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CASES DECIDED JULY – DECEMBER 2008

Administration of estates – deceased estate – litigation – must be represented by executor

Nyandoro & Anor v *Nyandoro & Ors* HH-89-08 (Kudya J) (Judgment delivered 16 October 2008)

The first plaintiff, a widow, sought the transfer of a property to her. The property was registered in the name of her late husband's brother, who was also deceased. The plaintiff's brother in law had never lived in the house, but her husband had. The action was also brought in the name of the estate of the first plaintiff's husband. The first defendant was the son of the first plaintiff's late brother in law.

Apart from disputing the claim on the facts, the defendants argued (1) that the second plaintiff was not properly before the court, no executor having been appointed for the estate; (2) that the first plaintiff in any event had no *locus standi*; and (3) that the claim had prescribed. The plaintiff conceded the first point, but argued that the plaintiff had *locus standi*; that a plea of prescription must be pleaded; that it should be raised by way of a special plea and lastly that the first plaintiff's claim was not a debt but a claim for land for which prescription runs for 30 years. The defendants initially counter-claimed for eviction and rentals but abandoned this claim during the trial.

Held: (1) the plaintiff's concession was correct. A deceased estate must be represented by an executor or executrix duly appointed and issued with letters of administration by the Master. The executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position. Because a deceased's estate is vested in the executor, he is the only person who has *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate. Arising from the nature of a deceased estate, the citation of a deceased estate as a party to litigation is wrong. The correct party to cite is the executor, by name. The citation of the second plaintiff and second defendant *in casu* was therefore improper and incurable and their presence was a nullity.

(2) On the issue of whether the plaintiff, as the widow, has the legal interest to sue for the immovable property in question on the basis that she was a part owner of the property, property that is registered solely in the husband's name belongs only to him. This case dealt with estate property, not the distribution of matrimonial property arising from divorce which would be governed by s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. The plaintiff would not have had *locus standi* to sue for such property in her own right.

(3) The defendants raised the matter of prescription in their plea, but did not raise a special plea. The failure to raise a special plea does not debar a litigant who has pleaded prescription from having its case resolved. Having pleaded it *in casu*, the defendant was within his rights to seek to curtail the trial on the basis of prescription.

(4) The plaintiff's claim fell within the definition of "debt" in the Prescription Act [*Chapter 8:11*]. Her claim for transfer of the immovable property whether based on a purported trust for her children or her contributions began to run at the latest when the distribution plan of Nelson's Estate was approved by the Master.

Administration of estates – maintenance – dependant – who is – person unrelated to deceased who received support during lifetime of deceased – not entitled to maintenance

Maloya v *Nyamupfukudza NO & Anor* HH-115-08 (Makoni J) (Judgment delivered 26 November 2009)

The applicant was employed by the deceased. The applicant had a minor child, who stayed with him after he divorced the child's mother. From the time of the divorce until his death, the deceased provided the child with the basic necessities of life. The deceased, in his will, left his entire estate to his sister. The will was accepted by the Master of the High Court as the deceased's final testamentary disposition. The applicant sought, in terms of s 3 as read with s 8(2)(d) of the Deceased Persons Family Maintenance Act [*Chapter 6:03*], an order that a specified immovable property be transferred to the child. It was argued that the child was a "dependant" of the deceased in terms of para (f) of the definition of "dependant". This classifies as a dependant any person who (i) was being maintained by the deceased at the time of his death or (ii) was entitled to the payment of maintenance by the deceased at the time of his death.

Held: a "dependant", in the context of the Act, must be someone whom the deceased had a legal duty to maintain. The word "maintain", in the context of the Act, connotes a legal duty on the part of the deceased to maintain the claimant. *In casu*, the deceased had no legal obligation to maintain the minor child. It was an act of benevolence on the part of the deceased, constituting gratuitous support. He was assisting the child's father who had a legal obligation to maintain the child. Adopting the approach suggested by the applicant would lead to an absurdity, more particularly in the context of the

African extended family. If the deceased, during his life time, had ceased to assist the minor child, the applicant could not have successfully sued the deceased for maintenance.

Administration of estates – Master of the High Court – acceptance of will by – Master's discretion – process that should be followed in deciding whether or not to accept will

Mujuru NO & Ors v *The Master & Ors* HH-112-08 (Guvava J) (Judgment delivered 20 November 2008)

The Master of the High Court rejected the will of the deceased on the grounds that it did not comply with the formalities prescribed in s 8(1) of the Wills Act [*Chapter 6:06*]. The will had been signed by the deceased and the two witnesses on the last page only, the other pages being unsigned. The executor nominated in the will brought the Master's decision on review, seeking an order, *inter alia*, to have the will accepted. Section 8 (5) of the Act allows the Master, if he is satisfied that the document was intended to be the will of the deceased, to accept it for the purpose of administering the estate. It was argued that the failure by the Master to apply this provision when arriving at a decision was grossly irregular.
Held: (1) a proper application of the section would require the Master to adopt a two stage approach in coming to a decision. Firstly, he must satisfy himself that the document before him does not comply with the formalities in the Act. Secondly, he must satisfy himself that the document was indeed intended to be the last will and testament of the testator. If he is so satisfied, then he has a discretion whether or not to accept it for the purpose of the administering the estate. His failure to take the second step in the enquiry was a gross irregularity which would warrant the setting aside of his decision.
(2) It would not be correct for the court to make the decision whether or not to accept the will. The provision envisaged the exercise of this discretion by the Master, with the court determining the matter on appeal in the event that one of the parties is dissatisfied with his decision.

Appeal – extension of time within which to note appeal – application – delay due to legal practitioner not making enquiries about when pending judgment was to be handed down – not an acceptable explanation for non-compliance with rules

Metro Intl (Pvt) Ltd v *Old Mutual Property Invst Corp (Pvt) Ltd* S-31-08 (Malaba DCJ, in chambers) (Judgment delivered 29 October 2008)

On 18 June 2008 an order for the ejectment of the applicant from the premises it occupied was made by the High Court. Judgment in the matter had been reserved on 31 January. The applicant it had no knowledge that judgment had been given on 18 June 2008 until the Deputy Sheriff served a copy of it at its head office on 4 October 2008 in execution of the writ of ejectment. On 7 October it applied for extension of time within which to note an appeal. The applicant's legal practitioner admitted that he did not at any time during the period between 31 January 2008 and 4 October 2008 contact the Judge's clerk or the Registrar's office to inquire as to when judgment would be handed down. The only inquiry made was by a legal assistant on 26 August 2008 when she asked the judge's clerk whether the judgment was still pending. She said she was told that the judgment had not yet been given. It was her view that she did not find it necessary to confirm the inquiries by a letter because the status *quo ante* was in favour of the applicant. As events turned out the statement that judgment had not yet been given was not true and the belief that the status *quo ante* continued to favour the applicant was misplaced.

Held: (1) In considering an application for condonation of non-compliance with its Rules or for an extension of time within which to note an appeal, the court has a discretion, which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefore; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice. The applicant's legal practitioners were under a duty, having taken instructions to represent it in the application at the High Court, to make regular inquiries at the Registry, confirmed by letters, as to whether the judgment had been given and, if not when, it was to be handed down. A vigilant litigant interested in the speedy outcome of the application would have satisfied himself that the legal practitioners made regular inquiries for the judgment. Lack of knowledge of a judgment due to failure to make necessary inquiries in circumstances where one is under a duty to do so cannot be an acceptable explanation for non-compliance with Rules of the court. The applicant could not remain inactive until notification of the judgment was given by the Registrar.
(2) In any event, there were no prospects of success on appeal: *inter alia*, the applicant was not entitled to the protection of a statutory tenant as it had not complied with the terms of the lease.

Appeal – interlocutory order – includes provisional order for winding up of company

Dorbrock Hldgs (Pvt) Ltd v *Turner & Sons Pvt) Ltd & Anor* S-69-07 (Cheda JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 11 September 2008)

A provisional order for the winding up of a company is not appealable, as it is an interlocutory order, the correctness of which is still open to be tested on the return date. Similarly, the property of a company under provisional liquidation may not be sold before the provisional order is confirmed.

Arbitration – arbitration clause – clause in rules of pension fund – construction of clause – clause providing that dispute under rules may be referred to arbitration – proper construction of rules showing that dispute was not about matter not arising out of rules – matter not a dispute falling within terms of arbitration clause

Communication & Allied Industries Pensioners' Assn v *Communication & Allied Industries Pension Fund* S-29-08 (Malaba JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 17 November 2008)

The respondent was a self-administered fund governed by a set of rules. The affairs of the fund were administered and controlled by nine trustees. The object of the fund was to provide benefits for officers and employees and former officers and employees of the Post and Telecommunications Corporation and its successor companies on their retirement through age, ill-health or other reasons specified under the rules.

One of the categories of beneficiaries under the fund was that of employees who were discharged owing to the abolition of office or to any retrenchment. They were entitled to benefits calculated in accordance with a formula which took into account the accumulated contributions made by the member every year from the fifth year of service, together with an additional benefit equal to a prescribed percentage of his accumulated contributions excluding any voluntary contributions paid. The rules give the trustees the discretionary power to make additions to the benefits payable to the member as they see fit. The additions referred to could be made to a benefit payable to a member of any category of pensioners. Where the benefit was being paid to a pensioner who received an additional pension from another source, the exercise of the power must take into account amounts of increases made to those pensions.

The appellant, as an association of pensioners, claimed on behalf of retrenched pensioners that such pensioners were entitled to additions to benefits calculated in accordance with a formula which took into account the amounts of increases made to salaries of employees in the services of the successor companies. The trustees denied that the rules imposed any obligation on them to do this. The appellant asked that the matter be referred to arbitration in terms of r 7 of the rules, which allows a dispute about a claim from a member about any matter under the rules to be referred to arbitration. In the High Court, the judge held that the claim did not arise from the rules but rather sought an amendment of the rules.

Held: The matter about which the dispute which the parties must refer to arbitration, should the other party in the dispute be dissatisfied with the decision of the trustees, should not be a matter outside the rules; it must be a matter for which the parties made provision under the rules.

The first thing to be ascertained is the precise nature of the dispute which has arisen. The dispute in this case was about the existence or otherwise, as a matter of law under the rules, of an obligation on the trustees to take into account amounts of increases made to salaries of serving employees by the successor companies when calculating additions to benefits payable to retrenched pensioners. The appellants were demanding as a matter of law that the trustees must act in the manner suggested whilst the trustees argued that the decision as to what factors were to be taken into account in calculating additions to benefits payable to pensioners or beneficiaries was a matter of discretion.

The next question is whether the dispute is one which falls within the terms of the arbitration clause, that is, whether the matter about which the dispute arose was a matter under the rules. The appellant conceded that the rule did not impose an obligation on the trustees but argued that the court could nonetheless proceed on the basis that the trustees were under the obligation. This would impose on the trustees a burden they did not undertake under the rules. The principle of impartiality which trustees must observe in dealing with beneficiaries under the rules requires that the court should intervene in matters of administration of the fund for purposes of enforcing the rules. The matter sought to be imposed on the trustees was one outside the rules. Accordingly, the dispute did not fall within the terms of the arbitration clause.

Company – general meeting – when can be called by shareholders – articles of association – provisions dealing with calling of meetings – override general provisions of s 128(1)(b) of Companies Act [*Chapter 24:03*] – shareholders must require directors to call meeting – shareholders only entitled to call meeting if directors fail to comply with requisition

Africa First Renaissance Corp Ltd v *ACM Invstms (Pvt) Ltd & Ors* HH-95-08 (Uchena J) (Judgment delivered 16 October 2008)

The first five respondent companies, all shareholders in the sixth respondent, gave public notice convening an extraordinary meeting of the sixth respondent. The object of the meeting was to remove and replace certain of the directors of the sixth respondent. The applicant, also a shareholder, contended that the convening of the meeting was a nullity. It was argued on behalf of the first five respondents that they were entitled to call a meeting in terms of s 128(1)9b) of the Companies Act [*Chapter 24:03*]. This section provides that, in so far as the articles of a company do not make other provision in that behalf, two or more members holding not less than one tenth of the issued share capital of a company may call a meeting. The articles of association of the sixth respondent provided that meetings had to be called by the directors, whether on their own initiative or when requisitioned by shareholders "in accordance with the statutes". "The statutes" was defined as meaning the Companies Act.
Held: The provisions of s 128(1)(b) only have effect if the company's articles of association do not provide otherwise. The provisions of the articles were different from the provisions of s 128(1)(b). They therefore provided otherwise, and should in terms of s 128(1) be followed. Since the requisitioning of a general meeting had to be in accordance with the Act, it was necessary to look into the Act for provisions on how shareholders can call for an extraordinary meeting or any meeting other than in the manner prescribed in s 128(1)(b), which defers to the provisions of the articles of association. Section 126 provided the procedure whereby shareholders could requisition a meeting and for the circumstances where they could convene a meeting if the directors failed to call a meeting when required. The first five respondents therefore used the wrong procedure. While they had a right to initiate an extraordinary meeting by requisitioning the directors, they had no right to convene the meeting themselves. They could only have convened the meeting themselves if, after complying with s 126(1), the directors had failed to comply with their requisition. It is not lawful for shareholders to convene an extraordinary meeting before requisitioning the directors to do so, and then only if the directors have failed to comply. The notice was therefore null and void.

