Latest update: 22 June 2012

CASES DECIDED JULY – DECEMBER 2011

Administration of estates – application of customary law – person married under general law – when such person's estate may be dealt with according to customary law

Zawaira v *Nyamupfukudza NO & Ors* HH-241-11 (Chitakunye J) (Judgment delivered 3 November 2011)

See below, under SUCCESSION (Intestate – heirs *ab intestato*).

Administration of estates – direction by Master – review of – failure to observe time limits for making application for review – failure to notify persons affected by Master's direction – both fatal to application – court having no power to condone failure to file within time limit

Mayiswa v *The Master & Anor* HH-278-11 (Gowora J) (Judgment delivered 23 November 2011)

The applicant was a widow. She and her late husband had been married under the civil law and had 5 children. The deceased had fathered a further 13 children by other women during the subsistence of the marriage. The Master held a meeting where a decision was made that all the 18 children sired by the deceased, including those born out of wedlock, were the heirs to the deceased's estate in equal shares. The Master directed that the 13 children born out of wedlock by her late husband be included in the distribution plan. The applicant had therefore approached the court to have the decision of the Master reviewed on the ground that it was unlawful and illegal as it had no basis in law. When the application was served on the Master, he pointed out that the application had been filed outside the 30 days provided by s 52(9) of the Administration of Estates Act [*Chapter 6:01*]. The beneficiaries who had been accorded the status of heirs by the Master, although not cited in the application, had applied to be joined as parties to the dispute and had in fact been joined. The present application was however not served upon them.

Held: (1) The provision which affords the right to an aggrieved party to seek a review does not allow for an extension of the time within which such review may be launched. The court could not accord to itself the power to condone the failure on the part of the applicant to file the application within the period provided for by the statute. To do so would be to usurp Parliament's power to legislate. In the absence of compliance on the part of the applicant to observe statutory time limits, the court would have to find that the application is not properly before it. Further, s 52(9) requires that before an application for review is made, notice thereof must be given to any person affected by the Master's direction. No such notice was given and failure to give it was fatal to the applicant's case. Under r 256 of the High Court Rules, any proceedings for the review of a decision of any court, tribunal or official shall be by way of court application and delivered to the official whose decision is being reviewed and to all the other parties affected. In spite of this requirement, the applicant sought to enrol the matter as unopposed in circumstances where the parties directly affected by the order being sought had sought an order for their joinder and had in fact been joined as parties.

(2) While under the common law, which has not been altered by statute, illegitimate children are not entitled to succeed *ab intestato*, there are arguments that this provision is unconstitutional. However, in the circumstances the only course open to the court was to withhold its jurisdiction.

Editor's note: on the issue of whether illegitimate children are entitled to succeed *ab intestato*, see *Zawaira* v *Nyamupfukudza NO & Ors* HH-241-11, which is summarised below under SUCCESSION (Intestate – heirs *ab intestato*).

Administration of estates – estate property – disposal of before executor appointed – when property may be disposed of – purposes for which property may be disposed of

Muchini v *Adams & Ors* HH-208-11 (Hlatshwayo J, Karwi J concurring) (Judgment delivered 5 October 2011)

The appellant bought a house which was part of a deceased estate. The deceased had died intestate and his widow sold the house, although no executor had by then been appointed. The appellant moved in but did not pay for the house. The widow then sought an eviction order, on the grounds that the sale was invalid.

Held: in terms of s 21 of the Administration of Estates Act [*Chapter 6:01*], it was the widow's duty to keep custody of the property until the appointment of an executor or executor dative. In terms of s 41 of the Act, a person who takes it upon himself to administer deceased estates outside the provisions of the Act becomes personally liable to the creditors for all debts due by the estate should there be a shortfall in the payment of such debts. That person is only excused from such personal liability if his actions were "absolutely necessary" for, among other things, the subsistence of the family or household. It would thus be permissible to use estate property for, *inter alia*, providing a suitable funeral for the deceased, providing for the subsistence of the deceased's family or household, or the safe custody or preservation of any part of such property, e.g, it may be necessary to purchase feed for cattle. In this case, the facts did not show that the house was sold in circumstances which satisfy the exception provided by s 41. The sale thus violated s 21 of the Act.

Administrative law – review – grounds for – legitimate expectation – contractual matter – party awarded tender by town council – decision to award tender not communicated to party – no legitimate expectation that tender would be awarded

MWI Zimbabwe (Pvt) Ltd v *Ruwa Town Council & Anor* HH-237-11 (Kudya J) (Judgment delivered 2 September 2011)

See below, under LOCAL GOVERNMENT (Urban council – resolution).

Agency – agent – authority – institution of legal proceedings on behalf of principal – need for specific authority to be given – mandate given to estate agent to manage property – does not imply authority to institute proceedings on behalf of principal

Westwood v *Mercers Property Brokers* HH-281-11 (Patel J, Chiweshe JP concurring) (Judgment delivered 30 November 2011)

The respondent, a firm of estate agents, successfully brought eviction proceedings against the appellant, the tenant of a leased property. The only issue on appeal was whether the respondent had *locus standi* to bring the proceedings. The lease agreement purported to have been made and entered into by the respondent as agent for the owner of the property in question. However, the agreement was not signed by the respondent, but by the owner himself *qua* lessor.
Held: No matter how broad an agent's mandate may be to manage the leased property on behalf of the owner or lessor, he must be given specific authority to sue before he can institute legal proceedings against the lessee, whether for rentals due or for recovery of the property. In terms of the contract *in casu*, it was the owner who granted vacant possession of the property to the appellant. No authority to sue on behalf of the owner was given to the respondent by its principal, either in its management mandate or in the lease agreement. The clause of the agreement relating to the enforcement rights of the lessor contemplated that the lessor would instruct his attorney to make demand and to institute legal proceedings against the lessee. Similarly, the property management mandate executed by the owner only allowed the respondent to manage the property. It did not expressly authorise the respondent to sue on behalf of the owner. Accordingly, the respondent lacked the requisite *locus standi* to institute proceedings for eviction.

