Latest update: 8 April 2011

CASES DECIDED JULY – DECEMBER 2009

Administration of estates – estate property – sale of – when Master's consent required – property devolving upon minors – Master's or court's consent required – sale without such consent void *ab initio*

Nemuseso v *Mashita & Ors* HH-122-09 (Guvava J) (Judgment delivered 5 November 2009)

The plaintiff bought a house, which was part of a deceased estate. The arrangement was made between the plaintiff and the first defendant, the executor of the estate. The heirs to the estate were minors at the time of the sale. The fifth defendant had, after the estate was wound up, bought the property from the heirs. The plaintiff issued summons seeking a declarator that the transfer of the property to the fifth defendant by the third and fourth defendants was wrongful, unlawful and fraudulent as he had already purchased the property from the estate. He sought an order for the cancellation of the transfer and an order for specific performance in terms of his contract. The fifth defendant counter-claimed for the ejectment of the plaintiff.
Held: In terms of the s 122 of the Administration of Estates Act [*Chapter 6:01*] it was incumbent upon the parties to approach the Master for his consent to the sale or so that he could apply to a judge for authority to sell the property. The provision indicates that the Master is called upon to exercise his discretion as to the referral of the case to a judge in chambers. It is clear that the property of a minor is protected and may not be disposed of without the consent of either the Master or the court. Clearly the intention of the legislature was to protect the inheritance of minors from unscrupulous executors. The Master will usually require a sworn appraisement of the property to be sold. He will want to know why the property is being sold and why the sale will be to the benefit of the minor. The same information will be required by a court and the court will not grant such leave unless it is fully satisfied beyond all reasonable doubt that it will be to the advantage of the minor. Here, the Master's consent was never sought in accordance with s 122. Where a provision prescribed by statute is not followed then it renders the contract void. The agreement which the plaintiff entered into with the executor was null and void as it related to property in which minors had an interest and no authority to sell was sought either from the Master or from the court for such sale. It is as if there was never a sale to the plaintiff by the first and second defendants. The fifth's defendant's counter-claim would be upheld.

Administrative law – administrative decision – administrative authority's duty to act lawfully, reasonably and fairly – Minister making declaration that would operate unequally as between different groups of residents of same city – declaration unlawful

***Marufu* v *Min of Transport & Ors* HB-127-09 (Ndou J) (Judgment delivered 3 December 2009)**

***See below, under* STATUTES (Tolls Roads Act [*Chapter 13:13*]).**

Administrative law – administrative decision – decision arising out of contract between administrative authority and another party – applicability of Administrative Justice Act [*Chapter 10:28*] to such decision – duty of administrative authority to act fairly and in accordance with Act

U-Tow Trailers (Pvt) Ltd v *City of Harare & Anor* HH-103-09 (Makarau JP) (Judgment delivered 21 October 2009)

The applicant was the lessee of premises; the first respondent, the Harare City Council, was the lessor. The lease agreement provided that the premises should not be sub-let without the written consent of the lessor. In spite of this provision, the applicant sub-leased the premises to the second respondent. The first respondent wrote to the applicant, summarily terminating the lease agreement and seeking the ejectment of the applicant from the premises. When the applicant tendered rentals for that month, these were rejected on the basis that the lease agreement had been cancelled. The applicant sought firstly an order holding the first respondent to the lease agreement on the basis that it was not subletting to the second respondent as alleged and secondly an order ejecting the second respondent from the premises. The main issue for determination was whether the first respondent was justified in summarily cancelling the lease agreement without first affording the applicant a chance to respond to the allegations that it was subletting the premises to the second respondent.

The first respondent argued that the terms of the lease agreement allowed it to do so. The second issue was whether the Administrative Justice Act [*Chapter 10:28*] introduced the application of rules of natural justice into the field of contract law where one of the parties is a local authority.

Held: (1) even where a lease agreement grants the lessor the right to cancel the lease on account of breach and to re-take possession of the leased premises, such cancellation is always subject to the control of and confirmation by the court. The lessor has to approach the court for the confirmation of its cancellation of the agreement and for the eviction of the tenant. The right to summary termination of the lease agreement, no matter how clearly worded, does not oust the jurisdiction of the court to grant the eviction order. The existence of the grounds for and the validity of the cancellation of the lease agreement are always subject to validation and confirmation by the court, which alone can order the eviction of the defaulting tenant. The lessor cannot exercise self help and retake possession of the property without a court order even where the agreement specifically provides so. Here, the first respondent did not approach the court for the eviction of the applicant. It did not counter apply for the confirmation of its cancellation of the lease agreement and the eviction of the applicant.

(2) The first respondent acted strictly in terms of the lease agreement between the parties and did not afford the applicant a chance to be heard before it summarily cancelled the lease agreement. The rule at common law is that tenets of natural justice have no application in the law of contract unless the aggrieved party can prove that the contract impliedly imported and incorporated such into the contract. However, even before to the enactment the Administrative Justice Act, courts in this jurisdiction were generally alive to the need to import fairness into administrative decisions, even those that were founded primarily on contract, especially the employment contract. Section 2 of the Act defines administrative authority as including any person, committee or council of a local authority and an administrative action as including any action or decision taken by an administrative authority. The definition is immensely wide. Accordingly, any decision made by an administrative authority under the empowering provisions of any enactment, in pursuance of any rule of common law, or in terms of an agreement between itself and another party or in terms of any legal instrument, must be made fairly and in accordance with the provisions of the Act. The decision by the first respondent to summarily terminate the lease agreement between itself and the applicant was an administrative carried out by an administrative authority, empowered to do so by the lease agreement between the parties. The Act applied fully to this decision. The first respondent was bound to act fairly in terminating the lease agreement between itself and the applicant. It failed to do so and so breached the obligations placed upon it by the law. Its consequent decision, arrived at in circumstances where it had failed to act fairly, could not therefore stand.

(3) Section 4 of the Act provides that any person who is aggrieved by the failure of an administrative authority to comply with s 3 may apply to the High Court for relief. Generally, it is not necessary for an applicant to specifically plead the law that it seeks to rely on as long as the necessary averments are made therein to sustain a cause of action under the applicable law, unless the law under which he is proceeding requires that certain averments be specifically pleaded.

Administrative law – illegal exercise of power – Minister and public servant exercising powers not granted by statute – such actions invalid

B-Sky Energy (Pvt) Ltd v *Min of Energy & Anor* HH-104-09 (Bhunu J) (Judgment delivered 8 October 2009)

See below, under CONSTITUTIONAL LAW (Minister – authority of).

Administrative law – review – application for – domestic remedies available – need to advance reasons why domestic remedies not pursued – grant of declaratory order when domestic remedies available – not appropriate if court being asked to substitute its decision for that of administrative body

Djordjevic v *Chrmn, Practice Control Cttee, Medical & Dental Practitioners Council of Zimbabwe* HH-110-09 (Makoni J) (Judgment delivered 28 September 2009)

The applicant, after some years of provisional registration as a medical practitioner, applied for an unrestricted practising certificate permitting her to practice as a specialist obstetrician and gynaecologist. The Medical and Dental Practitioners Council refused her application. The applicant sought a declaratory order to the effect that she was entitled to the issue of an unrestricted practicing certificate. She also sought consequential relief, that the respondents issue her with such a certificate. The first respondent raised the point *in limine* that the applicant had not exhausted the domestic remedies available to her before approaching the court. In terms of s 22 of the Health Professions Act [*Chapter 27:19*], any person who is aggrieved by any decision taken in regard to him by a council may appeal against the decision to the Health Professions Authority within thirty days after being informed of the decision. Section 123 provides for an appeal from the

Authority to the High Court.
Held: where domestic remedies are capable of providing effective redress in respect of the complaint, a litigant should exhaust those remedies unless there are good reasons for not doing so. No good reasons were advanced for not pursuing the domestic remedies available to her. While a declaratory order may be granted even if some other form of relief is available, the merits of each case constitute one of the circumstances of the matter to which regard must be paid before a declaratory order is issued. The nature of the relief being sought by the applicant was such that she was asking the court to substitute its own decision for that of the first respondent. A court will not interfere in the sphere of practical administration. There were disputes of fact which the court could not resolve, as they would require the expertise provided for in the Act.

Agency – agent – estate agent – authority of – no authority to amend agreement of sale unless instructed to do so by parties

Runatsa v *Rumani Estates (Pvt) Ltd & Ors* S-54-09 (Sandura JA, Chidyausiku CJ & Ziyambi JA concurring) (Judgment delivered 3 November 2009)

See below, under CONTRACT (Condition precedent – fulfilment).

Agency – agent – estate agent – status of – not an agent *strictu sensu* – no authority generally given to bind the principal in a sale agreement

Katsande v *Rumani Real Estate (Pvt) Ltd & Ors* HH-96-09 (Makarau JP) (Judgment delivered 23 September 2009)

While it is legally correct that an estate agent and the seller of the property are in an agent-principal relationship, the Roman-Dutch Law of agency has since adopted the position that obtained in English Law, which places the estate agent in a position *sui generis*. An estate agent is not an agent *strictu sensu*, clothed with authority to transact fully on behalf of his principal. An estate agent is merely mandated to find a prospective purchaser of the seller's property. After accepting the mandate, he is under no obligation to find the purchaser and no action will lie against him for failing to find a purchaser or for finding a purchaser who will not eventually go through with the sale. After finding a prospective purchaser, he is not clothed with authority to bind his principal in the sale agreement. The appointment of an estate agent to find a purchaser for immovable property in return for a commission, without more, places the agent under no contractual obligations. The contract is merely a promise, binding upon the principal, to pay a sum of money upon the happening of a specified event. While the estate agent assumes no obligations under his contract with the seller of the property, equally, in this relationship *sui generis*, the seller is not obliged to accept any of the sellers that the estate agent may find. The seller is simply bound to pay the agent's commission where the agent does find a prospective buyer.
An estate agent may be authorised to conclude an agreement of sale on behalf of the seller, but such an authorization is not to be lightly inferred from vague and ambiguous language. The fact that an estate agent is authorised to accept payments for his commission before forwarding a draft agreement of sale to the seller cannot be construed as a grant of authority by the seller to the estate agent to conclude the sale agreement.
The clearest language that a seller can use to show that the estate agent has authority to conclude the agreement of sale is to specifically authorize the agent, in the seller's mandate, to sign the agreement of sale on behalf of the seller. Where the seller retains or reserves the right to sign the agreement of sale, that is the clearest language that the final word rests with the seller and the agent is but an estate agent.

Appeal – court's powers on appeal – appeal court's powers to substitute its discretion for that of the trial court – trial court erroneously failing to exercise discretion – facts not in dispute – appeal court entitled to interfere

Halwick Invstms v *Nyamwanza* S-48-09 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 19 November 2009)

The respondent was employed as a driver by the appellant company. An incident occurred which resulted in disciplinary proceedings being instituted against the respondent and the respondent being dismissed. He filed an appeal with the Labour Court, but shortly afterwards signed a document stating that he accepted a specified sum of money in full and final settlement of his claim or entitlement arising out of terminal benefits and that he confirmed that his acceptance of that sum

determined finally his claim and that he had no future or retrospective claims against the appellant of any nature whatsoever. In spite of signing this document, the respondent persisted with his appeal in the Labour Court, citing various alleged irregularities in the disciplinary hearing. At the hearing, the appellant raised the issue of the waiver, as well as disputing the irregularities. The Labour Court did not address the issue of the waiver; it only dealt with the alleged procedural irregularity and remitted the case for re-hearing. On appeal to the Supreme Court, the appellant argued, *inter alia*, that that the respondent had waived his right to appeal or to take on review the termination of his employment. It argued that, since the facts were common cause, the court could determine whether waiver had been established.

Held: (1) It is not permissible for an appellate court to interfere with the discretionary power vested in a lower court unless it is shown that the lower court had committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision. If the lower court erred in the exercise of its discretion, and if all the facts relevant thereto are undisputed, the appeal court would be free to exercise its own discretion. Here, the Labour Court failed to determine an issue that had been properly raised by the appellant. It completely ignored the issue of waiver raised and proceeded to determine the matter on the basis of procedural impropriety. It failed to appreciate that the question of waiver could finally determine the issues between the parties, depending on the interpretation that would be given to the agreement reached between the two sides. The contents of the agreement were not in dispute, so the only issue was whether the facts established waiver.

(2) Waiver occurs when one of the parties, by his words, actions or inaction, has evinced an intention not to enforce one or more or all of his rights under the contract. There is a presumption against waiver and that it must be clearly proved that the person who is alleged to have waived his rights knew what those rights were. Here, the respondent accepted payment of a sum of money in full and final settlement of any claims he may have had against the appellant. In so doing, he waived any right of action he may have had to challenge his dismissal. Having entered into this agreement he no longer had any rights to pursue. His decision to proceed with the appeal thereafter could only be described as dishonest.

Appeal – leave to execute pending appeal – order granting leave – not appealable

Edgars Stores Ltd v *Ramson (Pvt) Ltd & Ors* HB-110-09 (Ndou J) (Judgment delivered 5 November 2009)

The applicant sought a stay of execution pending an appeal noted at the High Court, Harare, against a decision of the magistrates court in Harare. The application was made to the High Court in Bulawayo. The first and second respondents had obtained a default judgment from the magistrates court for the eviction of the applicant from premises it occupied in Harare. The applicant sought rescission of the default judgment and a stay of execution ending appeal. The magistrate rejected the application, and the applicant appealed to the High Court, Harare. Two days later, the first and second respondents filed an application for execution pending appeal, which was granted. The applicant filed a notice of appeal against this judgment. Two issues were raised in the present application. The first was whether the High Court, Bulawayo, had jurisdiction, as the cause of action arose in Harare, and the affected premises were in Harare. The second was whether the filing of the notice of appeal suspended the magistrate's judgment granting leave to execute pending appeal. The applicant's argument was that, whilst an application for leave is, technically an interlocutory matter, once it is granted, its effect is final and as such the notice of appeal would serve to suspend that order as envisaged by the provisions of s 40(2)(b) of the Magistrates Court Act [*Chapter 7:10*].

Held: (1) there was no legal bar to the matter being heard by the High Court in Bulawayo. Under s 13 of the High Court Act [*Chapter 7:06*], the High Court has full original civil jurisdiction over all persons and over all matters within Zimbabwe. There is only one High Court, although some of its judges operate from Harare and others from Bulawayo.

(2) When leave to carry a judgment into execution under s 40(3) of the Magistrates Court Act has been granted by a magistrate, the appellant cannot take interdict proceedings against the execution of the judgment pending his appeal. The effect of the order sought by the applicant would be to reverse the order by the Harare magistrate even before the appeal was heard, which would render the hearing of the appeal academic. More importantly, an order granting leave to execute under s 40(3) is interlocutory and accordingly not appealable.

Appeal – Labour Court – appeal from – appeal on a "question of law" – what amounts to a "question of law" – when misdirection on facts may amount to a question of law

Mutsuta & Anor v *Cagar (Pvt) Ltd* S-47-09 (Sandura JA, Malaba DCJ & Cheda JA concurring) (Judgment delivered 11 November 2009)

In terms of s 92F(1) of the Labour Act [*Chapter 28:01*], an appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court. The term "question of law" is used in three distinct, though related, senses. First, it means a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. Second, it means a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors. A serious misdirection on the facts amounts to a misdirection in law. If an appeal is to be related to the facts, there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented.

