 17 March 2008)

See above, *under* CONTRACT (Mistake).

Court – jurisdiction – children's court – custody order granted by High Court – juvenile court having no jurisdiction to vary such order

Court – jurisdiction – two courts having jurisdiction over same matter – one court seized with the matter – other court, even a senior one, having no jurisdiction to deal with the matter

Surtee v *Surtee* HH-7-08 (Makarau JP, Mavingira J concurring) (Judgment delivered 13 February 2008)

It sometimes happens that two courts both have jurisdiction over the same matter, a situation that obtains between the High Court and the children's court and other lower courts. The question is not which court is the senior, but which course is more conducive to stability of administration. The High Court has over the years adopted the approach that where there is an existing order by a court of competent jurisdiction, another court (including the High Court) cannot, except by way of review or appeal, make an order competing with or overriding it even if the court making the original order is inferior to the High Court. By the same token, and in reverse order, where there is an order of the High Court regulating the custody of minor children, a lower court cannot make an order seeking to compete with or vary such order. The issue is not that the children's court is an inferior court, but that the courts have to adopt a sensible and practical approach to the matter and avoid dealing with orders that are properly before another court of competent jurisdiction, save as is provided for under the procedure of review. *In casu*, having made an order relating to custody (with the unstated but undisputable condition that the order is subject to variation if circumstances change), the High Court was seized with the custody issue. The children's court could not exercise its parallel jurisdiction in the matter at first instance nor could it purport to vary the order of the High Court.

Court – magistrates court – proceedings before – requirement to follow correct rules of procedure – not permissible for court to proceed on informal basis even with unrepresented parties

Mandava v *Chasweka* HH-42-08 (Makarau JP, Hlatshwayo J concurring) (Judgment delivered 8 May 2008)

All magistrates courts are formal courts whose proceedings are governed by a set of rules and established procedures. The setting of rules of procedure is the widely acceptable manner of avoiding arbitrariness and ensuring fairness in the airing of disputes by litigants. Rules of court are framed for a purpose and any procedure done outside the rules is susceptible of being set aside. Such informality as hearing the parties in the absence of pleadings filed of record and before a pre-trial conference has been held is unacceptable. It destroys the integrity of magistrates' courts as courts of law and reduces proceedings before the court to the same level as that before the traditional leaders and at village level.

Court – magistrates court – jurisdiction – eviction – interdict amounting to constructive eviction – such order subject to normal monetary jurisdiction of court

Court – review – magistrates court – grounds for review – gross irregularity – includes conduct which though well-intentioned and *bona fide*, prevented a fair trial

Pondoro (Pvt) Ltd & Anor v *Nemakonde & Anor* HH-18-08 (Hungwe J) (Judgment delivered 20 January 2008)

The applicants were the owners of a farm which had been expropriated by the State. The first respondent was the person to whom the farm had been offered. The first respondent had obtained an eviction order against the applicants from the second respondent, a local magistrate. The magistrate had granted the order in default after the applicants' legal practitioners were late in appearing to answer the application for eviction. This order was made despite the magistrate having earlier recused himself from dealing with another, related, matter between the same parties. The applicants complained that the eviction order had the effect of preventing them applicants from continuing with their farming operations without having been afforded an opportunity to be heard on such a drastic issue. In addition, they averred that the value they stood to lose was far in excess of the court's monetary jurisdiction.
Held: (1) under s 27 of the High Court Act [*Chapter 7:06*] the decision of an inferior court may be brought on review on the grounds of, *inter alia*, gross irregularity. Not all procedural irregularities will qualify a superior court setting aside the proceedings leading to the result complained of. The irregularity must be so gross as to have prevented the presiding officer from deciding the issues which he had to decide. Put differently, the irregularity must have resulted in a miscarriage of justice to be sufficient ground for review. It is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues, then it will amount to a gross irregularity.
(2) *In casu*, the magistrate committed two gross procedural errors warranting the court to infer prejudicial bias on his part: (a) having correctly decide that it was appropriate for him to recuse himself, he then went ahead and presided over the same or similar matter. It did not matter that the matter was one proceeding by default. (b) The applicants raised the question of jurisdiction but because of the procedure the magistrate adopted he prevented them from placing their case before him when he knew they had a case to present.
(3) A magistrates court can only do those things the Magistrates Court Act expressly prescribes to it. In respect of interdicts, s 12(1) provides that, subject to the limits of jurisdiction prescribed by the Act, the court may grant interdicts. The effect of the wording of the interim interdict was to shut the applicant out of his home and farm. This in essence was constructive eviction of the applicant and thus was in violation of the monetary jurisdictional limit of the magistrates court.
(4) There is a specific procedure for eviction in respect of land acquired in terms of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*]. The right to claim eviction is only exercisable by the acquiring authority. That process is not initiated by a beneficiary under that land reform programme, or by an officer of the acquiring ministry.