Company – winding-up – provisional order for winding up of company – such order interlocutory and not subject to appeal

Dorbrock Hldgs (Pvt) Ltd v *Turner & Sons Pvt) Ltd & Anor* S-69-07 (Cheda JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 11 September 2008)

See above, under APPEAL (Interlocutory order).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1) – application to Supreme Court – when may be brought – proceedings commenced in lower court – lower court declining jurisdiction – no proceedings before that court – applicant entitled to bring application under s 24(1)

Shumba & Anor v *ZEC & Anor* S-11-08 (Chidyausiku CJ; Sandura, Ziyambi, Malaba & Garwe JJA concurring) (Judgment delivered 1 August 2008)

The applicants both wished to stand as candidates in the presidential election in March 2008. At 1545 on nomination day they were both in the nomination court to present their papers. Their papers were rejected by the second respondent, the nomination officer, on the grounds that the nomination court had closed. They brought an application in the High Court to compel the respondent to accept their nominations and declare them to be candidates for the election. The High Court declined jurisdiction, holding that only the Electoral Court had jurisdiction, by virtue of s 46(19) of the Electoral Act [*Chapter 2:13*]. An application was then brought before the Electoral Court, which held that the matter had prescribed in terms of s 46(19)(c). After the election had been held, the applicants brought an application under s 24(1) of the Constitution, alleging that their right to freedom of association, guaranteed by ss 21(1) and 21(2) of the Constitution and their right to protection of the law, guaranteed by s 18(1) of the Constitution, were violated by the second respondent, an employee of the first respondent.
It was argued by the respondents that the remedy available to the applicants upon the rejection of their nomination papers was an appeal to a Judge of the Electoral Court in terms of s 46(19) of the Act. When the applicants failed to do so timeously the decision of the nomination officer became final, in terms of s 46(19)(c). The application to the Supreme Court was, they argued, a disguised appeal against the nomination officer's decision and not permissible. The second point raised was that the application should be dismissed on the basis that the matter arose from proceedings in both the High Court and the Electoral Court and therefore could only find its way to the Supreme Court by referral in terms of s 24(2) of the Constitution. The applicants had no right to approach the court directly in terms of s 24(1). The third point raised was that the first

respondent, the Electoral Commission, was wrongly cited having regard to the provisions of s 18 of the Zimbabwe Electoral Commission Act [*Chapter 2:12*]. The chairman of the Commission should have been cited.

Held: (1) the applicants' contention that the nomination papers of the applicants were not rejected in terms of s 46(10) of the Act was correct. The application of subs (10) is conditional upon the fulfilment of the requirements of subss (8) and (9), which envisage that nomination papers are submitted to the nomination officer who in turn accepts and examines the nomination papers. It is only after a nomination officer has accepted and examined the nomination papers that he can act or do any of the things provided for in terms of subs (10). *In casu* the respondents' nomination papers were rejected by the nomination officer for failure to comply with s 46(7) of the Act, which provides that nomination papers have to be submitted by four o'clock in the afternoon of the nomination day. The rejection of the papers was contrary to the explicit provisions of s 46(7) of the Act, the applicants being within the court by four o'clock. The Act does not provide a remedy for such a candidate – an apparent oversight by the draftsman. Where no specific remedy is provided for in the Act the High Court can exercise its inherent jurisdiction of review. The approach to the High Court in the first instance was therefore correct.
(2) Once proceedings are commenced in the High Court or any subordinate court and a constitutional point arises from the pleadings or circumstances of the case, the constitutional point has arisen from proceedings in that court. *In casu*, the High Court and the Electoral Court both declined jurisdiction. Where a court has declined jurisdiction there cannot be proceedings before it thereafter. While it was open to the applicants to apply to the High Court or the Electoral Court to refer the case to the Supreme Court, the mere existence of an opportunity to apply for a referral did not create an obligation on the applicants to comply with s 24(2) of the Constitution or bar them from approaching the Supreme Court in terms of s 24(1). One of the objects of s 24(2) and s 24(3) is to prevent parallel proceedings in two courts and the possibility of two conflicting outcomes. Where the one court has concluded that it has no jurisdiction that possibility is eliminated. It is also incongruous to hold that a matter arises from proceedings in another court when that other court has declined jurisdiction.
(3) It is clear from s 18 of the Zimbabwe Electoral Commission Act that the chairperson of the Electoral Commission is to be cited whenever the Commission is being sued. Failure to cite the chairperson of the Commission or the citing of the Commission itself instead of the chairperson constitutes a failure to comply with s 18 of the Zimbabwe Electoral Commission Act. Sections 2 and 3 of the State Liabilities Act [*Chapter 8:14*], which are incorporated by s 18 of the Zimbabwe Electoral Commission Act, have to be interpreted as directing a plaintiff or applicant to cite the Minister as the defendant or the respondent. To interpret the sections as conferring on a plaintiff or applicant unfettered discretion to cite the Minister or any other person of their choice would lead to an obvious absurdity that could not have been intended by the legislature. The correct interpretation to be ascribed to s 18 of the Electoral Commission Act, as read with the State Liabilities Act, is that whenever an employee of the Commission is being sued and a plaintiff or applicant wishes to join the Commission, the Chairperson of the Commission, not the Commission itself, has to be cited. However, the use in s 3 of the State Liabilities Act of the word "may" rather than "shall" meant that the provision was directory rather than peremptory. The consequences of failure to comply with the provisions of s 18 of the Zimbabwe Electoral Commission Act are not explicitly spelt out. In those statutory provisions where the legislature has not specifically provided for the consequences of failure to comply, it has to be assumed that the legislature has left it to the courts to determine what the consequences of failure to comply should be. One of guiding principles for the determination of whether failure to comply with a statutory provision is fatal or a mere irregularity is the possible consequences of a particular interpretation. If interpreting non-compliance with a statutory provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did not intend such a consequence and therefore the provision is directory. The purpose of s 18 of the Zimbabwe Electoral Commission Act is to ensure that the chairperson of the Commission, as an interested party, is not sidelined in litigation against the Commission. *In casu*, he had not been sidelined. He was aware of the proceedings and had filed an affidavit. To hold that the proceedings were a nullity for failure to comply with s 18 of the Zimbabwe Electoral Commission Act would result in a consequence totally disproportionate to the mischief intended to be remedied. No prejudice was caused in this case.

Contract – *depositum* – applicability thereto of Praetorian edict relating to liability of sailors, innkeepers and stable-keepers — loss of goods deposited due to theft by employee of bailee — where onus of proving damage lies — "owner's risk" clause in contract — effect of – need for plaintiff to allege and prove gross negligence

Rix Upholstery (Pvt) Ltd v *Biddulphs (Pvt) Ltd* HH-91-08 (Makarau JP) (Judgment delivered 15 October 2008)

The plaintiff left certain of his goods in storage at the defendant's premises. He signed, but did not read, a document which stated that the defendant "shall not be responsible for any loss or damage of any nature whatsoever sustained or suffered by the customer and however and from whatever cause arising even if the customer (*sic*) and/ or their servants and /or agents are negligent, the basis of this quotation being that work and storage will be effected entirely and solely at the

customer's risk." An employee of the defendant broke into the warehouse where the plaintiff's goods were stored and stole some of the plaintiff's goods. The plaintiff issued summons against the defendant claiming a sum representing the value of the stolen goods. The claim was based on breach of contract, on the basis that the defendant failed to return to the plaintiff certain items that had left with it for storage. No fault was pleaded in the papers and no cause of action of which fault is an element was raised.

Held: (1) a plaintiff who has suffered loss as a result of the alleged negligent performance of a contract by the defendant has the option to embed his claim in either delict or in contract. The legal principles applied in establishing liability under each cause of action are different and necessary averments to sustain each cause of action have to be made and supporting evidence adduced.

(2) This was a *depositum* contract, a specific form of contract whose terms are implied by law. An essential element of the contract is the fact of the delivery of the item to the bailee and its return to the owner upon demand. Were the contract for storage only, the plaintiff would have been merely shown a designated place on the defendant's premises where he could place his goods and from which he could retrieve them when he chose. Under a contract of *depositum*, the bailee has the obligation, imposed by law, to return the goods to the owner upon demand. The liability of the bailee under the *depositum* contract is similar to the obligations imposed on sailors, innkeepers and stable keepers by the Praetor's Edict *de nautis, cauponibus et stabulariis* which is a part of our law. The parties to a *depositum* contract can agree to exempt one of the parties from liability for breach of the contract that ordinarily would have attracted liability, just as carriers by land invariably insert clauses in their contracts limiting their liabilitiy to instances of gross negligence only. Although the "owner's risk" clause expressly referred to negligence, it would not exempt the defendant from liability arising from gross negligence. *In casu*, there was no averment, evidence or argument that the defendant or its servants were negligent in any way, let alone grossly negligent. Employing a dishonest employee on its own is not *per se* proof of negligence.

Contract – donation – *inter vivos* – donation between spouses – may be revoked at any time

Taylor v *Taylor* S-70-07 (Garwe JA, Cheda & Ziyambi JJA concurring) (Judgment delivered 15 September 2008)

The parties met in 1982 and during the same year started co-habiting. They eventually got married the next year. The marriage subsists to this day. After living together for a period of over ten years, the respondent decided to donate the vacant piece of land to the appellant. The appellant accepted the donation and the property was formally transferred to him in 1998. After the respondent discovered that the appellant had engaged in an adulterous relationship during the subsistence of the marriage, she brought an action for an order revoking the donation. The High Court granted the order. The appellant appealed, arguing *inter alia* that the court *a quo* erred in ordering a revocation of the donation without *mero motu* considering the question of compensation for the dwelling built on the land by the appellant. The judgment of the court *a quo* thus, he argued, had the effect of unjustly enriching the respondent.

Held: (1) In general a donation *inter vivos*, once made, is irrevocable, except in a few instances, notably ingratitude. In the case of a remuneratory donation, there can be no revocation, even for ingratitude. In the case of donations between spouses the common law position was that a donation *inter vivos* between spouses was prohibited subject to certain exceptions, but that rule no longer applies in this country: see s 11 of the General Law Amendment Act [*Chapter 8:07*]. Consequently donations between spouses are now permissible, though the common law position remains that the donor may at any time revoke such a donation. Reciprocal and remuneratory gifts between spouses, however, are not revocable.

(2) Unjust enrichment now forms a cause of action in terms of our common law, but the issue of unjust enrichment was not before the court *a quo* and indeed no submissions in that regard were made there by either party. The issue before the court was whether the respondent could revoke the donation and, if so, whether it was necessary to prove ingratitude on the part of the respondent. The court not having been asked to direct its mind to the question of compensation for improvements effected on the land, there was no basis upon which the court could be said to have misdirected itself in not *mero motu* dealing with an issue that was never before it. The appellant was still entitled to take any action he considered appropriate in order to recover any monies he may have expended in effecting improvements to the donated land.

Contract – enforceability – illegal contract – maxim *ex turpi causa non oritur action* – inflexibility of maxim – no exceptions will be entertained by the courts

Mega Pak Zimbabwe (Pvt) Ltd v *Global Technologies Central Africa (Pvt) Ltd* HH-84-08 (Makarau JP (Judgment delivered 24 September 2008)

The plaintiff company, which wanted to purchase two luxury cars from outside the country, entered into an arrangement with the defendant in terms of which the plaintiff would pay the defendant local currency (plus a commission) and the defendant would source funds from another party. The third party did not transmit all the funds expected and payment for one of the cars was not made. The plaintiff sought specific performance of the contract and the delivery from the defendant of the car that was not paid for. Alternatively, it sought damages to place it in the position where it could procure a similar vehicle to the one the defendant allegedly failed to deliver.
Held: the plaintiff could not succeed: the maxim *ex turpi causa non oritur actio* applied. An illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute, admitting of no exceptions. Were the plaintiff simply seeking to extricate itself from the contract by seeking a refund of the local currency payment it made in respect of the motor vehicle yet to be delivered, there may have existed scope for the court to apply the *in pari delicto* rule and attempt to do justice between the parties. Here, however, the court was dealing with the attempted enforcement of a contract which arose *ex turpi causa* and not an attempt to undo performance pursuant to an illegal contract. It followed that the plaintiff must be entirely non-suited.