Appeal – Labour Court — appeal limited to question of law – what is a question of law – question as to whether a document constituted a valid legal agreement – such issue a question of law – grounds on which Labour Court may set aside arbitral award – not limited to public policy grounds

Mbisva v *Rainbow Tourism Group Ltd* S-32-09 (Sandura JA, Ziyambi JA & Malaba JA concurring) (Judgment delivered 15 July 2009)

The appellant worked for the respondent hotel. Due to deteriorating working relationships between the parties, the hotel dismissed the appellant. Discussions were held with the appellant's trade union to determine a severance package, but no agreement was reached. Finally, the appellant, who needed money, signed a document entitled "Memorandum of Agreement" (MOA), whereby he agreed to accept a lump sum payment and to withdraw any claims he might have against the hotel. The appellant's legal practitioners then referred the matter of the appellant's dismissal to a labour officer, who, having failed to settle the dispute, referred the matter for compulsory arbitration, the questions for decision being whether the agreement was valid or not and what damages, if any, were payable to the appellant. The arbitrator concluded that the agreement was not valid. The hotel appealed to the Labour Court, which set aside the arbitrator's decision. The appellant appealed to the Supreme Court, the grounds of appeal being that the Labour Court should not have heard the matter, there being no point of law at issue; and in any event, should have decided the appeal purely on the question of whether the arbitrator's award offended against public policy, as enunciated in art 34 of the Schedule to the Arbitration Act [*Chapter 11:15*]; and that the MOA was not binding, being signed under duress.
Held: (1) in terms of s 98(10) of the Labour Act [*Chapter 28:01*] the right to appeal against an arbitrator's decision is restricted to questions of law only. The issue before the Labour Court was whether or not the memorandum was an agreement in terms of the law. That was a question of law in the sense of being a question of what the law is, and the matter was thus properly before the Labour Court.
(2) Article 34 of the Schedule to the Arbitration Act does not apply to an appeal against an arbitral award, brought to the Labour Court in terms of s 98(10) of the Labour Act. The Article only deals with and limits the power of the High Court to set aside an arbitral award, and does not in any way deal with or limit the power of the Labour Court to set aside an arbitral award challenged in terms of s 98(10) of the Labour Act. The Labour Court therefore did not have to be satisfied that the arbitral award was in conflict with the public policy of Zimbabwe before setting it aside.
(3) On the facts, the Labour Court found that the appellant did not sign the MOA under duress; and this matter, being a question of fact only, was not appealable.

Appeal – notice – validity – notice not complying with requirements of r 29 of Supreme Court Rules – notice fatally defective – course open to appellant

Hubert Davies Employees Trust (Pvt) Ltd & Ors v *Croco Hldgs (Pvt) Ltd* S-35-09 (Garwe JA, Malaba DCJ & Gwaunza JA concurring) (Judgment delivered 24 July 2009)

A notice of appeal which does not comply with the requirements of r 29 of the Supreme Court Rules 1964 is fatally defective. Unless the court is prepared to grant an application for an extension of time within which to comply with the relevant rule and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs.

Arbitration – award – setting aside of – allegation that award went beyond scope of submission to arbitration – no formal submission to arbitrator of specific issues to be decided – not going beyond scope of submission – allegation that award contrary to public policy – restrictive construction of what is contrary to public policy

Muchaka v *Zhanje & Anor* HH-68-09 (Patel J) (Judgment delivered 7 July 2009)

The applicant and the first respondent ran a business in partnership for approximately 2 to 3 years until a dispute arose between them. The applicant then instituted proceedings in the High Court, seeking an order dissolving the partnership and appointing a liquidator to realise the assets of the partnership, to liquidate its liabilities, to prepare a final account and to distribute the net assets of the partnership. The first respondent's lawyers proposed a possible settlement of the dispute, failing which the matter should be referred to arbitration. The applicant's lawyers rejected the proposed settlement and agreed to the referral of the matter to arbitration by the second respondent. There was no formal submission by the parties of the specific issues to be determined by the arbitrator. The arbitrator, having found that the applicant had not brought any assets into the partnership, proceeded to make his award. In essence, taking into account the first respondent's material contribution to the partnership, he awarded the remaining assets of the partnership in a manner that was more favourable to the first respondent. He also issued specific directions to the liquidator in drawing up the accounts of the partnership. Each party was ordered to bear its own costs in connection with the arbitration and each party was to pay half of the arbitration fee.

The applicant sought an order setting aside the award, arguing (a) that the arbitrator went beyond the issues referred to him for determination, as set out in the applicant's statement of claim, in that he proceeded to apportion the assets of the partnership as between the parties; (b) that in apportioning the assets, the arbitrator acted without the benefit of any valuation of the partnership assets or partnership accounts or submissions on apportionment and also disregarded the law of partnership. In so doing, he acted in a manner that was grossly unreasonable and therefore contrary to public policy.

Held: (1) the public policy argument under Article 34(2)(b)(ii) of the Model Law is to be restrictively construed so as to preserve and recognise the basic objective of finality in the arbitration process. An award cannot be held to be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law.

(2) Given that there was no formal submission by the parties of the specific issues to be determined by the arbitrator, it could not be said that the arbitrator dealt with a dispute not contemplated by or not falling within the submission to arbitration, or that his award contained decisions on matters beyond the scope of the submission to arbitration. The essential purpose of the reference to arbitration was to resolve the dispute between the parties as to the assets of the partnership and the respective rights and interests of the parties in those assets upon the dissolution of the partnership. Therefore, given that the partnership was not intended to continue but was to be dissolved, the apportionment of assets at that stage could not logically be contrary to the law of partnership.

Arbitration – award – setting aside of – by Labour Court on appeal under Labour Act [*Chapter 28:01*] – grounds on which Labour Court may set aside award – not limited to question of whether award offended against public policy

Mbisva v *Rainbow Tourism Group Ltd* S-32-09 (Sandura JA, Ziyambi JA & Malaba JA concurring) (Judgment delivered 15 July 2009)

See above, under APPEAL (Labour Court).

Bank – funds – funds in customer's account – ownership of – such funds not belonging to account holder

ZRA & Anor v *Murowa Diamonds (Pvt) Ltd* S-41-09 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 28 September 2009)

See below, under REVENUE AND PUBLIC FINANCE (Duty and value-added tax).

Church – constitution – interpretation of – whether voluntary association created – whether right to sue and be sued created

Christian Faith Tabernacle v *Sparrows Nest Ministries* HH-69-09 (Patel J) (Judgment delivered 7 July 2009)

The *locus standi* of a voluntary association derives from the provisions of its charter or constitution, either expressly or

impliedly. For the power to sue to be implied, it must be incidental to the express powers as being absolutely requisite for the due carrying out of the express objects of the association. The two principal characteristics of the capacity of a *universitas* to sue are perpetual succession, viz. continued existence or identity of the association despite changes in its membership, and the capacity to acquire rights and incur obligations independently of its members, in particular, the capacity to own property. Where the constitution of a church showed that the membership of the church was open to all persons meeting the prescribed spiritual qualifications and that the composition of its executive body was subject to change under specified circumstances, this clearly demonstrated the separate existence or identity of the church, notwithstanding changes in its leadership or general membership. Where the constitution endowed the church with the capacity to do everything necessary to effectuate its objectives, including by implication the power to advance and protect its property rights, the power to sue must perforce be implied as being necessarily incidental to its express powers for the due carrying out of its express objects. The biblical injunction against recourse to temporal as opposed to spiritual authority cannot be invoked in the realm of human affairs to preclude the administration and application of the general law through the secular courts. This is so particularly where the issues that call for resolution centre on proprietary interests and their assertion in the material world.

Company – director – managing director – authority – ostensible authority to enter into contract – when can be presumed by person contracting with company

Chikumbu v *Bryden Technical Svcs (Pvt) Ltd* HH-93-09 (Chitakunye J) (Judgment delivered 9 September 2009)

The first respondent, by resolution of its board of directors, resolved to sell a property it owned, with a view to using the proceeds to buy another one instead and resolved to appoint a particular firm of estate agents to sell the property. The first respondent's managing director gave further instructions to the estate agents in furtherance of the resolution. The applicant made an offer to the estate agents. The offer letter was faxed to the managing director, who signed it and returned it to the estate agents. A few days later, he signed a special power of attorney, authorising a firm of legal practitioners to sign all the necessary papers to conclude the sale and effect transfer. The agreement of sale was duly signed by the applicant and a partner in the firm of legal practitioners and two days later the purchase price was transferred to the first respondent. The day after that, the managing director wrote to the estate agents, purporting to cancel the sale on the grounds that, due to hyper-inflation, the price of the replacement property had gone up substantially. A few days later, the company, through its legal practitioners, wrote to the firm that had facilitated the sale, stating that the managing director had not been authorised to act as he did.

The applicant sought an order to enforce the sale. His position was that that the agreement of sale he entered into was valid and should be enforced. The first respondent contended that it did not see the applicant's irrevocable offer letter and acceptance and it therefore did not accept his offer. In any case, the managing director, who was alleged to have seen the irrevocable offer letter and to have proceeded to sign it, had no authority to negotiate the purchase price.

Held: the first respondent, being a legal *persona*, had to act through its agents, in this case the board of directors. The company's intention to sell the property was known through the resolution made by the board of directors. The company authorised the managing director to instruct the estate agents. That director was clothed with the general powers of a managing director of a company. Anyone dealing with him would be entitled to assume he had all the powers and mandate of a managing director. He was a high ranking agent of the company endowed with enormous powers befitting a managing director. Any person dealing with him was entitled to assume that he had the apparent authority to contract on behalf of the company which is generally available to all managing directors of similar companies. When a person is appointed to a certain position or post, the principal represents by such that that person has such powers as other persons holding similar positions in companies dealing in similar business. These powers included the power to enter into contracts on behalf of the company. The issue of him not having been specifically authorized to deal with the details of the agreement of sale could not vitiate a contract which he lawfully entered into on behalf of the company. Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and that one is not bound to inquire whether acts of internal management have been regular. This rule renders proof by the company that the internal formalities have not been complied with insufficient to enable it to escape liability under the contract. In this country, s 12 of the Companies Act [*Chapter 24:03*] makes it clear that the company was estopped from denying that the managing director had the necessary authority to sign the irrevocable offer letter and to negotiate the price when, from its own admission, he had been authorized to instruct the estate agents to dispose of the property. Accordingly, the contract would be enforced.

Company – name – changing of – application to compel company to change its name – grounds for such application – who may make application – no need to show that use of name amounts to passing off

Company – name – registration of company name – Registrar's decision – procedure for impugning such decision

Southbay Real Estate (Pvt) Ltd v *Southbay Properties (Pvt) Ltd & Ors* HH-150-09 (Makarau JP) (Judgment delivered 25 November 2009)

Once the Registrar of Companies makes a decision to register a name in terms of the Companies Act [*Chapter 24:03*], such an exercise, being a juristic act, cannot be impugned by the High Court save by way of an appeal in terms of s 24(11) of the Act or by way of review at common law. The registration of names in terms of the Act is a function in the exclusive discretion of the Registrar, such discretion to be exercised not only in terms of the guidelines set out in the Act but also judiciously. It is thus a quasi-judicial exercise that confers not only corporate status on the company so registered, but also creates a new legal *persona*.

The principles of the law of passing off are well settled. They seek to protect business from unfair competition where one business entity seeks to feather its nest from the goodwill and reputation built up by the plaintiff business enterprise through confusing the public. The public must be misled to such an extent that they mistake one business venture for the other and take away the business of the reputation holder to the imposter.

The statutory remedy of compelling a competitor company to change its name under s 24 of the Act is akin to, but not the same as, the delict of passing off. The right to protect a name under the delict of passing off arises only when the name has acquired a reputation. Under the statute, all that the applicant needs to prove is that the respondent's name is likely to mislead the public or gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public or is likely to cause damage to any other person. Such an applicant need not prove that it has a reputation or goodwill or a clientele that will be confused by the similarities in names. The emphasis of the section is the protection of the public from being misled, rather than the protection of the applicant company's good name and business against competition. This approach is confirmed by s 24(13), which gives the right to *any* person to approach the court to compel a change of name on the grounds listed in the section. A member of the public thus could approach the court under the section. It would be absurd to require such an applicant to satisfy the requirements of a passing off action by showing that he has a reputation or goodwill to protect. The section is primarily enacted for the protection of the public. Thus, if it is proved that the public is likely to be misled, the application to compel the respondent should succeed even if the respondent has no intention of engaging the public.

Constitutional law – Constitution of Zimbabwe 1980 – s 16(9b) – protection given to investors under international treaties – investment in rural land – acquisition of rural land under s 16B – whether s 16B overrides provisions of s 16(9b)

Route Toute BV & Ors v *Min of National Security & Ors* HH-128-09 (Patel J) (Judgment delivered 17 November 2009)

The applicant was a business corporation registered in the Netherlands. The other three applicants were commercial farming entities registered in Zimbabwe. The applicants together, directly or indirectly, were the registered owners and leaseholders of a farm. On 21 January 2005, the first respondent published a preliminary notice of his intention to acquire the farm for resettlement purposes. On 10 June 2005, he issued an acquisition order compulsorily acquiring the farm. On 8 August 2006, the first respondent caused to be delivered a notice of eviction upon the applicants. It was served on a director of the third applicant at the farm, not at the company's registered office. Subsequently, an arrangement was negotiated between the parties not to enforce the eviction of the applicants. Nevertheless, on 8 November 2006, the third respondent, a general in the army, arrived to occupy the farm on the strength of the earlier notice of eviction and a letter of offer dated 11 July 2006, which he had received from the first respondent. The applicants sought to enforce their ownership and leasehold rights in the farm. They claimed protection against compulsory acquisition by virtue of two separate bilateral treaties concluded by the Government of Zimbabwe with the Governments of the Netherlands and Malaysia. Six issues arose for determination: (1) whether the farm had been duly acquired by the State in terms of s 16B of the Constitution; (2) the effect of the notice of eviction served upon the applicants and whether the applicants were entitled to continue in occupation until evicted by order of a competent court; (3) the effect of the letter of offer given to the third respondent and whether this letter conferred any right of occupation before the current occupier vacated the farm or was duly evicted by a court order or otherwise; (4) whether the applicants' rights and interests in the farm constituted "investments" within the meaning of the relevant bilateral treaties; (5) the effect of the relevant bilateral treaties within the domestic legal system and their enforceability at the national level; and (6) the interrelationship between ss 16(9b) and 16B of the Constitution of