Agency – agent – personal liability – when person contracting with agent can sue agent instead of principal – agent making himself jointly responsible – party entitled to claim against agent personally – non-joinder of principal not fatal

Phiri v *Nawasha* HH-20-12 (Mutema J) (Judgment delivered 23 November 2012)

The applicant bought a house from a deceased estate. The respondent, acting on behalf of the executor of the estate, concluded into the agreement of sale. The sale agreement provided, *inter alia*, that "the agent [identified as the respondent] hereby undertakes and guarantees that the seller will perform as per the agreement and in the event of any material breach he will be jointly responsible with seller in paying damages to the purchaser". The applicant paid the agreed purchase price but the respondent did not deliver. In a subsequent agreement, the respondent undertook to deliver to the applicant an alternative house within 14 days of signing of the memorandum. He did not comply with this undertaking, nor did he return the purchase price. When the applicant claimed for specific performance, the respondent argued that the non-joinder of the principal was fatal to the application.
Held: The general rule is that a person contracting with an agent can only sue the principal on that contract, but in some cases he can sue the agent. If, for example, he contracts with the agent as a principal, makes him his debtor and gives credit to him and not to his principal, then he can sue the agent personally on such contract. The usual test would be to enquire

to whom the contracting party looked. In the agreement of sale, the respondent held himself out as a guarantor and surety and being "jointly responsible with the seller in paying damages to the purchaser" in case of a material breach of the contract. He thus made himself a co-principal debtor. The only consequence (albeit an important one) that flows from a surety also undertaking liability as a co-principal debtor is that, vis-à-vis the creditor, he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with the principal debtor. By the respondent holding himself out as a guarantor and surety, by retaining the purchase price in his company's trust account for some 13 months, and by undertaking to secure for the purchaser an alternative property, the applicant looked to the respondent not only as a co-principal debtor but, through novation, as the sole debtor who could be sued in either instance alone without joining the principal or original principal as the case may be. In any event, by agreeing to be a co-principal debtor, the respondent tacitly renounced the benefit of excussion and it was idle for him now to claim it.

Appeal – criminal matter – notice of appeal – appeal against conviction – need to state grounds of appeal clearly and specifically – reason for such requirement – notice consisting of vague averments invalid – not saved by providing details in heads of argument

S v *Nyamukapa* HH-60-12 (Zimba-Dube J, Bhunu J concurring) (Judgment delivered 17 November 2011)

After the appellant's conviction and sentence on a charge of theft of "trust property", a notice of appeal was filed on his behalf, which stated:

"AD CONVICTION

Appellant argues that the court *a quo* erred or misdirected itself in one or more of the following ways:-

1. Whether or not the court *a quo* heavily relied on unsafe evidence which did not point to the guilt of the appellant.
2. Whether or not the court *a quo* relied on flouting of workplace procedures by the appellant as evidence of theft, the charge alleged by the State.

AD SENTENCE

3. Whether the court *a quo* imposed a disproportionate and stiffer penalty without regard to the accused's personal circumstances, mitigation and contrition".

The respondent argued that the notice and grounds of appeal raised in respect of conviction fell short of the requirements of r 22(1) of the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules 1979 (SI 504 of 1979), being vague and too generalised. The rules require a notice of appeal to be clear and specific and to indicate whether the misdirection alleged is one of fact or law. The appeal, he argued, was not properly before the court. The appellant's counsel submitted that there was no need to give further details because the notice of appeal stated clearly what the grounds of appeal were. He contended that the State had not suffered any prejudice as the grounds were amplified by appellant's heads of argument.

Held: r 22(1) provides that a notice of appeal should set out "clearly and specifically the grounds of the appeal". Failure to comply renders the notice a nullity. In terms of r 47, if the notice is a nullity and the time for noting an appeal has lapsed, the right to appeal must be deemed to have lapsed. Our criminal courts in practice do not strictly scrutinise grounds of appeal for compliance with the requirements of the rule, and the Attorney-General's Office has in the past not paid particular attention to the format of grounds of appeal. Most grounds of appeal, though not complying with the rules, have gone unchallenged, resulting in litigants not adhering strictly to the rule.

The first ground averred that the magistrate relied on unsafe evidence to convict. If the ground was meant to challenge the magistrate's findings of fact, it did not specifically say so. A ground that the court *a quo* misdirected itself in that it heavily relied on unsafe evidence which did not point to the guilt of the appellant is too general. It lacks precise detail of the points the appellant seeks to rely on. It is vague as it does not state whether the magistrate erred in law or fact. The second ground was also vague and did not state whether the challenge was of law or fact.

The procedure governing filing of notices of appeal is separate from that for heads of arguments. The two processes serve two different purposes and the processes are filed at different stages. Grounds of appeal are required at the initial stages of the appeal to inform all concerned of the appeal. Their purpose is to advise the trial magistrate of the points challenged on appeal. The magistrate's views and comments in turn are meant to assist the appeal court on the points challenged. It is difficult for a magistrate to make a meaningful response to an imprecise ground of appeal. The respondent similarly needs to be sufficiently informed of the points the appellant wishes to take on appeal so that the respondent is capable of making a meaningful response. The appeal court should also be adequately advised on points over which its decision is required. Heads of argument, on the other hand, serve a completely different purpose, that of identifying arguments in opposition to or in support of the appeal. It is inappropriate to file grounds of appeal that are vague on the premise that these will be bolstered up by the appellant's heads of argument.

The grounds of appeal were accordingly a nullity.