Criminal law – common law offences – culpable homicide – foreseeability – accused creating dangerous situation by driving away from police road block – police officer firing at accused's vehicle and killing passenger – death not foreseeable consequence of accused's acts

S v *Machembo* HH-2-08 (Kudya J) (Judgment delivered 16 January 2008)

The accused was driving a lorry on a main road at night. The lorry carried several passengers. The accused was stopped at a police road block; he was told by the police to go to the nearest police station because the vehicle was not properly lit. He instead drove off, resulting in the police giving chase and erecting another road block to stop him. He did not stop there either. The police opened fire, killing one of the passengers. The accused was charged with and convicted of culpable

homicide. It was alleged that by failing to obey the order to stop, he acted negligently and that this negligence caused the death of one of his passengers.
Held: a conviction for culpable homicide is founded, firstly, on proof of negligent conduct and, secondly, on the foreseeability of death arising from that conduct. The concept of foreseeability is sometimes expressed as the natural and probable consequence or as the direct result of the act or omission that the accused fails to guard against which results in death. *In casu*, the accused took a deliberate and conscious act to disobey the police. His actions in failing to stop were grossly negligent. He was therefore negligent in that he created a dangerous situation by driving off from the road block instead of stopping as directed by the police. However, the State case fell on the aspect of the foreseeability of death arising from the accused's failure to obey the instruction to stop. Whether or not he was aware that the police who stopped him before the shooting were armed, a reasonable man would not expect an armed policeman to shoot at a moving lorry with passengers at the back in a bid to stop the driver. The death of the deceased was thus caused by the policeman and not by the accused's manner of driving. It was neither the direct result nor the natural and probable consequence of his failure to obey the police instruction to stop.

Criminal procedure – extradition – appeal – nature of — appeal in the wide sense – not necessary to rely on misdirections by court *a quo*

Criminal procedure – extradition – *prima facie* case – meaning of – what evidence is required before extradition may be ordered

Criminal procedure – extradition – when prohibited – prohibition where extradition would conflict with international obligations – UN Convention on Torture – applicability of

Mann v *Republic of Equatorial Guinea* HH-1-08 (Makarau JP & Patel J) (Judgment delivered 23 January 2008)

An appeal in terms of s 18 of the Extradition Act [*Chapter 9:08*] is an appeal in the wide sense, that is, the appeal court need not first establish any misdirection on the part of the lower court. It re-hears the request as argued before, together with any additional considerations of a humanitarian nature that may be placed before it during the appeal hearing. The correctness or otherwise of the approach adopted by the lower court in coming to the conclusion that it did are therefore not issues before the appeal court.
Before a court can make a finding that there are substantial grounds for believing that the appellant will be subjected to torture, cruel, inhuman or degrading treatment if extradited, there must be expert evidence concerning the efficacy and fairness of the justice delivery systems in the country seeking extradition. A report, even from a body of international standing such as Amnesty International or the International Bar Association, cannot be accepted without some further basis having been laid as to the authors of the report and their expertise in issues relating to torture and the legal system of the country in question.
Torture is universally proscribed at the international level, in instruments of global as well as regional application. This has two consequences: (a) it imposes upon every State obligations which are applicable towards all other States, which are then endowed with correlative rights; and (b) the principle against torture has evolved into a peremptory norm or *jus cogens*, that is, a principle endowed with primacy in the hierarchy of rules that constitute the international normative order. As such, it cannot be derogated or deviated from by any State or group of States. The overarching nature of the principle against torture imposes certain additional duties on States. It requires States to do more than simply eschew the practice of torture and to give more positive and wider effect to the principle in the fulfilment of their international obligations. Consequently, Zimbabwe is not yet a party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it nonetheless has an obligation not to extradite any person to a country where there are substantial grounds for believing that the person so expelled, returned or extradited would be in danger of being subjected to torture.

The court was established by s 161(1) of the Act, which provides that the purpose of the court is to hear and determine election petitions "and other matters in terms of this Act". The applicants argued that the words of the section were wide enough to give the court jurisdiction to hear and determine matters arising from failure to comply with any provisions of the Act.

Held: (1) As a creature of statute, the court could only exercise the jurisdiction conferred on it by the statute which created it. Jurisdiction can be conferred expressly or by necessary implication.

