Latest update: 19 November 2010

CASES DECIDED JANUARY – JUNE 2009

Administration of estates – executor – distinction from trustee – roles and functions of executor and trustee – appointment of executor – may be made by the Master – trustee – must be appointed by court

Kadengu & Ors v Kadengu & Ors S-27-08 (Ziyambi JA, Sandura & Garwe JJA concurring) (Judgment delivered 19 January 2009)

The testator appointed a firm of legal practitioners as executors and trustees of his estate. His will directed that the executor should realise the assets of the estate and with the proceeds establish and administer a trust fund. The fund was to be used for the maintenance and general advancement of his mother, wife and children. The senior partner of the firm left the country before he had completed the administration of the estate and the firm subsequently renounced agency. The Master appointed an executor. Due to delays by the executor in carrying out his duties, the appellants brought an action, in which they sought an order than the trust be abandoned and the estate be disposed of in a different way from that expressed in the will. It was argued that the appointment of a trustee was now a practical impossibility since the will envisaged the appointment of the nominated firm as trustees and that an executor appointed by the Master cannot assume the office of trustee in terms of the will. Further, the will itself made no provision for the appointment of any other person as trustee in the event that the appointed firm failed to take up the appointment for any reason.
Held: (1) there is a distinction in our law between an executor and a trustee. The executor realizes the estate, reduces it into possession and accounts for it to the Master. When he has discharged his duties the trustee (if one has been appointed) steps in and administers the fund, which the executor has realized in accordance with the terms of the will. Not infrequently, a testator appoints the same person to be both executor and trustee. While there is no objection to this, the two offices are under our law quite separate and distinct and the person who will be appointed to both will be required to act in two different capacities.
(2) Where an executor has renounced his appointment under a will, the Master is empowered by the Administration of Estates Act [Chapter 6:01] to appoint an executor whose duties are as set out in the Act, namely, to bring in the assets of the estate, file a liquidation and distribution account and to account to the Master for the assets of the estate as set out in that account. However, the Master has no power to appoint a trustee, so if a trustee appointed in a will has renounced his appointment or is incompetent or, having been appointed, is for some reason no longer acting or, if a testator has created a trust but failed to appoint a trustee, only the court can appoint a trustee to administer the estate in accordance with the wishes of the testator. The court will exercise this power in order to enable the trust to be continued.

Administration of estates – executor – removal of – application by Master – application should be against executor personally, not in his official capacity – need to set out grounds for removal in application or heads of argument

The Master v Moyo NO & Ors HH-11-09 (Guvava J) (Judgment delivered 19 February 2009)

The removal of an executor should never be undertaken lightly. If the Master applies for the removal of an executor in terms of s 117(1) of the Administration of Estates Act [Chapter 6:01], the court must be satisfied that the executor had failed to perform satisfactorily any duty or requirement imposed on him by or in terms of the law. It would be desirable for the Master to set out in his application or heads of argument the grounds upon which he relies for the removal of the executor, rather than letting the grounds be ascertained from the founding affidavit.

Semble: in an application by the Master for the removal of an executor, the executor should be cited in his personal capacity, not in his official capacity as executor. When an action is brought against an executor in his representative capacity, it is an action against the estate, rather than one against the individual.

Administrative law – administrative decisions and acts – validity of – acts performed by commission running affairs of city– commission effectively running affairs although its term had expired and its re-appointment was unlawful – such decisions cannot be legitimated on basis of theory of efficacy

City of Harare v Zvobgo S-4-09 (Garwe JA, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 2 April 2009)

The respondent and 17 other employees of the City of Harare (the appellant) were suspended from duty, following the findings of a committee of inquiry set up by the Minister of Local Government in terms of the Urban Councils Act. At the time of the suspension of the respondent and the other employees, the City's affairs were under the management of a commission appointed by the Minister in terms of s 80 of the Act, following the suspension of the elected councillors. The appointment of the commission in terms of s 80(3) was for a period of six months. In spite of this limitation, the Minister kept re-appointing the commission, which continued in office for nearly 3 years. During the first 6 months of its tenure, the commission resolved to appoint a special committee to inquire into the allegations faced by the 18 suspended employees. After the first six months of its lifetime, the Commission (which was still in office) appointed a committee in accordance with the resolution. That committee was dissolved and another appointed, which commenced inquiries into the allegations of misconduct by the applicant in spite of objections raised by the applicant about the legitimacy of its actions. The respondent sought an order setting aside the committee's actions as void. The City Council accepted that it was illegal for the commission to continue in office after 6 months, but argued that since the commission was the only authority running the affairs of the City, its otherwise illegal acts must be legitimated on the basis of Kelsenian efficacy. The High Court rejected this argument (see Zvobgo v City of Harare & Anor HH-80-05 (a judgment of Makarau J, as she then was, delivered 14 September 2005).

On appeal, the City Council argued that (a) the committee was appointed in pursuance of a resolution passed during the first six months of the life of the first Commission and was therefore not tainted with any illegality that may be associated with any future or subsequent commission; (b) the dismissal of the respondent was a separate act by a separate body, namely the Local Government Board and therefore the Board should have been cited as a party; (c) any illegality associated with the extension and re-appointment of subsequent commissions would not affect the legality of administrative actions and decisions done by any such subsequent commissions; (d) the High Court erred by determining that the commission running the affairs of the appellant was not a legal authority capable of running the affairs of the City of Harare and bringing about legal consequences; and (e) the court erred in concluding that the re-appointment of the commissioners after the first six months rendered the commission illegal.

Held: (1) in terms of s 140(1) of the Urban Councils Act [Chapter 29:15], a council may at any time discharge a senior official summarily on the ground of misconduct, negligence or any other ground that would in law justify discharge without notice. Before terminating the services of a senior official, the approval of the Local Government Board must first be obtained. However, the Board does not itself terminate the employment of a senior official. It is the Council that does so. It was thus unnecessary to cite the Board.

(2) Section 86(2) of the Act, which, the council argued, validated the commission's actions, did not refer to an interim body such as the commission. The section was intended to protect a council or committee from a defect only in the appointment of some of its members. It was not intended to cater for a situation where the appointment of the entire council or committee was found to be wanting.

(3) The committee was appointed after the commission had exhausted its lawful tenure. The fact that the committee was appointed by an illegal commission in pursuance of a resolution passed during the lawful period of office of the commission did not clothe the committee with legitimacy, as the passing of the resolution and the appointment of the committee were two separate juristic acts. Both must emanate from a commission or council lawfully in office.

(4) The illegality of the re-appointment of the commission had already been decided by the Supreme Court and there was no basis for re-visiting that decision.

(5) The High Court's decision that Kelsen's theory of efficacy does not apply to domestic law, because there is no change in the grundnorm, was clearly correct. Domestic law is itself not the fundamental law and needs no independent validation other than that which the grundnorm confers on it. Vacuums created by the domestic law should be filled by making reference to the grundnorm and applying domestic remedies. The theory cannot be invoked to destroy the grundnorm by legitimising acts that are illegal under the grundnorm. Any vacuum that may have arisen clearly arose not because of the absence of laws in the domestic arena but rather because the provisions of some of the domestic laws were ignored. This case was not concerned with any attempted shift in the grundnorm but rather with people ignoring its administrative statutes. Kelsen's theory, which is controversial, should apply only in extreme situations where there is a change in the grundnorm and not in a situation such as the present. If such a line were not drawn, then a situation would arise where people would do that which is illegal and, because they were in effective control, seek legitimacy on the basis of this doctrine. Clearly the court could not endorse such a situation.

Administrative law – review – grounds for – audi alteram partem rule – applicability to decision to transfer employee to another town – legitimate expectation to be heard before being transferred – employee being told of transfer without being heard but subsequently given opportunity to make representations – rule complied with and legitimate expectation fulfilled

Guruva v Traffic Safety Council of Zimbabwe S-30-08 (Cheda JA, Sandura & Gwaunza JJA concurring) (Judgment delivered 27 January 2009)

The appellant was notified by the respondent, his employer, that he was to be transferred to another town. He wrote back, making submissions against the transfer, and giving personal reasons for objecting to being transferred. A meeting of the employer's directorate was held to discuss the matter. The directorate notified the appellant that, after a thorough consideration of his submissions, the decision that he be transferred would stand. The appellant referred the matter to a labour relations officer, who referred the matter for arbitration. The arbitrator held that the respondent had not observed the dictates of the audi alteram partem rule and declared that the transfer was unlawful and should be reversed. The respondent successfully appealed to the Labour Court. On appeal to the Supreme Court, the appellant argued that the respondent had not observed the audi alteram partem rule, nor had it fulfilled his legitimate expectation of being heard before being transferred.

Held: (1) The appellant should have been granted a hearing before the decision to transfer him was made. However, the respondent had considered the appellant's submissions; it was not as if the respondent refused to hear him. It could not be said that once the appellant made representations, the respondent should necessarily have made a different decision. It was still open to the respondent to arrive at the same decision even after hearing the appellant. The respondent may have erred in not giving the appellant a hearing in the very first place; but, since the respondent did not compel the appellant to go on transfer before he was heard, but deliberated on the issue before re-affirming its previous decision, his legitimate expectation of being heard and the requirement of the audi alteram partem rule were complied with.

(2) An employee who undertakes to work for an employer whose business is carried out at different places takes the risk of being sent to perform services for the employer wherever such services are required unless the employment contract stipulates that he is to be employed and remain at a specific place only. The right to transfer an employee from one place to another is the prerogative of the employer. It is the employer who knows better where the services of an employee are required. The employer's discretion in determining which employee should be transferred and to which point of the employer's operations is not to be readily interfered with except for good cause shown. Good cause, while not easy to define, would include such matters as unfounded allegations, victimization of the employee and any action taken to disadvantage the employee.

Appeal – evidence on appeal – when such evidence may be led – appellant making serious allegations of fraud and dishonesty against respondent – such allegations not made at trial – respondent permitted to lead evidence refuting allegations

Chitengwa v Manase S-14-09 (Cheda JA, Ziyambi & Malaba JJA concurring) (Judgment delivered 16 March 2009)

The appellant, in his heads of argument, raised serious allegations of fraud and dishonesty against the respondent, a senior legal practitioner. The allegations had not been made previously. The respondent applied to lead evidence at the appeal to rebut the allegations.

Held: the respondent should be allowed to lead such evidence. It would not be appropriate to deprive him of the opportunity to lead the evidence to show if he so wished, that there was no fraud on his part. It was the appellant who made the allegations and the new evidence did not prejudice his case in any way.