Zimbabwe and whether or not and the extent to which the former has been overridden by the latter.
Held: (1) The critical requisites for the application of s 16B(2)(a) of the Constitution were (a) that the land in question was identified as being required for resettlement purposes on or before 8 July 2005 in the *Gazette* under s 5(1) of the Land Acquisition Act and (b)that it was itemised as such in Schedule 7 to the Constitution. The question of compliance with all the requirements of s 5(1) of the Act did not arise for the purposes of acquisition of agricultural land and the vesting of title thereto in the State in terms of s 16B of the Constitution. Both requisites had been met and accordingly, *prima facie*, the farm had been duly acquired by and vested in the State in terms of s 16B(2)(a).
(2) The eviction notice was invalid. By virtue of s 16B(3) as read with subs (6), Parliament specifically contemplated the enactment of legislation dealing with the criminal prosecution and eviction of unlawful possessors or occupiers of State land. As a matter of principle, where the Constitution enjoins that anything should be done by or under statute, then that is the manner in which that thing should be done. In the absence of such legislation, the State cannot resort to any other non-statutory basis for evicting a recalcitrant occupier.
(3) Section 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] was clearly designed to address the issue of eviction. It specifically provides for the prosecution and conviction of any person who continues to hold, use or occupy gazetted land after the stipulated period and for the eviction of such person upon conviction. What this meant was that the applicants were at large to remain in occupation of the farm and could not be evicted therefrom except by due process, viz. by order of court after prosecution and conviction in terms of s 3 of the Act.
(4) The letter of offer, as defined by statute, merely constitutes an offer by the State to allocate to the third respondent the piece of land described in the letter. It did not *per se* confer any proprietary rights of use or occupation without due process. The third respondent could not rely on the letter to enter or occupy the farm until the applicants have been duly evicted by court order issued in terms of s 3 of the Gazetted Lands (Consequential Provisions) Act. He could not resort to self-help in order to obtain vacant possession.
(5) There was little doubt that the first applicant was a "national" within the meaning of the Netherlands Agreement and an "investor" within the meaning of the Malaysia Agreement. It was equally clear that the first applicant's rights and interests in the farm as well as those of its subsidiary companies, i.e. the other three applicants, constituted "investments" within the meaning of both Agreements. The position in most Commonwealth jurisdictions is that customary international law is generally regarded as having been internally incorporated insofar as it is not inconsistent with statute law and judicial precedent. In contrast, the internal reception of treaty law is perceived as standing on an entirely different footing. A treaty does not form part of the domestic law except by virtue of enabling legislation. Thus, the mere ratification of a treaty does not serve to incorporate its provisions into domestic law. What is required for that purpose is Parliamentary intervention in the shape of legislation clearly designed to transform the relevant treaty provisions into rules of national law. The common law position has been specifically codified and embodied in the Constitution, in s 111B. Both the Netherlands and Malaysia Agreements were approved by Parliament and ratified by the President in conformity with s 111B(1) of the Constitution. However, they have not been directly incorporated by or under an Act of Parliament so as to form part of the law of Zimbabwe. In any event, s 16(9b) of the Constitution was specifically enacted in December 1996 to protect and safeguard proprietary rights and obligations created under multilateral and bilateral treaties. Whether or not investment protection treaties can properly be regarded as having been incorporated into our domestic law, the courts of Zimbabwe are bound to give effect to the terms of such treaties in accordance with the constitutional guarantee afforded by s 16(9b).
(6) The amendments to s 16 of the Constitution were inconsistent with the international standards embodied in prevailing investment protection treaties governing the form, nature and justiciability of compensation in the event of expropriation. Section 16(9b) of the Constitution was introduced in 1996 with the specific policy objective of preserving pre-existing international norms notwithstanding the diminution of those norms in s 16(1). Section 16(9b) confers a greater degree of protection against expropriation in favour of foreign investors in contradistinction to local nationals whose rights and interests are governed by the lower standards of protection contained in s 16(1). The provisions of s 16B(2) clearly conflict with the objectives underlying s 16(9b) in several material respects: the act of expropriation itself is explicitly declared to be unchallengeable before any court, contrary to the due process requirements of investment protection treaties; no compensation is payable for agricultural land in respect of the land itself; and the standards of compensation (for improvements only), viz. fair compensation within a reasonable time, are clearly inconsistent with the compensatory norms recognised and applied under prevailing investment protection treaties. Applying the maxim *lex posterior priori derogat* or, as it is otherwise stated, *leges posteriores priores contrarias abrogant*, the later s 16B must be construed to take precedence and prevail over the earlier s 16(9b) to the extent that the latter is inconsistent with the former. On the other hand, s 16B is couched in very general and all-embracing terms, whereas s 16(9b) is specific in its scope of application to property rights protected by international treaties that are binding upon Zimbabwe. Having regard to the maxim *generalia specialibus non derogant*, it is perfectly permissible to construe the later general provisions of s 16B as not derogating from the prior special provisions of s 16(9b). There is a general presumption against the extinction or diminution of pre-existing fundamental or substantive rights. The abridgement of s 16(9b) and the diminution of the rights protected by that provision would involve a violation of Zimbabwe's obligations at international law. There would thus be a contradiction between our

domestic law and the State's international obligations, although that does not necessarily negate or invalidate the conflicting domestic law. In interpreting and applying the domestic law the courts cannot entirely disregard international law and the obligations of the State thereunder. In enacting domestic legislation Parliament is presumed to be aware of the State's solemn undertakings at the international level and to have legislated without intending to extinguish or diminish rights vested under international law.
Under s 52(1), any amendment of the Constitution must be made in explicit terms. Section 16B specifically mentions ss 16(1), 18(1) and 18(9) as not applying in relation to land acquired under s 16B(2), but does not make any express reference to the provisions of s 16(9b). It would then follow that s 16B does not operate to amend, override or detract from the provisions of s 16(9b).

Editor's note: the learned judge, after being referred to *Nyahondo Farm (Pvt) Ltd* v *Tapfumaneyi & Ors* SC 176/08, concluded he was bound by the Supreme Court's ruling that s 16B did override s 16(9b). Regrettably, that judgment was not made available to him (he had to rely on counsel's submissions), nor has it yet been received by the Editor of these summaries.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – referral of alleged contravention of Declaration of Rights to Supreme Court – question arising during proceedings in a lower court – application must be made under s 24(2) – not permissible to proceed under s 24(1)

MDC & Ors v *Judge President & Anor* S-55-09 (Sandura JA, Chidyausiku CJ, Malaba JA, Gwaunza JA & Garwe JA concurring) (Decision handed down 17 May 2007, but reasons not handed down until late 2009)

The applicant political party had notified the police of its intention to hold a party rally. The police officer concerned purported to prohibit the rally. The applicant obtained a court order restraining the police officer, the Commissioner of Police and the Minister of Home Affairs from prohibiting, disrupting or interfering in any way with the applicant's rally. The order was served on all the respondents. In spite of this, the police officer went to the rally venue, prevented the rally from taking place and public tore up his copy of the court order. The applicant filed an urgent chamber application with the High Court, seeking to have the respondents committed for contempt of court. The judge declined to hear the application on the grounds that the rules of court required that the application should have been in the form of a court application. The applicant brought an urgent application to the Supreme Court in terms of s 24(1) of the Constitution, claiming that its rights to the protection of the law had been denied by the High Court through its rigid adherence by the court to the rule of court. The second respondent argued that the application was not properly before the Supreme Court because the issue for determination should not have been brought in terms of s 24(1), but should have been referred by the High Court in terms of s 24(2).
Held: the question as to whether the applicants had been denied the effective protection of the law arose in proceedings in the High Court. Although the judge had declined to hear the urgent chamber application, the proceedings were in the High Court when the question arose. Accordingly, the applicants should have proceeded in terms of s 24(2) and requested the judge *a quo* to refer the constitutional question to the Supreme Court. Having failed to do that, the applicants were barred by s 24(3) from proceeding in terms of s 24(1).

Constitutional law – Minister – authority of – duty to exercise general direction and control over Ministry – does not empower Minister to assume powers not specifically granted by statute – Cabinet authority and directives – not having force of law – Minister not entitled to act in terms of Act not assigned to him

B-Sky Energy (Pvt) Ltd v *Min of Energy & Anor* HH-104-09 (Bhunu J) (Judgment delivered 8 October 2009)

The second respondent, an official in the Ministry of Energy, prevented the applicant from importing a load of diesel fuel into the country. The reasons given were that the sulphur content was above the standards determined for Zimbabwe. His actions were subsequently supported by the first respondent, the responsible Minister. The applicant was one out 15 importers of fuel of the same quality, which came from the same source in South Africa, but the other importers were not prevented from importing their consignments. In justifying his actions, the Minister claimed that he was exercising his constitutional mandate to give general direction and control over his Ministry and departments in terms of s 31D of the Constitution. He also claimed cabinet authority and directives as justification of his conduct. Finally, he sought to argue that as a government Minister he placed the embargo on the diesel in the public interest because it constituted a harmful substance in terms of the Environment Management Act [*Chapter 20:27*].
Held: (1) While it was correct for the Minister to say that, as the minister, he had a constitutional duty to exercise general direction and control over his Ministry or departments, that constitutional mandate must be exercised within the strictest

confines of the law. It cannot and must not be used as a vehicle to act outside those confines. All administrative powers (other than those exercised by domestic tribunals) derive from statute and the nature and extent of those powers are to be found in the statutory provisions whereby these powers have been granted. Such powers are not unlimited. The legislature gives power for specific purpose only, or subject to special procedures or with some other kinds of limits. The exercise of a power by an administrative official or body will be invalid unless the official or body is authorized to exercise that power. If an administrator purports to exercise a power he does not have or acts in excess of a power he possesses, his action will be invalid on the basis that it is *ultra vires.*
(2) The Minister's resort to cabinet authority and directives as justification of his unlawful conduct was equally misplaced and without merit because the cabinet has no legislative authority. Laws are made in Parliament and not in cabinet.
(3) The Environmental Management Act defines "Minister" as the minister of Environment and Tourism or any other minister to whom the President, may from time to time, assign the administration of the Act. As the first respondent was not the Minister of Environment and Tourism, nor had the administration of the Act been assigned to him, his conduct in assuming responsibility over the Act without presidential authority was unconstitutional and unlawful. In any event, neither the Act nor regulations made under it authorized any minister to place an embargo on any fuel on the basis that its specifications constituted a hazardous substance or was harmful to motor vehicles.
(4) Although the second respondent was acting in the course of duty as a civil servant, he was not entitled to act unlawfully. A civil servant who acts unlawfully in the course of duty attracts personal liability for the simple reason that he is not employed to discharge his duties contrary to law. He could therefore not object to being sued in his personal capacity.

Contract – condition precedent – fulfilment – whether must be fulfilled *in forma specifica* – intention of parties as expressed in agreement

Runatsa v *Rumani Estates (Pvt) Ltd & Ors* S-54-09 (Sandura JA, Chidyausiku CJ & Ziyambi JA concurring) (Judgment delivered 3 November 2009)

The first respondent and the appellant signed an agreement for the sale by the first respondent to the appellant of a piece of land. The agreement provided that the effective date of the agreement would be the date of payment of the deposit by the purchaser and that the purchase price was payable on the signing of the agreement. The appellant did not pay the purchase price immediately as stipulated; instead, she approached the estate agent who had negotiated the agreement and requested to pay in two instalments. The estate agent agreed to this and the appellant paid the two instalments. She was then informed that the first respondent had cancelled the agreement and sold the property to the third respondent. The appellant sought an order compelling the first respondent to transfer the property to her. The application was dismissed and the appellant appealed.
Held: (1) the clause which deferred the commencement of the operation of the agreement until the date of the payment of the "deposit" (by which the parties must have meant the purchase price) by the appellant introduced a condition precedent (which is also known as a suspensive condition) into the agreement. The condition precedent to the coming into operation of the agreement was that the appellant paid the full purchase price to the seller's estate agents on the date of the signing of the agreement.
(2) The essential question was whether the condition precedent was to be fulfilled in *forma specifica*, i.e. in the exact manner stated by the parties in the agreement, or *per aequipollens*, that is to say, in some equivalent manner. The answer depended upon the intention of the parties as expressed in the agreement. There could be no doubt that the language used was plain and that, therefore, the condition precedent had to be fulfilled *in forma specifica* before the agreement came into effect.
(3) The conclusion of a sale agreement on behalf of a prospective seller is not part of an estate agent's business, unless the estate agent is instructed by the prospective seller to conclude the sale agreement on his behalf. An estate agent does not have the power or authority, in the usual course of his business as an estate agent, to amend an agreement concluded by a prospective seller and a prospective purchaser unless instructed to do so by the parties to the agreement.
(4) Consequently, the condition precedent was not fulfilled, and the agreement did not come into operation.

Contract – formation – offer – acceptance – offer not specifying how acceptance to be made – any conduct consistent with acceptance sufficient to create *vinculum juris*

Antonio & Ors v *Ashanti Goldfields Zimbabwe Ltd & Anor* HH-135-09 (Makarau JP) (Judgment delivered 18 November 2009)

The defendant company, after a long period of negotiation and discussion, issued a document to the three plaintiffs (among others), in which it stated that it agreed "to dispose of its housing units … to its employees who are sitting tenants effective 1 December 2003. Find the agreed prices attached". On various dates thereafter, but commencing around 9 December 2003, the defendant and its employees entered into several lease agreements in respect of the housing units that the employees were occupying. Deductions were thereafter effected against the salaries of the employees. The employees contended that such were in fulfilment of the agreement of sale concluded on 1 December 2003. The defendant, on the other hand, contended that these were rentals deducted in fulfilment of the lease agreements concluded by each of the employees in respect of the housing unit they were occupying. Failing to reach agreement on whether the employees had purchased the housing units or were renting them from the defendant, a number of suits were filed, the plaintiffs seeking orders declaring the sale agreements to be binding and compelling the defendant to transfer the various properties to them. The defendant argued that no sale agreement had been reached. The plaintiffs contend that they accepted the offer to purchase their respective housing units by completing the lease agreements which they understood to be vehicles to finance the payment of the purchase price in instalments.
Held: An offer is a proposal by the offeror made with the intention that by its mere acceptance, a contract shall form. The proposal, objectively construed, must be intended to create binding legal relations and must have so appeared to the offeree. As a general rule a contract is not concluded until the offeree has not only decided in his mind to accept the offer, but has communicated his acceptance to the offeror. Where the offer is silent as to how the offer is to be accepted, any conduct on the part of the offeree, by deed or by word, that is consistent with acceptance of the offer and which conduct or word is brought to the attention of the offeror and is also understood by the offeror as an acceptance of the offer is sufficient to create the requisite *vinculum juris* between the parties. *In casu*, the agreement of 1December 2003 was silent as to what the employees needed to do to accept the offer. Had each employee named in the agreement tendered the full purchase price of his respective unit to the defendant, a binding agreement of sale would have been created. The plaintiffs' understanding that the lease agreements were part of the process of disposing of the houses to them was more probable than the defendant's contention that this was a new stand alone agreement. The plaintiffs made various monthly payments to the defendant (which payments were accepted as part payment of the purchase price) in reduction of the agreed purchase price of their respective units. This was sufficient communication of the acceptance of the offer.

Contract – illegality – contract agreement understating purchase price so as to avoid tax and stamp duty – contract otherwise genuine and mostly carried out – court entitled to declare true purchase price so as to reflect true agreement

Sibanda v *Nyathi & Ors* HB-94-09 (Kamocha J) (Judgment delivered 17 September 2009)

The first and second respondents sold a house to the applicant. The price stated in the agreement of sale was Z$70 million, but it was also agreed that the total price to be paid was Z$130 million, including the transfer fees. The applicant paid this larger sum, over an agreed period, and moved into the house. The respondents subsequently tried to have the sale set aside on the grounds that the agreement of sale that applicant sought to rely on was *contra legem* and was *ipso facto* unenforceable. They contended that it was entered into and signed solely for the purpose of reducing capital gains tax and stamp duty and that what the parties had concluded was an illegal contract which was void or at least voidable at law.
Held: an agreement concluded for the sole purpose of avoiding payment of the capital gains tax and stamp duty is illegal and *ipso facto* null and void *ab initio*: s 44 of the Stamp Duties Act [*Chapter 23:09*]. An illegal agreement which has not yet been performed, either in whole or in part, will never be enforced by the courts. Here, however, the agreement of sale was almost complete. It had been performed in part, as the applicant had paid the purchase price and was given vacant possession of the house. The sale was a genuine one and could not have been made for the sole purpose of evading payment of tax. What was illegal in the agreement of sale was the portion where the parties stated the purchase price. The court was at liberty to properly declare to true purchase price so as to reflect the true agreement between the parties.

Contract – interpretation – intention of parties – plain language of agreement – plain language indicating manner of fulfilment of condition precedent

Runatsa v *Rumani Estates (Pvt) Ltd & Ors* S-54-09 (Sandura JA, Chidyausiku CJ & Ziyambi JA concurring) (Judgment delivered 3 November 2009)

See above, under CONTRACT (Condition precedent – fulfilment).