(2) The meaning of "and other matters in terms of this Act" can be discovered by assigning an ordinary, literal or grammatical meaning to every word in the phrase. In this case the key word was "terms", the dominant meaning of which clearly has something to do with limiting, conditioning, bounding and directing whatever is to be done. In this context, it meant that the jurisdiction of the court was as is limited, conditioned, bound and directed by the Act.
(3) Whether the court had jurisdiction could be determined by ascertaining the expressed or implied intention of the legislature from the construction of the sections which confer jurisdiction on the court and a careful study and construction of the scheme of the Act. This called for an analysis of the sections conferring jurisdiction on the Electoral Court and other courts. An examination of the sections conferring jurisdiction showed that in some instances, the magistrates court had jurisdiction; in others, the Electoral Court; and in others, the High Court. This clearly demonstrated the legislature's deliberate intention as to which court it intended to deal with which situation. Consequently, where the legislature intended to confer jurisdiction on the Electoral Court it did so by conferring it through a specific provision in the Act. There was clearly no room for the conferring of jurisdiction by implication. The express mention of the instances where the court had jurisdiction was a clear indication that where no jurisdiction was specifically conferred the legislature did not intent to confer jurisdiction on the court. Although the maxim *expressio unius est exclusion alterius* was one of limited application to be applied with great caution, this was a case where it did apply.
(4) The clear meaning of s 157 of the Act is that the court may during the hearing of a petition, or when an application is made to it in terms of s 157(2), make an order allowing an otherwise illegal practice an exception to the provisions of the Act. The interpretation of the words "and other matters in terms of this Act" remains unaffected by the provisions of s 157.

Elections – presidential election – results – announcement of – need for results to be processed with urgency – when delay permissible – recount ordered on initiative of Election Commission – when may be ordered – may justify delay in announcing results

Elections – Zimbabwe Election Commission – proceedings against – need to cite Chairman – jurisdiction of court to hear matter against Commission – court having jurisdiction to ensure Commission operating within law

MDC & Anor v *Chairman, ZEC & Anor* HH-37-08 (Uchena J) (Judgment delivered 14 April 2008)

Following the harmonised elections held on 29 Match 2008, the results of the polls for elections to parliament and local authorities were announced within a few days of the elections. The results were announced at constituency levels by the respective constituency elections officers. They were also announced by the National Collation Centre presided over by the second respondent, the chief elections officer of the Zimbabwe Election Commission (ZEC). This second announcement was merely for the benefit of the general public as the legal requirements had been satisfied at constituency level. The applicants, the main opposition party and its president, sought an urgent order compelling the respondents to announce the results of the poll for the office of President.
The respondents argued that the court did not, in view of the wording of s 61(5) of the Constitution, have jurisdiction to hear the application.
On the question of urgency, the applicants argued that s 110 (3) of the Electoral Act [*Chapter 2:13*] provides for a re-run within 21 days after the previous election in the event of no candidate obtaining a clear majority in the election. This meant that a delay in announcing the election results would deprive candidates of sufficient time to prepare for the re-run. The respondents argued there was no urgency in the application because the cause of action was based on the announcement of the results of the presidential poll. Those results were not due, as the provisions of the Second Schedule to the Act had not yet been complied with; and any cause of action would arise only when the provisions of that schedule had been complied with.
The respondents argued that the first respondent, the Chairman of the ZEC, should not have been joined as he plays no roll in the processing and announcement of presidential results.
On the merits, the applicants contended that there had been an unreasonable delay in the processing and announcement of presidential results. The results for the presidential poll should have been announced already. The respondents were employing delaying tactics by announcing the already declared results for the House of Assembly and the Senate, thereby avoiding their primary responsibility. The procedures laid down in ss 64 and 65 and the Second Schedule of the Act should have been followed. It should not have taken long to collate, verify and announce the results. These procedures signified the legislature's intention that the results of the poll must be processed and be announced without any undue delays. The respondents argued the Act did not require them to collate, verify and announce the results in a specified period. They were entitled to act at their own discretion.
The first respondent claimed that the delay in producing the results of the presidential election was that it had received several complaints and was considering whether to order a recount, a matter that was entirely within the ZEC's discretion.