Appeal – late noting of – application for condonation and for extension of time – reasons for failure to note appeal in time – delay due to not finding out when judgment appealed against was to be delivered – applicant and legal practitioner not being diligent – not acceptable excuse

Mutizhe v Ganda & Ors S-17-09 (Malaba DCJ) (Judgment delivered 2 April 2009)

To provide a reasonable explanation for non-compliance with rules of court it is generally necessary to say why the applicant or his legal representative failed to act in a manner a diligent litigant or his legal practitioner would reasonably

have been expected to act. Where a trial court a quo has reserved judgment at the end of hearing of evidence, the applicant and his legal practitioner are under a duty to make regular inquiries with the Registrar as to when the judgment would be given. A vigilant litigant interested in the speedy outcome of the application would satisfy himself that the legal practitioners made regular inquiries for the judgment. Lack of knowledge of a judgment due to the 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. An applicant cannot remain inactive until notification of the judgment is given by the Registrar. Where notification of the judgment is given by the Registrar in a court roll of cases to be dealt with on that day and the applicant and his legal practitioner do not avail themselves of the official source of the information on the delivery of the judgment, the applicant cannot escape the consequences of failure to diligently pursue a judgment.

Appeal – leave – prospects of success – point of law – divergence of authority – desirability of having point settled by Supreme Court – leave should be granted – provisional order – order having hallmarks of a final order – leave to appeal no required

Chikafu v Dodhill (Pvt) Ltd & Ors S-28-09 (Chidyausiku CJ) (Judgment delivered 7 May 2009)

The applicant had been refused leave to appeal by a judge of the High Court, who granted a provisional order against him. The judge was of the view that as the order was a provisional one, leave was required; and that, as there was no prospect of success, leave should be refused. The applicant applied to the Supreme Court for leave to appeal.

Held: (1) the point of law on which the trial judge ruled against the applicant was one on which there was a divergence of authority, both in Zimbabwe and elsewhere. The fact that different judges of the High Court had come to different conclusions on the same issue created uncertainty in the law, a situation that is totally undesirable. A judge faced with this situation should facilitate the resolution of the issue by the highest court in the land.
(2) Although the judge labelled his order as a provisional order, the judgment had all the hallmarks of a final judgment. There was nothing interlocutory about the judgment apart from the label. In the event, the applicant appeal as of right and did not need the leave of the judge.

Appeal – leave – when required – provisional order – leave to appeal required – spoliation order – not necessarily a final order – when granted as a provisional order, leave to appeal required

Nyikadzino v Asher & Ors HH-36-09 (Makarau JP) (Judgment delivered 13 March 2009)

The applicant was the second respondent in an application for a spoliation order (see Asher v Minister of State for Lands & Anor HH-34-09, below, under PROPERTY AND REAL RIGHTS (Spoliation order – locus standi)). He noted an appeal against the grant of the order. The first respondent (the applicant in the previous case) instructed the deputy sheriff to enforce the provisional order restoring possession of the farm to him, having been advised that the appeal noted in the Supreme Court was a nullity as prior leave to appeal had not been obtained as required by s 43 (2)(d) of the High Court Act [Chapter 7:06] and in view of the fact that the provisional spoliation order issued was a simple interlocutory order. The applicant urgently sought an order staying execution of the provisional order pending determination of the appeal. It was argued on his behalf that the order, although granted as a provisional order, was final in effect. Secondly, it was argued that the granting of the order had the effect of assisting the first respondent to remain in occupation of the farm in violation of a specific provision of the law regulating land acquisition and reform. The issue was whether or not the spoliation order was a final order, thereby obviating the need for the applicant to apply for leave before noting an appeal in the matter.

Held: A provisional order granted under the rules is always subject to confirmation or discharge before it becomes final. Confirmation or discharge is in open court and is on a balance of probabilities. In a provisional order, the power of the court to vary discharge or confirm its earlier decision is reaffirmed in that it calls upon the respondent to show cause why the provisional order may not be confirmed. A provisional order cannot be final in its effect. The order previously granted, although it pronounced on the right to possession and the unlawfulness of the applicant's actions, did so only on a prima facie basis. The applicant was not precluded from mounting a challenge to the court's findings upon the matter being set down for the confirmation and discharge of the order.

Appeal – Rules of Supreme Court – departure from – discretion given to judge in terms of r 4 – cannot be used to give single judge jurisdiction which he would not otherwise have

Appeal – striking out – application for striking out made to single judge of Supreme Court in chambers –judge in chambers not having jurisdiction to strike out appeal

Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor S-29-09 (Malaba DCJ in chambers) (Judgment delivered 16 June 2009)

The applicant obtained a spoliation order from the High Court against the respondents, who filed a notice of appeal. The application for the spoliation order had been in the form of one seeking interim relief. The notice of appeal was filed timeously and contained all the matters required in terms of r 29 of the Supreme Court Rules 1964 for a valid notice of appeal. The applicant applied to a judge of the Supreme Court, in chambers, for the notice of appeal to be struck out on the grounds that no appeal was pending before the Supreme Court, because the order appealed against was an interlocutory one, and leave of the judge a quo or of a judge of the Supreme Court was required. The respondent argued that a judge in chambers had no jurisdiction to strike out an appeal for failure to comply with the Rules and that the application should have been a court application in terms of r 39 of the Rules. The respondent also argued that although the High Court's order was interlocutory in form, it was final and definitive. The applicant argued that a judge in chambers constituted "the court" for the purposes of r 39 and, further, that r 4 gave the judge discretion to condone a departure from the Rules in the interests of justice.

Held: (1) a single judge of the Supreme Court sitting in chambers has no power derived from any provision of the relevant statutes, to make an order striking an appeal pending in the Supreme Court off the roll. Section 43(1) of the High Court Act [Chapter 7:06] provides that an appeal in any civil case shall lie to the Supreme Court from any judgment (includes order) of the High Court. The Supreme Court is the body endowed with the power to hear and determine the appeal. In terms of s 3 of the Supreme Court Act [Chapter 7:13], three is the minimum number of judges required to duly constitute the Supreme Court when exercising its power to hear and determine an appeal. This effectively precludes a single judge sitting in chambers or in open court from exercising the power conferred on the court under s 21 of the Act, which gives the court to hear and determine appeals in civil cases. It is for the Supreme Court duly constituted to make a finding that no appeal lies to it against the order and to strike the appeal from the roll. An order striking the appeal off the roll could only be made following a finding on the nature of the order from which relief was being sought on appeal.

(2) A judge cannot use the discretion conferred on him under r 4 to direct a departure from a rule in order to assume jurisdiction which he does not have over a matter. Rules of court are made under s 34 of the Act for the purpose of regulating proceedings of the Supreme Court and facilitate the proper dispatch by the court of its business. The rules cannot be used to usurp the court's jurisdiction under s 21 of the Act.

(3) To determine whether the order was interlocutory or final, one has to look at the nature of the order and its effect on the issues or cause of action between the parties, not at its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect to which relief is sought from the court. When the applicant made the application for the order to the High Court it placed three issues of fact before the court. All these facts in issue had to be determined in favour of the applicant for the spoliation order to have been made in applicant's favour. A clear right in the applicant to be restored to the possession of the property had to have been established. A spoliation order cannot be granted on evidence of a prima facie right only. Once the order was made and fully executed it was discharged. Accordingly, the first respondent had the right to appeal to the Supreme Court against the spoliation order without first obtaining the leave of the judge.

Editor's note: see Nyikadzino v Asher & Ors HH-36-09, above (under APPEAL (Leave – when required)), where Makarau JP held that a spoliation order is not necessarily a final order. See also Church of the Province of Central Africa vKunonga & Anor S-7-08, summarised in the summaries for 2008(1) under APPEAL (Striking out). In that case Chidyausiku CJ, also sitting in chambers, concluded that a single judge of the Supreme Court had no jurisdiction to strike out an appeal.

Arbitration – arbitrator – challenge to – procedure – not necessary for parties to agree on procedure – procedure to follow where parties have not agreed – how aggrieved party's application for recusal may be presented – failure by arbitrator to respond to challenge – remedies available

Trust Corporation Securities (Pvt) Ltd v Gabilo & Anor HH-59-09 (Uchena J) (Judgment delivered 3 June 2009)

During the hearing of an arbitration between the applicant and the second respondent, the first respondent, who was the arbitrator, made a comment which indicated that he had discussed the matter with the second respondent. The arbitrator did not respond to a query by the applicant's counsel about when such a conversation had taken place. The day after the hearing, the applicant's lawyer wrote to the second respondent's lawyer and to the arbitrator indicating an intention to impeach the arbitrator. No response was received. The applicant's lawyer then wrote to the arbitrator, asking the arbitrator to recuse himself because of the applicant's doubts about his impartiality. The arbitrator did not respond, but proceeded to make an award. He did so without first rejecting the challenge. The applicant sought an order terminating the arbitrator's

appointment and providing for fresh arbitration proceedings to commence within a fortnight. In limine, the second respondent argued, inter alia, that in terms of art 13(1) of the Schedule to the Arbitration Act [Chapter 7:15], the parties should have agreed upon a method of challenging the arbitrator. Not having done so, the applicant could only apply to have the award set aside in terms of art 34.

Held: art 13(1) states that the parties are free to agree on a procedure for challenging the arbitrator. It does not say that they have to. An alternative procedure to be used if the parties do not agree on the procedure is provided in art 13(2). In terms of that provision, the party seeking the recusal of the arbitrator must, within 15 days, send to the arbitrator a written statement stating the reasons for the challenge. All that is needed is a simple statement which informs the arbitrator of the reasons why his recusal is being sought. There is no need for the challenging party to submit an application accompanied by an affidavit in which the reasons for recusal are stated. The arbitrator is bound to respond to the challenge; he cannot ignore the challenge and proceed with the arbitral proceedings as if his appointment has not been challenged. If he rejects the challenge, then art 13(2) and (3) permit him to continue with the proceedings in spite of the challenge and the challenging party's request that the High Court determines the challenge.

Here, the arbitrator was required to deal with the challenge before proceeding with the proceedings before him, but the issue was whether or not the applicant was properly before the court. The court can in terms of article 13(3) only decide on a challenge after its rejection by the arbitrator. In this case, the failure by the arbitrator to reject the challenge before making the award made the procedure under art 13(3) procedure inapplicable, as the court can only be requested to intervene when the challenge has been rejected. This meant that in this case an application in terms of art 34 (1) to set aside the award was the only procedure through which the applicant could seek a remedy from the court. The applicant's grounds for applying for the recusal of the first respondent and the setting aside of his award was that he heard submissions from the second respondent outside the arbitral proceedings. That, if proved, would be contrary to the rules of natural justice and entitle the applicant to the setting aside of the award in terms of art 34.