Contract – illegality – agreement to pay foreign currency for item purchased in Zimbabwe – breach of exchange control laws – *par delictum* rule – relaxation of – when appropriate

Gambiza v *Taziva* HH-109-08 (Gowora J) (Judgment delivered 27 August 2008)

The parties entered into an agreement whereby the plaintiff would supply a motor car to the defendant. The purchase price was stated in South African currency. An initial deposit was paid of around one-third of the full price, with the balance to be paid within a month. The plaintiff in the mean time kept possession of the car's registration book. The defendant failed to pay the balance in rand and tendered payment in local currency at the official exchange rate. The plaintiff refused the tender and sued for the return of the vehicle or payment of the balance, in rands. It was argued by the plaintiff that the agreement was not unlawful, as s 4(1) of the Exchange Control Regulations (SI 109 of 1996), which proscribes the buying, selling, borrowing, lending or exchange of any foreign currency without permission from the exchange control authority, did not make it an offence to receive foreign currency. The defendant argued that the agreement was illegal and that the *in pari dellicto* rule should apply. Accordingly, the loss should lie where it fell. The defendant counterclaimed for the delivery of the registration book against payment of the balance owed, paid in local currency.
Held: (1) Although the regulations did not forbid parties from transacting in foreign currency in general terms but they proscribed specific conduct involving foreign currency. In this situation, the question was whether what the parties did could be said to be "exchanging" foreign currency. In the context in which the word "exchange" is used in the regulations, the meaning that can be ascribed to it is "to pay" and "to receive". Thus the agreement was tainted with illegality and could not be enforced.
(2) The agreement had only been partially performed by either of the parties. Whilst the defendant had paid less than half of the purchase price the plaintiff had not really effected delivery, in that the registration book had not been given to the defendant and thus he could not assume ownership of the vehicle. Although the agreement itself was not illegal, the manner in which the parties performed part of the agreement had rendered it illegal and any order by the court that would lead to the performance of the remaining part of the agreement would have the effect of giving sanction to the actions of the parties in violating the regulations. This meant that the defendant's counterclaim could not be entertained. The usual way of treating illegal agreements, where the parties are equally to blame, is to let the loss lie where it fell. However, the courts have a discretion, in suitable cases, to relax the *par delictum* rule in order to do justice between man and man and to prevent the injustice of one party being enriched at the expense of another. The plaintiff having parted with a valuable item against payment of an amount which was less than half the purchase price, it would be just to order that the vehicle be returned to the plaintiff.

Contract – option – right of first refusal – meaning – what rights given to grantee – no obligation on part of grantor to sell subject of the contract – right only exercisable if grantor decides to sell item

Makamure v *Devon Engineering (Pvt) Ltd* HH-106-08 (Gowora J) (Judgment delivered 26 November 2008)

The applicant was employed by the respondent company. When he left its service, having worked there for nearly 4 years, he retained the car that had been allocated to him. He sought an order compelling the respondent to sell the car to him at the

current market value. The relevant clause in the contract of employment provided that assigned vehicles shall be disposed of after three years of continuous use by the employee concerned and, where applicable, subject to the lease hire company's laid down conditions. The user would be given a right of first refusal to purchase the vehicle at a price to be determined by reference to the lease hire company's laid down value or any other value as determined by the executive directors.
Held: (1) There was an agreement offering the applicant a right of pre-emption. A right of pre-emption or first refusal entitles the holder to the first opportunity of buying if the seller decides to sell. It is a right that is exercised upon the fulfilment of a condition: there must be an offer made for the property which is subject to the right. At that stage, the obligation of the grantor, before accepting the offer made with a specific price, is to offer the property for sale to the grantee to purchase at the price being offered by the third party. The grantee is then at liberty to accept or refuse the offer made to him. Thus are the conditions of first refusal satisfied. *In casu* there was no offer on the table for the applicant to accept. There was no third party vying to purchase the car from the respondent. There was no price specified on the vehicle. The applicant could not exercise a right of pre-emption in a vacuum.
(2) The grantor of a right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right.

Contract – sale – instalment sale – of land – when such sale exists – agreement under which lessee to buy sells rights in property to another – not a sale of land – contract one of cession of rights and interests in land – contract not governed by s 8 of Contractual Penalties Act [*Chapter 8:04*]

Khumalo v *Mandeya & Anor* S-23-08 (Malaba JA, in chambers) (Judgment delivered 30 September 2008)

The applicant entered into a lease–to–buy agreement with the Bulawayo City Council in respect of a stand in a high-density suburb. The agreement included a clause in terms of which the applicant was prohibited, prior to transfer of the property to himself, from ceding or assigning the agreement or any rights acquired by him thereunder, or parting with the possession of the property or any part thereof or alienating, donating or otherwise disposing of the same without the prior consent in writing of the Council. The applicant subsequently entered into a written agreement with the first respondent in respect of the property before transfer of ownership of the property to him by the Council. The transaction was described by the parties as an "agreement of sale", the subject matter of which was referred to as "a piece of land". The agreement provided for payment by means of a deposit, followed by two instalments (which were not equal amounts). The applicant had sought and obtained the written consent of the Council. With that consent the applicant ceded all his rights and interests in the property under the lease-to-buy to the first respondent.
The first respondent did not pay the deposit in full, nor did she pay the instalments either timeously or in full. The applicant, acting in terms of the agreement, gave the first respondent, who admittedly was in breach of the contract, 14 days' notice to remedy her breach. When she failed to do so within the time limit prescribed in the notice, he cancelled the agreement. The first respondent applied to the High Court for an order declaring the cancellation of the agreement of "sale" by the applicant null and void on the ground that the written notice fell foul of s 8(2)(c)(i) of the Contractual Penalties Act [*Chapter 8:04*]. Section 8(1) of the Act prohibits a seller under an instalment sale of land from terminating the contract on account of any breach of by the purchaser unless he has given notice in terms of subs (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued. The period given to the first respondent within which she was called upon to remedy the breach was less than the thirty days specified in s 8(2)(c) in respect of an "instalment sale of land". An "instalment sale of land" is defined in s 2 of the Act as a contract for the sale of land whereby payment is required to be made by way of a deposit and two or more instalments; and ownership of the land is not transferred until payment is completed. The court *a quo* held that the agreement was an "instalment sale of land" as the subject matter of the sale was "land", the purchase price for which was payable by way of a deposit and two or more instalments. He declared the cancellation of the agreement by the applicant null and void *ab initio*.

Held: Whilst the concept used by the parties to describe the merx was an important factor to consider in the determination of the question whether the subject-matter of the agreement of sale was "land", it was not an overriding one. At the time the parties entered into the agreement, the applicant was not the owner of the land and improvements thereon. He could not pass title to the land to the first respondent at the payment of the purchase price in terms of the agreement. At the time the parties entered into the agreement, the applicant held rights and interests in the land and improvements thereon under the lease-to-buy. With the written consent of the Council he ceded those rights and interests to the first respondent, who stepped into his shoes as the cessionary and acquired them under the lease-to-buy. In spite of the language used by the

parties in the agreement, what was in effect sold and purchased were rights and interests in the land, not the *dominium* in the land.

Contract – termination – effect – rights accrued before the date of termination – enforceability of such rights

HEM Granite Industries (Pvt) Ltd v *Keeley Granite (Pvt) Ltd* S-18-09 (Malaba DCJ, Ziyambi & Garwe JJA concurring) (Judgment delivered 9 September 2008)

The respondent entered into a tribute agreement with the appellant, which owned a mining location. Whilst the appellant was holder of the title to the minerals within its location it did not have the necessary capital for digging up, extracting, processing and disposing of the actual minerals for its own benefit and account. The agreement gave the respondent the rights, for a period of three years, to mine, extract, process, remove from site granite and dolorite blocks and dispose of them for its own benefit and account, subject to payment of an amount of a royalty of 10% of the "at quarry" value of the minerals won. The value was defined as being the price set by the Minerals Marketing Corporation. The agreement had a termination clause, in terms of which the respondent had a right to terminate the tribute agreement if it was unable to continue mining operations due to causes beyond its control, subject to it giving the appellant three months' written notice of its intent.
The granite blocks extracted from the mining location were of poor quality and the respondent found it difficult to sell them at the price set for the lowest category of grades of the quality of granite blocks. This resulted in the operations of the respondent becoming increasingly uneconomic, and the respondent gave notice of termination. It duly removed its equipment from the site but left behind 188 granite blocks. Attempts were made to sell the blocks but without success. After some years the prices in the international market had generally improved and the respondent went to remove the blocks from the site. The appellant prevented it from doing so, claiming that the respondent had lost its ownership in them until a new royalty agreement had been concluded. The respondent obtained an order from the High Court, authorising the removal of the blocks, subject to payment of a royalty as provided for in the tribute agreement. The appellant argued that the rights which the respondent had acquired in the granite blocks ought to have been exercised during the period of tribute.
Held: the general rule of the law of contract is that termination of a contract operates *ex nunc*, *de futuro* only and does not affect rights which have accrued to the parties. Termination or extinction of the obligation to perform is restricted to the executory portion of the contract, leaving intact rights which were accrued due and enforceable before termination. Up to the date of termination, the rights have come into existence and can be enforced. *In casu* the granite blocks had already been won by the respondent in the exercise of the rights given to it under the tribute agreement. They were in its possession, ready to be removed from the mining location at the time of termination of the contract. They had become the property of the respondent by reason of its having performed its side of the bargain subject, of course, to payment of the amount of royalty which had to be calculated in the manner expressly provided for under the tribute agreement. The right to remove the blocks had accrued to the respondent at the time of termination of the tribute agreement and was enforceable against the appellant in the event of interference with its exercise. The only limitation to the exercise of the right of ownership by the respondent was the obligation to pay the amount of royalty determined in the manner specified of the agreement.

Court – contempt – committal for – when committal justified – need for wilfulness and *mala fides* to be shown – disobedience to order brought to person's notice – wilfulness and *mala fides* inferred

***Batezat* v *Permassan (Pvt) Ltd* S-49-09 (Sandura JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 6 October 2008)**

Not every breach of an order of court justifies committal for contempt. A person's disobedience must be not only wilful but also *mala fide*. However, only in the limited class of case referred to as "constructive" contempt does the applicant have to allege and prove *mala fides*; in the more usual case of a "direct" contempt, where there is a deliberate disobedience of an existing order of court, he need prove wilfulness only, *mala fides* being inferred. Thus, whenever an applicant proves that the respondent has disobeyed an order of court which was brought to his notice, then both wilfulness and *mala fides* will be inferred. The *onus* is then on the respondent to rebut the inference of *mala fides* or wilfulness on a balance of probabilities.

Court – magistrate – duties – unrepresented accused – magistrate's responsibilities towards

S v *Gwande & Anor* HH-101-08 (Omerjee J) (Judgment delivered 15 November 2008)

See below, under CRIMINAL PROCEDURE (Plea – guilty plea).

Criminal law – being found in possession of goods in regard to which there is a reasonable suspicion that they were stolen – whether accused person can be convicted on plea alone, without evidence being led

S v *Gaviyaya* HH-85-08 (Chitakunye J) (Judgment delivered 11 September 2008)

The accused pleaded guilty in the magistrates court to a charge of contravening s 125(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], that is, being found in possession of goods in circumstances giving rise to a reasonable suspicion that they were stolen and being unable at any time to give a satisfactory account of his possession. The magistrate found him guilty on his plea. The facts in the outline of the State case did not contain any explanation of how accused acquired the goods and the questions posed by the magistrate did not elicit any explanation from the accused as to how he came to possess the goods or even what explanation he gave to the police.

Held: it would be absurd to ask an offender in plea proceedings if he admits that there was a reasonable suspicion that the goods found in his possession had been stolen. It is not the accused who suspects himself. The suspicion is formed by a third person, usually a police officer. The circumstances which give rise to the suspicion that the property was stolen must be as perceived by and considered by that police officer. There must be something that the police officer saw and considered in the accused's possession or manner of possession for him reasonably to suspect that the property was stolen. Such a matter is not within the accused's knowledge and so any admission of that element of the offence by the accused would not be of much value. Consequently, where the accused enters a plea of guilty the presiding magistrate should still receive evidence on the circumstances giving rise to a reasonable suspicion that the goods were stolen. Where no evidence has been given, the court is never in a position to satisfy itself that the explanation is not satisfactory. It is the court that has to be satisfied that the accused has failed to give a satisfactory account of his possession and that the suspicion alleged is therefore reasonable in the circumstances.

Criminal procedure – admissions – what may be admitted – by accused person – accused may not admit facts which are within the peculiar knowledge of another person

S v *Gaviyaya* HH-85-08 (Chitakunye J) (Judgment delivered 11 September 2008)

See above, under CRIMINAL LAW (Being found in possession of goods in regard to which there is a reasonable suspicion that they were stolen).

Criminal procedure – arrest – child of arrested person – police having no right to detain child along with parent

Criminal procedure – arrest – time for which an arrested person may be detained by police

Chiramba & Ors v *Min of Home Affairs & Ors* HH-29-09 (Hungwe J) (Judgment delivered 11 November 2008)

The applicants, all activists in the main opposition party, were detained by the police. One of the applicants had a two year old child and the child was also taken away with its mother. For some two weeks the applicants were kept incommunicado. They had no access to their lawyers for nearly two weeks. They were not informed of the reason for their arrest, and enquiries by their lawyers were met with denials that the applicants were in police custody at all. The applicants sought orders (a) declaring their arrest and continued detention unlawful; (b) requiring the respondents and all those acting through them or on their behalf to permit applicants access to medical treatment at medical centres of their choices; and (c) directing the respondents produce the applicants before a High Court judge in chambers within two hours of the order being made or, alternatively, to take the applicants for a remand hearing at the magistrates court by a stated time, failing which the respondents should forthwith release all the applicants from custody.