Held: (1) The clear intention of the legislature in s 61(5) of the Constitution was to ensure ZEC's independence, provided it was operating within the law. It has to exercise its functions as provided by s 61(4) for it to enjoy that immunity. It cannot, for example, conduct elections unfairly or outside the law or which are not free and fair, but on being sued insist that the courts have no jurisdiction over it. The court would in such circumstances have jurisdiction to hear and determine complaints against ZEC.
(2) The applicants had shown that the delay was caused by the respondents wasting time on already declared election results instead of doing what they are mandated to do, that is, the collation and verification of presidential results and their announcement.
(3) The first respondent was correctly cited in his nominal capacity as the Chairman of ZEC. Section 18 of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] provides for his being a nominal cite in the event of legal proceedings against the ZEC.
(4) In terms of s 64(2) of the Electoral Act polling station-returns and other election results material must be urgently, and under the personal care of the presiding officer, be sent to the constituency elections officer. Even the death, injury or illness of the presiding officer is not allowed to delay the transmission of these materials; in that event a polling officer must take over and deliver them with the same urgency the presiding officer should have done. The presidential polling station-return is part of the material to be urgently transmitted. In terms of para 1 of the Second Schedule, these returns must be urgently transmitted from polling stations and constituency centres to the second respondent for collation.
(5) In terms of para 2(1), the Chief Elections Officer must give reasonable notice in writing to each candidate or his chief election agent of the time and place where the Chief Elections Officer will verify and collate all the constituency returns. No time limit is specified for him to give such notice. However, para 3 of the Schedule required that once the verification and collation starts it continues until the winning candidate is forthwith declared the president if the result produces a winner with a majority of the votes cast. This clearly proves urgency is resumed from the time the invitees come till the declaration of the winner. The limited period between the first and second election suggests that the first election's results must be processed with urgency to avoid prejudicing candidates who will be contesting the second election. The processing of presidential results must be given priority when compared to the announcement by the National Collation Centre of other elections which have no possibility of a re-run. The legislature must have intended that presidential election results should be processed without any undue delay.
(6) It was not necessary to decide whether the ZEC was an "administrative authority" in terms of the Administrative Justice Act [*Chapter 10:28*]. Its conduct should be determined by whether it had complied with s 61(4)(a) of the Constitution, which required it to conduct elections "efficiently, freely, fairly, transparently and in accordance with the law". The use of the word "efficiently" when construed in conformity with the urgency provided for in the Electoral Act means the ZEC must act accurately and timeously. In the absence of an explanation the delay in announcing the results seemed to be unjustified and pointed to a lack of efficiency. The period between the holding of the elections and the date of application is six days; three other elections involving greater numbers of candidates were processed and finalized at their levels within two days of the date of the elections.
(7) In terms of s 67A(1) of the Act (which by virtue of s 112 applies *mutatis mutandis* to presidential elections), a recount can only be requested by a party or candidate within forty-eight hours after the declaration of the results of the presidential election. A recount before the announcement of the results is not provided for. However, s 67A(4) allows the ZEC of its own initiative to order a recount of the votes at any station if it has reasonable grounds for believing that votes were miscounted. The section does not state when it can do so. The matter is within the ZEC's discretion and not subject to appeal. Consequently, the reason proffered by the respondents for their failure to timeously announce the presidential results was legally valid and could justify the delay. The respondents had not strayed from the law and the court was therefore not entitled to intervene.

Employment – code of conduct – disciplinary proceedings under – penalty which may be imposed – code providing different penalties for a first offence and for subsequent offences – serious offence committed – employer no limited to penalties for first offence

Toyota Zimbabwe v *Posi* S-55-07 (Malaba JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 4 March 2008)

The respondent was dismissed from his employment following disciplinary proceedings for an act of gross negligence regarding the handling of funds. This act had caused considerable financial loss to the employer. The code of conduct under which he was charged provided that, "depending on the severity of the offence committed", the following penalties were provided for an offence which fell into the category of serious breaches of the code: for a first offence, a final written warning valid for 12 months and/or demotion and suspension without pay for up to 30 days; and for a second offence,

dismissal. The respondent argued that since this was a first offence the disciplinary committee was bound to impose the lighter penalty and that dismissal was not a competent penalty.
Held: If the construction of the words proposed by the respondent was adopted, the result would be that an employee who committed an act of misconduct which went to the root of the relationship between employer and employee could not be dismissed as long as it was his first breach of the rule against that conduct. This construction would drastically alter the common law. The position at common law is that a high degree of negligence, such as gross negligence in the performance of work, justifies an employer dismissing the employee. It is also the position at common law that the commission by an employee of conduct inconsistent with the fulfilment of express or implied conditions of the contract of employment entitles the employer to dismiss him if the circumstances of the commission of the offence show that the continuance of a normal employer and employee relationship has in effect been terminated. The Labour Act contains no provision which either expressly or impliedly purports to alter the common law principle that an employer has a right to dismiss an employee following conviction for a misconduct of a material nature going to the root of the employer and employee relationship. A code of conduct cannot alter or abrogate a principle of the common law. It does not matter that the code of conduct is a product of an agreement. What the code meant *in casu* was that the intention of the parties was to have the penalties provided imposed by employers unless there was evidence in the circumstances of the commission of the offence which so aggravated the conduct of the employee as to take it out of the ordinary degree of seriousness of the breach. In that case the employer was entitled to impose the penalty of dismissal on a first offender, which accords with the common law principle mentioned.

Employment – contract – variation of terms – conditions of service – what constitute – provision of medical aid – employers' obligation to pay contributions to medical aid society – medical aid society altering levels of benefits in accordance with contributions – not a change in employees' conditions of service

Railway Artisans Union & Ors v *Railmed & Ors* HH-111-08 (Gowora J) (Judgment delivered 29 January 2008)