Contract – performance – impossibility – when a party may be relieved of his obligations on grounds of impossibility – temporary impossibility – does not override obligation to perform contractual duties

Mutangadura v *T S Timber Building Supplies* HH-146-09 (Patel J) (Judgment delivered 24 November 2009)

The plaintiff ordered various building supplies from the defendant. Included in his order, which the defendant said could be supplied, was a large quantity of cement. The plaintiff paid the agreed price. The rest of the order was in due course delivered, but the cement was not. The defendant claimed that it was unable to supply the cement, as its own supplier was not able to make the cement due a shortage of a vital raw ingredient. The plaintiff sued for specific performance. The defendant offered to refund the purchase price, but because of the rate of inflation, the plaintiff rejected the offer. The plaintiff then borrowed the required quantity of cement from another supplier. He sued the defendant for the delivery of an equivalent quantity of cement, alternatively, for damages to the value of the current market rate of the cement. The defendant pleaded impossibility.
Held: (1) a party to a binding agreement has the right to demand from the other party, as far as it is possible, performance of his undertaking in terms of the contract where he is in a position to do so. Such specific performance can only be avoided in compelling circumstances. The onus lies on the party seeking to avoid the contract to establish the facts and circumstances justifying the court's exercise of its discretion to refuse specific performance.
(2) If a supervening physical or legal factor renders the performance of a contract impossible through no fault of the debtor, the obligations of the parties under the contract are thereby extinguished and cannot be enforced. However, this general rule does not override the terms of the implications of the contract. The court must have regard to, *inter alia*, the nature and circumstances of the contract and the nature of the impossibility that is relied upon. If, for instance, it is ascertained that the parties contemplated the situation that gives rise to the impossibility and accepted the risk of the supervening event, the general rule does not apply and the parties are bound to perform their contract.
(3) Another situation where the general rule does not override the obligation of the parties to is where a party is only temporarily disabled from fulfilling his contractual obligations, in contradistinction to the position where the contract becomes finally and completely impossible of performance.
(4) On the evidence, there was nothing to indicate that the non-availability of the raw ingredient was permanent and irreversible. Cement was available on the market when the contract was concluded and again became available a couple of months later.
(5) On the quantum of damages, the plaintiff 's entitlement to damages must entail him being placed in the position he would have been in but for the defendant's breach of contract. He should be put in a position to purchase the cement that he required at the current minimum market price in order to meet his obligation to replace the cement that he had borrowed. He was therefore entitled to the measure of damages that he claimed in the alternative.

Contract – waiver – what is – what party alleging waiver must show

Halwick Invstms v *Nyamwanza* S-48-09 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 19 November 2009)

See above, under APPEAL (Court's powers on appeal).

Court – High Court – jurisdiction – civil matter arising in Harare – High Court, Bulawayo, having jurisdiction over the matter

Edgars Stores Ltd v *Ramson (Pvt) Ltd & Ors* HB-110-09 (Ndou J) (Judgment delivered 5 November 2009)

See above, under APPEAL (Leave to execute pending appeal).

Courts – judicial officer – recusal – application for – need for formal written application to be made – recusal – principles – objective test applicable – irrelevance of judge's subjective view that he would not be biased

Diocesan Trustees, Diocese of Harare v *Church of the Province of Central Africa* HH-166-09 (Hlatshwayo J) (Judgment delivered 24 July 2009)

A formal written application should be made for the recusal of a judicial officer. A formal application is necessary, because certain issues raised informally in the preliminary stages of a recusal request could have fallen away and more pertinent points assumed prominence. The formal application, like pleadings, "fixes" or joins issues, so that the proceedings do not become a snowballing roller-coaster of complaints and allegations.

Although the judge's own subjective belief that he would not be biased is increasingly regarded as irrelevant, the application itself should be *bona fide*. A mere suspicion of bias is not enough. The fact that the judge indicated the desirability of the parties reaching a settlement is not proof of bias.

A judge should disqualify himself from participating in any proceedings in which he is unable to decide the matter impartially or in which it may appear to a reasonable observer that he is unable to decide the matter impartially. There still exists a tension – which should not be ignored – between acceding too readily to requests for recusal, on the one hand, and the duty to sit where one is not disqualified on the other. The judge's duty to sit where he is not disqualified is as compelling as the duty not to sit where he is disqualified.

Criminal law – offences under Criminal Code – indecent assault – aggravated indecent assault – act involving penetration of the body of another male – placing of penis into buttocks of complainant – an act involving penetration – Criminal Law Code [*Chapter 9:23*] – s 66(1)(a)

S v *Tapindwa* HB-97-09 (Kamocha J) (judgment delivered 22 September 2009)

The appellant, a male aged 21 years, pleaded guilty to two counts of aggravated indecent assault, in contravention of s 66(1)(a) of the Criminal Law Code [*Chapter 9:23*]. The section penalises a male person who commits upon a male person anal sexual intercourse or any other act involving the penetration of any part of the other male person's body. The complainants were boys aged 9 and 10 years, respectively. The agreed facts were that the appellant took each of the complainants and made him lie facing downwards, with his trousers at knee level, and that the appellant inserted his penis between the complainant's buttocks. In respect of one complainant, the appellant forced the boy to suck the appellant's penis. It was argued on the appellant's behalf that penetration had not been proved.

Held: In each case the appellant inserted his penis into the complainant's buttocks, thereby penetrating each complainant's body. In the first count he also penetrated the complainant's mouth. The very fact that he inserted his penis into the complainant's buttocks suffices to constitute the offence of aggravated indecent assault. It was immaterial whether or not he went through sexual motions and completed his purpose. It was also irrelevant whether or not penetration was vertical or horizontal. Similarly, it was also immaterial whether or not he went through sexual motions and completed his purpose when he penetrated the complainant's mouth.

Criminal law – offences under Criminal Code – unlawful entry into premises followed by theft of property therefrom – how should be charged – not competent to convict of theft if person charged only with unlawfully entering premises – theft may nonetheless be taken into account in assessing sentence – Criminal Law (Codification and Reform) Act [*Chapter 9:23*] – s 131

S v *Chirinda & Ors* HH-87-09 (Uchena J) (Judgment delivered 29 July 2009)

Section 131(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code) enacts the crime of unlawful entry into premises. The essential elements of the crime are an intentional entry into premises without the authority of the lawful occupier or other lawful authority. The crime is aggravated by the fact that the accused person stole property from the premises or caused damage or destruction to property. The section does not create an offence of unlawful entry and theft, so the accused cannot be convicted of unlawful entry *and* theft, even if the facts establish that he stole from the premises he unlawfully entered. The elements of theft need not be canvassed as they would for purposes of

securing a conviction for theft. The stealing of property can merely be mentioned in the agreed facts or the State outline, or in the prosecutor's address in aggravation.
An accused person who steals from the premises he unlawfully enters must be charged with contravening s 131(1)(a) of the Code for unlawful entry. He can also be charged for contravening s 113(1) of the Code for stealing from those premises if the State hopes the court may impose a stiffer sentence if the accused is charged with both offences. However, once the details of the theft have been used as an aggravating factor for the unlawful entry charge, they cannot again be used to punish the convicted person on a theft charge, as that would amount to punishing the convicted person twice for the theft which will have been taken into account in sentencing him for unlawful entry. The sentence for an unlawful entry which is accompanied by theft of property from the premises will in most cases be the same as that which would be imposed if the convicted person is convicted of unlawful entry as defined in s 131(1) and theft as defined in s 113(1) of the Code.
A simple unlawful entry not accompanied by theft, destruction or damage and not aggravated by the circumstances mentioned in subs (2) should charged under s 131(1)(b), which provides for a lower sentence than a charge under s 131(1)(a).

Criminal procedure – bail – evidence which court may take into account – documents from police docket relied on by prosecutor – need not be produced unless court requires their production – accused not entitled to have access to such documents

A-G v *Mpanga-Nhachi* S-40-09 (Sandura JA, in Chambers) (Judgment delivered 15 September 2009)

Bail proceedings are different from proceedings in a criminal trial. In bail proceedings the court has a wide range of information, including hearsay evidence, as the basis on which to determine whether or not to grant bail to the accused. In terms of s 117A(4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the court may consider evidence on oath, including hearsay evidence; affidavits and written reports which may be tendered by the prosecution or the defence; written statements made by the prosecutor, the accused or his legal representative; and statements not on oath made by the accused. The court may require the prosecutor or the accused to adduce evidence. If the court does not do so, the prosecutor is not obliged to produce any report he is relying on. In any event, under s 117A(10), assuming the report is part of the police docket, unless the Attorney-General directed otherwise, the defence is not entitled to have access to the report in the bail proceedings although they would be entitled to it for the purposes of his trial.

Criminal procedure – defence outline – defence outline inadequate – Attorney-General not entitled to apply for outline to be struck out – late filing of defence outline – Attorney-General's remedies

S v *Bennett* HH-138-09 (Bhunu J) (Judgment delivered 11 November 2009)

Where an accused person is committed for trial in terms of s 66(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a notice is served on him in terms of s 66(6) requesting him to give an outline of his defence to the charge and a list of the witnesses he proposes to call, together with a summary of the evidence which each witness will give. Where the accused is represented by a legal practitioner, s 66(8) requires the legal practitioner to supply this information to the Attorney-General at least three working days before the trial date. Failure by the accused to supply an adequate outline does not entitle the Attorney-General to apply for the striking out of the defence outline. It simply places the accused at the risk that the court may, in terms of s 67(2), draw such inferences from the failure as appear proper and that the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused. Similarly, failing to supply the information by the stipulated time would not give rise to the striking out of the defence outline. It would simply entitle the Attorney General to an extension of time to consider the defence outline.

Criminal procedure – mental disorder – accused found to be suffering from mental disorder at time of commission of crime – special verdict – courses open to court after returning special verdict

S v *K (a juvenile)* HH-149-09 (Uchena J) (Judgment delivered 20 November 2009)

The effect of s 229 of the Criminal Law Code [*Chapter 9:23*] is that if an accused person is proved to have committed the acts constituting the crime charged, but is also proved to have been suffering from a mental disorder or defect at the time of committing the offence, which mental disorder or defect constitutes a complete defence in terms of s 227 of the Code, he must in terms of s 29(2) of the Mental Health Act [*Chapter 15:12*] be found not guilty because of insanity, and be dealt with in terms of the options provided in subss (a) to (c) of that section. Section 229 of the Code applies to Part V of the Code,

which comprises ss 226 to 229. However, s 29(2) of the Mental Health Act, which provides for a special verdict, refers to s 248 of the Code as being the section which provides for a mental disorder or defect being a complete defence. Section 248 actually provides for consent to medical treatment for none-therapeutic purposes. It is therefore not the provision intended by the legislature in s 29(2) of the Mental Health Act. The legislature clearly intended to refer to a section of the Code which provides for a mental disorder or defect being a complete defence, that section being s 227. A wrong section was referred to in s 29(2) of the Mental Health Act. As to whether the court can substitute s 248 of the Code with s 227 of the Code, in s 29(2) of the Mental Health Act, the court can do so, as the intention of the legislature is clear, and reference to s 248 was an obvious error. In interpreting a statute, the court must be guided by the clear intention of the legislature. When the words used by the legislature create an absurdity they can be modified to bring out the clear intention of the legislature.
Having returned a special verdict, the court has three options under s 29(2): (a) if the accused person still needs to be mentally examined or to be treated, he has to be returned to prison where he will be transferred to an institution or special institution for examination or treatment; (b) If the offence the accused person was facing and for which a special verdict has been returned was one for which the accused could not have been sentenced to imprisonment or a fine exceeding level three, then the accused can be released to be dealt with in terms of s 29(2)(b); (c) if the court is satisfied that the accused is no longer mentally disordered or intellectually handicapped or is otherwise fit to be discharged, it can order his discharge.
If (a) is applicable, the condition of a prison does not justify the court's refusal to send to prison those the law says must be send there. The court has to proceed in terms of the correct option. From prison the accused must be transferred to a designated institution or special institution, as defined by s 2 of the Act.

Criminal procedure – witness – compellability – when witness may decline to give evidence

Mutasa v *Nduna NO & Ors* HH-113-09 (Patel J) (Judgment delivered 27 October 2009)

The applicant was formerly the Minister responsible for land reform and resettlement. He sought an interim order barring the first respondent, who was the presiding magistrate in a criminal matter, from compelling him to testify in that matter. He also sought a final order setting aside the subpoena issued for him to attend and testify in the criminal matter, which involved the prosecution of the fourth respondent under s 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:*28]. The fourth respondent claimed that the applicant's evidence was necessary for his defence, which was that he was given an "offer letter" by the applicant which constituted the requisite "lawful authority" entitling him to remain in occupation of the farm. His evidence was that this offer letter was returned to the applicant in order to correct a spelling error in his name and that the letter was then never handed back to him. He wanted the applicant to testify on his behalf by confirming that the offer letter was in fact originally issued to him. The applicant's reasons for not testifying in the trial were, firstly, that the evidence sought did not constitute a valid defence to the charge and was therefore irrelevant and inadmissible; secondly, that he could not be compelled to divulge matters involving land allocation, as these were privileged by dint of public policy and public interest; and, thirdly, that he was only being called as a witness in order to degrade his character and could not be compelled to do so. He relied on ss 252, 295 and 297 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].
Held: (1) Ordinarily, the applicant's claims of privilege and the validity or otherwise of the subpoena should in the first instance be ventilated before the magistrates court. Nevertheless, as the subpoena was originally issued by an officer of the court and subsequently reissued by order of the court, it may properly be regarded as an order of the court itself. Moreover, whether the subpoena is regarded as an administrative order issued by the clerk or as an order of the court, the High Court is endowed with the requisite jurisdiction in either case, by virtue of its inherent jurisdiction at common law as well as its statutory jurisdiction under s 26 of the High Court Act, "to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe". It was thus perfectly appropriate to deal with the merits of the application in order to avoid further delays in the administration of justice.
(2) Generally speaking, the mere production of an offer letter would, unless the origin or authenticity of the letter is questioned, avail as a complete defence to a charge of contravening s 3. However, where the offer letter in question is lost or destroyed, the evidence of the issuing authority or other public official may be necessary in order to establish that the letter was in fact issued to the occupier concerned at the relevant time. Such evidence would undoubtedly constitute the requisite lawful authority and a valid defence to the charge and as such was highly relevant and admissible.
(3) Given that such evidence was to be elicited from the applicant in relation to what he himself did or did not do vis-à-vis the fourth respondent as the authority responsible for issuing offer letters, there could be no question of him having to divulge any official secret or other confidential information inimical to public policy or the public interest.
(4) As for the possible degradation of the applicant's character, any such apprehension of an attack on his character must be weighed against the constitutional right of every accused person to be afforded a fair criminal trial as enjoined and guaranteed by s 18(3) of the Constitution and, in particular, the right "to obtain the attendance and carry out the examination of witnesses to testify on his behalf".

Criminal procedure (sentence) – general principles – community service – period within which community service must be completed – period must allow for weekends, public holidays and leave of absence

S v Hakurerwi & Anor HH-78-09 (Chitakunye J) (Judgment delivered 2 July 2009)

In terms of the guidelines on community service supervisors are empowered to use their discretion and grant time off to probationers on good cause shown. Where a probationer is given time off, he must be made to understand that the time lost will have to be made up. If the period stipulated by court is so calculated as to entail the probationer rendering service for 8 hours per day without any break, it means the supervisor has been denied the discretion and the probationer can in fact not be granted time off. Any time off granted in these circumstances would require the probationer to apply to court for an extension of the stipulated period within which to complete the community service. The granting of the discretion to grant time off to supervisors was meant, among other things, to obviate the need to approach the court whenever a probationer needed time off. It is therefore imperative that the period within which a probationer must complete community service must not be calculated to tally with the period the hours come to an end if the probationer worked non stop at eight hours per day. Courts must always stipulate a period that takes into account public holidays, weekends and leave of absence that the supervisor may grant on good cause shown.