Held: (1) Zimbabwe is a signatory to the International Covenant on Civil and Political Rights. As a state party to this treaty, Zimbabwe is bound by the obligations flowing from the treaty, which deals, *inter alia*, with the rights of persons who have been arrested and detained on criminal charges. The treaty places two types of obligations on states: firstly, the duty to respect and ensure human rights and, secondly, the duty to guarantee that those same rights are respected. The first set of obligations is both positive and negative in nature; on the one hand the state must refrain (whether by act or omission) from violating human rights; and on the other the state must ensure that, through the adoption of whatever means necessary, such rights can be actively enjoyed. Section 13(3) of the Constitution guarantees the rights of persons who have been detained, and s 32(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] requires that a person who has been arrested must be brought before a judge or magistrate within 48 hours. The respondents had denied the applicants the protection of the law. Their conduct in doing so should be deprecated.
(2) Zimbabwe was also a signatory to the Convention on the Rights of the Child and accordingly it must be seen, through the acts of its public officials, to be protective of the rights of the child. Article 16 of the Convention provided that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. Neither the Criminal Procedure and Evidence Act nor the Childrens Act [*Chapter 5:06*] provided for a child in a situation like this; they dealt with young persons suspected of having committed criminal offences. The Prisons Act [*Chapter 7:11*] made provision in s 58 for dealing the unweaned child of a female prisoner. Section 84(1) of the *Children's Act* did not expressly address the plight of a baby taken by police who have arrested its mother but the prohibition against detention of minors is implied in this section. The conduct of the respondents in this case did not in any way uphold this international obligation to protect and promote the rights of the child. To subject a two year old to the rigours of detention simply on the grounds that its mother may have committed some criminal offence is totally unconscionable and immoral, made worse by the denial of basic rights to the mother.
(3) The orders sought would accordingly be granted.

Criminal procedure – plea – guilty plea – questioning of accused by magistrate – need to phrase questions carefully to ensure accused understands what he is pleading guilty to – disclosure of facts by prosecutor – need for court to ensure that prosecution discloses sufficient facts – use of State's outline of facts – need to ensure that accused has actually agreed with such outline

S v *Gwande & Anor* HH-101-08 (Omerjee J) (Judgment delivered 15 November 2008)

Magistrates owe enormous duties toward unrepresented accused persons. The magistrate is the primary bulwark defending the ignorant or impoverished against the potential injustices wrought through an excess of zeal; pressure of work; administrative inefficiency or plain ineptitude in the investigation and prosecution of offences.
Where the accused person pleads guilty, and the court proceeds in terms of s 271(2)(b)(i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the magistrate is duty bound to ensure that the prosecutor has disclosed sufficient and adequate facts, which are capable of informing, not only the court, but also the accused, precisely what the allegations against him are. Where the prosecution fails to provide or disclose adequate facts in support of the charge, it must be directed to do so: the magistrate must *mero motu* invoke the provisions of s 177(1) of the Act and direct the prosecution to provide further particulars. Failure by the magistrate to ensure prior disclosure of adequate and sufficient facts amounts to a misdirection and offends against the accused person's constitutional right to be afforded a fair trial, in particular, the right to be informed, in detail, of the nature of the offence charged as guaranteed by s 18(3)(b) of the Constitution.
The purpose of the enquiry in terms of s 271(2)(b)(i) of the Act is to ensure that the accused's plea of guilty is an unqualified or unequivocal and genuine plea. The magistrate can only satisfy himself of this if he asks questions which are carefully formulated by marrying the charge, the essential elements and the particular facts of the case. Merely paraphrasing the definition of an offence will not assist the accused to understand the import of the elements, more so if they are of a technical legal nature.
Magistrates and prosecutors should desist from the practice, which appears to be common, of simply using the State's outline of its case when the accused tenders a guilty plea. The State outline is not based on facts which the accused has given prior agreement to. The use of the State outline exposes the accused to the danger of being convicted on facts that he has not been given an opportunity to carefully reflect on and has the real potential of the accused being severely prejudiced, in the sense that he may be convicted on the basis of facts which he may not agree with but which facts aggravate the offence and lead to a more severe punishment than warranted. The correct procedure should be that if, in a contested trial, the accused pleads guilty to the charge, the magistrate should take a short recess to allow the prosecutor to interview the accused and draw up a statement of agreed facts based on the information gathered.

Criminal procedure — plea — guilty plea — conviction on basis of plea — charge under s 125(a) of Criminal Code [*Chapter 9:23*] — conviction may not be recorded without leading evidence

S v *Gaviyaya* HH-85-08 (Chitakunye J) (Judgment delivered 11 September 2008)

See above, under CRIMINAL LAW (Being found in possession of goods in regard to which there is a reasonable suspicion that they were stolen).

Criminal procedure – specification in terms of Prevention of Corruption Act [*Chapter 9:16*] – whether Minister is obliged to notify person affected of his intention to declare him to be a specified person – extra-territoriality of specification – whether Minister entitled to declare non-resident of Zimbabwe to be a specified person – such person having assets and controlling companies within Zimbabwe – Minister entitled to declare him to be a specified person

Mawere v *Min of Justice* S-67-07 (Cheda JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 11 September 2008)

In terms of s 6 of the Prevention of Corruption Act [*Chapter 9:16*], the Minister of Justice may declare any person whom he has reasonable grounds to believe to be guilty of offences set out in the section to be a "specified person". The offences broadly relate to activities that have resulted in any loss to the State or other persons or institutions in which the State has a direct interest and other forms of corruption. The consequences of specification are that an investigator is appointed. The specified person is prohibited by s 10 of the Act from expending any of his assets in Zimbabwe without the consent of the investigator.

The appellant was a citizen and resident of South Africa although he has previously been a resident and citizen of Zimbabwe. He was specified by the respondent Minister. He applied to have the specification set aside on various grounds, *inter alia*: (1) he only became aware of the specification some three months after the fact as he was not normally resident in Zimbabwe and no order was served on him personally; (2) the respondent had breached the rules of natural justice in failing to afford the appellant a hearing prior to declaring him to be a specified person; (3) the respondent did not have the jurisdictional facts to entitle him to exercise his discretionary power to declare the applicant to be a specified person; and (4) the Act did not have extra-territorial application, and created no crime or conduct with such effect.

The respondent argued that the appellant had no *locus standi* because he was a fugitive from justice and had had no authority from the investigator to expend his assets.

Held: (1) Any assets which the appellant had in South Africa were not affected by s 10. The investigator had no jurisdiction over the appellant's assets which were not in Zimbabwe. In the absence of evidence suggesting that he was expending or disposing of assets in Zimbabwe, the court could not hold that he had no *locus standi*.

Quaere: (2) whether the appellant could be deprived of his constitutional right to challenge such an administrative decision to test its correctness. If such authority were refused by the investigator the appellant would have a right to appeal if it was unreasonably refused.

(3) For the court to hold that the appellant was a fugitive from justice it would have to be shown that he left Zimbabwe with the intention to flee and deliberately put himself beyond the jurisdiction of the court to avoid any legal action that might be brought up against him, or that he was in hiding within the jurisdiction of Zimbabwe. The fact that an attempt was made to arrest and bring him to Zimbabwe and that he was now avoiding coming to Zimbabwe did not make him a fugitive from justice. No person can be compelled to leave his country of residence and citizenship in order to go and subject himself to the jurisdiction of another country to face any legal action in that country.

(4) The appellant could not avoid being investigated simply because he was not a citizen or resident of Zimbabwe. There is nothing to prohibit investigating the activities of a person simply because he resides outside Zimbabwe.

(5) Specification of a person under the Act is simply a declaration. It is neither an arrest nor detention. It is a declaration that is made in order to facilitate an investigation. Even though the specification of a person may have serious implications, it would defeat the whole purpose of specification if a person were to be informed that it was intended to investigate him as this would give him an opportunity to take whatever action he could to frustrate the intended investigations. The person specified is given an opportunity under s 8(c) of the Act to give any explanation on the matters concerned when he is questioned by the investigator. Section 9 also gives him the opportunity to present his position on being examined by the investigator. He is given the opportunity of a full hearing. Specification is not a final action against him.

(6) There is no provision in the Act for the Minister to warn or give notice to the person concerned before investigating him. Accordingly, the Minister cannot be ordered to issue such a warning first. The argument that specification offends against the rules of natural justice could not be sustained, since if the Minister sees fit to cancel the specification, he can do so after

a report is made to him. Specification is not different from any other provisional orders made in the courts where it is feared that investigations may be jeopardised if prior warning is given to the person involved.
(7) The right to exercise a discretionary power is dependent upon the existence of a jurisdictional fact and that jurisdictional fact consists of the holder of the power satisfying himself, subjectively speaking, upon certain matters. *In casu*, the appellant had assets in Zimbabwe in the form of a house, bank accounts and companies he owned through some holding companies. There were allegations of fraud and externalization of funds involving those companies. Consequently, the Minister did not exceed his powers.

Note: the judgment appeal against was that of Uchena J in Mawere *v* Min of Justice *HH-1-05, delivered on 11 May 2005.*

Criminal procedure (sentence) – general principles – factors to consider – need to balance needs of society against interests of accused – desirability of sentencing court identifying and articulating such competing interests

S v *Mukome* HH-68-08 (Makarau JP, Hungwe J concurring) (Judgment delivered 6 August 2008)

Assessing sentence is one of the most difficult tasks that faces a judicial officer. Except where the law has laid out a minimum mandatory sentence, the judicial officer is called upon to exercise his discretion and punish the accused on behalf of society. As with most judicial functions, a number of competing interests come into play and have to be delicately balanced. On the one hand is the need to punish and on the other are the interests of the accused. Reaching the correct balance is always a taxing exercise and one that must be approached humanely and rationally. The same punishment does not weigh the same with all people. A sentence that is heavily weighed in favour of the needs of society without paying adequate attention to the interests of the offender is invariably harsh and appears draconian, while a sentence that underplays the interests of society while overemphasizing the interests of the offender is invariably lenient and ineffectual in curbing crime. While it is not practical that in each case the court should identify and articulate the two competing interests that it seeks to balance, this is a prudent way of approaching the exercise. If this is done, it will assist the court to view whether it has overplayed any of the interests at the expense of the other. It will also assist any superior court that will be reviewing the sentence to see whether the competing interests have each been fairly considered. Trial magistrates must not pay lip service to any plea of guilty and to the mitigatory factors that have been advanced by the accused. The sentences they impose after receiving submissions in mitigation must reflect that the mitigatory features of the case have been taken into account.

Criminal procedure (sentence) – general principles – theories of purpose of punishment – reformation, rather than retribution, the preferable approach – multiple counts – approach to be taken – need to ensure individual sentences as well as overall sentence are appropriate

Criminal procedure (sentence) – common law offences – theft – multiple counts – maximum overall sentence acceptable to courts

S v *Chera & Anor* HB-84-08 (Ndou J) (Judgment delivered 31 July 2008)

The most popular theory today is that the proper aim of criminal procedure is to reform the criminal so that he may become adjusted to the social order. A mixture of sentimental and utilitarian motives gives this view its great vogue. With the spread of humane feelings and the waning of faith in the old concept of the necessity for inflicting pain in the treatment of children and those suffering from mental disease, there has come revulsion at the hard-heartedness of the old retributive theory. The growing belief in education and in the healing powers of medicine encourages people to suppose that the delinquent may be re-educated to become a useful member of society. Is it not better to save such youthful offenders for a life of usefulness rather than punish them by lengthy imprisonment, which generally makes them worse after they leave than before they entered? An enlightened judicial officer will recognise the futility of severely punishing unavoidable retrogression in human dignity. It is accepted that it is one of the functions of the criminal law to give expression to the collective feeling of revulsion towards offences committed by the accused persons, but such disapproval need not be cruel or take extreme forms. Magistrates need to be guided by principle of consistency in sentencing, so regard must be had to sentences imposed or recommended in similar cases by the superior courts.
Where multiple counts are involved, it is necessary, where such counts are not treated as one for sentence, to ensure that the sentence on each count, as well as the overall sentence, is not excessive. The correct approach is either to take all

counts as one for the purposes of sentence and then impose a globular sentence which court considers appropriate in the circumstances, or, alternatively, to determine an appropriate sentence for each count taken singly so that the seriousness of offence is properly reflected. The court would then determine a realistic total which is considers appropriate in the circumstances and where necessary the severity of the aggregate sentence on all the counts taken together may be palliated by ordering some counts to run concurrently with others. For multiple counts of theft, the maximum effective sentence should rarely even be as much as 20 years.

Criminal procedure (sentence) – stock theft – penalties applicable – theft of equine animal – whether includes theft of a donkey

S v *Moyo & Ors* HB-124-08 (Ndou J) (Judgment delivered 27 November 2008)

The three accused were convicted before different magistrates of the theft of donkeys. In terms of s 114(2)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], where stock theft involves any bovine or equine animal, a mandatory minimum sentence is applicable. The magistrates all took the view that a donkey is an "equine animal" and imposed the mandatory minimum sentence.
On automatic review, held: there are conflicting rulings of the High Court as to whether a donkey is or is not an "equine animal". This has resulted in widely different sentences for the crime, depending on which line the magistrate or judge follows. This is not justice. The accused should benefit from this uncertainty and not be disadvantaged. Irrespective of what interpretation is followed, the lesser of the punishments should be visited upon the donkey thieves. The imposition of the minimum mandatory sentence on the accused person in the present cases is discriminatory and unfair when other thieves of donkeys do not attract such mandatory punishment. There is a need, *in casu*, to use international law for the purpose of removing this uncertainty or ambiguity. It is within the proper nature of judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. Article 7 of the Universal Declaration of Human Rights states that all are equal before the law and are entitled without any discrimination to equal protection of the law. To remove that discrimination, the mandatory minimum sentence should not be applied.