The first respondent was a registered medical aid society, the object of which was to provide medical aid to persons associated with the railway industry. In terms of its constitution, the respondent could include the schedule of rates payable by different categories of members, and could determine the range and scope of benefits to be afforded by it to its members. Benefits which the employees received were originally not related to the level of payment by the beneficiary. The first respondent put into effect a three tier system where benefits were structured according to the level of contributions paid by respective members. The applicant trade unions sought an order to set aside the new system. It was argued that the first respondent's actions in altering the benefit structure being offered to their members were an alteration of the conditions of service of the unions' members. Most of the unions' members were not actually employed by the first respondent, but by the railways and associated entities. The applicants argued that they had a legitimate expectation to be heard before the implementation of the new system. They contended that the first respondent was a public body and as such it had the obligation, before making any decisions which would adversely affect the rights of the members of medical aid society, to give them a right to be heard.
Held: (1) conditions of service can only exist where services of a personal nature are rendered, with one party being the employer and the other the employee. *In casu* there were no services of a personal nature being rendered by the applicants' members to and on behalf of the first respondent. While presumably the contracts of employment between the applicants' members and their employers provided for contributions by the employers for subscriptions to a medical aid society, the level and extent of benefits afforded to members was within the discretion of the first respondent and the employers had no input in such assessment. The condition of service was the entitlement to membership in terms of the contract of employment, coupled with the employer's obligation to contribute an equal measure as the employee. Since the employer did not determine the level of benefits afforded by the first respondent, the fact the benefits were reduced did not alter the conditions of service, which remain unchanged.
(2) The first respondent had the power to regulate the range and scope of the benefits to be afforded by the medical aid scheme. There would be no practical benefit for a medical aid society to have the power to set the schedule of rates of contributions to be paid by the different categories of members but not the power to set the range and scope of the benefits to be afforded to the membership. It would be only logical that the range and scope of benefits be set and then the contributions be calculated.
(3) As the first respondent was a restricted medical aid society on the basis of employment or association therewith, it could not be termed to be a public body. There was thus no basis of public law on which the first respondent's actions could be challenged. The court was concerned only with the rights and obligations which flowed from the contract.
(4) There is a presumption in favour of applying the *audi alteram partem* rule when the decision is made in the exercise of

a statutory power (unless the rule is expressly excluded). There is no such presumption when a decision is taken in the exercise of a contractual right, because the question then is whether or not the failure to hear the other party constituted a breach of contract. A party cannot be in breach of an obligation which has not been made an express or implied term of the contract.

Employment – contract – variation of terms – when employer entitled unilaterally to alter defined rights to salary and allowances

Employment – Labour Court – jurisdiction – labour matters – declaratory order – no exclusive jurisdiction to grant declaratory order – High Court retaining jurisdiction

Agribank v *Nachingaifa & Anor* S-61-08 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 17 March 2008)

See above, *under* CONTRACT (Mistake).

Employment – employment councils – voluntary employment councils – membership – entitlement to – admission to membership in discretion of council – no trade union entitled to membership as of right

NEC for the Catering Industry v *Catering & Hospitality Workers' Union of Zimbabwe* S-8-08 (Ziyambi JA, Cheda & Malaba JJA concurring) (Judgment delivered 13 May 2008)

The appellant was a voluntary employment council formed in terms of s 56 of the Labour Act [*Chapter 28:01*]. The Act provides for two types of employment councils, voluntary and statutory. Voluntary employment councils differ from their statutory counterpart in the manner of formation. With regard to the former, the parties may come together by choice to form a council, whereas in respect of the latter, the parties to the council are chosen by the Minister in the manner prescribed in s 57 of the Act.

As required by s 58(g) of the Act, the appellant's constitution made for the provision of new members to the council. The constitution stated that "…any …trade union registered in terms of s 36 of the Act, in respect of persons engaged or employed in the industry, may be admitted to membership of the Council". The respondent trade union sought membership of the council but its application was refused. It then approached the Registrar of Labour, who ordered that the respondent be admitted to membership and allocated two seats on the council. An appeal by the appellant to the Labour Court failed. On appeal to the Supreme Court, the appellant argued is that by virtue of its being a voluntary employment council, admission to its membership was not as of right but dependent on the discretion of the council. The use of the words "may be admitted" in clause 5:3 of the constitution clearly showed that admission was not as of right. Since the issue of membership was within the discretion of the council, a court can only interfere with the exercise of that discretion if it was exercised irrationally. The second contention was that s 21 of the Constitution guarantees the right of the appellant to freedom of association and there was nothing in the Act which entitles the respondent to membership of the appellant as of right or obliges the appellant to admit the respondent to its membership. The respondent argued that the word "may" was to be construed as being mandatory in this case, since it was mandatory in terms of s 58 of the Act that any constitution of an employment council should contain provisions for admission to that council. This meant, it argued, that the legislature was making it mandatory for the appellant to admit whoever applied, subject only to the applicant possessing the qualifications set out in clause 5(3) of its constitution.

Held: (1) Summary dismissal of an action in terms of r 79(2) is an extraordinary remedy to be granted in clear and exceptional cases, as granting the remedy interferes with the elementary right of free access to the court. The object of the rule is to enable the court to stop an action which should not have been launched. The word "frivolous" in its ordinary sense connotes an action characterized by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense "frivolous or vexatious" when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation. A plaintiff who commences action in a court of law when he has no reasonable grounds to do so has no cause of action. An action without a good cause is baseless and obviously unsustainable. It was thus necessary to determine whether the appellant had reasonable grounds for charging the first respondent with undue influence on the testatrix's will.