Criminal procedure (sentence) – general principles – factors affecting – need for judicial officer to avoid emotion and bias against class of persons – need to consider factors set out in statute creating offence – deterrence – relevance of – should not result in inappropriate sentence

S v *Nemukuru* HH-102-09 (Uchena J, Karwi J concurring) (judgment delivered 21 September 2009)

A judicial officer must, in considering sentence, be dispassionate and avoid being propelled by emotion into passing ever-increasing sentences. He must look at all factors which can be considered in passing the appropriate sentence for the offence under consideration. He must avoid over-emphasizing some factors, while playing down or ignoring others. He must avoid language which displays gender insensitivity or bias against a class of people, as that gives an impression that the offender is, over and above being punished for his offence, being punished for belonging to a class which the judicial officer has displayed bias against. Where the factors to be considered are provided by statute, he must consider all such factors. If he does not consider the factors which the statute requires him to consider, the sentence may be set aside, if it is shown that a consideration of the omitted factors would have resulted in the court arriving at a different sentence. While deterrence is a valid consideration, a judicial officer must avoid giving the impression that the sentence is a tag which society must read for it to be deterred. The sentence must suit the offence and the offender. If others have to be deterred, they should be deterred by a deserved sentence, and not by one which over-emphasises deterrence, and punishes the offender beyond the level his offence deserves.

Criminal procedure (sentence) – general principles – multiple counts – treating as one for sentence – mandatory minimum sentence applicable on each count – not competent to treat counts as one for sentence – permissible to order sentence on one count to run concurrently with sentence on other count or counts

S v *Huni & Ors* HH-147-09 (Kudya J) (Judgment delivered 25 November 2009)
The accused were each convicted of more than one count of stock theft. No special circumstances having been found, a minimum sentence of 9 years' imprisonment was mandatory, in terms of s 114(2)(e) of the Criminal Law Code [*Chapter 9:23*]. The magistrate ordered that the counts against each accused be treated as one for sentence. On review:
Held: in the absence of special circumstances an accused person must be sentenced to an effective mandatory minimum sentence of nine years for each count that he is convicted of. Where the accused person has been convicted on more than one count, to treat both or all of them as one for the purposes of sentence defeats the clear intention of the legislature, that there should be an effective mandatory minimum penalty of 9 years per count. The options available to the trial magistrate were either to impose an effective minimum sentence of 9 years' imprisonment per count and order the accused person to serve the arithmetical total or to impose the minimum mandatory sentence on each count and order both or one or more to run concurrently with each other or the others. The result will always be that the total effective sentence would be a multiple of 9 years.

Criminal procedure (sentence) – general principles – uniformity of sentence – desirability of uniformity must not interfere with proper exercise of discretion – sentence must be individualised to particular offender – suspension of portion of sentence – need to consider suspending portion of prison sentence – failure to consider suspension a misdirection

S v *Mahove & Ors* HH-83-09 (Chitakunye J) (Judgment delivered 8 July 2009)

The 12 accused were all convicted in separate trials of housebreaking and theft. They all received the same sentence of 2 years' imprisonment, although there were several differences between the cases, such as the ages of the accused, the value of the goods stolen, and the value recovered. No portion of the sentence was suspended, although they all pleaded guilty.
Held: A sentence based on a tariff, as these were, is indicative of an abrogation of judicial discretion, which is tantamount to a misdirection. Though uniformity of sentences, that is of sentences imposed upon accused persons in respect of the same offence, or in respect of similar offences of a kindred nature, may be desirable, the desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged. It is the responsibility of the judicial officer to consider all the factors and circumstances placed before him in arriving at a just sentence. The sentence must be individualized to the particular offender. Failure to individualize the sentence is a misdirection. It makes a mockery of the reasons for sentence that the judicial officer purports to have taken into account in assessing the sentence. Time and again the superior courts have strongly warned judicial officers against paying lip service to mitigatory features. It is an act of dishonesty to tell an accused person that the court has considered their personal mitigatory features when in fact no such features have been considered. Furthermore, the trend in our jurisdiction has been to spare first offenders from effective imprisonment unless the circumstances are such that imprisonment is the only suitable option. The magistrate did not consider suspending any portion of the sentences. No reason or explanation was given for such failure. Though it is not a rule that first offenders who are being imprisoned are entitled to have a portion of their sentence suspended, failure to consider or to give reasons for not suspending portions of the sentences on suitable conditions, including restitution, where the sentences are not long, is a misdirection. First offenders should be given the chance to reform by not sending them to effective imprisonment. Where for good reasons imprisonment cannot be avoided, then at least a portion of the sentence must be suspended so that they serve only what is absolutely necessary.

Damages – assessment of – *actio injuriarum* – defamation – villagers at general meeting falsely accusing plaintiff of stock theft – motive to influence chief to evict plaintiff from his home – appropriate award

Nkala v *Sebata & Anor* HB-96-09 (Ndou J) (Judgment delivered 24 September 2009)

Sometime in July 2009, the chief of the area in which the plaintiff lived presided over a meeting of his subjects. This was a public meeting open to all villagers; most of them were in attendance. The first defendant, who was a senior kraalhead, was present, as was the second defendant a senior villager. The first defendant addressed the meeting and made utterances to the effect that the plaintiff was a stock thief who had stolen cattle from fellow villagers and had recruited other villagers to participate in this nefarious practice. He stated that the plaintiff's herd boy and young brother had stolen cattle and sold them to the plaintiff. The second defendant made utterances that supported what the first defendant said. He further said the other villagers in attendance were afraid to unmask the plaintiff as a stock thief because they thought he would steal their cattle in revenge. The plaintiff claimed that these utterances were false and actuated by malice, in that the defendants' principal intention was to persuade the chief to order the plaintiff's eviction from his homestead. The defendants were in default and the plaintiff applied for summary judgment. The only issue was the quantum of damages. As a result of such utterances and at such a meeting the applicant's dignity, self-esteem and reputation were maligned and lowered in the eyes of the villagers present.
Held: The assessment of damages in a case such as this is not easy because it is difficult to recompense the plaintiff for the insult perpetrated against him and the pain which he suffered as a result of the false allegations levelled against him. The quantum ultimately determined by the court represents what is designed to be a fair and appropriate sum which, in contemporary thinking, will help to assuage the plaintiff's injured feelings, and will compensate him reasonably for the injury. It is not always a simple matter to decide what is proportionate or adequate. Here, in a rural setting, the defendants participated in an extremely grave attack upon the applicant. They wanted to cause the applicant to lose his homestead. They wanted to maliciously influence the chief to remove the applicant from the village. Bearing in mind these factors and the true value of the awards in previous cases in this country, an award of US$2 000 would be appropriate.

Delict – negligence – professional negligence on part of medical practitioner – standard by which to assess such negligence – average reasonable professional

Chibage v *Ndawana* HH-141-09 (Makarau JP) (Judgment delivered 18 November 2009)

The issue of whether to bring claims of professional negligence against medical practitioners in delict or in contract is not new. The line of division where negligence is alleged is not always easy to draw; for negligence underlies the field both of contract and of delict. It is not necessary for a plaintiff to plead a contractual relationship between the parties to enable him to bring an action in delict against a defendant medical practitioner. Our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue.

Where the conduct of a defendant medical practitioner towards a plaintiff, who may not be his patient, is unlawful and causes injury to the plaintiff, the medical practitioner is liable if his conduct was negligent. The particulars of negligence alleged against a medical practitioner can only be validated by reference to the standard operating procedures of other medical practitioners in that field. This is so because, to test the negligence of a professional, one has to first establish what an average reasonable professional in the shoes of the defendant would have done. An average professional is not one who is so careful that he will weigh each and every risk attendant upon the task at hand and advise the client of all such risks before proceeding. He will weigh the obvious risks and advise the client of same. The reasonable professional is one who will bring his training to bear on the task at hand to assess the attendant risks and proceed with alertness. He has a certain degree of confidence in his capacity and skill that allows him to proceed without undue timidity and is, to a large extent, a practical person who wishes to achieve a specified result.

The stringent test for establishing the negligence of a professional thus requires that the allegedly defaulting professional be judged by the standards set by his peers. Cases of professional negligence are difficult to successfully prosecute in this jurisdiction where most professions are still small and closely knit and members of the profession know each other on personal levels. Testifying against a fellow professional is still frowned upon as being in itself unprofessional and thus evidence of negligence is difficult to come by.

Domicile – acquisition and loss of – when domicile of origin is lost – voluntarily residing in another country with intention of doing so for an indefinite period

Sheasby v *Chief Immigration Officer & Anor* HB-77-09 (Cheda J) (Judgment delivered 23 July 2009)

The applicant was born and grew up in Zimbabwe. After his tertiary education in South Africa, he was granted residence in Australia, where he stayed continuously for 3 years. He acquired Australian citizenship and thereby lost his Zimbabwean citizenship. He did not surrender his Zimbabwean passport and used it on numerous occasions to enter and leave Zimbabwe. When he first did so, he declared that he was a returning resident. The respondent argued that he was an alien and had lost his domicile in Zimbabwe. The applicant argued that he had not lost his domicile of origin as he still had an immovable property in Zimbabwe and continued to pay rates and taxes like all Zimbabweans.

Held: everybody is born with a domicile, being that of origin which he can later change by choice. Domicile of origin is that which a person is invested at birth. He retains it until he chooses another, which becomes his domicile of choice. Domicile of choice is a conclusion or inference which the law derives from the fact of a person voluntarily making his sole or chief residence in a particular place, with the intention of continuing to reside there for an unlimited time. There must be a residence freely chosen, and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation. Under s 3(4) of the Immigration Act [*Chapter 4:02*], a person can lose his domicile of origin by voluntary departure from Zimbabwe and residence outside Zimbabwe with an intent of making his home outside Zimbabwe. The applicant voluntarily departed for Australia and he chose and assumed Australian citizenship. His conduct could lead to one irresistible conclusion: that he intended to abandon his domicile of choice. He had a definite intention (*animus manendi*) to permanently remain in Australian as opposed to a "floating intention", being the desire to return to his domicile of origin upon the happening of a certain event.

Employment – code of conduct – disciplinary proceedings under – charges arising from unlawful job action – code not specifying such action as an offence – employer's right to prefer charges under code where evidence supports such charge

CABS v *Rugwete* S-30-09 (Sandura JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 9 July 2009)

An employer is entitled to prefer charges of misconduct specified in its code of conduct in respect of acts arising out of an

unlawful job action even where the code has not specified such industrial action to be an offence. Similarly, obtaining a disposal order in terms of the Labour Act does not bar an employer from taking disciplinary action against an employee in terms of the code. There is nothing in the Act to the effect that a disposal order grants immunity from the unlawful collective job action referred to in it. Even in the case of a person who engages in a lawful collective job action, he cannot, for example, resort to sabotage or damage of his employer's property and still claim immunity.

Employment – Labour Court – appeal from – appeal on a "question of law" – what amounts to a "question of law" – when misdirection on facts may amount to a question of law

Mutsuta & Anor v *Cagar (Pvt) Ltd* S-47-09 (Sandura JA, Malaba DCJ & Cheda JA concurring) (Judgment delivered 11 November 2009)

See above, under APPEAL (Labour Court).

Employment – Labour Court – appeal to – appeal limited to question of law – what is a question of law – question as to whether a document constituted a valid legal agreement – such issue a question of law – grounds on which Labour Court may set aside award – not limited to question of whether award offended against public policy

Mbisva v *Rainbow Tourism Group Ltd* S-32-09 (Sandura JA, Ziyambi JA & Malaba JA concurring) (Judgment delivered 15 July 2009)

See above, under APPEAL (Labour Court).

Employment – Labour Court – jurisdiction – exclusive jurisdiction in labour matters – includes exclusive jurisdiction in review proceedings in labour matters

Border Timbers Intl (Pvt) Ltd v *Export Processing Zones Labour Bd & Ors* S-46-09 (Sandura JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 5 November 2009)

The appellant company was an export-oriented manufacturing company, licensed by the Zimbabwe Export Processing Zones Authority. The first respondent was established in terms of s 24(1) of the Export Processing Zones (Employment) Rules 1998 (SI 372 of 1998). Its main function was to resolve labour disputes within the area of its jurisdiction. The remaining respondents worked for the company. After a prolonged wage dispute between the company and its employees, the employees threatened to resort to collective job action. When the threat was not withdrawn, the company, which did not have a registered code of conduct, suspended the employees and charged them with the act of misconduct specified in s 28(c)(iii) of the Rules, i.e. any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of the contract of employment. Internal disciplinary proceedings were subsequently conducted and all the employees were found guilty as charged, and their dismissal was recommended. The internal appeals which followed were dismissed. The company then applied to the Board in terms of the Rules for authority to terminate the employees' contracts of employment. In due course, the Board dismissed the applications, having concluded that no act of misconduct had been established. On 18 January 2006 the company filed an application in the High Court, seeking a review of the Labour Board's decision and an order setting it aside. The High Court dismissed the application, on the ground that in terms of s 89(6) of the Labour Act [*Chapter 28:01*] the High Court did not have the jurisdiction to hear and determine the application. The application was made after the Labour Act was amended by Act 7 of 2005. This amendment, which came into effect on 30 December 2005, gave the Labour Court exclusive jurisdiction in the first instance to deal with all the matters set out in s 89(1) of the Act.
Held: (1) previously, in terms of s 56(1) of the Export Processing Zones Act [*Chapter 14:07*] the Labour Act did not apply to licensed investors operating in export processing zones, and to persons employed in such zones. The appellant could not have brought the matter to the Labour Court, but could have brought it on review to the High Court. However, the amendment to the Labour Act repealed s 56(1) of the Export Processing Zones Act. It also gave the Labour Court the same powers of review as would be exercisable by the High Court in respect of labour matters, which meant that the Labour Court enjoyed exclusive jurisdiction in review proceedings in labour matters. Consequently, the High Court correctly held that it had no jurisdiction in the matter.
(2) While there is a presumption at common law against interpreting a statute in such a way as to make it apply retrospectively, as well as a presumption against legislative interference with vested rights, the company did not acquire a vested right to institute review proceedings in the High Court, challenging the Labour Board's decision. It is an established principle that

a person cannot have a vested right in matters of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Questions relating to what courts and within what time proceedings are to be instituted are questions of procedural law.

Estate agent – authority of – no authority to amend agreement of sale unless instructed to do so by parties

Runatsa v *Rumani Estates (Pvt) Ltd & Ors* S-54-09 (Sandura JA, Chidyausiku CJ & Ziyambi JA concurring) (Judgment delivered 3 November 2009)

See above, under CONTRACT (Condition precedent – fulfilment).

Estate agent – status of – not an agent *strictu sensu* – no authority generally given to bind the principal in a sale agreement

Katsande v *Rumani Real Estate (Pvt) Ltd & Ors* HH-96-09 (Makarau JP) (Judgment delivered 23 September 2009)

See above, under AGENCY (Agent – estate agent).

Family law – child – custody – award of – to third party – limited grounds on which custody may be awarded to a third party where a natural parent is available

Ncube v *Guni* HH-121-09 (Mavangira J) (Judgment delivered 25 September 2009)

The applicant and respondent had been divorced from one another. Custody of the children of the marriage was awarded to the applicant. She relocated to Australia and left the children with her mother in Bulawayo. At the beginning of the school holidays, the respondent collected the children from the applicant's mother's residence. This was in pursuance of the terms of the divorce order in terms of which he was entitled to such access. Just before the end of the school holiday he telephoned the applicant and advised her that he would not be taking the children back to her mother's residence at the start of the new term. The applicant, pending the determination of an application to be made for the grant of guardianship to her, sought an order that the respondent should return the two minor children to their grandmother's residence in Bulawayo. It was submitted that as the custodian parent she had the right to choose and establish the residence of the minor children, including the right to ask a third party to exercise her rights on her behalf.

Held: A court will only deprive a natural parent of custody and award it to a third party upon special grounds. These grounds include detrimental or undesirable effects or influences upon the physical, moral, psychological or educational welfare of a child. The test is not whether a third party can provide better materially or possesses more desirable attributes, but whether the parent or parents should be deprived of custody for any reason, including harm or danger to the child's welfare. The interim relief sought by the applicant would, if granted, be tantamount to placing the custody of the children with their grandmother in preference to their father who was willing and able to take care of the children and in fact was taking care of them. Both parties had instituted proceedings and the determination of those matters would resolve the real issue of contention between the parties and also put an end to the continual disruption of the minor children's lives that had been happening.