Customs and excise – seizure of goods – goods in possession of traveller leaving the country – traveller not asked to declare goods – not a violation of Customs and Excise Act and goods not liable to seizure

Mudima v *Commr-General, ZRA* HH-83-08 (Makarau JP) (Judgment delivered 24 September 2008)

In terms of s 55(2)(b) of the Customs and Excise Act [*Chapter 23:02*], any person leaving Zimbabwe shall, whether or not he has goods in is possession, report to an officer, in the case of a person leaving by aircraft, at the customs post or to an officer at the aerodrome of departure and shall, *if called upon to do so***,** unreservedly declare all the goods in his possession which he proposes to take with him beyond the borders of Zimbabwe in such manner as the officer may require, and shall fully and truthfully answer any questions put to him by the officer and, if so required, produce such goods for inspection by an officer. Goods found that have not been declared are subject to seizure and possible in terms of s 193 of the Act. The discovery of goods in possession of a traveller where he has not been asked to declare it is not a violation of the Act and thus there would be no basis upon which the seizure of the money could be lawfully made. The law does not oblige every traveller to *mero motu* declare the goods on his person. A traveller is only obliged to disclose and disclose fully and truthfully the goods in his possession if called upon to do so by a customs officer.

Elections – election petition – service of notice of petition on respondent – where such notice must be served – must be at respondent's "usual or last known" dwelling or place of business – meaning

Chivore v *Mudavanhu & Anor* HH-61-08 (Chitakunye J) (Judgment delivered 17 July 2008)

Section 169 of the Electoral Act [*Chapter 2:*13] provides that notice of the presentation of an election petition shall "be served by the petitioner on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business." This means that service must be either *personally* or by *leaving* the papers at the respondent's *usual or last known dwelling or place of business*. It is not enough to serve the notice at the respondent's party's offices.

The legislature intended that the respondent should get to know about the petition personally as soon as possible. The addresses for service are such that respondent frequents them as his usual dwelling or place of business. The term **"**usual" in this instance means "ordinarily used", "frequently used" or "that is in ordinary use". The dwelling place or place of business thus has to be where respondent is ordinarily found or frequents or is expected to be available on a day to a day basis; it is not just any dwelling place or place of business for the respondent. It is for the petitioner to show that the respondent frequents or is ordinarily found at the place at which service was effected. To merely say that a party headquarters is the respondent's place of business is not good enough. Even if, for instance, the respondent was employed by the party, the party's headquarters would still not suffice if that is not where the respondent is based. Election petitions are for the personal attention of the particular respondent. It is the respondent's, not the party's, election which is being challenged. It is the respondent, not his party, on whom the responsibility to act promptly is imposed and on whom the dire consequences of failure to act promptly fall.

Elections – election petition – service of notice of petition on respondent – service of notice on respondent's legal practitioner – whether such constitutes substantial compliance with Act

Kadzima v *Chimbetete* HH-75-08 (Mtshiya J) (Judgment delivered 20 August 2008)

All the places of service indicated in the Electoral Act [*Chapter 2:13*] clearly demonstrate the need for *personal service* on the respondent. For the purposes of service of a petition and other documents, the legislature has spelled out the manner and places of service only through ss 169 and 188(2). A legal practitioner's office is not one of the places provided for. If there is failure to effect service at places mentioned in s 169, then in terms of s 188(2) service can be effected at the respondents' address appearing in the voter's roll. But even in a last resort situation, the office of a legal practitioner is not availed to the petitioner as a proper place of service. The doctrine of substantial compliance has found way in our jurisdiction. If there was evidence to show that the respondent had in fact instructed or advised the petitioner to serve the petition on his legal practitioners, that might constitute substantial compliance.

Elections – election petition – time limits – failure to comply with – court has no power to dispense with time limits

Kaungwa v *Nguni* HH-72-08 (Uchena J) (Judgment delivered 31 July 2008)

Irrespective of the attitude of the parties, jurisdiction is conferred by statute and not by the parties. The authority to dispense with statutory time limits is not a wide discretion based on expediency, but a circumscribed discretion which is fully subject to judicial review. A reading of s 169 of the Electoral Act [*Chapter 2:*13] clearly establishes that it gives the petitioner a right and privilege to challenge the election of the respondent, subject to compliance with the time limit stipulated therein. If the legislature's intention was to authorise the courts to grant extension of time limits, it would have made provision for such extension in the section. The fact that no authority was granted to extend the time limits means the legislature's intention was that failure to comply should lead to nullity. If it can be shown that non-compliance with the rule has led to real or potential prejudice, there is no dispensing power and the rule must be observed. To determine whether non-compliance with formal or procedural requirements has resulted or may result in prejudice, the content and objectives of the rule must be analysed. If the administrative organ is mistaken about the possibility of prejudice and grants dispensation when such danger in fact exists, the court may review the defective exercise of the organ's discretionary power and declare the granting of the dispensation invalid. In this regard it is of importance to mention that the obligatory nature of formal and procedural requirements often arises in electoral issues. Although the courts are inclined to overlook minor formal defects, the general approach is nevertheless to regard the rules relating to the registration of voters, nomination, the drawing up of voters rolls and so on as peremptory. Such an approach is perfectly correct, elections are the foundation upon which a democratic system is built and although irregularities in elections cannot always be judged by the criterion of individual prejudice, the prejudice consists in the fact that the legitimacy of the system of government is undermined. The weight of authority in this country and elsewhere is to the effect that the time requirements are peremptory and cannot be dispensed with.

Elections – election petitions – time limits – failure to comply with – fatal to the petition

Sikanyika v *Garadi* HH-65-08 (Uchena J) (Judgment delivered 28 July 2008)

The statutory periods laid down for election petitions should be strictly complied with, and any failure to comply is fatal to the petition. If the legislature's intention was to authorise the courts to grant extension of time limits, it would have made provision for such extension. The fact that no authority was granted to extend the time limits means that the legislature's intention was that failure to comply should lead to nullity. The legislature had in mind the timeous resolution of election petitions. A petition must be determined within 6 months of its presentation. It must also be born in mind that a pending election petition undermines the authority of the legislature and the executive, as holders of office in the challenged constituencies will be participating in governing the nation while their election will be under challenge. The legitimacy of the system of government is undermined.

Elections – election petition – time limits – failure to comply with – High Court has no power to condone such failure

Shumba v *Chrmn, ZEC & Anor* HH-116-08 (Makoni J) (Judgment delivered 10 December 2008)

The applicant had wanted to contest the presidential election in March 2008. His nomination papers were rejected. He made an urgent application to the High Court, which was rejected on the grounds of lack of jurisdiction. The Electoral Court, to which the applicant then turned, declined to hear the case on the grounds that the time for presenting a petition had expired. The applicant appealed to the Supreme Court, sitting as a constitutional court. After the run-off election in June 2008, the Supreme Court handed down its decision (see *Shumba & Anor* v *ZEC & Anor* S-11-08). The applicant then presented an election petition to the Electoral Court and simultaneously applied to the High Court for condonation of the late presentation of the petition. The respondents opposed the application, arguing that the High Court had no jurisdiction to grant condonation.
Held: the Electoral Court can only hear election petitions and other matters in terms of the Electoral Act [*Chapter 2:*13]. The Electoral Court is a creature of statute whose powers and functions are to be found in the statute. It has no inherent powers such as is possessed by the High Court and can therefore not claim authority which cannot be found within the four corners of the Electoral Act. No provision is made in that Act for condonation, so the High Court cannot grant condonation. To ask the court to condone a departure from a period provided for in an enactment, as urged by the applicant, would be to usurp the functions of the legislature.

Election – nomination – rejection of nomination papers – papers rejected on the grounds that they were submitted after nominations had closed – remedies open to candidate disputing nomination officer's decision

Shumba & Anor v *ZEC & Anor* S-11-08 (Chidyausiku CJ; Sandura, Ziyambi, Malaba & Garwe JJA concurring) (Judgment delivered 1 August 2008)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1)).

Employment – appeal – under Labour Act – appeal from Labour Court – leave to appeal refused by Labour Court – time within which application for leave must be made to judge of Supreme Court

Zimnat Life Assurance Ltd v *Dikunye* S-21-08 (Cheda JA, in chambers) (Judgment delivered 30 September 2008)

The appellant had applied to the President of the Labour Court for leave to appeal against a ruling of that court. Leave was refused and application was made to a judge of the Supreme Court in terms of s 92F(3) of the Labour Act [*Chapter 28:01*]. The respondent contended that the application was out of time, but the applicant argued that it was made within the 30 day period allowed by r 36 the Labour Court Rules 2006 (SI 59 of 2006).
Held: the period of 30 days is for an application to the President of the Labour Court. For an application to a judge of the Supreme Court, the applicable rule is r 30(c) of the Supreme Court Rules 1964 (RGN 380 of 1964), which provides that if leave to appeal is necessary and has been refused by the High Court, by making application for leave to appeal within ten days of the refusal of leave to appeal. The application was therefore out of time, but in view of the importance of the point raised, leave to appeal would nonetheless be granted.

Evidence – credibility – demeanour – extent to which it may be relied on – all circumstances of case must be considered

Evidence – document – date of execution – presumption that document executed on date stated in document
Evidence – receipt of document – parties having agreed on method of delivery – all requirements complied with – presumption that letter delivered

M B Ziko (Pvt) Ltd & Anor v *Cestaron Invstms (Pvt) Ltd & Anor* S-68-07 (Malaba JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 9 July 2008)

An appellate court may still disagree with the finding of the trial court if on examination of the evidence and considering all the circumstances (such as inferences from unquestioned facts and probabilities) of the case, it comes to the conclusion that the trial court's findings on the credibility of witnesses cannot be supported. Whilst demeanour is an important factor to be taken into account in the assessment of a witness's credibility the weight to be placed on it in determining the question whether the evidence given is reliable and probative of the facts in issue must depend on all the circumstances of the case.
Where a specific method of communication has been chosen by the parties and all the necessary requirements for its use such as proper addressing and posting have been complied with as directed, a presumption arises of the fact that the letter was delivered or received unless there is proof to the contrary. The bare denial of receipt of the letters was not sufficient to discharge the *onus* on the first respondent to rebut the presumption that the letters were delivered at the address to which they were posted.
There is also a presumption that a document was executed on the day of the date it bears. In other words, unless the contrary is proved the date on a document must be taken as its true date.

Evidence – hearsay – civil case – when hearsay evidence is admissible

Hiltunen v *Hiltunen* HH-99-08 (Makarau JP) (Judgment delivered 19 November 2008)

See below, under PRACTICE AND PROCEDURE (Affidavit – founding affidavit – hearsay evidence in).

Exchange control – offences – exchanging foreign currency without approval – meaning – includes paying foreign currency to purchase item in Zimbabwe

Gambiza v *Taziva* HH-109-08 (Gowora J) (Judgment delivered 27 August 2008)

See above, under CONTRACT (Illegality – agreement to pay foreign currency).

Family law – child – arrest – parent of child arrested by police – police having no right to detain child along with parent

Chiramba & Ors v *Min of Home Affairs & Ors* HH-29-09 (Hungwe J) (Judgment delivered 11 November 2008)

See above, under CRIMINAL LAW (Arrest – child of arrested person).

Family law – child – birth – registration of – correction of "error" in register – meaning of "error" – when Registrar may correct entry – courses open to Registrar when entry based on false information – not open to Registrar to cancel entry without court order

Timbe v *Registrar-General* S-25-08 (Malaba JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 21 October 2008)

The appellant was the mother of two children. Before their birth she had married a man under customary law, unaware that he had been previously married under the civil law some 20 years earlier. After the birth of each child, the appellant and the man gave notice of the birth and its particulars to the Registrar for purposes of registration. As a result of the information

they supplied, the man's name was entered in the register as the father of each child. He loved and cared for the children as their father. It subsequently emerged that he could not, due to physical deformities, have been the father of the children, although he always acknowledged them as his. He was later killed in a car accident, and in a bid to prevent the children from sharing in the inheritance of his estate, the deceased's relatives approached the respondent and asked him to direct that the birth certificates of the two children be cancelled. Purporting to act in terms of s 8(1) of the Births and Deaths Registration Act [*Chapter 5:02*], he cancelled the registration of the children's births, on the ground that false information had been given that the deceased was their father. The appellant unsuccessfully sought an order in the High Court setting aside the respondent's purported cancellation of the births.