(2) The appellant particularly alleged undue influence as the ground on which she intended to rely for invalidating the will. She was thus required to give the necessary particulars which would constitute the wrong she accused the first respondent

of having committed. She, however, seems to have had no knowledge of the material facts she was required to allege in the declaration, proof of which would constitute the essential elements of undue influence and entitle her to judgment. The *onus* was on her to prove that the first respondent through undue influence on the testatrix's mind caused her to execute the will she was unwilling at the time to make.
(3) Undue influence is a compendious description of the facts which if alleged in the declaration and proved at the trial would constitute the wrong for the redress of which the action was commenced. Undue influence may take many different forms. It may be in the form of coercion of the testator's will so that he does what is against his or her own volition. When undue influence amounts to coercion of the mind of the person who becomes the testator it may also take an infinite number of forms depending on the facts and circumstances of each case. It does not follow that because undue influence was applied on the testator it necessarily caused the execution of the will. That the undue influence caused the execution of the will must be established by the facts alleged. The undue influence must be shown to have been operative at the time of the execution of the will. A testator may still make a will expressing his wishes notwithstanding the application of undue influence to his mind. In order to invalidate a will, the plaintiff must have reasonable grounds for alleging undue influence. That requires him to allege in the declaration all the material facts he has to prove to succeed. Here, there were no allegations of facts on what the first respondent could have done or said to the testatrix causing her to execute the will under which he benefited. The cause of action remained shadowy. The action was thus baseless and unsustainable. It was frivolous.
(4) The will began with a general revocatory clause, in terms which showed that it was the intention of the testatrix to revoke *all* former wills made by her. The language used was clear and unambiguous. The testatrix was of a sound mind, memory and understanding at the time she executed the latest will. She knew that she had made prior wills disposing of part of her whole estate in a manner inconsistent with the disposition she was about to make. An action based on the contention that she did not intend to revoke the earlier will was therefore untenable and frivolous.

Judgment of Kamocha J in *Rogers* v *Rogers & Anor* HH-116-06 upheld.

Practice and procedure – bar – upliftment of – application – desirability of application being made in writing – court's duty when application made – not entitled to decide matter on merits without dealing with application for upliftment

GMB v *Muchero* S-59-07 (Garwe JA, Cheda & Gwaunza JJA concurring((Judgment delivered 11 March 2008)

The respondent, the appellant's chief executive officer, was suspended from his employment on disciplinary grounds. The respondent thereafter filed an application in the High Court challenging his suspension. That application was dismissed on the basis that the same matter was pending before the Labour Court. The respondent then appealed to the Supreme Court, which remitted the matter to the High Court, giving the appellant leave to file its opposing papers within fourteen days of the date of the order. The appellant failed to file its opposing papers within the stipulated time. The matter was then set down again before the High Court. Both parties were legally represented. Having failed to file its opposing papers within fourteen days stipulated, the appellant was automatically barred. An oral application to uplift the bar was made. The High Court, however, proceeded to deal with the matter on the merits and concluded that the suspension was a nullity. It also found that no application to uplift the bar had been made. The appellant appealed against this decision, submitting that an oral application had been made, on which the court should have adjudicated first. It argued that it was improper for the High Court to deal with the case on the merits without adjudicating on the application to uplift the bar. In any event, it argued, the court erred in dealing with the merits of the application in a situation where a default judgment was to be granted. The appellant prayed for the matter to be remitted so that the court could make a decision on the application for the upliftment of the bar.

Held: (1) It is clear from rr 83, 84, 233 and 239 of the High Court Rules 1971 that once a party is barred the matter is treated as unopposed unless the party so barred makes an application before that court for the upliftment of the bar. It is also clear that in making the application to uplift the bar the party that has been barred can either file a chamber (not court) application to uplift the bar or, where this has not been done, the party can make an oral application at the hearing.
(2) The practice in the High Court is that only in very few instances have oral applications to uplift the bar been entertained. This is because in such a case the applicant must explain the reason for the delay, and thereafter convince the court that he has a *bona fide* defence on the merits. The general view is that this cannot properly be done by oral application as the other party would not have been afforded the proper opportunity to prepare and possibly contest the application. In practice, where such an application is made, the court will direct that a written application be filed. In that event the court will postpone any decision on the merits pending the determination of the application to uplift the bar. The court may also give

a time limit within which any such application is to be made as well as order the payment of the wasted costs by the party seeking the postponement.
(3) Once the application to uplift the bar had been made, the court became seized with the matter and was required to make a determination on that application. It did not do so; instead it proceeded on the basis that there was no such application before the court. If the court was of the view that the appellant should have filed a written application then it should have said so and proceeded to grant a postponement for such application to be filed. Once there was a failure to determine the application to uplift the bar, then the decision on the merits was incompetent and cannot stand.