Appeal – execution – leave to execute pending appeal – application – must be made specifically, not in a manner requiring interpretation, deduction or inference

Econet Wireless (Pvt) Ltd v *Saruchera NO* HH-171-11 (Mavangira J) (Judgment delivered 21 September 2011)

An application for leave to execute on a judgment notwithstanding the noting of an appeal is such a special application that there should be no need for it to be interpreted or deduced or inferred from the papers. The papers must clearly and specifically indicate the exact nature of the application before the court. The applicant must take care to address the principles or factors which the court must apply in determining such an application.

Appeal – execution – leave to execute pending appeal – when may be granted – factors to consider – judgment not appealable – need for compelling justification for refusing to grant application to execute

Trustco Mobile (Pty) Ltd & Anor v *Econet Wireless (Pvt) Ltd & Anor (2)* HH-211-11 (Mavangira J) (Judgment delivered 12 October 2011)

The first applicant and the respondents concluded an agreement in terms of which the first applicant undertook to license to the first respondent certain intellectual property which would facilitate the provision of the free life insurance cover to Zimbabwean cellular phone users and customers of the first respondent against the purchase of cellular airtime from the first respondent. Differences arose amongst the parties in relation to the agreement, as a result of which the first applicant brought an urgent application; this resulted in judgment being delivered in favour of the first applicant. The first respondent did not complied with the order; instead it noted an appeal. Consequently, the applicants filed an urgent chamber application seeking a provisional order that, pending the determination of the dispute between the parties by of arbitration, the provisional order previously granted should remain operational notwithstanding any appeals filed by the respondents.
The applicants argued that leave to execute pending appeal ought to be granted because the judgment appealed against was not appealable by reason of the provisions of the Arbitration Act [*Chapter 7:15*], in particular art 9(4) of the Schedule thereto, under which the court had previously granted relief. In terms of art 9(4), a decision made by the High Court in terms of art 9(1) is not subject to appeal; and as the decision was made in terms of the provisions of the art 9, s 43 of the High Court Act [*Chapter 7:06*], which gives a right of appeal from the High Court in a civil case, was not applicable. They also argued that if the judgment was not complied with, the applicants would not be able to calculate the quantum of the damages which they would be seeking in the arbitration proceedings. The appeal would thus have the effect of rendering the intended arbitration futile because the applicants would not be able to determine the extent of their damages. It was contended that the applicants need to have access to the first respondent's systems for this purpose.
The respondents argued that the parties' agreement provided that arbitration would only be resorted to if negotiations failed. There had been no negotiations and consequently there was no right to resort to arbitration. Accordingly, there was no right to interim measures being afforded the applicants. On the merits, their stance was that the agreement was cancelled by mutual agreement and that as the judgment was therefore wrongly made, execution of the judgment would be unpalatable to it. It would be ruinous to the first respondent's business to resuscitate, by the granting of leave to execute pending appeal, a relationship that had been created in terms of the agreement.
Held: (1) In determining an application for leave to execute pending an appeal, the court must have regard to the preponderance of equities, the prospects of success on the part of the appellant and whether the appeal has been noted without the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or to harass the other party. *A fortiori*, where a judgment is not appealable, there must be compelling justification for refusing to grant an application such as the applicant's *in casu*.
(2) The balance of convenience or hardship favoured the applicants, and the application would be granted.

Appeal – notice of – effect – suspension of decision appealed against – applicability to arbitral award under Labour Act – award suspended if appeal noted in terms of Labour Act

Mvududu v *ARDA* HH-286-11 (Bhunu J) (Judgment delivered 23 November 2011)

The applicant obtained an arbitral award in his favour against the respondent, his former employer. The arbitrator had awarded him certain sums of money. The applicant applied for the awarded to be registered as an order of the High Court in terms of s 98(14) of the Labour Act [*Chapter 28:01*]. The applicant also noted an appeal to the Labour Court against the award on the grounds of its inadequacy, and the respondent cross-appealed. The issue arose whether the applicant could

register the award in spite of noting an appeal against it and whether a registered award is enforceable notwithstanding a pending appeal to the Labour Court.
Held: (1) In order to qualify for registration, all that an applicant has to do is to satisfy the court that (a) he is a party to the arbitral proceedings; (b) the award relates to him; and (c) the copy he is presenting for registration has been duly certified by the arbitrator in terms of subs (13). If those conditions are met, he is entitled as of right to register the arbitral award. While it may be correct that at common law it is incompetent for one to seek enforcement of a judgment or order one is appealing against, for the purposes of registration of the arbitral award, this legal principle is inapplicable as it has no relevance to the registration process. The Labour Act does not provide for the suspension of the registration of an arbitral award in terms of the Act and there is no other law that provides for the suspension of the registration of an arbitral award pending appeal. Upon registration with the court, an arbitral award is converted into a civil judgment of the court for the purposes of enforcement only. That being the case, the court has the power, upon proper application, to determine in terms of the High Court Rules whether or not execution should be effected notwithstanding the noting of appeal to the Labour Court.

(2) Where an appeal is made in terms of s 98(10) of the Act against the award of an arbitrator, there is no express provision in the Act to the effect that an appeal shall not have the effect of suspending the determination or decision appealed against. One must therefore to turn to common law for an answer. At common law the execution of all judgments is suspended upon the noting of an appeal. The rule applies to all adjudicating authorities without exception, including the magistrate's court and the Labour Court. The noting of the appeal to the Labour Court in terms of s 98(10) of the Act thus automatically suspended the arbitral award appealed against. Where a litigant has only appealed against a portion of a judgment, the suspension only applies to that portion of the judgment appealed against. It does not extend to portions not appealed against. The applicant's appeal against the non-award of more damages than those awarded by the arbitrator has therefore no bearing on the amount granted by the arbitrator. The amount granted by the arbitrator was therefore subject to the universal common law rule that an appeal suspends the decision appealed against. The applicant would have to seek leave to execute pending appeal.