Held: The Registrar has the power under s 8(1) of the Act to direct the correction of any error in any register, whether it is a clerical error or an error of fact or substance if he discovers the error himself or upon an application by any person. Under s 8(3), corrections shall be made without erasing the original entry. "Entry", in relation to any register kept in terms of the Act, is defined in s 2(1) as including any information contained in a birth certificate which forms part of that register. Section 8(1) is the only section which gives the Registrar the power to correct an entry in a register without erasing the whole entry altogether. The subsection vests him with a discretionary power, exercisable only when he has satisfied himself that what he is being called upon to correct is an error in the register. An error of fact or substance implies the existence of a state of mind in regard to the fact or state of facts but one which does not accord with the facts or state of facts in question. For purposes of exercising the powers of correction under s 8(1) of the Act, it would have had to be shown that the man had genuinely believed that he was the father of the children and had caused that belief to be entered in the register when in fact another man was the father of the children. That would have been an error of fact found to have been entered in the register. It would not have been enough for the respondent to find that the man was not the father of the children without relating that fact to his state of mind for the existence of an error of fact to be established.

Cancellation of a birth certificate, on the other hand, has the effect of erasing the entry in the register. There is no section in the Act which gives the respondent power to cancel an entry in a register without an order of a court. The respondent did not find that there was an error of fact in the register relating to the entry of the name of the man as the father of the two children; he found that there was a false entry in the register relating to the paternity of the children. If there was a false entry, it could be cancelled but only on the order of a court.

Family law – child – custody – custodian parent's powers and obligations – variation of custody order – what applicant for variation must show

Samudzimu v *Ngwenya* HH-92-08 (Kudya J) (Judgment delivered 16 October 2008)]

The applicant sought an order granting him the custody of his two children. Custody had been granted to their mother, the respondent, when she and the applicant were divorced, with provision for access. The custody order also provided that if the respondent wanted to remove the children from Zimbabwe, she should seek the consent of the applicant, "which consent shall not be unreasonably withheld". The respondent proposed to relocate to South Africa, and sought the applicant's consent. His response was to initiate the present action. He averred that the relocation was not in his best interests. The respondent counter-claimed for the removal of the children and consequential relief to facilitate the removal.

Held: (1) a custodian parent is in absolute charge of the day to day needs of the children. She determines where they go to school; which church they go to; which houses they visit; which friends they play with. She does not exercise these powers in consultation with anyone. As long as these are in the best interest of the children; they cannot be impugned. She is vested with the power of nurturing, shaping and bringing up the minor children. The onus was on the applicant to show on a balance of probabilities that the respondent's relocation was not in the best interest of the children. It was not enough to aver that she had relocated to another country or that the non-custodian parent was economically better able to support the children and offer them the creature comforts of life. *In casu*, he could not use the fact of her employment in South Africa as a changed circumstance which necessitated the variation of custody. The children were still very young and their mother was best suited to look after them. The view that that the maternal link, which is necessary for the psychological well being of children, is formed earlier than the paternal link, was still true.

(2) With regard to the counter-claim, the consent order contemplated the removal of the children from Zimbabwe. The applicant's consent was required for the purpose of ensuring that the parties come to some reasonable accommodation on the applicant's access rights. If he was able to exercise them in South Africa, then well and good; if not, then the order would need to be varied to allow him to have them in Zimbabwe at his cost on agreed terms. If both parties, as the parents, truly had the interests of the children at heart, then they should come to a workable compromise.

Family law – husband and wife – divorce – grounds – irretrievable breakdown of marriage – factors showing that marriage has irretrievably broken down

Murada v *Murada* HB-119-08 (Ndou J) (Judgment delivered 27 November 2008)

There are two characteristics of irretrievable breakdown of marriage: (a) the marriage relationship is not normal any more; and (b) there is no reasonable prospect of the restoration of a normal marriage relationship. A subjective decision by one of the parties that he no longer desires to maintain a marriage relationship with the other is an indication of the breakdown of the parties' marriage but not necessarily of an irretrievable breakdown. The next step is to examine, in an objective manner, the reasons advanced by the party and to determine the irretrievability of the breakdown. Where it is the party's stated desire to terminate the marriage, it is in reality hardly possible for a court to find that there is a reasonable prospect of reconciliation between the parties. A further factor could be that the parties have separated: this would evince a serious violation of consortium i.e., *inter alia*, loyalty, love, affection, comfort, mutual services and sexual relations which characterise a normal marriage relationship.

Family law – husband and wife – divorce – jurisdiction – domicile – acquisition – proof – proof on balance of probabilities required – intention to acquire new domicile – how can be inferred, notwithstanding stated intentions to contrary

Kung v *Kung* S-16-08 (Gwaunza JA, Malaba & Garwe JJA concurring) (Judgment delivered 16 September 2008)

The appellant was born and educated in Zimbabwe. His mother being a citizen of South Africa, the appellant was able to obtain a South African passport and the right of residence in that country. After their marriage in 1999, the parties initially lived in Harare. They had certain business interests in Zimbabwe. Apart from their concern over the economic situation in Zimbabwe, they also wished to have the respondent's daughter from a previous marriage educated in South Africa. To this end they purchased a residence in South Africa and placed the daughter in a South African school. Before that, the appellant had disposed of all his assets in Zimbabwe and externalised the proceeds. He acquired other assets in South Africa and secured employment there. The respondent did not relocate to South Africa. No family of the appellant remained in Zimbabwe and he himself did not maintain his permanent residence status in Zimbabwe. At the time the divorce proceedings were instituted, the appellant was already living in South Africa. He said that at that time he was going "backwards and forwards" between Zimbabwe and South Africa. This was the only way he remained connected to Zimbabwe.

At the divorce trial, the court *a quo* raised the issue of the appellant's domicile. The appellant expressly denied that he had adopted South Africa as a domicile of choice. He said that he intended to come back to Zimbabwe should the economic situation improve.

Held: the requirements for the acquisition of a domicile of choice are (a) the *factum* of residence; (b) the *animus manendi*, or intention of remaining permanently; and (c) freedom of volition.

Even if expressions of intention are clear and consistent, they cannot prevail against a course of conduct inconsistent with them or lending to an opposite inference. An intention to reside in a country for a fixed period of time, or until the happening of some clearly foreseen and reasonably anticipated event, will not be sufficient to acquire domicile, but if the proper conclusion from all the circumstances is that the person intends to make his home in a country for an indefinite time, he will acquire a domicile of choice there, notwithstanding a continuing emotional attachment to some other country, or an intention to change his residence upon some vague or improbable contingency.

The acquisition of domicile of choice is proved on a balance of probabilities. There was no authority that classified the requisite *animus manendi* as either "strong" or "weak". To suggest this qualification would be akin to requiring the court to apply a test higher than that of "a balance of probabilities" in its determination of the state of mind of the *de cujus*. The courts also tend to use the words "permanently" and "indefinitely" interchangeably; there was no real distinction between the two.

In casu, the appellant no longer had any business interests in Zimbabwe at the time the proceedings were instituted, nor did he have any family interests left. What interest or attachment he did have might have been no more than emotional or sentimental. Viewed against the other factors referred to, this interest was not sufficient to disprove an intention on his part to make a permanent home in another country. His stated intention to come back to Zimbabwe should the economic situation improve was clearly based on some "vague or improbable contingency".

Human rights – discrimination – discrimination based on race – statute making no mention of race – implementation of law in fact discriminatory

Human rights – rule of law – right of access to courts – deprivation of right of access to courts – a breach of human rights

Mike Campbell (Pvt) Ltd & Ors v *Republic of Zimbabwe* SADC 2/07 (Mondlane J; Pillay P, Mtambo J. Kambovo J & Tshosa J concurring, except as indicated)

See below, under INTERNATIONAL LAW.

International law – international tribunals – access to – requirement that domestic remedies must have been exhausted – applicants entitled to approach such tribunals where domestic remedies are denied or are ineffective

International law – treaties – binding nature of – effect of domestic legislation – party to treaty may not invoke domestic law to evade treaty obligations

International law – treaties – SADC Treaty – art 4(1) – interpretation – principles – requirement to act in accordance with human rights, democracy and the rule of law – art 21(b) – Tribunal required to develop its own jurisprudence, having regard to applicable treaties, general principles and rules of public international law

Mike Campbell (Pvt) Ltd & Ors v *Republic of Zimbabwe* SADC 2/07 (Mondlane J; Pillay P, Mtambo J. Kambovo J & Tshosa J concurring, except as indicated)

Note: this judgment is included for interest only, being the first case in which the Government of Zimbabwe has been a party to an application in an international tribunal. There has not yet been a decision of the courts of Zimbabwe on the subject of the enforceability in Zimbabwe of a Tribunal decision.

The applicants brought an application before the SADC Tribunal, arguing that the respondent (the Government of Zimbabwe) had acted in breach of its obligations under the SADC Treaty by enacting and implementing Amendment No 17 to the Zimbabwean Constitution. They argued that all the lands belonging to them which had been compulsory acquired by the respondent under that Amendment were unlawfully acquired since the Minister responsible had failed to establish that he applied reasonable and objective criteria in order to satisfy himself that the lands to be acquired were reasonably necessary for resettlement purposes in conformity with the land reform programme. They claimed that they had been denied access to the courts to challenge the legality of the compulsory acquisition of their lands, that the respondent was in breach of art 6(2) of the Treaty, which prohibits discrimination, by enacting and implementing Amendment No 17 to the Constitution, and that they had been denied compensation (on the subject of compensation, s 16B(2)(b) of the Constitution, as amended, provides that compensation shall be paid for improvements only). Apart from arguing to the contrary, the respondent argued that the Tribunal had no jurisdiction to entertain the application, on the grounds that the applicants had not shown that they had exhausted all available remedies or were unable to proceed under the domestic jurisdiction.

Held: (1) individuals are required to exhaust local remedies in the municipal law of the state before they can bring a case to the Tribunal. This means that individuals should go through the courts system starting with the court of first instance to the highest court of appeal to get a remedy. The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the tribunal does not deal with cases which could easily have been disposed of by national courts. However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. Amendment No 17 ousted the jurisdiction of the courts of law in Zimbabwe from any case related to acquisition of agricultural land and therefore the applicants were unable to institute proceedings under the domestic jurisdiction.

(2) Member states cannot rely on their national law to avoid their legal obligations under the Treaty. To allow this would permit international law to be evaded by the simple method of domestic legislation. The Vienna Convention on the Law of Treaties provides in art 27 that a party to a treaty may not invoke provisions of its own internal law as justification for failure to carry out an international agreement.

(3) The concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. In terms of arts 4(c) and 6(1) of the SADC Treaty, member states are obliged to respect principles of "human rights, democracy and the rule of law and to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty. Legislation which deprives the courts of the powers to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen is inimical to the principle of the rule of law, which requires citizens to have access to justice. Indeed, one can scarcely conceive of the rule of law without there being a possibility of having access to the courts. The

right of access to the courts is not only set out in court decisions, but also enshrined in international human rights treaties, such as the African Charter on Human and Peoples' Rights. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to a court or, where appropriate, another independent and impartial tribunal or forum. It is quite clear that the provisions of s 18(1) and (9) of the Constitution, dealing with the right to the protection of law and to a fair hearing, have been taken away in relation to land acquired under s 16B(2)(a). There is not even the remedy of judicial review in respect of land acquired under s 16B(2)(a)(i) and (ii). The applicants had thus been expressly denied the opportunity of going to court and seeking redress for the deprivation of their property, giving their version of events and making representations. The applicants had established that they had been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and consequently the respondent has acted in breach of art 4(c) of the Treaty.

(4) (Tshosa J dissenting) Discrimination of whatever nature is outlawed or prohibited in international law. There are several international instruments and treaties which prohibit discrimination based on race, the most important one being the United Nations Charter, as well as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples' Rights and the Convention On the Elimination of All Forms of Racial Discrimination, all of which prohibit racial discrimination. The respondent acceded to both Covenants, the African Charter and the Convention and, by doing so, was under an obligation to respect, protect and promote the principle of non-discrimination and must, therefore, prohibit and outlaw any discrimination based on the ground of race in its laws, policies and practices. In addition to those international agreements, the SADC Treaty itself, in art 6(2) prohibits discrimination. Although the Treaty does not define racial discrimination or offer any guidelines to that effect, the Convention On the Elimination of All Forms of Racial Discrimination, for example, prohibits any distinction, exclusion, restriction or preference based on race, colour, descent, or natural or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The 17th Amendment affected all agricultural lands or farms occupied and owned by the applicants and all the applicants were white farmers. While there was no explicit mention of race, ethnicity or people of a particular origin in the Amendment as to make it racially discriminatory, its implementation affected white farmers only and consequently constituted indirect discrimination or *de facto* or substantive inequality. The differentiation of treatment meted out to the applicants also constituted discrimination, as the criteria for such differentiation were not reasonable and objective but arbitrary and based primarily on considerations of race. The aim of the respondent in adopting and implementing a land reform programme might have been legitimate if and when all lands under the programme were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups.

(5) Ordinarily in international law it is the expropriating state that should pay compensation. This would mean that *in casu* the respondent should shoulder the responsibility of paying compensation to the applicants for their expropriated lands. It is the right of the applicants under international law to be paid, and the correlative duty of the respondent to pay, fair compensation. The respondent cannot rely on its domestic legislation to avoid payment of compensation to the applicants for their expropriated farms, regardless of how the farms were acquired in the first place, provided that the applicants had a clear legal title to them.