Arbitration – arbitrator – challenge to – procedure in High Court – court confined to same grounds of challenge presented to arbitrator – court not restricted to hearing same submissions as were presented to arbitrator – prescription of right to challenge arbitrator – alleged misconduct continuous, extending over a period – prescription running from time when justifiable doubts are formed

EBI Zimbabwe (Pvt) Ltd v Old Mutual Unit Trusts (Pvt) Ltd & Anor HH-55-09 (Patel J) (judgment delivered 9 June 2009)

An arbitrator may be challenged in terms of art 13(2) of the Schedule to the Arbitration Act [Chapter 7:15]. If he rejects the challenge, the challenging party may request the High Court to decide on the challenge. The High Court is confined to determining the challenge on the grounds of challenge presented to the arbitrator and cannot entertain any fresh ground of challenge. However, art 13(3) does not narrow the scrutiny of the court, when examining and ventilating the issues before it, to the same submissions that were presented to the arbitrator, for a number of reasons. Firstly, although the challenge before the High Court may be likened to an appeal, it is not described as such and cannot therefore be regarded as an appeal stricto sensu. Even if it were to be so treated, it does not invariably follow that a party to an appeal cannot make fresh submissions on the grounds of appeal or the issues that constitute the subject-matter of the appeal. Secondly, art 13(3) does not define or fetter the powers of the court as to the procedure to be followed. In practice, the procedure that is adopted in the referral of arbitral matters to the court is by way of ordinary application and there is nothing in the Rules of Court to preclude the filing of submissions by any party to the arbitration proceedings in question. Last but not least, to construe art 13(3) in a restrictive manner would operate to constrict and offend the common law right to be heard which vests in every interested party – as embodied in the audi alteram partem rule – as well as the constitutional right to a fair hearing guaranteed by s 18(2) of the Constitution.

In terms of art 13(2) as read with art 12(2), the challenging party must raise his challenge within 15 days after becoming aware of any circumstance that gives rise to justifiable doubts as to the arbitrator's impartiality or independence. The partiality of an arbitrator may not always manifest itself immediately as a single act committed on one specific occasion. More often than not, it will be evinced by a series of acts at different times or continuing conduct which, when pieced together, demonstrates his lack of impartiality. In this context, the aggrieved party may only be in a position to form justifiable doubts as to the arbitrator's impartiality towards the end of such continuing conduct rather than at its inception.

Company – corporate veil – lifting of – matrimonial matter – "one man" company run by one of the spouses – when assets and proceeds of company may be treated as spouse's own assets

Gonye v Gonye S-15-09 (Malaba JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 2 April 2009)

See below, under FAMILY LAW (Divorce – division of property following divorce).

Constitutional law – Constitution of Zimbabwe 1980 – s 24 – referral of constitutional question to Supreme Court – question arising out of proceedings in lower court – may only be referred by that court in terms of s 24(1) – not open to party to apply directly in terms of s 24(1)

Mukoko v Cmmr General of Police & Ors S-3-09 (Chidyausiku CJ, in chambers) (Judgment delivered 14 January 2009)

The applicant was placed on remand by the fifth respondent, a magistrate. She contended that there was no legal basis to place her on remand and that her constitutional rights had been violated by her being placed on remand in the circumstances in which she was had been arrested. She then brought an application to the Supreme Court in terms of s 24(1) of the Constitution.
Held: the application was fatally defective. As the application arose from proceedings in the magistrate's court, the applicant should have proceeded in terms of s 24(2) of the Constitution. The application should have come to the Supreme Court by way of referral in terms of s 24(2) as opposed to a direct application in terms of s 24(1) of the Constitution. When a matter is before the High Court or any court subordinate to the High Court, such as the magistrate's court as in this case, the question of the contravention of the guaranteed right should be referred to the Supreme Court by the court mero motu or at the instance of any one of the parties to the proceedings. That constitutional question cannot be brought to the Supreme Court by way of an application in terms of s 24(1) of the Constitution. Section 24(3) of the Constitution expressly prohibits that. If the lower court fails to act mero motu or refuses upon application to refer the matter to the Supreme Court for reasons other than those permitted under s 24 of the Constitution, an applicant is then entitled to approach the Supreme Court in terms of s 24(1). Once proceedings have 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.

Contract – breach – remedies – specific performance – court's discretion – when specific performance may be refused – order operating harshly on defendant – plaintiff being unjustly enriched due to inflation

Zimbabwe Express Svcs (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd S-21-0 (Garwe JA, Ziyambi & Gwaunzza JJA concurring) (Judgment delivered 19May 2009)

An order for specific performance is at the discretion of the court and there are circumstances in which a court may refuse to grant such an order. The order which the court makes should not produce an unjust result which would be the case, for example, if, in the particular circumstances, the order would operate unduly harshly on the defendant. This would be the case if the plaintiff were to be unjustly enriched by being able to acquire something that was worth a great deal by paying virtually nothing, the value of the money having being severely eroded by inflation by the time the case was adjudicated.

Contract – breach – remedies – specific performance – when order for specific performance may be granted – principles to be followed

Savanhu v Marere & Ors S-22-09 (Malaba DCJ, Cheda & Garwe JJA concurring) (Judgment delivered 18 May 2009)

A party to a contract has in an appropriate case a right to claim specific performance, but it is in the discretion of the court either to grant such an order or not. The right to claim specific performance of a contract by the defendant is premised on the principle that the plaintiff must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform his own side of the bargain or that he has been prevented from doing so by the defendant. The court will not decree specific performance where the plaintiff has himself broken the contract or made a material default in the performance on his part.

Contract – cancellation – how notice of cancellation must be conveyed to other party – cancellation by conduct – cancellation by conduct may be inferred from circumstances

Zimbabwe Express Svcs (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd S-21-0 (Garwe JA, Ziyambi & Gwaunzza JJA concurring) (Judgment delivered 19May 2009)

Notice of cancellation of a contract must be clear and unequivocal and takes effect from the time it is communicated to the other party. A notice of intention to cancel must be such that the other party is or ought to be aware of its nature, but it is not necessary to use the word "cancellation". The intention to cancel may be made sufficiently clear in other ways. The decision to cancel a contract may also be by conduct. Repudiation of a contract by the defaulting party may be by words or conduct justifying cancellation by the aggrieved party. If the defaulting party can repudiate by words or conduct, the aggrieved party should be able to terminate the contract by conduct too. As in all cases, the circumstances must be such that that is the only reasonable inference that may be reached.

Contract – performance – tender – tender of performance by one party – such tender not in accordance with terms of contract – other party entitled to treat tender as a breach of contract

Mbayiwa v Chitakunye & Anor S-20-09 (Malaba JA, Cheda & Ziyambi JJA concurring) (Judgment delivered 18 May 2009)

The appellant sold agricultural equipment to the respondents. The agreed method of payment was that they would pay $20 million of the total price of $195 million as a deposit and the rest would be paid by electronic transfer within 3 banking days of the day of the agreement. On the last day for payment, the first respondent told the appellant that $150 million had been paid by electronic transfer and the rest would be paid later to him in person later that day. The appellant told the first respondent that he was cancelling the agreements of sale because they had not paid the balance of the purchase price. The respondents obtained an order from the High Court for specific performance, the basis of their claim being that the payment of the sum of $150 million and a tender of payment of $25 million had been made within the time limit of three banking days.
Held: For a tender of performance to be valid, it must comply with all the requirements of a valid performance, since the basis of the effect which the law gives to a valid tender of performance is that the debtor was correct in thinking that what he was attempting to achieve amounted to proper performance and that it was due to no fault of his own that he was unable to achieve it. Therefore, when performance has to be made at a specified time and place, a tender will not be valid unless it is made at that time and place.
The respondents, as the debtors, had to show that they had been able and willing to perform their obligations in terms of the contracts with the appellant. They had to show that they had performed their obligations as far as they were able to do so but had been prevented from completely performing the contract by the refusal of the appellant to accept their performance. It was clear from the terms of the contracts and surrounding circumstances that performance in forma specifica was stipulated in the contracts. The contracts specified that the balance of the purchase price should be paid by electronic transfer into the appellant's bank account before close of business on the third day after the contract was concluded. Thus, payment of the balance of the purchase price to the appellant in person was not a valid performance of the respondents' obligations under the agreements of sale. That mode of payment had not been agreed upon by the parties, and the appellant was not under any obligation to accept payment which was not in terms of the contracts. He entitled to treat the breach as repudiation of contracts by the respondents, releasing him from the duty to further perform his obligations under the contract.

Contract – performance – time – no time specified for performance – demand by creditor necessary to place debtor in mora – time of essence – demand still necessary

Zimbabwe Express Svcs (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd S-21-0 (Garwe JA, Ziyambi & Gwaunzza JJA concurring) (Judgment delivered 19May 2009)

When a contract does not fix a time for performance there can be no mora ex re, only mora ex persona, so a demand by the creditor is necessary in order to place the debtor in mora. When no time for performance is fixed but time is of the essence, the debtor is not in mora and the creditor cannot cancel for non-performance unless a proper demand for performance has been made. If no time is fixed there can be no breach by non-performance, whether or not time is of the essence, until the creditor has informed the debtor when he maintains performance is due.

Contract – stipulatio alteri – formation – need for offer to be made to and accepted by third party – third party not entitled to sue upon contract before then

Chirenje v Vendfin Invstms (Pvt) Ltd & Ors S-13-09 (Chidyausiku CJ, Sandura & Malaba JJA concurring) (Judgment delivered 19 March 2009)

The appellant and a number of other people had contracted to buy residential stands in Harare from the third respondent at a stated price. Before the stands could be transferred, the property of which the stands formed sub-divisions was sold in execution to the first respondent, the nominee company of the second respondent. A legal dispute between the third respondent and the second respondent ended with a consent order and an agreement between the two parties, in terms of which the second respondent was to offer the stands to the appellant and his co-purchasers at the original price within seven days of the date of the agreement. This offer was not communicated to the appellant and his co-purchasers, and a month later the second and third respondents amended their agreement (as they were entitled to in terms of the agreement) to offer the stands at a price over three times higher than the original price. The new price was the market value at the time. This second offer was communicated to the appellant and his co-purchasers, who, having become aware of the amendment, applied for an order compelling the second respondent to sell the stands at the original price. The court a quo dismissed the application. On appeal:
Held: the agreement entered into between the second and third respondents was a contract for the benefit of a third party. In such a contract, the beneficiary third party's right to sue and the obligation to be sued under such contract accrue upon the offer being communicated to and accepted by the third party in terms of the contract. It is the communicating of the offer and the acceptance of the offer that creates the vinculum juris, which in turn creates the entitlement to sue and the obligation to be sued. As no offer was ever made to the appellant and his co-applicants, no vinculum juris was ever created entitling them applicants to sue the promissor (the second respondent) on the undertaking to sell the property at the original price in terms of the agreement before it was amended. The third respondent, as a party to the agreement, could have sued him to make good that offer before it expired. Had he communicated the offer to the applicants and sought to withdraw the offer prior to the expiry date of the offer, the applicants might have had a cause of action. Without the offer being communicated to the applicants and the applicants accepting such offer, the applicants could not sue or be sued upon the contract between the second and third respondents.