Arbitration – award – award under Labour Act – registration of – what applicant for registration must show – applicant's entitlement to registration if conditions met, even if appeal noted against award

Mvududu v *ARDA* HH-286-11 (Bhunu J) (Judgment delivered 23 November 2011)

See above, under APPEAL (Notice of – effect).

Arbitration – award – review – application – procedure to be followed – application made in terms of High Court Rules – when may be treated as application made under Arbitration Act

Starafrica Corp Ltd v *Sivnet Invtsms (Pvt) Ltd & Anor* HH-178-11 (Patel J) (Judgment delivered 13 September 2011)

In an application for review of an arbitrator's award, the applicant did not state that the application was made in terms of art 34 of the Model Law (Schedule to the Arbitration Act [*Chapter 7:15*], but it was specifically averred that the award was in conflict with public policy as well as being grossly irregular.
Held: (1) an arbitration award cannot be challenged or set aside by way of review proceedings. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) of art 34 of the Model Law (Schedule to the Arbitration Act [*Chapter 7:15*].
(2) The principal object of para (1) of art 34 is to ensure the finality of arbitration proceedings by defining and restricting the scope of challenges to arbitral awards. This is achieved by stipulating that any such challenge may be made only by an application for setting aside *in accordance with* paras (2) and (3). Paragraph (2), as amplified by para (5), sets out the substantive grounds upon which an arbitral award may be set aside. Paragraph (3) prescribes the time limit within which such an application must be made. Apart from this, art 34 says nothing more about the procedure governing an application for setting aside.
(3) The differences between an application under art 34 and review proceedings under the High Court Act [*Chapter 7:06*] generally are (a) that the interventionary powers of the High Court are confined to setting aside the impugned award and do not extend to any other corrective measure; and (b) that the time limit for a review application is 8 weeks, subject to extension for good cause, while the period stipulated under art 34(3) is 3 months, without the possibility of extension. Apart from these procedural distinctions, the substantive grounds for setting aside an award, in terms of art 34(2) as read with art 34(5), are virtually the same as the grounds for review under common law and the High Court Act.

(4) The requisite procedural provisions are set out in Order 32 of the High Court Rules 1971 relating to applications generally, which provisions also apply to the conduct of review proceedings under Order 33. Although Order 33 is unquestionably subsidiary legislation, its fundamental objective is to prescribe the procedure to be applied in the exercise of review powers embodied in its parent statute, the High Court Act. The procedural exigencies of the Model Law should not be seen as being in conflict with the High Court Rules. Rather, art 34 should be construed and applied in conjunction and conformity with the Rules, including Order 33, which should be treated as a complementary adjunct to the application contemplated by art 34. Article 34(1) does not exclude or preclude an application for the setting aside of an arbitral award by way of review proceedings under Order 33, provided such application is in accordance with arts 34(2) and (3), *viz.* premised on one or more of the grounds enumerated in art 34(2) and (5), and made within the 3 months time limit stipulated by art 34(3).
(5) Where the application for review was made within the time limits set out in the Model Law and the grounds for review were those set out in the Model Law, it would be permissible to treat the application as one made under art 34.

Bank – duty to client – undertaking to pay client's money out on demand – bank handing money to Reserve Bank following directive – bank's duty to protect interests of client – bank's duty to ensure that directive issued lawfully

China Shougang Intl v *Standard Chartered Bank Zimbabwe Ltd* HH-310-11 (Bere J) (Judgment delivered 23 November 2011)

The applicant held foreign currency accounts with the respondent bank. In 2007, in line with a directive from the Reserve Bank, the respondent debited with applicant's account with all the foreign currency in those accounts and transferred the money to the Reserve Bank. When the applicant sought the return of its money, the respondent argued (a) that it was improper for the applicant to have proceeded by way of application to recover a debt due to it and that the applicant ought to have instituted proceedings by way of summons; and (b) that since the funds in issue were held by the Reserve Bank, it was against the Reserve Bank of Zimbabwe that this application should have been directed. By debiting the applicant's corporate foreign currency account, the respondent was merely complying with a directive issued by the Reserve Bank (to all commercial banks) to so act.
Held: (1) what determines the nature of the proceedings to initiate is whether or not there are material disputes of facts. If there are such disputes, motion proceedings would be incompetent. Institution of proceedings would have to be by way of summons. Legally it is competent for a creditor in a proper case to claim money owing to him by way of notice of motion, provided that the facts are not in dispute and the claim is liquidated.
(2) The respondent as a commercial banker undertook to keep the applicant's money and pay it out to the applicant upon demand. The respondent failed to do so when called upon to do so by the applicant. The respondent claimed it had transferred the money into a third party's account. There was no privity of contract between that third party and the applicant. The party with whom the applicant had entered into a contractual arrangement was the respondent. While the Reserve Bank was empowered by Exchange Control Regulations 1996 (SI 109 of 1996) to order the expropriation of the applicant's deposits, any such directive had to be approved by the Minister and published in the *Gazette*. Non-compliance with this mandatory requirement would render any directive unlawful. The Regulations gave the respondent, as an authorised dealer, an adequate opportunity to make representations if it felt it had an obligation to protect the deposits made by the applicant. In addition, but the regulations provided for an appeal by the respondent against any decision by the Reserve Bank.
Given the special relationship that existed between the respondent and the applicant, the decision by the former to interfere with the applicant's deposits was not one that should have been taken lightly. The onus was on the respondent to ascertain the lawfulness of the Reserve Bank's directive, instead of blindly following it. The respondent had a natural obligation thrust upon it to protect the applicant's deposits. That duty entailed, *inter alia*, verifying the legality or otherwise of the directive given by the Reserve Bank because the Reserve Bank was not privy to the contractual relationship between the applicant and the respondent. The respondent should be ordered to reimburse the monies due to the applicant without putting the applicant into the further unnecessary cost of insisting that it joins the Reserve Bank in these proceedings. The respondent could take appropriate action against the Reserve Bank of Zimbabwe if it so desired.