(6) (Pillay P dissenting) No order of costs would be made.

International law – treaties – human rights treaty – obligations of state parties – duty of state parties to refrain from acts which violate treaty and to guarantee enjoyment of rights contained in treaty

Chiramba & Ors v *Min of Home Affairs & Ors* HH-29-09 (Hungwe J) (Judgment delivered 11 November 2008)

See above, under CRIMINAL LAW (Arrest – child of arrested person).

Interpretation of statutes – directory and peremptory provisions – distinction between – failure to comply with directory provision – effect – principles – whether effect of holding that failure to comply was fatal would be disproportionate

Shumba & Anor v *ZEC & Anor* S-11-08 (Chidyausiku CJ; Sandura, Ziyambi, Malaba & Garwe JJA concurring) (Judgment delivered 1 August 2008)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1)).

Interpretation of statutes – meaning of words – ambiguity – ambiguity in criminal statute resulting in unequal treatment of persons being sentenced – use of international instruments to ensure equality of treatment

Interpretation of statutes – meaning of words – international instruments – may be used to resolve ambiguity and ensure equal treatment

S v *Moyo & Ors* HB-124-08 (Ndou J) (Judgment delivered 27 November 2008)

See above, under CRIMINAL PROCEDURE (SENTENCE) (Stock theft).

Landlord and tenant – lease – termination – fixed term lease – grounds on which landlord may seek eviction of tenant

Landlord and tenant – statutory tenant – when statutory tenancy created – referral of issue of quantum of rental to rent board – determination of rental by board – tenant not thereby made a statutory tenant

P Rosati & Sons (Pvt) Ltd v *P & C Panel Beaters & Spray Painters* HH-102-08 (Uchena J) (Judgment delivered 19 November 2008)

The plaintiff leased commercial premises to the defendant in terms of a ten-year lease. The lease provided that the rentals were to be reviewed from time to time. In pursuance of such a review, when the parties could not agree on a rental, the plaintiff referred the matter to the rent board, which set a rental figure. The plaintiff was dissatisfied with the figure set and sought the eviction of the defendant, claiming that the defendant had, because of the referral to the Rent Board, become a statutory tenant, and that as the plaintiff wanted the premises for its own use, it entitled to have the defendant evicted.
Held: (1) in terms of s 10(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), the rent board may, in fixing a fair rent for the premises, specify different rents for different periods during the currency of the lease concerned. The wording of s 10(2) clearly indicated that the intention of the legislature in providing for the determination of fair rental by a rent board was not to terminate the lease agreement, but to determine fair rentals to be paid *during the currency of* the lease agreement. It was clear from the wording of the lease agreement that the intention of the parties was to review the rentals while the lease remained in existence for the stated period. The defendant was not, therefore, a statutory tenant.
(2) A landlord and his tenant are bound by the terms of their contract. If a fixed period is agreed, earlier termination is not possible unless there has been a breach by the tenant. Notice to quit cannot be given before the expiry of the lease, save where the premises have become dangerous or urgently in need of repair and vacation becomes necessary for that purpose. Even in that situation, the lessee would ordinarily be permitted to resume occupation upon completion of repairs. There being no breach alleged, the defendant was entitled to lease the premises until the period agreed to in the lease had lapsed.

Legal practitioner – conduct and ethics – duties – duty to ascertain whether pending judgment has been handed down or when it is to be handed down

Metro Intl (Pvt) Ltd v *Old Mutual Property Invst Corp (Pvt) Ltd* S-31-08 (Malaba DCJ, in chambers) (Judgment delivered 29 October 2008)

See above, under APPEAL (Extension of time within which to note appeal – application).

Legal practitioner – conduct and ethics – refusal to accept court process – practitioner having obtained order in *ex parte* application – order granted erroneously – practitioner refusing to accept notice of set-down for fresh hearing – such conduct unethical and unacceptable

Mufundisi v *Rusere* HH-22-09 (Bere J) (Judgment delivered 6 November 2008)

The applicant sought and obtained an *ex parte* order which restrained the respondent from disposing of a certain motor vehicle. Upon having had his attention drawn to the respondent's notice of opposition to the applicant's application, the judge considered that the order should not have been granted before affording the respondent an opportunity to be heard.

Accordingly, he *mero moto* invoked the provisions r 449 of the High Court Rules 1971, which allows a court to correct, rescind or vary any judgment or order erroneously granted in the absence of any party affected thereby. He arranged for the matter to be set down for further hearing, intending to advise the parties that he proposed to have the order granted *ex parte* rescinded and to hear both parties afresh and on equal footing before making a determination. The applicant's legal practitioner did not appear at the hearing; the evidence was that his firm had refused to accept service of the notice of hearing, and that the applicant's counsel, who happened to be at the court on the date of set-down, indicated that he would not attend.

Held: judges are not endowed with the gift of infallibility. They often make mistakes. Once such mistakes are noted, they must be addressed at the earliest possible opportunity to avoid perpetuating a miscarriage of justice. Rule 449 is one rule which a judge can invoke in order to do justice between litigants. For a legal practitioner to advise his law firm to refuse to accept court process for whatever reason would represent an act of brutality to the rules of professional ethics. Such an act is clearly calculated to subvert court process and is unacceptable. It is unforgivable for a legal practitioner to conspire to defeat court process by arrogantly instructing his law firm to refuse to accept court process in the misplaced hope that his client can hold onto a court order obtained *ex parte*.

Mines and minerals – tribute agreement – effect – minerals extracted in terms of agreement but not removed from site by date of termination of agreement – tributor entitled to remove minerals subject to compliance with terms of agreement relating to payment of royalty

HEM Granite Industries (Pvt) Ltd v *Keeley Granite (Pvt) Ltd* S-18-09 (Malaba DCJ, Ziyambi & Garwe JJA concurring) (Judgment delivered 9 September 2008)

See above, under CONTRACT (Termination – effect)

Police – discipline – dismissal from force – dismissal in terms of s 48(a) of Police Act following conviction – conviction set aside on appeal – dismissal thereby rendered unlawful

Mpofu v *Commissioner of Police & Anor* S-15-08 (Chidyausiku CJ, Sandura & Gwaunza JJA concurring) (Judgment delivered 2 September 2008)

The appellant was a police officer. He had in 1999 been convicted of assault and sentenced to a fine, together with a suspended short term of imprisonment. He appealed against conviction and sentence, but before the appeal was heard the first respondent, the Commissioner of Police, acting in terms of s 48(a) of the Police Act [*Chapter 11:10*], summarily dismissed him from the police force. In September 2001 the High Court quashed the conviction and set aside the sentence. The appellant applied for reinstatement. The Commissioner rejected his application. An appeal to the Police Service Commission was rejected as being out of time, s 51 of the Act requiring that an appeal be noted within seven days. In October 2003 the appellant launched an application in the High Court for the rescission of the decision of the Commission. The judge *a quo* dismissed the application on the ground the appeal to the Commission was out of time and prescribed.
Held: (1) The judge *a quo* was correct in holding that the appeal to the Commission was out of time.
(2) However, it is quite clear from s 48 of the Act that a member of the police force has to stand convicted of an offence before he can be dismissed in terms of the section. At the time that the Commissioner of Police discharged the appellant, the appellant stood convicted of assault, but on appeal to the High Court the conviction was quashed and the sentence set aside. The successful appeal had the retrospective effect of obliterating the conviction which was the basis of the appellant's dismissal. To hold that the appellant stood discharged from employment on the basis of a conviction that was quashed would be a travesty of justice and totally irregular. His dismissal in terms of s 48(a) of the Act *in casu* was unlawful because he stood convicted of no offence.
(3) This was a proper case for the court to exercise the review powers conferred by s 25 of the Supreme Court Act [*Chapter 7:13*] to correct a blatant irregularity by an administrative authority in dismissing the appellant. The matter would be remitted to the High Court for the purposes of determining whether following the unlawful dismissal of the appellant he should be reinstated, as he requests, or be paid damages in lieu of reinstatement.

Practice and procedure – action – ancillary issue not specifically before court – whether court entitled to deal with such issue *mero motu*

Taylor v *Taylor* S-70-07 (Garwe JA, Cheda & Ziyambi JJA concurring) (Judgment delivered 15 September 2008)

See above, under CONTRACT (Donation – *inter vivos*).

Practice and procedure – action – dismissal of – application by defendant for dismissal of action on grounds that it is frivolous and vexatious – need for defendant to file plea, answering plaintiff's allegations, before applying for dismissal of action

Gwizi v *Ndebele & Ors* HB-68-08 (Kamocha J) (Judgment delivered 17 July 2008)

Where an application is made for the dismissal of an action on the grounds that it is frivolous and vexatious, the defendant must file his reply to the allegations raised by the plaintiff before he makes an application to the court for dismissal of the plaintiff's action. He may not do so before filing his reply, because he can only convince the court by his plea that the plaintiff's action is frivolous or vexatious. That is not possible if there is no reply from the defendant.

Practice and procedure – action – dismissal of for want of prosecution – courses open to defendant – procedure under r 236(3) of High Court Rules not appropriate

Anchor Ranching (Pvt) Ltd v *Beneficial Entprs (Pvt) Ltd & Ors* HB-103-08 (Bere J) (Judgment delivered 16 October 2008)

There have been numerous applications recently, made under r 236(3) of the High Court Rules, for the dismissal of an action for want of prosecution after closure of pleadings. This procedure is not the correct one: the procedure under r 236(3) relates to the dismissal of an application for want of prosecution. Where pleadings are closed and the plaintiff does not prosecute his claim, the defendant has numerous courses open, under Orders 16, 23, 24 or 26.

Practice and procedure – affidavit – founding affidavit – hearsay evidence in – when such evidence is admissible

Hiltunen v *Hiltunen* HH-99-08 (Makarau JP) (Judgment delivered 19 November 2008)

The applicant's founding affidavit was deposed to, not by the applicant herself, but by a person to whom a general power of attorney had been granted by the applicant. There were no facts in the affidavit that the deponent, as a general agent of the applicant, would have personal knowledge of. The entire founding affidavit was hearsay and was an affidavit of belief and information. The deponent either believed that what she was saying was correct or had been informed and believed the information to be correct.

Held: (1) In application proceedings, it is to the founding affidavit that the court will look to for the cause of action being alleged by the applicant and the evidence that the applicant has to sustain such a cause of action. Hence an applicant must stand or fall by his founding affidavit and the facts alleged therein because those are the facts which the respondent is called upon either to affirm or deny. Generally speaking, affidavits must be confined to such facts as the witness is able of his own knowledge to prove. In interlocutory motions, in which statements as to belief, with the grounds thereof, affidavits containing hearsay evidence may be admitted. It is also a long-standing practice in urgent applications to receive hearsay evidence if an acceptable explanation is given why direct evidence is not available and the source of the information and the grounds for the belief in the truth of the statement are disclosed.

(2) The practice of the court has to some extent been amended by the relaxation to the rule against hearsay evidence provided in s 27 of the Civil Evidence Act [*Chapter 8:01*], making first-hand hearsay evidence admissible on conditions. For first-hand hearsay to be admissible under the Act, the evidence must be about a statement made orally or in writing by another person. The person who made the statement must be identified and it must appear from the nature of the evidence that the contents of the statement would have been admissible from the mouth of that person were he present and testifying. Thus, if the statement were, for instance, on an opinion held by that other person, then the evidence would be inadmissible because opinion evidence is inadmissible from the mouth of any witness other than expert witnesses. Similarly, second- and third-hand hearsay remains inadmissible as the amendment to the law only provides for first-hand hearsay.

Practice and procedure – condonation – application – when application must be made – failure to comply timeously with applicable rule – no need to apply for condonation when no rule breached
Practice and procedure – execution – sale – setting aside of – common law right to have sale set aside on good cause shown

Garati v *Mau Mau & Ors* S-19-08 (Malaba JA, Sandura & Garwe JJA concurring) (Judgment delivered 15 August 2008)

The appellant's property had been sold to the first respondent in a sale in execution at the instance of the second respondent, a building society. The sale took place in November 2001. In January 2002 the appellant wrote to the third respondent, the sheriff, protesting that the sale price was unreasonably low. In April 2002 the sheriff confirmed the sale in terms of r 359(7) of the High Court Rules 1971. The first respondent, however, did not pay the purchase price immediately. Six months later, the building society expressed its concern about the delay. In January 2003, the price still being unpaid, the appellant wrote to the building society asking it to cancel the sale. The building society in turn asked the sheriff to cancel the sale. On 31 January 2003 the purchase price was finally paid. On 18 February, the appellant made application for an order setting aside the sale on the ground that there had been an inordinate delay in the payment of the purchase money by the first respondent. He said that because of the hyper-inflationary conditions obtaining in the country, he would lose considerably if the sale in favour of the fist respondent were allowed to go through. He also alleged that by failing to take steps to cancel the sale on the ground that the first respondent had failed to pay the purchase price within a reasonable time, the sheriff aided and abetted the first respondent in delaying the payment. The first respondent averred that the application was in term of r 359(8) and so had to have been made within one month after the appellant was notified of the decision of the sheriff. He contended that the application was not properly before the court as it was made outside the time limit. No condonation of non-compliance with r 359(8) had been applied for and granted. The appellant at first disputed that there was any need to apply for condonation, then accepted that he should apply for condonation. His application for condonation was rejected.