Contract – waiver – when may be inferred – innocent party abiding by contract in spite of breach by other party – very belatedly seeking to enforce right in contract – conduct indicative of waiver of right

Agro Chem Dealers (Pvt) Ltd v Gomo & Ors HH-71-09 (Gowora J) (Judgment delivered 6 April 2009)

In 1995 the applicant bought an undeveloped stand from the second respondent, the city council. It was a condition of the sale that within six months of the date of sale the applicant should have commenced developments of a stipulated minimum value and that those developments should be complete within twelve months. The contract provided that in the event of the applicant failing to do so, the council would be entitled to cancel the sale or to claim re-transfer of the stand. Seven months after the date of the sale agreement, no development had begun; nonetheless the council transferred the stand to the applicant. The stand was duly registered in the name of the applicant in terms of the Deeds Registries Act [Chapter 20:05]. There were no conditions attached limiting the vesting of title in the applicant.
In 2008, it came to the notice of the applicant that some developments were taking place on the stand. Enquiries revealed that these were being made by the first respondent, a former employee of the council. The council and the first respondent had concluded an agreement of sale in respect of the land in May 2008. The applicant sought the eviction of the first respondent. The application was opposed, the first and second respondents arguing that the council had cancelled the agreement of sale with the applicant because of the applicant's non-performance and re-possessed the stand. The council claimed that it had written to the applicant stating that it had cancelled the sale and demanding that the title deeds be handed over to it. The applicant denied receiving such correspondence.
Held: (1) The registration of title in one's name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to vindicate his right, i.e. to enforce his right in the thing for his own benefit as against the world; that is against all persons whatsoever. The effect of registration of a person's name as owner of a piece of land is that he is the owner of the land including the permanent buildings on it, in the absence of fraud, error or other exceptional cases. Since an owner cannot be deprived of his property against his will, he is entitled to recover his property from anyone who possesses the property without his consent. When an owner of property delivers the property sold and has the capacity of alienation, or if he is not the owner but has the consent of the owner to alienate, the effect of delivery is to transfer to the person of the purchaser the property in the thing sold, provided the purchaser has paid for the

property or has been granted credit by the seller. Once the council had sold and transferred the dominium in the stand it lost any right to treat the property as its own. It could sell the stand to the first respondent as it did, but it could not transfer the dominium in the stand as it had lost it when it sold and transferred the stand to the applicant.
(2) The council should have taken legal steps to have the contract cancelled. The mere demand by it of the return of the deed of transfer did not in itself reverse ownership in the stand from the applicant to itself. Equally the lack of response to the alleged letters of cancellation did not, in itself, show that the applicant had accepted that the property had changed hands.
(3) Any attempt on the part of the council to seek cancellation and retransfer would be met with the defence of prescription and there would be no factor available to counter it.
(4) If the innocent party to a contract, with full knowledge of his rights, performs an unequivocal act from which a reasonable person would necessarily infer that he has elected to affirm the contract, he would be bound by his act. Although the applicant had breached the sale agreement, the council elected to abide by the contract and discharged its obligations in terms of the agreement by transferring the stand to the applicant. The council's conduct created an impression that not only was it affirming the contract, it was complying with all its obligations under the contract of sale. Transfer to the applicant could not have been effected without the specific authorization of the seller. In spite of knowing that the conditions had not been complied with, it took the council almost thirteen years before it called up the agreement. If such dilatoriness in seeking to enforce a right in a contract is not indicative of a waiver of a right to cancel it would be difficult to imagine what else such conduct constitutes.
(5) The registered owner has a right to vindicate his property against anyone unless a lawful defence is presented against the claim. No such defence had been established and that the applicant had established a claim for the eviction of the first respondent from the stand.

Costs – de bonis propriis – when appropriate – legal practitioner advising client to disobey court order

Nyoni v Elmissing & Anor HB-38-09 (Cheda J) (Judgment delivered 2 April 2009)

See below, under LEGAL PRACTITIONER (Conduct and ethics).

Court – contempt – failing to obey court order – need to show that person knew of court order – unless person was in court when order was pronounced, order must be served on him

Matanda (Pvt) Ltd v Gotore HH-94-09 (Makoni J) (Judgment delivered 17 June 2009)

In order for the conduct of a party to constitute contempt of court, such conduct must be wilful or intended and calculated to impair the dignity or reputation of the court. The conduct complained of must be in violation of an obligation imposed on such person by a court of competent jurisdiction to obey a court order until its discharge. It must be shown that the person against whom it is sought to apply the sanction of the law of contempt has sufficient notice of the terms of the judgment or order which it is alleged he has disobeyed. This necessarily demands that the terms of the order be expressed in clear unambiguous language and, in so far as possible, the person should know with complete precision what it is he is required to do. This can be achieved if the defaulting party is served with the court order, unless he was present when the order was pronounced. It is not enough that his legal representative was present at that time.

Court – jurisdiction – court deciding matter outside limits of monetary jurisdiction – decision void and of no effect

Dube v Maphepha Syndicate & Ors HB-5-09 (Kamocha J) (Judgment delivered 15 January 2009)

The first respondent obtained an order from the magistrates court evicting the applicant from the mining claim she had lawfully occupied for some time. She sought an order setting aside the decision of the magistrates court.
Held: the court which granted the eviction order had no jurisdiction to entertain a claim relating to the ejectment of the applicant from a valuable mining claim. The court's monetary civil jurisdiction was at the relevant time very low, far below the value of a mining claim. When a magistrates' court does what is not within its jurisdiction, the result of what it purports to do is void and a nullity, with no force or effect. No benefit can be derived from it.

Court – Supreme Court – powers – declaratory order – court not empowered to determine application for such order

Guwa & Anor v Willoughby's Invstms (Pvt) Ltd S-31-09 (Garwe JA, in chambers) (Judgment delivered 24 June 2009)

The applicants sought an order from the Supreme Court, declaring that the notice of appeal filed by the respondents was a nullity, the notice having been filed out of time and not having specified whether the whole or part of the judgment of the court a quo was being appealed against.
Held: there was no doubt that the notice was null and void, but the Supreme Court, as a creature of statute, derives its jurisdiction specifically from the Supreme Court Act and other legislative provisions. Although it is the highest court in the land, its powers are regulated strictly by statute. It is not a court of first instance, having no original jurisdiction. It has only appellate jurisdiction, since it was created by statute purely as a court of appeal. Nowhere in the Act or in the Rules of the Court is the Supreme Court given jurisdiction to entertain, in the first instance, an application for a declaratur. Except where specifically empowered, the Supreme Court has no jurisdiction to hear or determine any matter and may only exercise powers in respect of an appeal in terms of the provisions of the Act and the Rules. The High Court, on the other hand, has jurisdiction to hear all matters except where limitations are imposed by law. In other words, whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law does not forbid. Accordingly, the application should have been filed in the High Court.

Criminal law – statutory offences – Copyright and Neighbouring Rights Act [Chapter 26:05] – s 59 – selling of infringing copies of CDs and DVDs – need to allege which copyright is being infringed and who owner of copyright is – possession of equipment designed or adopted for making infringing copies – need to allege and prove that articles in question were specifically designed or adopted – ordinary computers not covered

S v Moyo & Anor HB-21-09 (Ndou J) (Judgment delivered 19 February 2009)

On a charge of contravening 59(1)(a)(iv) of the Copyright and Neighbouring Rights Act [Chapter 26:05] (i.e. selling infringing copies of DVDs and CDs), it is necessary to allege and prove which copyright is allegedly infringed, who is the owner of such copyright and that such copyright still subsists.
On a charge of contravening s 59(1)(b)(iii) of Act, it is necessary to allege and prove that the equipment concerned was specifically designed or adopted for making infringing copies of CDs and DVDs. Mere possession of an ordinary computer capable of burning music CDs and DVDs cannot on its own constitute an offence.

Criminal procedure – bail – application – accused indicted for trial before High Court – need for new bail application to High Court – previous bail revoked

Dhlamini & Ors v A-G HH-56-09 (Mtshiya J) (Judgment delivered 11 May 2009)

The applicants had been arrested on various charges and remanded in custody. They were granted bail by the High Court, against which the Attorney-General appealed. The appeal not having been noted within the requisite time, the applicants were released from custody. The Attorney-General caused their re-arrest and subsequently had them indicted for trial before the High Court. The magistrate remanded them in custody in accordance with s 66(2) of the Criminal Procedure and Evidence Act [Chapter9:07]. The applicants applied again to the High Court for bail, arguing that changed circumstances existed. The Attorney-General argued that they could not bring a fresh application for bail and were not properly before the court. It was argued that as far as the issue of bail as concerned, they did not fall under the ambit of s 66, because, following the appeal to the Supreme Court, the High Court's order which granted them bail was automatically suspended. That being the case, they were in lawful custody at the time of their indictment. There was, therefore, no need for the lower court to have issued an order for their commitment to prison.
Held: (1) in terms of s 66(2), even if the applicants were on bail before their indictment, such bail fell away as a result of the indictment. That would place them in the same position as someone who had been denied bail. In terms of that provision, the applicants could not avail themselves of the pre-indictment bail unless the High Court extended that bail.
(2) An accused person can, however, upon indictment, make a fresh bail application before the High Court. It then becomes the prerogative of the High Court, taking into account the contents of the indictment papers, to either extend the pre-indictment bail or grant new bail or even deny bail completely.

(3) Ay decision of the Supreme Court arising out of the appeal by the Attorney-General would be academic having been overtaken by the fact that the applicants were indicted.