Constitutional law — citizenship – by birth – rights of citizen by birth – whether can be deprived of citizenship – Constitution of Zimbabwe 1980 – Chapter II – only citizenship by registration or naturalization may be lost – Citizenship of Zimbabwe Act [*Chapter 4:01*] – s 9(7) – requirement to renounce foreign citizenship, failing which Zimbabwe citizenship is lost – *ultra vires* s 9 of Constitution

Piroro v *Registrar-General of Citizenship & Ors* HH-128-11 (Mavangira J) (Judgment delivered 6 July 2011)

The applicant's father was born in Mozambique in 1941. He came to Zimbabwe in about 1955 when he was still young and lived most of his life in Zimbabwe. At some stage he became a citizen of Zimbabwe. He died in Harare on 8 February 2008. The applicant's mother was born in Zimbabwe. She was a citizen of Zimbabwe by birth. She lived all her life in Zimbabwe and died in Harare on 18 April 2008. The applicant himself was born in Harare in 1967. In 2000, the applicant was issued with a Zimbabwe passport on the basis that he was a Zimbabwean citizen. The passport expired in June 2010 when the applicant was in Canada where he was living and working. Before its expiry he submitted an application to renew his Zimbabwe passport. He submitted the form to the first respondent through the Zimbabwe Embassy in Canada. The first respondent refused to grant the application for a renewal. His reasons were that contrary to s 9(1) of the Citizenship of Zimbabwe Act [*Chapter 4:01*], the applicant was a dual citizen of Zimbabwe and Mozambique and that as a consequence, and in terms of s 9(7) of the Act, he had lost his Zimbabwe citizenship. Secondly, the first respondent contended that before the applicant was entitled to apply for a new Zimbabwe passport, he had, in the first instance, to renounce Mozambique citizenship in terms of Mozambican law, even though he has taken no voluntary or active steps to acquire such foreign citizenship. Then, in accordance with the provisions of s 14(1)(b) of the Act, he has to apply to the Minister of Home Affairs to be restored as a Zimbabwe citizen in terms thereof. If citizen were restored, it would be citizenship by registration. The applicant argued that the provisions of s 9 were not applicable firstly, because he was not, as at 6 July 2001, a dual citizen of Zimbabwe and Mozambique. Consequently, s 9(7) of the Act did not apply to him. Secondly, he had never been a citizen of a foreign country and thus had not breached the provisions of s 9(1). Thirdly, as he had not acquired a foreign citizenship, s 9(2) of the Act did not apply to him.

Held: (1) "citizenship" in law denotes a legal bond between an individual and the State in which the State recognises and guarantees that individual's rights. The most common rights of citizenship are the right to permanently reside within the State, the right to vote, the right to be elected to public office, and the right to freedom of movement within and outside the State, which includes the right to a passport issued by the State, and the right to diplomatic protection by the State.

(2) Historically, up to the time of Independence, the main criterion for citizenship was the place of birth of the person concerned. However, in 1972, the origin and citizenship of the person's parents at the time of that person's birth became more relevant. With the advent of Independence the main laws relating to citizenship of Zimbabwe were published as a Schedule to the Zimbabwe Constitution Order 1979 (SI 1979/1600 of the United Kingdom). Chapter II of the Constitution deals with citizenship. Section 5(1) of the Constitution, as originally promulgated in 1979, provided for citizenship by birth in respect of persons born in this country on or after 18 April 1980 in the same manner as that provided in s 5 of the Citizenship of Rhodesia Act [*Chapter 23* of 1974]. This meant that the place of birth of the person concerned was still the main criterion. However, in 1996, the 14th Amendment to the Constitution made the citizenship of the person's parents as important as the place of birth of the person concerned. For a person to be a citizen by birth of Zimbabwe he or she had to be born in Zimbabwe and his or her mother or father had to be a citizen of Zimbabwe at the time of his or her birth. The most recent amendment to the citizenship law in Zimbabwe was by the 19th Amendment to the Constitution which came into effect on 13 February 2009. That Amendment repealed Chapter II *in toto* and substituted it in substantially different terms. The original s 4, which stated that citizens before Independence were citizens after that date, does not appear in the new Chapter II. In its place there is a section which deals with the concept of citizenship.

(3) Under pre-Independence legislation, a citizen by birth could not be deprived of his citizenship. Only a person who was a citizen by registration or naturalization could be so deprived, after due notice and an enquiry. The Independence constitution made it clear that a citizen by birth could not be deprived of citizenship, but in 1983 this was amended to allow for a citizen by birth to lose citizenship if he was or became a citizen of another country. However, the 2009 amendment replaced all the previous provisions relating to citizenship. The power given to Parliament in relation to deprivation of citizenship is that contained in s 9(c) which specifically empowers Parliament to provide for "the circumstances in which persons qualify for or lose their citizenship by descent or registration". There is no provision empowering Parliament to pass laws to provide for deprivation of citizenship in the case of citizenship by birth. Thus a person who is a citizen by birth cannot be deprived of his or her citizenship, thereby confirming the paramount importance which the Constitution rightly assigns to citizenship by birth. Section 4 of the 1979 Constitution, which stated *inter alia* that a person who was a citizen by birth immediately before 18 April 1980 was on and after that day a citizen of Zimbabwe by birth, remained as it was originally until the 2009 amendment. The effect of s 5(1) of the Constitution now is that if a person fulfils the requirements set out therein, then he or she is a citizen by birth of Zimbabwe. The effect of s 9 as read with s 5(1) is that a person who qualifies as a citizen by birth in terms of s 5(1) cannot be deprived, and cannot have been deprived, of that citizenship by default or in any other manner during his or her lifetime. Consequently, s 9 (7) of the Citizenship of Zimbabwe Act not only breaches the provisions of Article 15 of the Universal Declaration of Human Rights, but it is also *ultra vires* s 9 of the Constitution of Zimbabwe in so far as that provision relates to citizens by birth of Zimbabwe.