Practice and procedure – parties – citation – Zimbabwe Electoral Commission – chairman should be cited as party, not Commission itself

***Muzenda* v *Kombayi & Anor* HH-47-08 (Kudya J) (Judgment delivered 10 June 2008)**

***See above, under* ELECTIONS (Election petition – notice to respondent – where must be presented).**

Practice and procedure – parties – joinder of – claim in reconvention by defendant in main action – not permissible to join another party as co-defendant in the claim in reconvention

Mungofa v *Sande & Anor* HH-29-08 (Chatukuta J) (Judgment delivered 23 January 2008)

The applicant was the defendant in an action being brought by his wife (the second respondent in this application) for divorce. He filed a counter-claim against her and cited the first respondent as co-defendant, claiming damages from the first respondent for his alleged adultery with his (the applicant's) wife.
Held: A claim in reconvention is dependent upon allegations which would defeat the plaintiff's claim in convention. In order for the applicant to be able to join the first respondent as a co-defendant in the claim in reconvention, the first respondent must have had a basis for defending the claim for divorce that was brought by the second respondent. Rule 120 of the High Court Rules does not provide for a claim in reconvention against any person other than the plaintiff in convention. In any event, the applicant's counter-claim for divorce on the basis of adultery could not strictly be termed a counter-claim in light of the Matrimonial Causes Act [*Chapter 5:13*], since fault is no longer a pre-requisite for divorce (before the amendment of the Act in 1985, fault and misconduct were relevant to the existence of grounds for divorce and it was possible to counter-claim for divorce on the basis of a different fault cited by the plaintiff in her or his claim for divorce). Joinder of the first respondent was thus not competent.

Practice and procedure – parties – *locus standi* – company – holding company – action in respect of wholly owned subsidiaries – holding company having *locus standi*

Bindura Nickel Corp Ltd v *ZRA* HH-30-08 (Chatukuta J) (Judgment delivered 20 February 2008)

For a party to be able to sue it must have an interest in the subject-matter of the suit and such interest must be a direct one. Where a company is wholly owned by another and the holding company has a direct pecuniary interest in the affairs of its subsidiary, the holding company would be entitled to bring an action relating to its subsidiary.

Practice and procedure – parties – *locus standi* – principles – need to have legal interest in subject-matter of action – Zimbabwe Stock Exchange – bringing action on behalf of stockbrokers – Stock Exchange having no legal interest at stake – Stock Exchange having no *locus standi*

Zimbabwe Stock Exchange v *Zimbabwe Revenue Authority* S-56-07 (Malaba JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 4 March 2008)
The appellant, the Zimbabwe Stock Exchange, was established as a corporate body in terms of s 3 of the Zimbabwe Stock Exchange Act [*Chapter 24:14*]. Its affairs are managed and controlled by a Committee, the duties of which are set out in s

15 of the Act. Stockbrokers are members of the Exchange. A stockbroker is defined in the Act as a person who "carries on the business of purchasing and selling, or purchasing or selling listed securities on behalf of other persons". In the discharge of the duties of managing and controlling the affairs of the appellant the Committee is enjoined to ensure that there is fair and efficient dealing in the securities listed and that the competence and conduct of stockbrokers is sufficiently high for the protection of the public.

A dispute arose as to the liability of registered stockbrokers to pay VAT on the services provided by them, the respondent claiming that they were liable. The appellant sought a declaration that stockbrokers were exempt from paying VAT on the grounds that the service of purchasing and selling of listed securities they rendered to their clients was a financial service. The court *a quo* considered *in limine* whether the appellant had *locus standi* to bring the application. The appellant argued that since it was set up to manage a fair and efficient manner of dealing in listed securities, it had an interest in the impasse between the respondent and the stockbrokers and thus had a standing in terms of the common law on the basis that it had a direct and substantial interest in the impasse. The court held that the appellant had no *locus standi*. On appeal:

Held: The common law on *locus standi* of a party instituting legal proceedings is that to justify participation in the action the party must show that he has a direct and substantial interest in the right which is the subject matter of the proceedings and the relief sought and not merely a financial interest which is only an indirect interest in the litigation. The exception to this rule where the question for determination involves the liberty of an individual who because of mental illness or detention is unable to institute the proceedings himself. The appellant was not involved in the purchasing and selling of listed securities. As such it would not have a direct interest in the result of the determination of the question whether or not such a service by a stockbroker was a "financial service" entitling its provider to an exemption from the liability for payment of VAT.

Judgment of Makarau JP in *Zimbabwe Stock Exchange* v *Zimbabwe Revenue Authority* HH-120-06 (judgment delivered 8 November 2006) upheld.