Criminal procedure – bail – application – when may be made – need for court to be apprised of charge and to decide whether there is legal justification for accused to be placed on remand – mere appearance in court without more is not sufficient

S v Mukoko HH-24-09 (Chitakunye J) (Judgment delivered 4 February 2009)

On 24 December 2008 the applicant appeared before a magistrate in Harare for an initial remand. At her insistence the initial remand proceedings were deferred pending the outcome of an application for release of the applicant that was pending in the High Court and was due to be heard on the same day. The High Court ordered that she should appear before a magistrate. On 30 December 2008 she was taken before a magistrate for the initial remand proceedings to be conducted. The proceedings were further deferred pending another application before the High Court for her release and a request for medical attention. This was followed by yet another urgent chamber application in the Supreme Court on 12 January 2009. Following the Supreme Court's rejection of the application (see Mukoko v Cmmr General of Police & Ors S-3-09, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – s 24), above), an application was successfully made to a magistrate to refer the matter to the Supreme Court in terms of s 24(2) of the Constitution. Two weeks later she applied to the High Court for bail. The State argued that she had never been placed on remand, so the matter was not properly before the court. The issue for determination was when, in the context of ss 116 and 117 of the Criminal Procedure and Evidence Act [Chapter 9:07], a person is deemed to have appeared in court on a charge so to as to be able to invoke his entitlement to apply for bail. The applicant argued that she had appeared in court on a charge that had been put to her by the investigating officer, and was in custody, so was properly before this court and her application must be entertained.
Held: In both sections the time to apply for bail is stated as being "…any time after he or she has appeared in court on a charge and before sentence." To trigger the process one must make an initial appearance in court on a charge. The magistrate or judge before whom then accused appears must be apprised of the charge the accused is appearing in court for and the accused must be informed why he has been brought to court. This is done by having the allegations against the accused put to him before the judicial officer. The mere fact that one has passed through a court room does not mean that one "has appeared in court on a charge". The initial process initiating a criminal trial must be undertaken. It is during that initial process, after the allegations have been put to the accused and a preliminary inquiry done on the circumstances of the accused such as why he was arrested and how he was treated after arrest, that the court will first determine whether there is legal justification to place the accused on remand or not. Where there is no legal justification, the court is enjoined not to place the accused on remand. Where the court finds that there is legal justification to place the accused on remand, the next issue is whether he should be remanded in custody or not. It is during this process that the issue of bail arises. It is important that this process takes place, as it is during this process that the court, having been informed of the allegations against the accused, will be better positioned to consider the various factors in adjudicating on the question of bail pending trial. To grant bail without first ascertaining whether there is legal justification for the accused to be placed on remand would be incompetent. The phrase "after a person has appeared in court on a charge" must be construed to mean "after the initial process of a criminal trial", which is the initial appearance in court before a judicial officer and the presentation to the legal officer of legal justification for the person's arrest and detention.

Criminal procedure – plea – pleas open to accused – case subject of previous civil trial – not permissible to rely on exceptio rei judicatae and plead autrefois acquit

S v Paragon Real Estate & Ors HH-35-09 (Uchena J) (Judgment delivered 20 Mach 2009)

The accused were charged with fraud arising from the sale of a house. The same matter had been the subject of a civil trial involving the same parties. The accused excepted to the indictment on the grounds of res judicata.
Held: If the current proceedings were of a civil nature there would have been no dispute as to whether or not the principles of the exceptio rei judicatae are applicable. However, criminal and civil proceedings belong to two different fields of procedural and substantive law. In civil proceedings, the exceptio cannot, in spite of the name, be raised by way of exception, but must be raised as a special plea. In criminal proceedings, the courses open to the accused when he is asked to plead to a charge are set out in s 180(1) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The accused can object on the ground that he was not duly served with a copy of the indictment, summons or charge; he can apply to have

the indictment, summons or charge quashed in terms of s 178; he can plead to the charge; or he can except to the charge on the ground that it does not disclose an offence cognizable by the court. One possible plea is that he has already been convicted or acquitted of that charge. While res judicata in civil procedure plays a role equivalent to that played by the plea of altrefois acquit or autrefois convict in criminal procedure, this does not mean that one can substitute one for the other. For a plea of autrefois acquit or autrefois convict to succeed, three elements must be satisfied: (1) the court was competent to try him for the offence; (2) the trial was upon a good indictment on which a valid judgment of conviction could be entered, and (3) the acquittal was on the merits. With regard to the first element, the High Court, as constituted to conduct a civil trial, is not properly constituted for a criminal trial, which requires that the court consist of a judge and two assessors. With regard to the second element, there was no valid indictment at the civil trial and the accused were in no jeopardy of conviction, so there could have been no acquittal on the merits.

Held: (1) it could not be said that the habitual residence of the child was Zimbabwe for purposes of determining whether the child had been wrongfully retained in terms of art 3. The agreement between the parties clearly stated that they had joint custody of the minor child. Those rights of custody would have continued to be exercised jointly in the United Kingdom had the child not been brought to Zimbabwe.
(2) The issue was not the custody rights of the parties. That issue was one for the jurisdiction of the country of habitual residence of the child. The purpose of the present proceedings was to secure the prompt return of the child to a England if it was proved that the child had been wrongfully retained. The matter could not be determined on the basis of the best interests of the child.
(3) No reliance could be placed on the uncertified copy of the English Act. However, in terms of ss 24 and 25 of the Civil Evidence Act [Chapter 8:01], the court can take judicial notice of any fact that is not the subject of reasonable dispute. In this respect Halbury's Laws of England was authority for the proposition that both the parties had parental responsibility in respect of the child in accordance with English law. This was what the agreement between the parties also stated.

Family law – child – custody – rights of custodian parent – right to determine where child should go to school – no obligation to consult non-custodian parent – when custodian parent's decision may be interfered with

Berens v Berens HH-28-09 (Chitakunye J) (Judgment delivered 6 January 2009)

The applicant and the respondent had separated, pending divorce proceedings. The respondent had custody of their son, who was about to start at senior school. The applicant enrolled the boy at a private school in Harare, while the respondent enrolled him at a private school in the country. The applicant sought an order compelling the respondent to allow the boy to attend the school in Harare. He claimed that the respondent's insistence that the boy go to the other school was unreasonable, there being various advantages claimed for the Harare school.
Held: the respondent, as the boy's mother, had sole custody of the boy in terms of s 5(1) of the Guardianship of Minors Act [Chapter 5:08]. As custodian parent, she had the right to regulate the life of the child, determining with whom he should or should not associate, how he should be educated, what religious training he should receive and how his health should be cared for, and so on. The applicant, as non-custodian parent, had no right to interfere in these matters, though he could petition the court to do so if it appeared that the respondent had exercised her discretion in a manner contrary to the interests of the child or in conflict with an order of court. In such intervention, the applicant would need to establish that the choice or decision was unreasonable or irrational or that no reasonable custodian parent could make such a decision and that such a decision was therefore not in the best interests of the child. While the custodian parent may consult the non-custodian parent, as this would in some cases be in the best interest of the minor, failure to consult would not on its own turn a good decision into an unreasonable or irrational decision. Even where consultation has taken place, the final decision is still with the custodian parent, with the non-custodian parent left to challenge such decision. It could not be said that the respondent's choice of school was irrational.

Family law – child – custody and guardianship – distinction between – sole guardianship – application for – need to show that guardian has failed to perform the functions of guardianship

Ralph v van Vuuren HH-5-09 (Kudya J) (Judgment delivered 22 January 2009)

Custody is but one incident or sector of natural guardianship. Where, as happens in most cases, custody is awarded to the mother and no order is made as to guardianship, the father is left with guardianship minus custody. The mother, as the custodian parent, is entitled to have the child with her, to control its daily life, to decide all questions relating to its education, training, religious upbringing and to determine what homes or houses the child may or may not enter and with whom it may or may not associate. In cases of urgency she can supply the necessary consent to a surgical operation on the child. The non-custodian parent has no right of interference in these matters. The father, as guardian, administers the child's property and business affairs.

The Guardianship of Minors Act [Chapter 5:08] provides that the best interests of a minor is the primary consideration in awarding guardianship of a child to one or other of divorced parents. Although the wife and mother now occupies a position of equality in such choices, in practice the courts are reluctant to appoint a mother as the guardian of a minor to the complete exclusion of the father unless there are some good grounds for so doing. The reason for this is that since guardianship imposes duties as much as, or even more than, it confers rights, it is normally not in the best interests of a minor child to deprive the father of guardianship unless he refuses to perform the function of a guardian or is sufficiently irresponsible or neglectful of the child's interest as to amount to such a refusal; or is physically so far from the child as to be unable to do so, or some circumstances of a similar nature and effect can be identified.

Where the custodian parents wishes to deprive the non-custodian parent of guardianship, she cannot rely on the fact that the father did not interfere with the exercise of her rights as custodian to prove his ineligibility as a guardian. She bears the onus of proving on a balance of probabilities that the respondent, as the guardian, has refused to perform the functions of guardianship or has, in his role as a guardian, been irresponsible and neglectful of the child's interests.

Family law – divorce – division of property following divorce – order for division, apportionment or distribution of assets of the spouses – what assets may be the subject of an order – all assets owned at time of divorce may be considered – assets acquired before marriage or during period of separation not excluded – company run by one spouse – when assets and proceeds of company may be treated as spouse's

Gonye v Gonye S-15-09 (Malaba JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 2 April 2009)

A court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Matrimonial Causes Act [Chapter 5:13] provides that the court may make an order with regard to the division, apportionment or distribution of "the assets of the spouses, including an order that any asset be transferred from one spouse to the other". The rights claimed by the spouses under s 7(1) are dependent upon the exercise by the court of the broad discretion. The section refers to "assets of the spouses" and not "matrimonial property". This is important because the adoption of the concept "matrimonial property" often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are on separation should be excluded from the division, apportionment or distribution exercise. The concept "the assets of the spouses" is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets. To hold that as a matter of principle assets acquired by a spouse during the period of separation are to be excluded from the division, apportionment or distribution a court is required to make under s 7(1) of the Act is to introduce an unnecessary fetter to a very broad discretion, on the proper exercise of which the rights of the parties depend. The object of the exercise must be to place the spouses in the position they would have been in had a normal marriage relationship continued between them.