Constitutional law – Constitution of Zimbabwe 1980 – s 20 – right to freedom of expression – general derogations from such right – public policy as a ground for determining whether derogation lawful – record of information kept on individuals and supplied to subscribers needing to assess individual's creditworthiness – record of criminal conviction – whether public policy requires limit on how long such information may be retained

Pazvakavambwa v *Portcullis (Pvt) Ltd* HH-175-11 (Patel J) (judgment delivered 13 September 2011)

The respondent's business was to collect, store and disseminate public information on persons likely to use the banking services or credit facilities of financial institutions. The respondent's clients used the respondent's centralised system to check the antecedents of their customers when considering whether to grant credit. The respondent operated on behalf of the Zimbabwe Financial Clearing Association. The Association provided information for its registered and associated members, on a confidential basis, as to the creditworthiness of persons and companies referred to it by its members for research.

The applicant had made 4 unlawful donations and corruptly sanctioned a loan to a co-operative of which he was a member. He had deliberately concealed these five transactions from the board of the company of which he was managing director. In 1997 he was convicted on 5 counts of contravening s 3(1)(f) of the Prevention of Corruption Act [*Chapter 9:16*] and sentenced to a substantial fine, with a period of imprisonment imposed in default of payment of the fine. He appealed to the Supreme Court, but without success. Press reports of the conviction were kept by the respondent in its data base. The effect of this listing was that the applicant was unable to access banking services and loans from financial institutions.

He sought a de-listing from the data base. In the absence of a reply from the respondent, he sought an order declaring unlawful his continued listing on the database, as well as an order directing the respondent to expunge his name from its database.

It was argued that no law authorised the respondent's blacklist, nor was there any legal basis for his listing being maintained. The maintenance of criminal records *ad infinitum* was unreasonable and caused disproportionate prejudice to past offenders. It should therefore be declared unlawful as being contrary to the public policy of rehabilitating offenders and the right of offenders to reintegrate into society. The relevant contracts between the respondent and its clients were also contrary to public policy. The right to freedom of expression and information was not absolute and must be balanced against the rights of other individuals and broader public policy. The rights of the applicant had been violated for an unreasonable period of time. The prejudice occasioned to the applicant was greater than the prejudice likely to be suffered by the respondent.

The respondent argued that it provided a service to banks at their request. The banks relied on the information when deciding whether to grant credit to their customers. The respondent did not decided whether or not to grant credit; it was merely a custodian of information in the public domain or contained in public court records. There was no law that precludes anyone from maintaining a database of such information. It was not practically possible to expunge from its records what had already happened. This would entail a breach of its duty of care to its clients. Allowing the relief sought by the applicant would assist him in concealing facts of importance to banks in deciding whether or not to grant credit. It would be contrary to public policy to prevent the dissemination of public information. This was underscored by the constitutional right to the freedom of expression and information.

Held: (1) s 20(2)(a) of the Constitution allows for derogations from the right to freedom of expression in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health. Section 20(2)(b) permits further derogations for the purpose of, *inter alia*, protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings. However, any such derogation is not permissible where it is shown not to be reasonably justifiable in a democratic society. Section 20(2)(a) does not provide for any derogation under the specific head of public policy, but the public policy of Zimbabwe should be a legitimate consideration in assessing the constitutionality of any law formulated or conceived under s 20(2)(b) to restrain any act or conduct impinging on the reputations, rights and freedoms of other persons. In other words, conduct in pursuit of the freedom of expression or information may be lawfully curtailed where it is contrary to any public policy pertaining to the rights and freedoms of others.

(2) The concept of public policy in any given society is an elusive one, depending upon transient and sometimes subjective views on what is in the public benefit or what constitutes the public good. Nevertheless, an act will be regarded as being contrary to the public policy of Zimbabwe if it violates notions of elementary justice or constitutes a palpable inequity that would hurt the conception of justice in Zimbabwe. Sentencing policy in criminal matters, as enunciated through legislation and the courts, is an integral part of the public policy of Zimbabwe. Our sentencing policy is geared towards the rehabilitation of offenders and their reintegration into society. The question was whether the retention of a criminal record in perpetuity on the database of a credit protection bureau, for disclosure to its clients on a confidential basis, violates our notions of elementary justice or constitutes a palpable inequity that is contrary to public policy.

(3) The creditworthiness of clients or potential clients is a matter of vital interest and any information honestly given to people who are legitimately interested in it does not attract liability, no matter the consequences to the client. The respondent's

activities involved an exchange of information within a closed business community, namely, the financial institutions that are members of the Association and the respondent. The information distributed by the respondent was confined to this closed community. The respondent's database was not a "blacklist", as the respondent was not a national credit protection agency whose information is accessible to the public at large. Rather, it gathers relevant information for capture on its database and is contractually bound to furnish any information in its possession to a client subscriber who makes an enquiry pertaining to that client's existing or prospective customers.
(4) As to the duration for which the information was kept, this case concerned the accessing of relevant information by a limited group of financial institutions under the terms and conditions of a subscription contract. There was no relevant legislation on the point and it was virtually impossible to assess what would constitute an appropriate period for retaining the record of a criminal conviction and resultant sentence. The length of a sentence of imprisonment does not necessarily afford a useful guide, because of the infinite variability of criminal sentences. Criminal conduct is morally more reprehensible than civil misconduct and its consequences are inherently more serious than the implications of civil liability. This meant that analogies with South African legislation regulating credit information and establishing national norms and standards relating to consumer credit were tenuous, as that legislation deals with civil court judgments, rehabilitation orders and administration orders. There could be no prescriptive period for the retention of records relating to proven criminal conduct. The fact that a person convicted of a crime involving dishonesty has served his sentence does not necessarily mean that he is reformed and that he is no longer a credit risk. In each case, a proper assessment would have to be made by the financial institution concerned on the basis of all relevant information, *i.e.* the individual's past record as well as such additional information as he proffers in order to demonstrate that he is now creditworthy. Accordingly, the retention of a criminal record on a creditworthiness database for an indefinite duration could not logically be characterised as being disproportionate or unreasonable.