Practice and procedure – parties – *locus standi* – spoliation order – need for applicant to show he has *locus standi*

Diocese of Harare v *Church of Province of Central Africa & Anor* HH-6-08 (Hungwe J) (Judgment delivered 30 January 2008)

See above, under CHURCH (Government of).

Practice and procedure – pleadings – what must be pleaded – parties entitled to plead only the facts and not the law or evidence – suit based on one ground but another one raised at trial – facts necessary to support other ground established – court entitled to base decision on that ground

Moyo & Anor v *Intermarket Discount House Ltd* S-60-07 (Ziyambi JA, Cheda & Garwe JJA concurring) (Judgment delivered 9 April 2008)

See above, under CONTRACT (Compromise).

Property and real rights – spoliation order – requirements for – need for applicant to show he was in exclusive possession of property – member of a church – cannot possess church premises to exclusion of other church organs or members – spoliation of incorporeal right – meaning – bishop being invited by faithful to minister to them – not an unlawful dispossession of any rights held by ordained bishop – *locus standi* to bring application for spoliation – applicant must show he has *locus standi*

Diocese of Harare v *Church of Province of Central Africa & Anor* HH-6-08 (Hungwe J) (Judgment delivered 30 January 2008)

See above, under CHURCH (Government of).

Revenue and public finance – interest – interest owed by taxpayer for unpaid or overdue taxes – accrual of interest – when accrual ceases – not limited by *in duplum* rule

Bindura Nickel Corp Ltd v *ZRA* HH-30-08 (Chatukuta J) (Judgment delivered 20 February 2008)

See above, under INTEREST (*In duplum* rule).

Statutes – Insurance Act [*Chapter 24:07*] – regulations made under s 89 – regulations imposing requirements for registration of brokers additional to those in Act and compelling brokers to re-register even if already registered – regulations *ultra vires*

Trust Insurance Brokers v *Min of Finance & Anor* S-6-08 (Ziyambi JA, Malaba & Garwe JJA concurring) (Judgment delivered 13 May 2008)

See above, under INSURANCE.

Succession – will

See below, under WILL.

Town and country planning – subdivision of property – prohibition on agreement for change of ownership of portion of property without permit allowing for subdivision – effect – permit issued after agreement had been concluded – no effect on validity of agreement

Tsamwa v *Hondo & Ors* HH-53-08 (Mavangira J) (Judgment delivered 25 June 2008)

The preamble to an agreement for sale of an immovable property reflected that as at the time of the sale a subdivision permit was not yet in place. The seller had applied to the City of Harare for the approval of the subdivision. He undertook that the subdivision permit would be ready in not more than six months from the date of agreement.
Held: at the time the parties entered into the agreement, there was no subdivision permit in existence. An agreement made in such circumstances is forbidden by s 39(1)(b)(i) of the Regional, Town and Country Planning Act [*Chapter 29:12*]. Any purported agreement for the change of ownership of a portion of a property is therefore null and void *ab initio*. The submission of an application for a subdivision permit is no guarantee as to its success. The planning authority should not have its hands forced. The issuance of the permit after the agreement had already been entered into cannot have any legal effect on the validity of the agreement insofar as compliance with the Act in question is concerned. It is the state of affairs prevailing at the time that the parties entered into the agreement, in relation to the existence or otherwise of a subdivision permit, that is relevant.

Will – validity – marriage subsequent to execution of will – whether will thereby invalidated – will made in contemplation of marriage – such will valid

Mapenzauswa v *Muskwe & Ors* HH-48-08 (Kudya J) (Judgment delivered 18 June 2008)

The deceased had executed a will in late 2000. In the will he referred to the applicant as his "wife" and in it he made several bequests to her. In fact he was not married to her at the time, though they were living together. His previous wife had died some time beforehand. There was no evidence as to whether the applicant and deceased had contracted a customary law marriage, but in April 2001 they were married by civil rites. After the deceased's death, the first respondent, the executor, started to dispose of the estate in terms of the will. This included the property where the applicant was living. The applicant sought an order declaring the will invalid.
Held: it was not necessary to decide whether the civil marriage was a subsequent marriage for the purposes of s 16(1) of the Wills Act [*Chapter 6:06*]. This situation was governed by s 16(4) of the Act, which saves a will made in contemplation of an impending marriage. The facts showed that this was such a will and, accordingly, its validity would be upheld.

Will – validity – undue influence on testator – what amounts to undue influence – need to show that undue influence actually influenced making of will

Rogers v *Rogers & Anor* S-64-07 (Malaba JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 27 May 2008)

See above, under PRACTICE AND PROCEDURE (Application – dismissal – summary dismissal).

Words and phrases – "days" – whether weekends and holidays included – Electoral Act [*Chapter 2:13*] – s 46(19)(b)

***Nyamapfeni* v *Constituency Registrar, Mberengwa East & Ors* HH-27-08 (Uchena J) (Judgment delivered 22 February 2008)**

***See above, under* ELECTION (Appeal).**