Immigration – domicile – loss of – when domicile in Zimbabwe is lost – Immigration Act [*Chapter 4:02*] – s 3(4)

Sheasby v *Chief Immigration Officer & Anor* HB-77-09 (Cheda J) (Judgment delivered 23 July 2009)

See above, under DOMICILE.

International law – treaties – incorporation into domestic law – effect of ratification of treaties – State's duty to comply with terms of treaties

Route Toute BV & Ors v *Min of National Security & Ors* HH-128-09 (Patel J) (Judgment delivered 17 November 2009)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – s 16(9b)).

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

International law – treaties – SADC Treaty – art 4(1) – interpretation – principles – requirement to act in accordance with human rights, democracy and the rule of law – Agricultural Finance Act [*Chapter 18:02*] – s 38 – section authorizing Agricultural Finance Corporation to attach and sell, without recourse to the courts, property which was the subject of a loan – such provision contrary to rule of law and rules of natural justice

Tembani v *Republic of Zimbabwe* SADC-07-08 (Pillay P, Mtambo, Mondlane, Kambovo & Tshosa JJ concurring) (Judgment delivered 14 August 2009)

The applicant was the owner of a farm in Zimbabwe. To finance his farming activities, he borrowed various sums of money from the Agricultural Finance Corporation, on the security of the farm. Each of the loan agreements included a standard clause authorizing the Corporation, if at any time any sum of money due in respect of an advance was unpaid, to enter upon and take possession of the whole or any part of the security, without recourse to a court of law. The clause was based on the provisions of s 38 of the Agricultural Finance Act [*Chapter 18:02*]. The section, in turn, was rendered constitutional by the provisions of s 16(7)(d) of the Constitution of Zimbabwe 1980. The applicant defaulted on his loan repayments and his farm was duly attached and sold. He applied to the High Court for an order setting aside the sale, on the grounds that the price was too low. He also challenged the constitutionality of s 38 and requested the court to refer the issue to the Supreme Court. The court declined to do so, on the grounds that the Supreme Court had already decided the issue in earlier decisions, which it cited. The Supreme Court in Zimbabwe had held that where such a clause is incorporated in a loan agreement the lending institution was entitled to proceed in terms of s 38(2) of the Act, without recourse to a court of law. The applicant brought an application before the SADC Tribunal, arguing that the Zimbabwean provisions were in conflict with art 4(c) of the SADC Treaty, which requires member states to act in accordance with human rights, democracy and the rule of law.

Held: (1) One of the aims of the requirement to exhaust local remedies is to prevent individuals from abuse of remedies through concurrent proceedings. The requirement thus aims at avoiding parallelism of proceedings. However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. The effect of s 38 of the Act and s 16(7)(d) of the Constitution of Zimbabwe is that the jurisdiction of the courts of law in Zimbabwe is ousted whenever agricultural land is acquired in the circumstances obtaining in the present application. This has been confirmed by various decisions of the Supreme Court. It would be meaningless in these circumstances to insist that the applicant should have first exhausted his domestic remedies.

(2) The concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. Since the attachment and sale of the applicant's property was without recourse to the courts, the provisions in terms of which it was seized was contrary to the rule of law. To permit a creditor to seize the property of a debtor without an order of court and to cause it to be sold by the creditor's agent on the condition stipulated by the creditor to secure payment of a debt denies to the debtor the protection of the judicial process and the supervision exercised by the court over the process of execution. The Corporation thus becomes a judge in its own cause. It decides whether it has an enforceable claim against the debtor; it decides the outcome of the dispute and the subsequent relief; and it enforces its own discretion, thereby usurping the powers and functions of the courts.

(3) The provisions of the Act also breached the principles of natural justice. The right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation is another principle well recognized and embodied in law. Here, the AFC had acted against the principles of natural justice in that (a) the applicant was not only denied the right of a hearing before an independent and impartial court or tribunal where he could contest the amount of the debt allegedly owed by him and the value of his farm which he claimed had been sold by the AFC at little more than half of its actual price, and (b) the AFC also became a judge in its own cause.

(4) There were exceptional circumstances warranting the grant of costs, in the interests of justice, against the respondent. No counter-arguments were offered on behalf of the respondent since the respondent knew or ought to have known that it stood no prospect of success; that the respondent persisted all the same to pursue the matter regardless, instead of coming to terms with the applicant, who has always been willing to compromise and come to an amicable settlement with the respondent.

Editor's note: the Zimbabwean Supreme Court cases referred to were *Nyamukasa* v *Agricultural Finance Co* S-174-94 (a judgment of Muchechetere JA, with Gubbay CJ & Korsah JA concurring) and *Chizikani* v *Agricultural Finance Co* S-123-95 (a judgment of Gubbay CJ, with Korsah & Ebrahim JJA concurring). The two cases were cited in *Agricultural Bank of Zimbabwe v Tembani & Ors* S-39-07. Neither of the earlier cases was marked reportable, nor was either one reported. Both simply accepted that the AFC was entitled, in terms of the Act, to proceed as it did. They were not constitutional cases as such.

Interpretation of statutes – intention of legislature – error – reference to wrong section of another statute – reading of enactment so as to refer to section to which legislature must have intended to refer

S v *K (a juvenile)* HH-149-09 (Uchena J) (Judgment delivered 20 November 2009)

See above, under CRIMINAL PROCEDURE (Mental disorder).

Interpretation of statutes – meaning of words – use of grammatical or ordinary meaning of words unless absurdity or inconsistency result

ZRA & Anor v *Murowa Diamonds (Pvt) Ltd* S-41-09 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 28 September 2009)

See below, under REVENUE AND PUBLIC FINANCE (Duty and value-added tax).

Interpretation of statutes – retrospectivity – effect on vested rights – change to procedural law – no vested rights in procedural matters

Border Timbers Intl (Pvt) Ltd v *Export Processing Zones Labour Bd & Ors* S-46-09 (Sandura JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 5 November 2009)

See above, under EMPLOYMENT (Labour Court – jurisdiction).

Interpretation of statutes – schedule to an enactment – extent to which can be used to clarify or complement main body of enactment

Marufu v *Min of Transport & Ors* HB-127-09 (Ndou J) (Judgment delivered 3 December 2009)

See below, under STATUTES (Tolls Roads Act [*Chapter 13:13*]).

Land – acquisition – acquisition from foreign investor – s 16(9b) of Constitution – protection given to foreign investors under international treaties – acquisition of rural land under s 16B – whether s 16B overrides provisions of s 16(9b)

Route Toute BV & Ors v *Min of National Security & Ors* HH-128-09 (Patel J) (Judgment delivered 17 November 2009)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – s 16(9b)).

Land – acquisition – land acquired by State – holder of offer letter in respect of land – not a lessee

Gwarada v *Johnson & Ors* HH-91-09 (Gowora J) (Judgment delivered 16 September 2009)

The first two respondents were the owners of a farm which had been compulsorily acquired by the State. They had nonetheless remained in occupation of the farm. The third respondent had been allocated the neighbouring farm, and was the majority shareholder in a company which carried out farming operations on two divisions of the farm. The first and second respondents were the remaining shareholders. The applicant had been given a letter of offer for the other division of the farm, and moved onto that division. He sought an urgent interdict to prevent the first and second respondents from using and occupying that division. The question was whether the applicant had *locus standi* to claim the relief sought. The

applicant contended that even though he was not the holder of a lease agreement in respect of the piece of land in question, nevertheless the offer letter that he had received gave him the right to sue the respondents for possessory rights over the land.
Held: (1) a lessee of land acquires a personal right to possession of the land, but until and unless granted vacant possession by the lessor, has no *locus standi* to claim the ejectment from the land of a trespasser.
(2) A letter of offer does not constitute a lease. Although the duration of a lease need not be specified for a lease to be constituted, the same cannot be said of the quantum of the rental and when it should be paid. In the absence of any provision setting out the rental an offer letter cannot be said to constitute a lease. That being the case, all an offer does is offer a right to occupy at the pleasure of the owner of the land, that is, the State. It could not be said that the applicant could claim the same rights as a lessee occupying under an agreement of lease.
(3) When an applicant files an urgent application, the Rules require, where such an applicant is legally represented, that a certificate of urgency be filed setting out why, in the opinion of the legal practitioner, the matter should be treated as urgent and not await set down in normal course. The certificate of urgency filed on behalf of the applicant suggested an infringement on the part of the respondents and an interference with his occupation of the piece of land that he was in occupation of. Given that the situation that the applicant was asking the court to reverse had been in existence for the better part of a year, it was mischievous in the extreme for a legal practitioner to issue a certificate that the matter was urgent. A matter does not assume urgency because a litigant has plans, the fulfilment of which requires an immediate solution. Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may in their very nature be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threat whatever it may be. In this matter no urgency was established.

Land – acquisition – land acquired by State – holder of offer letter in respect of land – not entitled to evict former owner – need for former owner to be duly evicted in terms of Gazetted Lands (Consequential Provisions) Act

Route Toute BV & Ors v *Min of National Security & Ors* HH-128-09 (Patel J) (Judgment delivered 17 November 2009)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – s 16(9b)).

Land – acquisition – preliminary notice of acquisition – withdrawal of such notice – effect – ownership of land remaining with original owner

***Matanda (Pvt) Ltd* v *Min of National Security & Ors* HH-178-10 (Makoni J) (Judgment delivered 11 November 2009)**

A preliminary notice of acquisition was issued in terms of s 5(1) of the Land Acquisition Act [*Chapter 20:10*] in respect of the applicant's farm. Just over a year later, a notice withdrawing the preliminary notice was published in terms of s 5(7) of the Act. Nonetheless, offer letters were issued to the fifth to ninth respondents by the first respondent. The applicant sought an order declaring that it was the owner of the farm. The first respondent's position was that despite the "de-listing" of the farm, it was subsequently acquired by operation of the Constitutional Amendment Act (No. 17) as it was listed in the schedules.
Held: the word "withdraw" in this context means "discontinue, cancel, retract". If one were to use that meaning, it would mean that the Government cancelled or retracted the preliminary notice in respect of the farm. It no longer had an interest in the farm. If it were to develop an interest in future it would have to start the whole process of acquisition afresh. The farm was not issued with a fresh notice of acquisition. It was a mistake or an oversight on the part of the acquiring authority to include the property in the schedules, since the initial identification of the land had been withdrawn.

Land – acquisition – under s 16B of Constitution – requirements for land to have been validly acquired

Route Toute BV & Ors v *Min of National Security & Ors* HH-128-09 (Patel J) (Judgment delivered 17 November 2009)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – s 16(9b)).

Landlord and tenant – lease – breach of by lessee – breach entitling lessor to cancel lease and seek eviction of lessee – only court may order ejectment of lessee

U-Tow Trailers (Pvt) Ltd v *City of Harare & Anor* HH-103-09 (Makarau JP) (Judgment delivered 21 October 2009)

See above, under ADMINISTRATIVE LAW (Administrative decisions).

Landlord and tenant – lease – agreement – amount of rental – must be fixed or some definite mode of fixing it must be agreed

Landlord and tenant – lease – termination – fixed term lease – no notice of termination required

Landlord and tenant – tenant – statutory tenant – notice to vacate – must be given before order of ejectment may be applied for – period of notice required – grounds for ejectment – good and sufficient grounds required – allegation that landlord requires premises for own use – failure to state specific use – effect of

Alliance Francaise v *Orford & Anor* HH-88-09 (Patel J) (Judgment delivered 1 September 2009)

The respondents entered into a fixed term lease of premises from the applicant. The lease was for a three year period, ending at the end of 2008. At the beginning of 2008, the applicant prepared a fresh draft agreement requiring, *inter alia*, usage of the premises in a manner that would be complementary to the applicant's cultural activities. This draft was rejected by the respondents on the ground that it was an entirely different lease arrangement with more onerous obligations. In March 2008 the applicant's lawyers gave notice to the respondents to vacate at the end of 2008. In July 2008, the applicant filed the present application seeking an order requiring the respondents to vacate the premises by the end of December 2008. The respondents resisted the application on the ground that the applicant did not want the premises for its own use but for some other ulterior purpose. At the end of the lease period, the respondents did not exercise their right under the contract to renew the lease, but stayed in occupation, thereby becoming statutory tenants. The question that arose was whether or not it was necessary to give the respondents any notice to vacate the premises before seeking their ejectment by the court. The second question was is whether or not the applicant had good and sufficient grounds for requiring the eviction of the respondents as envisaged in s 22(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983).

Held: (1) an essential ingredient of a contractual lease is that the amount of the rent payable by the lessee must be fixed or that some definite mode of fixing the rent must be agreed upon. In other words, the rental must be in an ascertained or ascertainable amount. An objective indicator determined by a public body, such as the inflation index compiled and published by the Central Statistical Office, would afford a definite mode of fixing an ascertainable rent.

(2) A fixed term lease terminates *ipso facto* upon the expiry of the fixed term, without the need for any notice of termination from either party. The giving of notice to terminate so as to coincide with the date of expiry of the lease is legally pointless and practically futile.

(3) The overall effect of ss 22 to 24 of the Regulations was that, subject to compliance with the terms of the expired lease agreement, the respondents were entitled to remain in occupation of the premises and use them without obstruction, unless and until they voluntarily vacated the premises or were lawfully removed therefrom in accordance with the Regulations. In the case of the good statutory tenant, the lessor is obliged to give him notice to vacate before approaching the court for an eviction order. The period of such notice would be such notice as would have been required under the lease agreement or, if no notice would have been so required, a period of three months' notice.

(4) An order for the ejectment of a statutory lessee may be made once the lessor satisfies the court that it is has good and sufficient grounds to require an order for ejectment. The needs of the lessee are irrelevant in this regard. While ejectment may not be ordered if the lessor's grounds for requiring it are that the lessee has declined to accept an increase in rent or because the lessor wishes to lease the premises to another person, the fact that other grounds for requiring ejectment may be motivated by one of those factors is immaterial as long as the other grounds are genuine. While the applicant asserted that it required the premises for its own use, it did not disclose the specific purpose for which it intended to utilise the premises. While this reticence would not necessarily preclude the relief that the applicant sought, it did render very questionable the *bona fides* of its declared reason for evicting the respondents.

Landlord and tenant – lessee – rights of – when can claim for ejectment of trespasser

Gwarada v *Johnson & Ors* HH-91-09 (Gowora J) (Judgment delivered 16 September 2009)

See above, under LAND (Acquisition – land acquired by State).