Held: (1) An application for condonation is made when there has been failure to comply properly or timeously with a rule under which a party is bound to act in seeking relief from the court. The judge *a quo* proceeded on the basis that a question of condonation of non-compliance by the appellant with r 359(8) had arisen for determination. In fact, the appellant did not apply to have the sheriff's decision confirming the sale set aside. The main application was for an order setting aside the sale on the ground that the purchase money was paid by the first respondent after an unreasonably long period of time. The ground on which the relief was sought arose after the decision of the third respondent in terms of r 359(7) and was a consequence of the conduct of the first respondent. There was therefore no question of non-compliance for the purposes of founding an application for condonation with a rule the appellant was not bound to comply with in seeking the relief from the court.
(2) Under the common law an owner of property which has been sold in execution but not yet transferred may seek an order of *restitutio in integrum* setting aside the sale on good cause shown. When he applied to have the sale in execution of his property set aside on the ground that the purchase money had been raised and paid by the first respondent after an unreasonably long time, the appellant was exercising this common law right. The judge *a quo* should have heard and determined the main application.

Practice and procedure – judgment – correction of – judgment or order erroneously granted in absence of party affected thereby – judge *mero motu* invoking provisions of r 449 of High Court Rules 1971

Mufundisi v *Rusere* HH-22-09 (Bere J) (Judgment delivered 6 November 2008)

See above, under LEGAL PRACTITIONER (Conduct and ethics – refusal to accept court process).

Practice and procedure – judgment sounding in foreign currency – when may be granted – need for loss to have been felt in foreign currency – exchange rate to be used – not competent for court to grant judgment at any rate other than official exchange rate

National Merchant Bank Ltd v *The Cold Chain (Pvt) Ltd* HH-96-08 (Mtshiya J) (Judgment delivered 16 September 2008)

The plaintiff, an authorised dealer in foreign currency, used to source currency to enable the defendant company to import goods. The defendant had no foreign currency and could only access it through the plaintiff. The practice was that the plaintiff would source foreign currency from the market and credit it to its customers in return for payment in Zimbabwe

currency. The defendant paid the plaintiff, in Zimbabwe currency, to source South African currency to pay for a shipment from its supplier in that country. Two months later, the plaintiff, believing that the payment had not gone through, paid the supplier again. The supplier used the duplicated payment to supply another shipment. The plaintiff initially demanded payment in Zimbabwe dollars. The defendant tendered payment at the official rate of exchange, which was about a quarter of the "parallel" or market rate that the plaintiff actually had to use to acquire currency. The plaintiff then demanded payment of the South African currency it had sourced, alternatively, payment in Zimbabwe currency at the market rate. The questions that arose for determination were (1) whether or not the defendant was obliged to return the overpayment in rands; and (2) if not, what was the applicable rate of exchange to determine the Zimbabwe currency equivalent.
Held: (1) the court has the power to give a judgment sounding in foreign currency. This would normally obtain where there is evidence or agreement that the loss suffered by a plaintiff was indeed felt in foreign exchange. While the options for how to recover a foreign debt must be left to the judgment creditor's discretion, such options should, however, be spelt out at the time of making the transaction and should be in compliance with foreign exchange regulations. Only then will a court proceed to enforce a claim in the agreed currency. Here, the established dealings between the parties dictated that the plaintiff's payment should be in local currency. The practice was for the plaintiff to source foreign currency for the defendant from the market and in return the defendant would pay the plaintiff in Zimbabwe currency. That position did not change because of the duplicated amount. The defendant was still expected to meet his obligation in local currency. (2) While in the current inflationary environment, the use of the parallel market rate made a lot of sense, that route remained illegal and could not be endorsed by the court. The court could only recognize the official exchange rate that was used by the defendant.

Practice and procedure – parties – citation – Electoral Commission – requirement to cite chairperson, not Commission itself – citation of Commission – whether fatal to proceedings

Shumba & Anor v *ZEC & Anor* S-11-08 (Chidyausiku CJ; Sandura, Ziyambi, Malaba & Garwe JJA concurring) (Judgment delivered 1 August 2008)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1)).

Practice and procedure – parties – deceased estate – must be represented by executor – citation of – must be cited in name of executor

Nyandoro & Anor v *Nyandoro & Ors* HH-89-08 (Kudya J) (Judgment delivered 16 October 2008)

See above, under ADMINISTRATION OF ESTATES (Deceased estate – litigation).

Practice and procedure – parties – *locus standi* – beneficiary under a will – *locus standi* to claim recovery of inheritance wrongly given to another

Moyo v*Ncube & Ors* HB-122-08 (Kamocha J) (Judgment delivered 27 November 2008)

A beneficiary under a will has *locus standi* to bring an action to recover an inheritance which he believes was wrongly given to another person.

Practice and procedure – parties – *locus standi* – fugitive from justice – what must be shown before person may be regarded as fugitive from justice

Practice and procedure – parties – *locus standi* – person specified in terms of Prevention of Corruption Act [*Chapter 9:16*] – need for investigator's approval to expend assets – whether person may be prevented from challenging correctness of investigator's decision

Mawere v *Min of Justice* S-67-07 (Cheda JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 11 September 2008)

See above, under CRIMINAL PROCEDURE (Specification in terms of Prevention of Corruption Act [*Chapter 9:16*]).

Prescription – pleading – how should be pleaded – not necessary to raise matter in special plea

Nyandoro & Anor v *Nyandoro & Ors* HH-89-08 (Kudya J) (Judgment delivered 16 October 2008)

See above, under ADMINISTRATION OF ESTATES (Deceased estate – litigation).

Property and real rights – immovable property – *bona fide* possessor – entitlement to fruits or produce as long as he remains a *bona fide* possessor

Fantaisie Farmers (Pvt) Ltd & Ors v *Manyeruke & Ors* S-65-07 (Cheda JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 11 September 2008)

The appellants were all owners of farms on which they cultivated and produced sugar cane in the Hippo Valley and Triangle area. The farms were acquired by the State in terms of s 8(1) of the Land Acquisition Act [*Chapter 20:10*] and allocated to the first group of respondents who settled thereon. The settlers reaped the sugar cane which had been planted there and sold it to sugar mills in the area. The acquisition orders were subsequently set aside as being invalid. The appellants argued that because the acquisition orders were subsequently set aside the Minister's actions were invalid right from the beginning and therefore the settlers have no lawful right to the proceeds of the sugar cane that they delivered to the millers during the period of the acquisition.

Held: (1) There was nothing to suggest that the settlers knew, or were aware, that in settling them on the sugar cane farms the Minister was not acting in accordance with the provisions of the relevant law. It was not for them to question the legality of the Minister's actions. They were therefore *bona fide* occupants of land regarding its fruits or produce. Under the common law, a *bona fide* possessor acquires all the fruits gathered by him before the *litis contestatio* in an action regarding the possession or ownership of the ground whether they have been consumed or are still in existence; but he is bound to restore to the owner of the property all fruits actually gathered by him after *litis contestatio,* because by *litis contestatio* a *bona fide* possessor becomes converted into a *mala fide* possessor. A *bona fide* possessor is not answerable to the person actually entitled for acts done by him in accordance with his supposed title, nor for the loss or deterioration of the thing possessed which occurred before he became aware of the other's right.
(2) The fact the production of sugar cane by the settlers was in contravention of the Sugar Production Control Act [*Chapter 18:09*] did not mean they should be deprived of the sugar cane, or that the sugar cane could then become the property of someone who did not produce it.

Property and real rights – spoliation order – incorporeal property – information stored on computer – such information being illicitly copied without consent of owner of computer – not possible under *mandament van spolie* to require person copying information to delete it from his computer

Mutsinya v *Dande Hldgs (Pvt) Ltd & Ors* HH-78-08 (Makarau JP) (Judgment delivered 22 August 2008)

The respondents unlawfully "cracked" the password on a computer belonging to the applicant, who was employed by the first respondent. They then copied a number of files and information onto their computers. The information that was transferred from the applicant's computers was personal and confidential to the applicant. He sought an order under the *mandament van spolie* compelling the respondents to delete from their computers all the information that they transferred from his computer in the interim and as final relief, that the respondents be restrained from using the information that they transferred from the applicant's computers.
Held: the *mandament van spolie* is a remedy for the restoration of possession and is usually used to restore physical possession of movable or immovable property. It is a remedy of a very specific nature. Its sole purpose is to restore the parties to the *status quo ante* after one of them has been despoiled against his will or without his consent of possession of something by the other party's violence, fraud, stealth or other illicit conduct. This is why the rights of the parties to the property do not enter the picture and no attempt is made or is indeed permissible to determine the merits of the underlying dispute between the parties. It is settled law that the remedy now applies to incorporeal rights.
The applicant was in possession of all the information on this computer before the cracking of his password. He had exclusive control over access to that information. The conduct of the respondents in gaining access to his files without his consent and in his absence was illicit. However, by gaining access to his information and mirroring such information onto their own computers, the respondents did not deprive the applicant of "possession" of the information in such a manner that such possession could be restored by a spoliation order. The applicant remained in possession of the information that

was originally on his computer. The respondents did not "take away" the information they had accessed. What they did was to simply obtain copies thereof, albeit illicitly.
The remedy of *mandament van spolie* cannot be used to assert and vindicate any other right in the property that is not possession, so the applicant could not use the remedy to interdict the respondents from accessing information that they were not entitled to but which they now had, or to eradicate from their own computers information that they illicitly obtained from his. His remedy would lie in some other branch of the law and not in the possessory remedy that he has invoked. What the applicant lost through the actions of the respondents was the right to have exclusive access, knowledge and use of the information that was on his computer. Such a right, albeit incorporeal, is incapable of restoration once access has been had to the information. It is a right that is incapable of being possessed physically and it cannot be protected by the *mandament van spolie*.

Property and real rights – spoliation order – what applicant must show – not necessary for applicant to show he had some reasonable or plausible claim to the property of which he was despoiled

Shiriyekutanga Bus Svcs (Pvt) Ltd v *Total Zimbabwe (Pvt) Ltd* HH-64-08 (Makarau JP) (Judgment delivered 30 July 2008)

In an application for a spoliation order, there are two requirements that an applicant has to set up and prove. These are that he was in peaceful and undisturbed possession of the property and that the respondent deprived him of such possession. The court does not look at all into the juridical nature of the possession claimed. It is not necessary for him to show that he had some reasonable or plausible claim to the property of which he was despoiled.

Succession – will – beneficiary – *locus standi* to bring action to recover inheritance wrongly given to another

Moyo v*Ncube & Ors* HB-122-08 (Kamocha J) (Judgment delivered 27 November 2008)

See above, under PRACTICE AND PROCEDURE (Parties – *locus standi* – beneficiary under will).

Succession – will – validity – disposition affecting property rights of surviving spouse – which rights are affected – only those existing at time will is executed may not be eroded

Est Wakapila v *Matongo NO & Ors* HH-71-08 (Kudya J) (Judgment delivered 31 July 2008)

The provisions of s 5(3)(a) of the Wills Act [*Chapter 6:*06] prevent a testator from eroding the property rights vested in his spouse by law in either his or their joint estate. These rights are those that the spouse has at the time the will is executed, as opposed to future or contingent rights that arise on the death of the testator. This is because the variation or prejudice does not arise on the demise of the testator but at the time the will is written, notwithstanding that the will only commences to operate on his demise. It is fallacious to argue that at the time of death the surviving spouse is vested with rights in a deceased estate in which a testamentary disposition has been made. The first reason is that the divested property, subject to acceptance by the beneficiary, no longer belongs to the testator. The second reason is that giving such a meaning to the provision in issue would result in a radical alteration of the common law power of a spouse to dispose of his property to whomsoever he wishes. If the lawmaker intended such a radical departure from the common law, it would have said so in clear language. It would be absurd to allow the spouse to dispose of his property during his or her lifetime but take away that power from him to dispose of it by will. The third reason is that a wife married under customary law can only inherit from her husband's estate if he dies intestate. Where he has disposed of his estate by a will, she does not inherit and thus has no rights in any property belonging to his estate.

Succession – will – validity – will not complying with formalities set out in Wills Act [*Chapter 6:06*] – Master's discretion as to whether or not to accept will in spite of such lack of compliance – process to be followed

Mujuru NO & Ors v *The Master & Ors* HH-112-08 (Guvava J) (Judgment delivered 20 November 2008)

See above, under ADMINISTRATION OF ESTATES (Master of the High Court – acceptance of will by).

Words and phrases – "dependant" – Deceased Persons Family Maintenance Act [*Chapter 6:03*] – s 2

Maloya v *Nyamupfukudza NO & Anor* HH-115-08 (Makoni J) (Judgment delivered 26 November 2009)

See above, under ADMINISTRATION OF ESTATES (Maintenance – dependant – who is).

Words and phrases – "exchange" – Exchange Control Regulation 1996 (SI 109 of 1996) – s 4(1)

Gambiza v *Taziva* HH-109-08 (Gowora J) (Judgment delivered 27 August 2008)

See above, under CONTRACT (Illegality – agreement to pay foreign currency).