Where the issue arises of whether the property rights, a proportion of the value of which is claimed by the one of the spouses, in reality lay with the other spouse or a company run by him, it is permissible to "lift the corporate veil" in order that justice could be done in the apportionment of the assets in terms of s 7(1) of the Act. Where the company can be said to be the spouse's alter ego, the company's assets and proceeds can be said to be the spouse's and thus can be the subject of an order under s 7(1).

Intellectual law – copyright – offences

See above, under CRIMINAL LAW (Statutory offences – Copyright and Neighbouring Rights Act [Chapter 26:05].

International law – treaties – SADC Treaty – protocol establishing SADC Tribunal – effect – whether Tribunal superior to courts in contracting states

Etheridge v Min of State for Lands & Anor HH-16-09 (Gowora J) (Judgment delivered 4 February 2009)

See below, under PROPERTY AND REAL RIGHTS (Spoliation order – right to).

Interpretation of statutes – eiusdem generis rule – applicability – a mere presumption – applicability to employment codes of conduct

Murawo v GMB S-27-09 (Sandura JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 11 May 2009)

See above, under EMPLOYMENT (Code of conduct – interpretation).

Landlord and tenant – lease – sub-lease – expiry of main lease – sub-lessee having no right to continue in occupation and cannot claim protection of statutory tenancy

Thandazo Retail & Mktg (Pvt) Ltd v Main Motors (Pvt) Ltd & Anor HB-41-09 (Ndou J) (Judgment delivered 19 March 2009)

The first respondent was the lessee in a lease agreement with the second respondent. In terms of the lease, the first respondent was entitled to sub-let the premises, which it did, to the applicant. The lease agreement between the respondents ended with effluxion of time and the applicant and the other sub-tenants were informed of the fact. The others moved out but the applicant argued that it was a statutory tenant and refused to vacate the premises.
Held: a "lessor", in relation to commercial premises, includes a lessee who has sub-let the premises, and a "lessee" includes any sub-lessee. To establish a statutory tenancy under s 22(2) of the Commercial Premises (Rent) Regulation 1983 (SI 676 of 1983), the lessor, as defined, must have some contractual relationship with the sub-lessee, as defined. A sub-lessee does not enjoy the protection of a statutory tenant where the lessee has surrendered any right of occupation under the head lease. The owner cannot be deprived of its property merely because the lessee did not give the sub-lessee adequate notice to vacate the premises.

Legal practitioner – Attorney-General – need to comply with rules of court on same basis as any other legal firm – no basis on which court can accept excuses from Attorney-General which it would not accept from other legal firm

Legal practitioner – conduct and ethics – statements from the bar – undesirability of – need for legal practitioners to give evidence in affidavit form

BGM Traffic Control Systems v Min of Transport & Ors HH-12-09 (Makarau JP) (Judgment delivered 12 February 2009)

Evidence led from the bar places both the court and the other legal practitioners at a distinct disadvantage, in that it can neither be countered nor tested by way of cross-examination. Effectively, the court and the other lawyers are compelled to accept to accept the evidence, for to decline to do so has the effect of calling into question the integrity of the lawyer testifying.
Where legal practitioners wish to place facts before the court, even facts that they believe are notorious, they must do so by way of affidavit, as an affidavit is sworn testimony. Where a response to such facts is deemed necessary, then an affidavit refuting the facts in the first affidavit is filed. Anything short of this procedure will allow the proceedings to degenerate into social exchanges between counsel that are neither evidence nor submissions based on evidence, something that the legal practitioners can engage in outside the courtroom.
The Office of the Attorney-General competes on an equal footing with all other law firms in the land. It is not exempted from abiding by the rules of court. Reports that there is an acute shortage of staff in the Attorney-General's Office, that staff attendance at work is erratic and control of support staff has become difficult in the circumstances, that the incidence of locked offices without staff in sight is now rampant and is common knowledge in the legal circles are not relevant. There is no basis upon which the courts can accommodate excuses from the Attorney-Generals' Office that they do not in the ordinary course of events accommodate from any other firm of lawyers. To accept such explanations from the Attorney-General's Office as reasonable the excuses would open the entire system to disorder and erratic filing of pleadings to an extent where the system may collapse. Courts that bend over backwards to accommodate excuses for ineptitude and

complete disregard of its rules by the Attorney-General's Office open themselves up unnecessarily to suggestions that they are partial to the executive, the clients that are solely represented by that office.

Legal practitioner – conduct and ethics – duty of honesty towards court – practitioner advising client to disobey court order – costs de bonis propriis ordered

Nyoni v Elmissing & Anor HB-38-09 (Cheda J) (Judgment delivered 2 April 2009)

A legal practitioner must avoid all conduct which, if known, could damage his reputation as an honourable citizen. He has a duty to act honestly and fairly at all times. In addition, he must always be truthful and candid in all his dealings. Lawyers, as officers of the court, have an unfailing duty to obey court orders and should not be seen to be assisting litigants in disobedience. Where this occurs, costs de bonis propriis against the practitioner are appropriate.

Local government – urban council – alienation of council land – subsequent use of land by person to whom alienated – subject to requirements of Regional, Town and Country Planning Act [Chapter 29:12]

Bruce v Econet Wireless (Pvt) Ltd & Anor HH-52-09 (Omerjee J) (Judgment delivered 6 May 2009)

See below, under TOWN AND COUNTRY PLANNING.

Local government – urban council – senior employee – dismissal of – dismissal must be approved by Local Government Board – decision to dismiss not a decision of the Board – not necessary to cite Board in proceedings arising out of dismissal

Local government – urban council – senior officials – defects in election or appointment – validation of acts by such officials – such validation not applicable to commission appointed by Minister in place of entire council – not applicable where election of entire council in question

City of Harare v Zvobgo S-4-09 (Garwe JA, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 2 April 2009)

See above, under ADMINISTRATIVE LAW (Administrative decisions and acts – validity of).

Practice and procedure – application – use of one form for application when other would have been appropriate – not fatal – use of format not in compliance with either form – application fatally defective – rules of court – departure from – when may be condoned

Zimbabwe Open University v Mazombwe HH-43-09 (Hlatshwayo J) (Judgment delivered 4 February 2009)

The respondent had registered with the High Court an arbitral award made in his favour against the applicant. The applicant applied for rescission of judgment. In doing so, it did not use either of the forms prescribed by r 230 of the High Court Rules 1971. Instead, it used a format which tersely stated that it was applying for rescission of judgment and relied on an affidavit annexed to the application. The respondent argued that the applicant's application was fatally defective.
Held: (1) Had the applicant used either of the forms prescribed in the Rules, the use of one form instead of another would not in itself constitute sufficient ground for dismissing the application, it being necessary for the court to conclude that some interested party had thereby suffered prejudice which could not be remedied by directions for service on the injured party, with or without an order of costs. The court could have exercised its discretion under r 4C.
(2) The form for a court application sets out a plethora of procedural rights that the respondent is alerted to, while the form for an ex parte application sets out a summary of the grounds of the application. By contrast, the format used by the applicant did neither. The application was therefore fatally defective.
(3) Not only was the application defective, but the applicant's attention had been drawn to the fact by the respondent. The applicant should have applied for condonation. The applicant's failure to even recognize the need to apply for condonation showed a cavalier approach to compliance with the rules of court, which should be discouraged by an exemplary order of costs.

Practice and procedure – declaratory order – application for such order made to Supreme Court – court having no jurisdiction to determine application

Guwa & Anor v Willoughby's Invstms (Pvt) Ltd S-31-09 (Garwe JA, in chambers) (Judgment delivered 24 June 2009)

See above, under COURT (Supreme Court – powers).

Practice and procedure – interdict – right to – applicant only entitled to interdict to protect legally enforceable right

Etheridge v Min of State for Lands & Anor HH-16-09 (Gowora J) (Judgment delivered 4 February 2009)

See below, under PROPERTY AND REAL RIGHTS (Spoliation order – right to).

Practice and procedure – judgment – currency in which judgment may be expressed – judgment may be expressed in currency which will redress loss suffered — local currency rendered worthless due to inflation – appropriate to give judgment in foreign currency

Kwindima v Mvunduma HH-25-09 (Makarau JP) (Judgment delivered 4 March 2009)

The plaintiff sought damages arising out of the failure of the defendant to transfer to her certain immovable property. A valuator fixed the value the property in US dollars. It was argued that the United States Dollar and other foreign currencies from the region had become the de facto currencies of Zimbabwe, the local currency having been rendered valueless by inflation. The issue was whether a claim for damages may be redressed in foreign currency where it has been felt in both the local and the foreign currency but the local currency has been ravaged by inflation and is de facto valueless.
Held: where a loss has been suffered and can be calculated in both the local and in a foreign currency, the court has a discretion to award judgment in the currency that will redress the injury suffered and adequately compensate the plaintiff for the loss. Where that currency is the foreign currency as opposed to the local currency, then judgment should be in the foreign currency, as to award damages in the local currency, where the local currency has been rendered valueless by inflation, might be to deny the plaintiff the redress that he seeks.

Practice and procedure – judgment – default judgment – rescission – application for – time limits – need for application to be heard and determined within 30 days of the date on which the applicant became aware of the judgment – need for condonation to be applied for

Sai Entprs (Pvt) Ltd v Girdle Entprs (Pvt) Ltd HB-62-09 (Ndou J) (Judgment delivered 4 June 2009)

The making of an application for rescission of a default judgment is when the application is set down and heard and not merely when it is filed with Registrar of the court. Consequently, if an application for rescission of judgment is not heard and determined within thirty days of the date on which the applicant had knowledge of the default judgment, the applicant must first seek an indulgence or condonation before the application for rescission is heard, no matter that there is no practical way that such an application can be filed, heard and determined within a thirty day period and the delay in set down beyond the thirty day period is beyond the applicant's control.

Practice and procedure – order – nature of when order is interlocutory or final – need to examine effect of order, not its form

Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor S-29-09 (Malaba DCJ in chambers) (Judgment delivered 16 June 2009)

See above, under APPEAL (Striking out).

Practice and procedure – parties – joinder – principles – when party should be joined – need to consider possible adverse effect of non-joinder

Sibanda v Sibanda & Anor HB-10-09 (Cheda J) (Judgment delivered 29 January 2009)

For a party to be joined in an action, it is necessary that the party should have a direct and substantial interest in the issues raised in the proceedings before the court and that his rights may be affected by the judgment of the court. Matrimonial matters are not excluded. What the court should consider is the effect of the joinder to both parties. Where liability is in dispute, a joinder should be ordered as long as there is no prejudice to be suffered by the respondent. If the respondent unduly suffers prejudice, his remedy will lie in costs against the plaintiff. It is also pertinent to enquire as to the consequences of a non-joinder. Joinder would be appropriate if there would otherwise be a lot of inconvenience, not only to the applicant, but to the court as well. A multiplicity of actions should be avoided if possible.