Landlord and tenant – tenant – obligations – obligation to pay rent – rent dispute – duties of parties – tenant obliged to continue paying last agreed rent – if last agreed rent not determinable, must pay a reasonable rent

Negowac Svcs (Pvt) Ltd v *3D Hldgs (Pvt) Ltd & Anor* HH-144-09 (Mtshiya J) (Judgment delivered 25 November 2009)

The defendants were lessees of premises owned by the plaintiff. For some years they had been in occupation of the premises, in terms of leases which were renewable on an annual basis. Rents were payable in Zimbabwe dollars up to the end of 2008. In February 2009, the parties commenced negotiations for payment of rentals in United States Dollars, following the adoption of the multi-currency system and the effective abandonment of the Zimbabwe currency. The landlord's agents proposed a certain figure, to which the defendants made a counter-proposal of a much lower figure. No conclusion was reached. The defendants did not make any payments at all for a period of 4 months and the plaintiff cancelled the lease agreements and brought proceedings to eject the defendants. Neither party saw fit to refer the dispute to the Rent Board in terms of the Commercial Premises (Rent) Regulations 1983 (SI 626 of 1983).
Held: (1) the obligation on the part of a tenant to pay rent is at the core of a lease agreement. Failure to do so entitles the landlord to cancel the agreement. The fact that negotiations for new rentals were in process did not absolve the defendants from paying the last agreed rentals or the amount proposed as a fair rent during the negotiations.
(2) From January 2009 the rent payable by the defendants became a totally unknown entity, so there was no question of the defendants continuing to pay the rentals previously agreed. Although they could have at least continued to pay the rental they proposed, that rental could not, in the absence of an agreement, constitute a fair rental. Clearly, therefore, it was incumbent upon both parties to approach the Commercial Rent Board or an arbitrator to fix the rent.
(3) The Regulations, apart from offering the tenant protection from unfair and prohibitive rentals, do not in any way give a tenant a licence to exploit the landlord by enjoying occupation of the landlord's premises without paying rent for it. That is why it is incumbent upon a sitting tenant to either pay the last agreed rent or to approach the Commercial Rent Board to determine a fair rent. This the defendants failed to do. As long as they wanted the tenancy to continue, they had an obligation to continue paying rent. They should have continued to pay what they believed was a reasonable rent, rather than enjoy a benefit from the plaintiff for nothing.

Lien – creditor's lien – scope of – debtor's property in possession of creditor – creditor not having performed work on or incurred expenditure on such property – creditor having no lien over property

Nexbak Invtsms (Pvt) Ltd & Anor v *Global Electrical Mfrs (Pvt) Ltd & Anor* S-43-09 (Sandura JA, Cheda & Ziyambi JJA concurring) (Judgment delivered 22 October 2009)

The first respondent's claim to ownership of a stand in Harare was dismissed with costs by the High Court and a subsequent appeal to the Supreme Court was also dismissed with costs. Both courts were satisfied that the stand belonged to the first appellant, the company in which the second appellant was a director. However, when the first respondent was called upon to vacate the stand it refused to do so on the ground that it required to retain occupation of the stand as security for the payment of a sum which it had claimed from the appellants as damages for unjust enrichment in another High Court case. In respect of that case, the appellants had filed a special plea of prescription. There was no replication to that special plea, but nonetheless the judge a quo had held that prescription had been interrupted. In so doing he relied on a submission made to him by the legal practitioner who appeared for the first respondent, which submission was not supported by any averment in the pleadings.
Held: (1) there was no evidence that the first respondent incurred any expenditure on the stand entitling it to retain possession of the stand until it was paid compensation for its expenditure. A debtor and creditor lien is available to anyone who has, by contract, performed work or incurred expenditure on the property of another. It confers a personal right, available only against the other party to the contract (or third parties with knowledge of the lien), to retain the property until paid the contract price. Such a lien gives no right of retention over other property of the debtor that is in the possession of the creditor (whether in pursuance of the contract or not) but on which he has not actually performed the work in respect of which he claims payment.
(2) If the first respondent wished to rely upon the alleged interruption of the running of prescription, it should have filed a replication to the special plea. In the absence of a replication, the issues between the parties were to be found in the pleadings as they stood. Those issues did not include the issue of whether the running of prescription had been interrupted. As there was no replication to the special plea, the judge *a quo* should have ignored the submission by the first respondent's legal practitioner that the running of prescription had been interrupted, and should have upheld the special plea.

Local government – town council – administrative decision by – decision arising out of contract between administrative authority and another party – applicability of Administrative Justice Act [*Chapter 10:28*] to such decision

U-Tow Trailers (Pvt) Ltd v *City of Harare & Anor* HH-103-09 (Makarau JP) (Judgment delivered 21 October 2009)

See above, under ADMINISTRATIVE LAW (Administrative decisions).

Medicine – medical practitioner – decision of council in respect of practitioner – practitioner's right of appeal to Health Professions Council and thence to High Court

Djordjevic v *Chrmn, Practice Control Cttee, Medical & Dental Practitioners Council of Zimbabwe* HH-110-09 (Makoni J) (Judgment delivered 28 September 2009)

See above, under ADMINISTRATIVE LAW (Review).

Medicine – medical practitioner – negligence – negligence on part of medical practitioner – standard by which to assess such negligence – average reasonable professional

Chibage v *Ndawana* HH-141-09 (Makarau JP) (Judgment delivered 18 November 2009)

See above, under DELICT (Negligence).

Practice and procedure – appearance to defend – defendant timeously entering appearance to defend – defendant failing to serve notice on plaintiff within 24 hours of entry of appearance to defend – plaintiff not entitled to have matter struck off or to move for summary judgment

Pinelong Invtms (Pvt) Ltd v *Vallance & Anor* HH-132-09 (Makoni J) (Judgment delivered 11 November 2009)

The applicant issued summons against the respondents. On the same date, the summons was served on the second respondent, a company, which also accepted service on behalf of the first respondent. On the day of expiry of the *dies induciae*, the first respondent entered an appearance to defend for himself and on behalf of the second respondent. The notice was not served on the applicant's legal practitioners. A week later, the applicant filed an application for default judgment. Later on the same day, the first respondent served the notice on the applicant's legal practitioners. The applicant's legal practitioners pointed out to the first respondent the irregularities of the notice of appearance to defend. The first point was that the respondents had not complied with r 49 of High Court Rules 1971, which provides for service of a notice of appearance to defend within 24 hours of the entry of appearance to defend. The second point was that the notice did not comply with Form No. 8, in that it did not state the date on which the summons was served. The last point was that the respondents did not comply with s 51 of the High Court Act [*Chapter 7:06*], as the first respondent had entered an appearance to defend for both himself as well as the second respondent, a duly registered company. There was no reply to this letter by the respondents. The applicant then filed an application for an order that the notice of appearance to defend be struck off and that the registrar be directed to expunge it from the court record.

Held: (1) in terms of r 49, within 24 hours of the entry of appearance to defend, written notice thereof should be served on the plaintiff or his legal practitioner and such notice shall be in Form No. 8. Rule 50 provides the sanction (barring) for failure to enter appearance in terms of r 48, but the Rules provide no sanction for failure to serve the notice in terms of r 49.

(2) In the event of failure to serve the notice on the plaintiff's legal practitioners, the plaintiff will be entitled to assume that notice of intention to defend has not been given. If however, he then moves for judgment, the court will not grant judgment, but will order the defendant to pay the wasted costs occasioned by his omission. The irregularity in this case did not warrant the punishment of having the notice of appearance struck off and that it be expunged from the record. Such a relief would be too drastic in view of the fact that the notice was entered timeously.

(3) The second respondent, a juristic person, has no right to be heard in court except through legal representation and the first respondent had no right to enter appearance on its behalf.

Practice and procedure – application – urgent – when urgent application may be made – situation existing for significant time before application made – not urgent

Gwarada v *Johnson & Ors* HH-91-09 (Gowora J) (Judgment delivered 16 September 2009)

See above, under LAND (Acquisition – land acquired by State).

Practice and procedure – application – what must be pleaded – no need to plead the law under which application made – application may be heard as long as necessary averments to sustain cause of action are pleaded

U-Tow Trailers (Pvt) Ltd v *City of Harare & Anor* HH-103-09 (Makarau JP) (Judgment delivered 21 October 2009)

See above, under ADMINISTRATIVE LAW (Administrative decisions).

Practice and procedure – application – withdrawal of by applicant after set down – court's discretion to allow withdrawal unless it amounts to abuse of court process

Mangena & Anor v *Filannino & Ors* HB-116-09 (Ndou J) (Judgment delivered 5 November 2009)

The court retains a discretion whether or not to allow the withdrawal of a case after set-down. A party is normally permitted to withdraw a claim subject to an appropriate order as to costs, unless the withdrawal amounts to an abuse of the court process. The same principles apply to application proceedings.

Practice and procedure – parties – *locus standi* – lessee of land – when can claim for ejectment of trespasser

Gwarada v *Johnson & Ors* HH-91-09 (Gowora J) (Judgment delivered 16 September 2009)

See above, under LAND (Acquisition – land acquired by State).

Practice and procedure – parties – *locus standi* – voluntary association – church – constitution of – whether right to sue or be sued created

Christian Faith Tabernacle v *Sparrows Nest Ministries* HH-69-09 (Patel J) (Judgment delivered 7 July 2009)

See above, under CHURCH (Constitution).

Practice and procedure – plea – *lis albi pendens* – requirements – court's discretion to order or refuse stay of proceedings – matters to be considered

Diocesan Trustees, Diocese of Harare v *Church of the Province of Central Africa* HH-166-09 (Hlatshwayo J) (Judgment delivered 24 July 2009)

The plea in abatement of *lis alibi pendens* is raised by a party that is able to establish the following prerequisites: (a) that the litigation is pending; (b) the other proceedings are between the same parties or their privies; (c) the pending proceedings are based on the same cause of action, and (d) the pending proceedings are in respect of the same subject matter. However, even if a party satisfies all the requisites, the court still has discretion to order or refuse a stay of proceedings on the grounds of *lis alibi pendens,* and in the exercise of that discretion it will have regard to the equities and to the balance of convenience in the matter. The exception is available even where the matters in issue are not brought by the same party, and indeed even where the prior or later matters consist of more than one suit. Considerations of convenience and equity must underpin the exercise of any discretion whether or not to allow the defence of *lis pendens*. The case which is allowed to proceed must not necessarily be the one that was instituted first. The question is whether justice will not be done without the double remedy.

Practice and procedure – pre-trial conference – whether judge conducting pre-trial conference may deal with application proceedings in same matter

Diocesan Trustees, Diocese of Harare v *Church of the Province of Central Africa* HH-166-09 (Hlatshwayo J) (Judgment delivered 24 July 2009)

The High Court's tradition of prohibiting a pre-trial judge from conducting the trial itself seeks to prevent the mischief of a judge's assessment of evidence in the actual trial being coloured by proceedings at the pre-trial conference stage. That risk does not exist in application proceedings.

Practice and procedure – pleadings – prescription alleged in special plea – opposing party relying on interruption of prescription – need to file replication alleging interruption

Nexbak Invtsms (Pvt) Ltd & Anor v *Global Electrical Mfrs (Pvt) Ltd & Anor* S-43-09 (Sandura JA, Cheda & Ziyambi JJA concurring) (Judgment delivered 22 October 2009)

See above, under LIEN (Creditor's lien).

Practice and procedure – *res judicata* – requirements for – need for parties to be the same – criminal trial – effect on subsequent civil claim – not a bar to action by person suffering injury from commission of offence – Criminal Procedure and Evidence Act [*Chapter 9:07*] – s 4

Chawasarira Transport (Pvt) Ltd v *Reserve Bank of Zimbabwe* HH-86-09 (Bhunu J) (Judgment delivered 19 August 2009)

The applicant was an exporter of commodities. In terms of s 7 of the Exchange Control (Currency Exchange) Order, 2004 (SI 9 of 2004), it was obliged to offer a proportion of the foreign currency it received to the respondent, the Reserve Bank. To do so, it had to submit its export documentation and the relevant forms and, based on the amounts disclosed, "acquit" those forms by paying the prescribed amounts to the Bank. It fell behind in its acquittals and was prosecuted in the magistrates court. The magistrate found special reasons for not ordering the applicant to "repatriate" the foreign currency concerned. The Bank nonetheless demanded the acquittal of the outstanding forms. The applicant refused to do so, claiming that it had been absolved by the magistrate from having to do so, whereupon the Bank, acting in terms of s 7 of the Order, "froze" the applicant's foreign currency account. The applicant sought an order setting aside the Bank's action. The applicant argued that the matter was res judicata in the sense that the rights of the parties had already been determined by the magistrate's judgment. The Bank argued that the magistrate's decision not to order acquittal of the forms did not amount to absolving the applicant from regularizing or acquitting its forms according to law.
Held: (1) The acquittal of the forms was a statutory obligation imposed by law. That being the case, it was not the function of the courts to excuse or absolve anyone from complying with the law. The mere fact that in punishing the applicant during criminal proceedings the trial magistrate declined to order repatriation did not absolve or excuse the applicant from complying with the law.
(2) When res judicata is pleaded by way of estoppel it amounts to an allegation that the whole of the legal rights and obligations of the parties are concluded by the earlier judgment and that the plaintiff is estopped by the findings of fact involved in that earlier judgment. Here, the Bank was not a party to the criminal proceedings in the magistrates' court; the parties to that case were the State and the applicant. The magistrate did not prohibit the Bank from compelling the applicant to discharge its statutory obligations of repatriating or acquitting its forms. That being the case, the Bank could not be bound by a judgment to which it was not a party and which made no specific order binding on it. In any event, in terms of s 4 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], neither a conviction nor an acquittal following on any prosecution is a bar to a civil action for damages at the instance of any person who may have suffered any injury from the commission of any alleged offence. The Bank suffered huge losses arising from the commission of the crime and could not be barred from seeking redress in the civil courts, notwithstanding the applicant's conviction in the criminal court arising from the same facts.

Property and real rights – *res litigiosa* – alienation of – purchaser bound by judgment – successful plaintiff entitled to recover *res* from new possessor

Supa Plant Invstms (Pvt) Ltd v *Chidavaenzi* HH-92-09 (Makarau JP) (Judgment delivered 9 September 2009)

The applicant bought a centre pivot for its farm from the respondent, who was represented in the negotiations by his agent. The price initially agreed on with the agent was paid, as was a supplementary payment, but the respondent did not deliver the centre pivot. He claimed that a further payment had been agreed upon. After an application was brought to order delivery, the respondent sold the pivot to a third party.

Held: (1) on the facts, there was nothing to support the respondent's allegation that a further payment had been agreed on; the evidence showed that the price was that negotiated with the agent.
(2) Although the applicant was suing ex contractu to enforce a personal right against the respondent, at the time the centre pivot was sold, the parties had filed both the application and the opposing affidavits and thus the matter had reached *litis contestatio* and the application could have at that stage been set down for hearing. The centre pivot thus became *res litigiosa.* After *litis contestatio* has been reached, a *res litigiosa* cannot be alienated and, where it has been alienated, the plaintiff, if successful, can recover it from the possessor by execution and without fresh proceedings.

Property and real rights – spoliation order – when may be issued – not necessary that possessor be dispossessed of whole thing before being entitled to claim a spoliation order – dispossession of only part of thing enough to entitle possessor to relief

Forrester Estate (Pvt) Ltd v *Vengesayi* HH-95-09 (Chatukuta J) (Judgment delivered 8 September 2009)

The applicant was the owner of a farm on which it carried out farming operations. The farm was not acquired by the State. The respondent came to the farm and demanded the keys to the gate and to the house on the farm. He showed one of the directors a copy of a letter purporting to be an instruction to the applicant to cease farming. The director refused to give the respondent the keys and also refused to let him move onto the farm. The respondent left the farm, but left behind seven employees sitting under a tree on the farm. The applicant sought a mandament van spolie. At the time the application was made the seven were still on the farm although they were not interfering with the applicant's farming activities. The respondent argued that a mandament could not be issued, as what the respondent did amounted to a mere disturbance of possession, not to unlawful deprivation of property.
Held: A possessor need not have been dispossessed of the whole thing before he is entitled to claim a spoliation order. Even where he has been deprived of possession of only a part thereof, he is entitled to relief. The act of leaving behind seven employees coupled with the indications by the respondent that he intended to take occupation of the homestead and the entire piece of land amounted to dispossession. The applicant could no longer claim to be in control of that piece of land currently occupied by the respondent's employees. Had the respondent left the farm with all his personnel, then one would have classified his visit to the farm as a mere disturbance.