Constitutional law – Constitution of Zimbabwe 1980 – s 24(2) – application for referral of matter to Supreme Court – dismissal of application by lower court – dissatisfied applicant should then approach Supreme Court directly – High Court not empowered to review lower court's decision

Mugabe v *Chiumburu NO & Anor* HB-157-11 (Ndou J) (Judgment delivered 20 October 2011)

When he appeared before a magistrate on a criminal charge, the applicant made an application for his case to be referred to the Supreme Court in terms of s 24(2) of the Constitution. The magistrate dismissed the application on the ground that it was frivolous and vexatious. The applicant brought the dismissal on review before the High Court. The Attorney-General argued that application should have been made to the Supreme Court and not to the High Court.
Held: Although s 24(9) of the Constitution provides that a written law may make provision with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred upon it under s 24 and of subordinate courts in relation to references to the Supreme Court under s 24(2), no such written law has been made. The Supreme Court itself has indicated the procedure to be followed in relation to matters which are raised under the provisions of s 24 is the procedure as announced by the Supreme Court itself. Section 24(2) and s 24(4) specifically mention the Supreme Court. There is no reference to the High Court, which indicates a deliberate limitation of the inherent jurisdiction of the High Court. The applicant should, in a constitutional matter under s 24, approach the Supreme Court directly for a speedy redress. An order under s 24 is a distinct legal redress established by the Constitution itself, to have important constitutional issues decided directly by the final court in the land, without protracted litigation. The Supreme Court is the only court empowered to deal with this kind of application. Although s 24(2) is intended to give the magistrate power to protect the Supreme Court from frivolous and vexatious litigation, a party who is not satisfied with the magistrate's determination should approach the Supreme Court directly. The Supreme Court can deal with such matters on an urgent basis if the circumstances so demand. It can also grant a stay of proceedings where a case has been made for such relief.

Contract – breach – damages – general and special damages – distinction between – claim for damages as alternative to claim for specific performance – such a claim for general damages – not necessary to specify amount of such damages in summons – value to assessed as at date of trial

Contract – breach – remedies – specific performance – claim for specific performance, alternatively damages – whether necessary to specify amount of damages being claimed – when amount of damages in lieu of specific performance must be assessed

Power Coach Express (Pvt) Ltd v *Martin Millers (Pvt) Ltd* HH-232-11 (Gowora J) (Judgment delivered 19 October 2011)

The applicant issued summons against the respondent for delivery certain fuel storage tanks, alternatively payment of damages representing the replacements costs of the tanks. The amount being claimed for damages was not indicated in the summons or declaration. The matter proceeded to trial and judgment was given in favour of the applicant. The respondent noted an appeal against the whole judgment and the applicant filed an application for leave to execute against the judgment.
The applicant had ordered and paid for the tanks, but rejected them because they were made of a thinner metal than that specified. The applicant acted on the recommendation of a fuel company. The respondent thereafter disposed of the tanks for value. It offered reimburse the plaintiff the price paid, but the applicant refused the offer and, instead, demanded payment in damages reflecting the replacement costs of the tanks. This demand was refused by the respondent.
The defendant argued that the summons issued by the applicant was fatally defective and that the defect was such that it could not be cured by evidence. It was argued that the summons should contain a true and concise statement of the nature, extent and grounds of both the cause of action and the relief sought. It was argued that in a claim for damages, ordinarily the claim must appear *ex facie* the summons and that a failure to comply with the rules in this regard renders the summons invalid.
Held: (1) For purposes of pleading, damages may be claimed as general (otherwise referred as intrinsic) or special (otherwise known as extrinsic). As a general rule of pleading, special damages have to be to be stated with particularity in a pleading, but general damages, which are those which flow naturally and generally from the kind of breach of contract in question, may be claimed without particulars being given.
(2) Where a plaintiff claims specific performance and in the alternative damages, the time for assessing the value is the date of trial. In this situation, he is content to treat the seller's obligation to deliver the article as continuing and to take it with the value it may have at the date of trial. Where, however, the purchaser elects instead to claim damages in place of actual performance, his reimbursement depends upon the value of the thing he ought to have received, calculated at the date when he ought to have received it, or when the seller declines definitely to deliver it. Here, the purchaser's election to release the seller from the obligation to deliver and to claim in lieu a sum of money crystallizes the claim both in nature and amount at the date of the seller's breach of contract, and subsequent variations in the value of the article are immaterial.
(3) A claim for specific performance or, in the alternative, damages gives the seller an election which lasts until he is judicially compelled to exercise it one way or another. If the seller chooses to tender payment before judgment he must tender an amount based on the then value of the item.
(4) The respondent did not and could not argue that there was no cause of action disclosed on the summons and declaration. The trial court was entitled to accept the evidence adduced by the applicant as to the value of the tanks as at the date of trial.
(5) The respondent had no prospect of success on appeal. If there was the potentiality of irreparable harm to both parties, the balance of hardship or convenience clearly showed that the applicant would suffer greater hardship if the trial court's order were suspended through the noting of the appeal. Leave to execute would be granted.