Practice and procedure – parties – voluntary association – club – capacity to institute legal proceedings – rules of club not followed – proceedings void

Mashonaland Turf Club v Nyamangunda HH-21-09 (Mtshiya J) (Judgment delivered 4 March 2009)

The plaintiff club wished to sue for the eviction of the respondent from portion of its premises. In terms of its rules, the plaintiff could sue and be sued in its own right provided it had the necessary authority granted under the relevant clause. The defendant raised the question of whether the plaintiff was properly before the court, as it had not followed its own rules relating to the institution of legal proceedings.
Held: while the plaintiff had capacity to institute legal proceedings, it did not comply with its own rules in order to be able to acquire the capacity to institute these particular proceedings. Failure to adhere to existing and established procedures in any operating system negates the whole purpose of ever putting the procedures in place. The plaintiff's failure to comply with the relevant provisions of the rules meant that, in law, the plaintiff never instituted any legal proceedings at all against the defendant. This procedural irregularity was fatal and accordingly the plaintiff was not properly before the court. The proceedings were a nullity.

Practice and procedure – res judicata – tests for when a matter is res judicata – matter previously left open – cannot be said to be res judicata when raised again later

Flowerdale Invstma (Pvt) Ltd & Anor v Bernard Construction (Pvt) Ltd & Ors S-5-09 (Chidyausiku CJ, Sandura & Gwaunza JJA concurring) (Judgment delivered 18 February 2009)

The second appellant had stood guarantor for the first appellant's debt to the third respondent, a bank. The third respondent obtained judgment against the first appellant, and as a result the second appellant's property was sold at a public auction to the first respondent. The Sheriff, who was the second respondent, refused to confirm the first respondent as purchaser and directed that the property be sold be private treaty.
The second appellant applied for the sale to be set aside on the grounds that the sale price was unreasonably low. The High Court determined the application on the basis that the issue before it was the price at which the property was sold and refused the application. In its notice of appeal, and during submissions, the second appellant contended that the sale in execution was not perfecta by reason of the fact that the third respondent was never declared the purchaser in terms of r 356 of the High Court Rules and that there was never confirmation of the sale in terms of r 360. The suggestion that the sale in execution was not perfecta arose from the report of the Sheriff to the court a quo. The Supreme Court declined to consider this point, holding that the question of the adequacy of the sale was being raised for the first time on appeal, and upheld the High Court's finding that the second appellant had not discharged the onus of establishing that the property had been sold for an unreasonably low purchase price (see Austerlands (Pvt) Ltd v Trade & Invstm Bank Ltd & Ors S-92-05, dated 27 March 2006).
The Sheriff understood the judgments of both the High Court and the Supreme Court to direct him to rescind his refusal to declare the first respondent the purchaser of the property, so he declared the first respondent the purchaser of the property in terms of r 356 of the High Court Rules 1971. The appellants then filed an objection to the Sheriff's decision, in terms of r 359 (which had been amended after the original sale took place). Rule 359 (as amended) vests in the Sheriff the power to confirm or deny confirmation of an auction sale in respect of which he has declared a purchaser in terms of r 356. The amended rule gives him a fairly wide discretion to confirm or deny confirmation of an auction sale – a discretion that was previously vested in the High Court before the amendment of r 359. Various grounds for objection were filed, among them that the contract was not complete, the bid was too low, that the first respondent had paid nothing towards the purchase price and that the judgment debt had since been satisfied. The Sheriff upheld the objection and refused to confirm the sale.

The first respondent applied to the High Court to have the Sheriff's determination set aside on review on the ground that the Sheriff had no jurisdiction to entertain the matter as it had been finalised by the Supreme Court and the High Court. It also contended that the Sheriff had erred in applying r 359 of the Rules, as amended, when the sale took place before the amendment. The High Court granted the application, holding that the matter was res judicata. On appeal, several grounds were raised but the deciding issue was whether the defence of res judicata should have prevailed.
Held: (1) while two of the elements of res judicata – that both applications concerned the same parties and the same subject-matter – were present, the third element – that the two actions must be founded upon the same cause of action – was not. The first application had as its cause of action the averment that the auction sale price was unreasonably low. The second application has as its cause of action the averments set out in the appellants' objection filed with the Sheriff. The issue of the auction sale being incomplete or not was specifically left open. It would be a contradiction in terms to assert that an issue that has been left open was determined and is therefore res judicata. In spite of the Sheriff's understanding of the effect of the earlier judgments, those judgments did not set aside the Sheriff's determination in the first instance. If the Sheriff's determination still stood, then the auction sale to the first respondent was imperfecta.
(2) Even if the Sheriff correctly rescinded his original determination, his declaration of the first respondent as purchaser was made after the amendment of r 359 had taken place. Consequently, it was proper for him to proceed in terms of the amended rule.
(3) The Sheriff's decision was not previously adjudicated upon on the merits. There was nothing to suggest that the Sheriff misdirected himself in the exercise of his discretion or that his discretion was exercised in a grossly unreasonable manner. There was thus is no basis for possible judicial interference on review on the merits.

Prescription – interruption – by issue of process – need for process to be prosecuted to final judgment – court application being dismissed on procedural grounds – such application not interrupting prescription

Chiwawa v Mutzuris & Ors HH-7-09 (Makarau JP) (Judgment delivered 4 February 2009)

The plaintiff entered into a verbal contract with the defendants to buy a property from them. The initial verbal agreement was made in November 2002 and in July 2003 a written agreement was signed. Transfer was not effected. In 2004 she filed a court application to compel the defendants to transfer the property. That application was dismissed in May 2005. In November 2006 she issued summons, to compel the defendants to pass transfer of the property to her. She also sought an order evicting the defendants and all those occupying through the defendant from the property in dispute. The defendants opposed the claim, arguing, inter alia, that the claim had prescribed, summons being issued more than three years after the cause of action arose, which at the latest was July 2003. The plaintiff argued that prescription had been interrupted by the issue of process in 2004.
Held: (1) the plaintiff's cause of action arose when she concluded the agreement of sale with the first defendant. It was at that stage that she at law became entitled to receive transfer from the defendants against payment of whatever was due from her in terms of the agreement of sale.
(2) A civil action may be commenced by the filing of a court application and, in the absence of an appeal, it is finally brought to a conclusion by the judgment of the court on that application. One of the judgments which the court can return is a dismissal of that application on the grounds that it raises a dispute of fact that cannot be resolved on the basis of the affidavits filed. Such a ruling is a judgment disposing of the application filed (but not disposing of the matter between the parties). It follows that when the court dismisses an application on account of dispute of facts arising, it finally disposes of that application and, although the applicant may be entitled to issue fresh process, the first action filed with the court is at an end and at an unsuccessful end at that. The unsuccessful application has no bearing on the prescription of the debt and will act as if the applicant did nothing in the matter. In terms of s 19(3) of the Prescription Act [Chapter 8:11], the running of prescription may be interrupted by the service on the debtor of process; but unless the debtor acknowledges liability, the interruption of prescription will lapse and the running of prescription shall not be deemed to have been interrupted if the creditor does not successfully prosecute the claim to final judgment. In casu, the defendants never acknowledged liability at any stage. The interruption of prescription by the filing of the court application thus lapsed and the running of prescription should not be deemed to have been interrupted as the plaintiff did not succeed in her prosecution of the claim in the court application proceedings

Property and real rights – land – registration – effect – registered owner's real rights in property – right to vindicate property

Agro Chem Dealers (Pvt) Ltd v Gomo & Ors HH-71-09 (Gowora J) (Judgment delivered 6 April 2009)

See above, under CONTRACT (Waiver).

Property and real rights – property – division of – following dissolution of partnership – actio communi dividendo – principles – court's discretion – need for plaintiff to plead ancillary claims relating to adjustment of claim – assessment of value of claims – adjustment of claims to counter effects of inflation – such adjustment contrary to principle of nominalism

Bakaris v Kattavenos HH-1-09 (Kudya J) (Judgment delivered 14 January 2009)

The parties, who were brothers in law, had been in partnership together. They owned several properties in equal shares. The parties eventually decided to terminate the partnership and the applicant sought order for the termination of the joint ownership and for a fair and equitable distribution of the properties. It was common cause that the plaintiff's claim was based on the actio communi dividendo, by means of which not only division, but also adjustment may be claimed. Adjustment may relate to, for example, damage caused to or profits enjoyed or expenses incurred in connection with the joint property.
Held: (1) If the co-owners cannot agree on the manner in which the property is to be divided among them, the court will make such order as appears to be fair and equitable in the circumstances. The court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court has in respect of the mode of distribution of partnership assets among partners. The court usually endeavours to divide the property physically amongst the co-owners in accordance with the value of the property and each co-owner's share in it. If such a division is uneconomical or inequitable, the court may, for instance, allot the property to one co-owner and order him to pay compensation to the other co-owners.
(2) While the actio communi dividendo may be used to claim for adjustments for profits enjoyed and expenses incurred, it is axiomatic that the pleadings must set out the cause of action in clear and concise language. The plaintiff must specifically plead the ancillary claims. In casu, the plaintiff did not do so. By his failure to plead the ancillary relief that he sought, he misled the defendant as to the nature and extent of his claim. The defendant did not prepare his defence with the ancillary claims in mind and was, therefore, prejudiced in the conduct of his defence.
(3) The system used by the plaintiff of upgrading values to counter the effects of inflation was contrary to our law as it offended against the principle of nominalism. It would represent a revolutionary transformation of our legal system if courts were to be called upon to determine the true economic value (in terms of purchasing power) of all obligations sounding in money. A monetary debt has to be paid in terms of its nominal value.