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

Bok Ests (Pvt) Ltd v *Masara & Ors* HH-148-09 (Bere J) (Judgment delivered 5 December 2009)

If the legislature recognizes and provides for a systematic way of evicting those who wish to cling on to acquired land, the process of such eviction must be followed to the letter. There can be no question of allowing those with offer letters or other beneficiaries to take the law into their own hands, because to allow that to happen would be to sanction illegality and to nourish chaos in the land acquisition exercise. The process of eviction is not for the offeree to initiate by using violence or force; it must be civilly conducted by those who are lawfully authorized to do so. Where an offeree has not acquired vacant possession he cannot take it upon himself to evict the former farm owner from the land. That prerogative is for the acquiring authority.
Spoliation is a remedy available even to a thief. By parity of reasoning, a former farm owner who opts to illegally continue squatting on acquired land is entitled to this remedy. It would be sanctioning illegality if the court were to make an order that would ratify the unlawful conduct of offerees who use force to evict the farmer.

Property and real rights – spoliation order – requirements for – peaceful and undisturbed possession – unlawfulness of possession – irrelevance of

Kwik-Pak (Pvt) Ltd v *Mashiringwana & Anor* HH-230-10 (Kudya J) (Judgment delivered 4 November 2009)

The applicant was the owner of a farm which had been compulsorily acquired by the state and allocated to the respondent. The applicant continued to occupy and make use of a portion of the farm for over two years, until the first respondent forcibly prevented it from doing so. The applicant sought a spoliation order. The respondent argued that the applicant, not being the owner, had no locus standi and, in any event, because its possession was unlawful, was therefore not peaceful and undisturbed.

Held: (1) the purpose of a spoliation order is not to restore ownership but to prevent self help. It seeks to encourage the despoiler to have recourse to the due process. The restoration of the despoiled party is not permanent but temporary. The order does not stop the despoiler from seeking the proper eviction of the despoiled party.

(2) The requirements for a spoliation order are that the applicant was in peaceful and undisturbed possession of the property; and that the respondent deprived him of the possession forcibly or wrongfully against his consent. Possession, in order to be protected by a spoliatory remedy, must consist of the *animus* – the intention of securing some benefit to the possessor – and of *detentio*, namely the holding itself. A spoliation order is available to any person who (a) is making physical use of property to the extent that he derives a benefit from such use; (b) intends by such use to secure the benefit to himself; and (c) is deprived of such use and benefit by a third person. The mental element is met once the possessor intends to derive some benefit from his possession. That intention is not affected by the criminalization of his conduct.

Editor's note: in this judgment, Kudya J departed from the view he expressed in *Gifford* v *Muzire & Ors* 2007 (2) ZLR 131 (H), that possession tainted with illegality was *ipso facto* not peaceful and undisturbed.

Property and real rights – ownership – vindicatory action by owner – what owner must show – defences to claim – what defendant must shown to defeat claim – equities – irrelevance of

Alspite Invstms (Pvt) Ltd v *Westerhoff* HH-99-09 (Makarau JP) (Judgment delivered 7October 2009)

The *rei vindicatio* is an action that is founded in property law. It is aimed at protecting ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to possess his property that, at law, he is entitled to recover it wherever found and from whomsoever is holding it, without alleging anything further than that he is the owner and that the defendant is in possession of the property. Thus it is an action *in rem*, enforceable against the world at large. The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the onus being on the defendant to allege and establish any right to continue to hold against the owner.

There are primarily two defences to the *rei vindicatio*, each aimed at destroying each of the two essential elements of the action. The first one seeks to destroy the claim of ownership completely by denying that the plaintiff is the owner of the property in question or seeking to diminish his rights in the property by admitting his ownership but by alleging that the plaintiff has parted, under some recognized law, with the right to exclusive possession of the property. The second defence is to deny possession of the property at the time the action is brought or the claim is instituted.

There are no equities in the application of the *rei vindicatio*. Thus, once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership.

Editor's note: see also *Invictus (Pvt) Ltd* v *Lessing* HH-130-09, a judgment of Gowora J, delivered on 11 November 2009, wherein the above principles are restated.

Revenue and public finance – duty and value-added tax – payment of duty in foreign currency when luxury goods imported – resident of Zimbabwe exempt from paying duty in foreign currency when goods paid for with funds "obtained" from authorised dealer – money in resident's foreign currency account with authorised dealer – money "obtained" from authorised dealer

ZRA & Anor v *Murowa Diamonds (Pvt) Ltd* S-41-09 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 28 September 2009)

The respondent company, a resident of Zimbabwe, imported motor cars, which were luxury items as defined in the Customs & Excise (Designation of Luxury Items) Notice 2007 (SI 80A of 2007). The funds used to purchase the motor **vehicles were**

sitting to the credit of the respondent's foreign currency account held with a commercial bank. In terms of the Notice, every resident of Zimbabwe who imports luxury items that were purchased using funds obtained otherwise than through an authorized dealer was liable to pay duty in foreign currency.

The appellants argued that the funds deposited into a foreign currency account belong to the holder of such account, so the respondent did not "obtain" the funds in the sense of acquiring ownership thereof or being in possession thereof through an authorized dealer. The funds could not therefore be said to have been "obtained" within the context of the notice nor could it be said that being given authority to utilize the funds in terms of the Exchange Control Regulations amounted to "obtaining" the funds from an authorized dealer.

The respondent argued that the real dispute was whether the holder of a foreign currency account physically holds or in law owns the money in that account and whether, when he accesses that money, he "obtains" it from an authorized dealer. By operation of law, the use of funds in a foreign currency account had to be dealt with through an authorized dealer. The intention of the legislature was to ensure a measure of control over the source of funds used for the importation of goods which would then qualify for payment in local currency even though they are classified as luxury items. In requiring an application through an authorized dealer for the necessary authority from the Reserve Bank to use the funds, the legislature had ensured that there is a measure of control over foreign currency accounts.

Held: (1) In general, if the plain and ordinary meaning of the words in an enactment is clear and unambiguous, then there is no need to resort to a secondary meaning. The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

(2) The words "purchased using funds obtained otherwise than through an authorized dealer" were clear and unambiguous. By operation of law, funds in a foreign currency account can only be accessed through an authorized dealer. The legislature must have been aware that there were persons who were holding foreign currency in foreign currency accounts and that to access these they had to apply for authority from the Reserve Bank. In exempting persons who purchased luxury items using funds obtained from an authorized dealer, the legislature did not exclude such persons with foreign currency held to their credit by authorized dealers. No distinction was made between persons who would have accessed the foreign currency from the Reserve Bank of Zimbabwe or other authorized dealers and those, for example, who would have earned the funds from exports. It could not be said the intention of the legislature was to exclude persons who would have access to funds from foreign currency accounts. The intention of the legislature was to create two categories of people, who would be treated in different ways. The first group consisted of those who purchase luxury items using funds held by an authorized dealer. That group would be exempt, irrespective of the source of the funds. The second group would consist of those who purchase luxury items using funds not held by an authorized dealer or accessed from sources outside the country. That group would not be exempt.

(3) The word "obtain", in its ordinary and popular sense, means "to get", "to acquire", "to come into possession of". It could not be said the legislature intended that only persons who had bought foreign currency from an authorized dealer were exempt.

(4) Funds in a foreign currency account do not belong to the account holder, so the respondent in this case could not be said to have obtained what it already owned.

Judgment of Makarau JP in *Murowa Diamonds (Pvt) Ltd* v *ZRA & Anor* HH-88-07 (judgment delivered 12 December 2007) upheld.

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

Standard Chartered Bank (Zimbabwe) Ltd v *ZRA* S-42-09 (Sandura JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 19 October 2009)

The main issue in this appeal was whether the discount on a treasury bill (i.e. the difference between the price at which the appellant bank bought the treasury bill and the bill's face value payable on the date of maturity) accrued to the bank before the date of maturity. The dispute between the parties concerned the time when the income earned from purchasing a treasury bill accrued to the purchaser, for the purposes of s 8(1) of the Income Tax Act [Chapter 23:06]. In terms of the section, "gross income" means the total amount received by or accrued to or in favour of a person or deemed to have been received by or to have accrued to or in favour of a person in any year of assessment. According to the appellant bank, the income in question ("the discount") accrued to the bank only on the date when the treasury bill matured. On the other hand,

the respondent contended that the discount, like interest on a loan, accrued on a daily basis from the date when the treasury bill was purchased by the bank up to the date when the treasury bill matured.
Held: what accrued to the bank before the date of maturity of the treasury bill was a right to claim payment of the discount in future (i.e. on the date of maturity) and that the value of that right was to be included in the bank's gross income for taxation purposes. The words in the Act, "has accrued to or in favour of a person", merely mean "to which he has become entitled". It has been authoritatively held that, in respect of a debt which is payable in the future and not in the year of assessment, while it might be difficult to hold that the cash amount of the debt has accrued to the taxpayer in the year of assessment, as he has not become entitled to a right to claim payment of the debt in the year of assessment, he has acquired a right to claim payment of the debt in future. This right has vested in him, has accrued to him in the year of assessment, and it is a valuable right which he could turn into money if he wished to do so. There is no real difference between the discount on a treasury bill and a debt payable in the future. After all, the discount is payable in the future, i.e. when the bill matures. Accordingly, the discount on the treasury bill ought to have been included in the bank's gross income for taxation purposes, with something being deducted from the face value of the discount to allow for the fact that the discount was not payable at the end of the year of assessment.

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

Statutes – Administrative Justice Act [*Chapter 10:28*] – applicability – decisions by administrative authority arising out of contract – such decision subject to Act

U-Tow Trailers (Pvt) Ltd v *City of Harare & Anor* HH-103-09 (Makarau JP) (Judgment delivered 21 October 2009)

See above, under ADMINISTRATIVE LAW (Administrative decisions).

Statutes – Agricultural Finance Act [*Chapter 18:02*] – s 38 – section authorizing Agricultural Finance Corporation to attach and sell, without recourse to the courts, property which was the subject of a loan – such provision contrary to rule of law and rules of natural justice

Tembani v *Republic of Zimbabwe* SADC-07-08 (Pillay P, Mtambo, Mondlane, Kambovo & Tshosa JJ concurring) (Judgment delivered 14 August 2009)

See above, under INTERNATIONAL LAW.

Statutes – delegated legislation – validity – when can be declared to be *ultra vires* – delegated legislation grossly unreasonable

Marufu v *Min of Transport & Ors* HB-127-09 (Ndou J) (Judgment delivered 3 December 2009)

See below, under STATUTES (Toll Roads Act [*Chapter 13:13*]).

Statutes – Toll Roads Act [*Chapter 13:13*] – declaration of toll road – road between places other than cities as defined by Urban Councils Act [*Chapter 29:15*] – such road may be declared to be a toll road

Marufu v *Min of Transport & Ors* HB-127-09 (Ndou J) (Judgment delivered 3 December 2009)

The applicant lived in a suburb within the Bulawayo City Council's area of jurisdiction. The respondent Minister had, in promulgating the Roads Toll (Regional Trunk Road Network (Amendment) Regulations 2009 (SI 39 of 2009) declared the Bulawayo-Victoria Falls Road to be a toll road in terms of the Tolls Roads Act [Chapter 13:13] and had fixed a point within the Council's area of jurisdiction to be a tolling point. The effect of this was that the applicant would have had to pay a toll to access the city, to take his children to school, to go shopping, and so on. He sought a declaratur to effect that the declaration by the Minister was ultra vires s 3(2) of the Act. Three questions arose: (1) whether the road was a "city to city trunk road" in terms of the Regulations; (2) the effect of the Minister's failure to consult the Council before making his declaration; and (3) whether the Minister had complied with s 3 of the Administrative Justice Act [Chapter 10:28].
Held: (1) although the Regulations defined a "city to city trunk road network" as "roads of the regional network that links cities in Zimbabwe" and Victoria Falls was not a city in terms of the Urban Councils Act [Chapter 29:15], the schedule to the

Regulations listed the road as a toll road. The extent to which schedules can and will be regarded as intra-textual, structural parts of any enactment will have to be determined with reference to their nature and intended function, relative to the context of the legislation or enactment as a whole. Schedules are treated at least as intra-textual sources of clarification and elucidation which are not necessarily only consulted in instances of uncertainty and ambiguity, but also as complements to or further explanations of the apparently clear and unambiguous sections contained in the body of the enactment.
(2) As the Ministry of Local Government had granted the Ministry of Transport authority over the Bulawayo-Victoria Falls road, and although this road ran through the city of Bulawayo, that section of the road itself was outside the jurisdiction of the city. The need to consult the local authority thus fell away.
(3) The Minister was an administrative authority in terms of s 2(1)(c) of Administrative Justice Act and as such was enjoined by s 3(1) to act lawfully, reasonably and fairly. The Regulations were partial and unequal in their operation as between people who are ratepayers and residents of the City of Bulawayo. The objective of the location of this toll point, that is, to enhance traffic catchment, was disproportionate to the financial oppression it is causing to residents of the same suburb as the applicant. The declaration was partial and unequal in its operation as between different groups of Bulawayo ratepayers.
Delegated legislation can be declared *ultra vires* the primary legislation if it is grossly unreasonable. Gross unreasonableness is present when the provisions of an enactment entail discrimination, are disproportionate, vague or uncertain, as these regulations were.

Statutes – Tourism Act [*Chapter 14:20*] – Tourism (Designated Tourist Facilities) (General) Regulations 1996 (SI 107 of 1996) – levies paid to Tourism Authority on facilities provided at a registered tourist facility – money paid by hunters for trophies – whether a "facility" in terms of Regulations

Safari Operators Assn of Zimbabwe v *Zimbabwe Tourism Authority & Ors* HH-81-09 (Patel J) (Judgment delivered 21 July 2009)

The Zimbabwe Tourism Authority, which administers the Tourism Act [Chapter 14:20], issued a circular to hunting operators, instructing them to pay a 2% levy on all trophy fees received by them. The applicant sought an order declaring that the instruction was ultra vires the Act. In terms of s 35 of the Act, the Minister had declared that services or facilities provided to tourists by hunting operators would be "designated tourist facilities". Under s 55 of the Act, the Minister may require levies to be paid in respect of registered tourist facilities, and to require the person operating such a facility to include the levy in the price charged by him. The Tourism (Designated Tourist Facilities) (General) Regulations 1996 (SI 107 of 1996) required that a levy of 2% be charged to the tourist making use of any facility provided at the designated tourist facility concerned.
The hunting operators charged the levy in respect of all services, facilities and amenities provided, including hunting operations. In addition, a tourist would be is charged a further, variable, amount depending on the size of the animal to be hunted. The trophy charge was not separately invoiced but was added to the daily rate charged to form part of the gross amount realised by the operator for hunting and all other services rendered to the tourist. Where the tourist failed to hunt any animal, he would be refunded the additional amount paid. If the tourist was successful, the trophy belonged to him exclusively, and the extra payment would be retained by the hunting operator.
The applicant argued that the trophy per se did not constitute a service or facility provided by the operator. The issue was whether a hunting trophy was a "facility" in terms of the Regulations.
Held: hunting operations and safaris were facilities as defined in the legislation. The trophy fee paid by a tourist to a hunting operator was a sum paid to be able to hunt through the hunting facilities provided by the operator. If the tourist succeeded in hunting an animal, he had to pay the additional charge for his trophy which he had acquired solely by dint of the facility provided by the hunting operator. It followed that the hunting operation afforded the means by which the tourist was able to access the trophy. The trophy was quite clearly an intrinsic and inseparable part of the hunting services afforded by the operator and could not, in ordinary usage, be extricated from the service or facility provided by the operator.

Words and phrases – "obtained"

ZRA & Anor v *Murowa Diamonds (Pvt) Ltd* S-41-09 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 28 September 2009)

See above, under REVENUE AND PUBLIC FINANCE (Duty and value-added tax).

Words and phrases – "withdraw" – Land Acquisition Act [*Chapter 20:10*] – s 5(7)

***Matanda (Pvt) Ltd* v *Min of National Security & Ors* HH-178-10 (Makoni J) (Judgment delivered 11 November 2009)**

***See above, under* LAND (Acquisition – preliminary notice of acquisition).**