Property and real rights – spoliation order – locus standi – unlawful occupier of land – person occupying land which had been acquired by State – person receiving offer letter from State in respect of such land – not entitled to deprive occupier of possession – need for occupier to be lawfully evicted before holder of offer letter entitled to occupy property

Asher v Minister of State for Lands & Anor HH-34-09 (Chatukuta J) (Judgment delivered 26 February 2009)

The applicant was the former owner of a farm which had been acquired by the State. He had nonetheless remained in possession of and continued to occupy the farm. The second respondent sent a group of youths to the farm when the applicant was away. These youths locked the applicant out of the homestead. The applicant sought a spoliation order. The second respondent argued that the applicant did not have locus standi to seek such relief and the court did not have jurisdiction to grant it. It was contended that the applicant was occupying the farm in contravention of s 3(1) of the Gazetted Lands (Consquential Provisions) Act [Chapter 20:28] and that that any finding that the applicant had locus standi would be tantamount to sanctioning and facilitating an illegal act.
Held: it was not for the court to determine the ownership of the farm. The fact that the first respondent (the Minister) had acquired the land and could therefore deal with it as he wished was not in issue, but was not relevant in determining the applicant's locus standi. The fact that the applicant was in occupation unlawfully was also not the issue. The issue was whether or not the applicant could prove that he was in peaceful possession of the farm and the possession was unlawfully or wrongfully interrupted by the second respondent. To so hold would not facilitate the perpetuation of an unlawful act. Section 3 of the Gazetted Lands Act provided what had to be done in order to evict the applicant from the farm. In terms of that section, the owner or occupier could only lose possession upon conviction and the issuance of an eviction order by the magistrates court. It was not disputed that the applicant's possession was disturbed. It was irrelevant whether the

disturbance was peaceful or as a result of the youths who locked the applicant out of the property. The fact that the second respondent had an offer letter in respect of the farm did not make his action lawful. In order for the recipient of an offer letter to enjoy occupation and use of that land he must have vacant possession, which can only be achieved where the due process of law set out in s 3(5) of the Act is followed. Consequently, the application would be granted.

Property and real rights – spoliation order – locus standi – unlawful occupier of land – person claiming right to land not entitled to evict occupier without legal process

Dodhill (Pvt) Ltd & Anor v Min of Lands & Anor HH-40-09 (Bere J) (Judgment delivered 16 March 2009)

The applicants were the former owners of a farm which had been expropriated by the State. The second respondent had received a letter of offer in respect of the land and, although the applicants were still occupying the farm, entered the farm and started farming operations. The applicants sought a spoliation order. The second respondent argued that the applicants had no locus standi because they were there unlawfully.
Held: The grant of a spoliation order does not depend on the lawfulness of possession. The purpose of the order is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the status quo ante to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. The lawfulness or otherwise of the applicants' possession of the property does not fall for considerations at all. To accept the second respondent's argument would be to re-define the very basic requirements of a mandament van spolie, which is not concerned with the legality or otherwise of the possession itself. To deny the applicants locus standi would be to sanction and encourage self-help exercise by those in the position of the second respondent. Such a position would be tantamount to perpetuating an infraction of the law by the second respondent without following due process of law. The courts must be careful not to encourage lawlessness in our farms by subtly condoning, by implication or inference, the conduct of land beneficiaries who believe they have a legitimate right to occupy land which hitherto belonged to those farm owners who choose to remain on the farm after they should have vacated. It is not a question of weighing who, between the former owner and a beneficiary, has a preferred or a more appealing right. It is simply a question of encouraging due process of law. This is not achieved by giving court orders which give the impression that holders of letters of offer can themselves carry out eviction processes.

Property and real rights – spoliation order – nature of – spoliation order final in effect – cannot be granted unless clear right established in applicant's favour

Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor S-29-09 (Malaba DCJ in chambers) (Judgment delivered 16 June 2009)

See above, under APPEAL (Striking out).

Property and real rights – spoliation order – right to – unlawful occupier of land – person occupying land which had been acquired by State – still entitled to protection against spoliation

Etheridge v Min of State for Lands & Anor HH-16-09 (Gowora J) (Judgment delivered 4 February 2009)

The applicant sought a spoliation order against the respondent. He and his sons occupied a farm which had been gazetted by the government for acquisition under the land reform program. Various people moved forcibly onto the farm and evicted applicant and his sons. The persons who moved onto the farm did so, allegedly on the instructions of the respondent (the President of the Senate). The respondent had been given a letter by the relevant minister to authorizing her move onto the farm. Possession and control of the farm had subsequently been restored through the efforts of the police and that some of the stolen property had been recovered but that recovery of the same was an ongoing process. However, the applicant persisted with the application for a spoliation order. He also sought an interdict, restraining the respondent from in any way interfering with the possession, control and use of the farm or in any way interfering with the normal farming and business operations of applicant.
The respondent claimed that the applicant has no locus standi, on the grounds that he had lost his right to institute the proceedings because the farm had been acquired by the government. The applicant was, it was argued, committing an offence by occupying the land in excess of the period allowed him by the Gazetted Lands (Consequential Provisions) Act

[Chapter 20:28]. The respondent claimed, too, that the court had no jurisdiction because the matter was pending before the SADC Tribunal.
Held: (1) once the land is acquired the former owner or occupier loses the right to occupy or use the land. If he does so, he commits an offence. This did not mean, though, that the mere fact that a former owner still occupied gazetted rural land outside the requirements of a statutory provision laid that particular occupier to the mercy of anyone who cared to come onto the land without due process. A spoliator is in no better position than the former owner or occupier, in the sense that in moving onto the land without due process, he is equally guilty of an infraction of the law. A former occupier still has to be evicted by lawful process. If it were the intention of the legislature to deprive him of locus standi to protect his possession of the gazetted land from self-helpers and would-be spoliators then the legislature would have provided for such in specific terms. However, as the applicant had been restored to possession by the police, he was not in a position to persist with the restoration of possession.
(2) An interdict is an order from a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm and therefore it is appropriate only when future injury is feared. As the applicant had lost his ownership in the land by virtue of the acquisition process and had lost his right to legally occupy the land, he had not established a right that would entitle him to seek an interdict against any future acts of spoliation on the part of the respondent.
(3) The SADC Treaty made provision for the establishment of a tribunal. The Protocol is the document that then sets up the tribunal and provides for the powers of the Tribunal. The Protocol contains no reference to the courts of any of the countries within SADC. If the intention was to create a tribunal which would be superior to the courts in the subscribing countries, that intent was not manifest in the Protocol. The supreme law in this jurisdiction was the Constitution, which has not made provision for the courts of Zimbabwe to be subject to the Tribunal. In any event, the nature of relief being sought in the Tribunal was different to what was being sought in the High Court, so there was no justification for the view that the applicant was seeking the same relief in different fora.

Property and real rights – spoliation order – when may be granted – property leased to respondent and not returned – spoliation order not appropriate

Gute v Jumbe HH-31-09 (Uchena J) (Judgment delivered 18 March 2009)

The applicant and the respondent entered a lease agreement in respect of a business premises. The lease agreement included the use of some of the equipment, which had to be returned at the end of the lease. When the lease ended, the respondent vacated the premises but took away some of the equipment. The applicant sought a spoliation order in respect of the equipment.
Held: a spoliation order could not be granted. The mandament van spolie is premised on the unlawful taking of property from another who should be in peaceful and undisturbed possession at the time of being despoiled. Here, the applicant had not resumed possession of the equipment at the time the respondent took it away from the butchery. The respondent could not therefore be said to have unlawfully dispossessed the applicant. If the application were granted, the applicant would regain possession of the property he lawfully handed over to the respondent at the commencement of the lease. He would through the mandament van spolie regain possession he did not lose by an unlawful taking, but by the act of leasing it to the respondent. He should have instituted a vindicatory action instead.

Town and country planning – appeal – to Administrative Court – what decisions are subject to appeal to Administrative Court – decision by council to alienate council land – not such a decision

Town and country planning – development – what constitutes – building on land or changing use of land – permit required under Regional, Town and Country Planning Act [Chapter 29:12]

Bruce v Econet Wireless (Pvt) Ltd & Anor HH-52-09 (Omerjee J) (Judgment delivered 6 May 2009)

The first defendant leased a piece of land from the second defendant, the City of Harare. On the land it erected a cellular telephone base station. The piece of land was next door to the plaintiff's land in a Harare suburb. The plaintiff was unaware of the council's proposal to lease the land or of the first defendant's proposal to erect a base station until construction had started. He brought an action to declare the lease to be invalid and to require the first defendant to remove the base station.

In the alternative, he sought an order requiring the defendants to comply with the requirements of Part V of the Regional, Town and Country Planning Act [Chapter 29:12]. The issues for determination were (1) whether the first defendant was required by the law to obtain a development permit; and (2) whether the plaintiff was given the required notice to object to the development. The defendants objected in limine that the court lacked jurisdiction to hear the matter because s 38 of the Act stipulates that any person aggrieved by a decision of a local planning authority has one month in which to lodge an appeal with the Administrative Court. In casu, they argued, the plaintiff, apart from instituting proceedings in the wrong forum, was also now out of time.

Held: (1) an appeal lies with the Administrative Court only if the decision being challenged is one listed in s 38 of the Act. The present matter concerned a decision was neither made nor could it be deemed to have been made in terms of the Act. The council's decision to lease the land was made in terms of s 152 of the Urban Councils Act [Chapter 29:15].

(2) The fact that a local authority, such as the City of Harare, is empowered by s 152 of the Urban Councils Act to alienate any land it owns through sale, exchange, lease, donation or otherwise to dispose of or permit the use of the land should not be construed as exempting it or any other person from complying with the requirements of Part V of the Regional, Town and Country Planning Act. This includes applying for a planning permit in terms of s 26 of that Act.

(3) The erection of the base station by the first defendant constituted the carrying out in, on, over or under the land of building operations and thus was "development" as defined is s 22 of the Regional, Town and Country Planning Act. Consequently, the construction of the mast was subject to the requirements of Part V of the Act.

(4) The leased stand was part of a piece of land designated for use as a recreational park. Section 22(1)(b) stipulates that the altering of the character of the use of land constitutes "development", unless the new use and the old use both fall within the same prescribed group of land uses. The erection or construction of a cellular mast on land designated for use as a recreational park could not be described as a simple change of use falling within the same prescribed group of uses of land. It amounted to the altering of the character of the use of land and therefore was "development". Section 24 proscribes the carrying out of any development unless permitted in terms of a development order or in accordance with a permit issued in terms of s 26. The erection of the cellular mast was not carried out in terms of any development order nor was it done in accordance with a permit issued in terms of s 26 of the Act. Accordingly, it was an illegal structure.

(5) This did not mean that the mast had to be demolished. Section 27 of the Act allowed an application to be made to regularise any development that has been carried out without the requisite development order.

Words and phrases – "after [a person] has appeared in court on a charge" – Criminal Procedure and Evidence Act [Chapter 9:07] – ss 116 and 117

S v Mukoko HH-24-09 (Chitakunye J) (Judgment delivered 4 February 2009)

See above, under CRIMINAL PROCEDURE (Bail – application).