Contract – cancellation – breach of contract by one party – notice by wronged party – must be with immediate effect – notice of cancellation at some future date – such notice invalid

Trustco Mobile (Pty) Ltd & Anor v *Econet Wireless (Pvt) Ltd & Anor* HH-158-11 (Mutema J) (Judgment delivered 4 July 2011)

The first applicant, a Namibian company, and the respondents concluded an agreement in terms of which the first applicant undertook to provide the first respondent with certain software and support services to facilitate provision of free life insurance cover to Zimbabwean cellular phone users and customers of the first respondent against the purchase of cellular airtime from the first respondent. In terms of the agreement, the first applicant would procure, for and on behalf of the first respondent, such life cover from the second respondent at no cost to the first respondent's customers against payment of a fee to the first applicant by the first respondent, prescribed and calculated in terms of that agreement. The agreement was to endure for an initial fixed duration of 18 months. A dispute arose when the first applicant and first respondent could not agree on the mode of calculating the royalty fees payable to the former. After some initial correspondence, the first applicant wrote to the first respondent advising that the latter was formally in breach of the agreement for non-payment of royalties to it and premiums to the second respondent. The letter stated that all obligations to provide insurance would be suspended 3 days later if all overdue payments were not received by then and that if all overdue amounts were not received within 14 days from date of the letter, the contract would be deemed to be cancelled in terms of clause 17.1 of the main agreement. The following day, the first respondent replied, saying "Your intention to terminate the agreement has been noted and accepted." In reply, the first applicant called on the first respondent to provide three names of people from whom an arbitrator could be chosen to enable referral of the dispute to arbitration in terms of the agreement. The first respondent reiterated its view that the contract had been cancelled and terminated the first applicant's link to the first respondent's mobile platform. The applicants sought an urgent order directing the first respondent to restore the link and to refrain from acting in a manner

inconsistent with the agreement until arbitration proceedings had been complete. The first respondent argued that the matter was not urgent; that the draft order was defective; that the relief sought amounted to an interdict, for which the requirements had not been met; that the applicants had repudiated the agreement; and that if it was found that the first respondent had repudiated the agreement, specific performance should not be granted.
Held: (1) where there has been a delay in bringing an application to court, either the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action. Law, unlike mathematics, is not an exact science. Whatever the length of the delay, if a reasonable or credible explanation for the delay is tendered, the delay should not detract from the urgency of the matter. *In casu* the explanation tendered for the delay was not only reasonable but understandable. Given the logistical difficulties encountered in the preparation, drafting and issuing the application over three different jurisdictions, the delay did not defeat the urgency of the matter.
(2) Article 9 of the Schedule to the Arbitration Act [*Chapter 7*:*15*] empowers the High Court to grant an interim measure of protection in the form of an interdict or other interim measure to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual where, as here, the arbitral tribunal has not yet been appointed and the matter is urgent. The relief being sought was designed to ensure that any award which may be made in the arbitral proceedings in favour of the applicants would not be rendered ineffectual.
(3) The fact that the agreement was to endure for 18 months with the first applicant receiving royalties, and that only 9 months had elapsed, clearly constituted a *prima facie* right accruing to the first applicant. Where, as here, a clear right is established which is not open to doubt, it is not necessary for an applicant to prove irreparable injury. No other adequate remedy was available to the applicants to achieve the preservation of the *status quo* pending determination of the dispute by way of arbitration.
(4) A valid notice of cancellation must clearly inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract as being at an end. The right to resile from the contract must be exercised immediately. A notice of cancellation which takes effect in the future is invalid. Here, the right to resile from the agreement was not exercised *ex nunc*, so the notice was not valid and there was no cancellation which the first respondent could note and or accept.
(5) Having found that there was no valid cancellation of the agreement and that the agreement was still alive, specific performance ought to be ordered to restore the *status quo ante*.

Contract – validity – contract made between State agency and another person – such contract concluded without following procedures laid down by relevant procurement legislation – such contract void *ab initio* and unenforceable

PMA Real Estate (Pvt) Ltd v ARDA HH-236-11 (Patel J) (Judgment delivered 1 November 2011)

The plaintiff operated a real estate business, including the valuation of assets and auctioning. The defendant was a statutory body established under the Agricultural and Rural Development Authority Act [*Chapter 18:01*]. The plaintiff issued summons claiming from the defendant a certain sum as valuation fees, together with interest, collection commission and costs. The arrangement between the parties had been that the defendant would pay a percentage of the value of assets valued by the plaintiff as valuation fees and that those fees would be paid out of the proceeds of sale by auction. This arrangement came to an end in when the defendant told the plaintiff to stop further auctions as the plaintiff was not registered with the Tender Board. The issue for determination was the validity of the contract between the parties in the context of the legislation on procurement. Under s 3(1) of the Procurement Act [*Chapter 22:14*], the provisions of the Act apply to procurement by all procuring entities as defined in s 2(1), including every statutory body such as the defendant. Under s 30(1) of the Act, services by a procuring entity shall be done by a method which complies with s 32, which sets out sets out the general procedures to be followed in the procurement of services. These relate to, *inter alia*, the publication of notices, tender documentation, criteria for qualification, the submission and evaluation of proposals, and other tender formalities. All proceedings for the procurement of a service must be in accordance with procurement regulations made by the Minister, or, in regard to any matter not prescribed in such regulations or in the Act, in accordance with such procedure as the procuring entity may fix. The Procurement Regulations 2002 (SI 171 of 2002) set out the procedures governing the invitation of tenders generally. It is an offence to contravene any provision of the Regulations, although the Regulations are silent as to the penalty to be imposed. The Act is equally silent in this regard.
Held: (1) The more pertinent enquiry was whether the contract was concluded in compliance with other procedures enjoined by the Act and Regulations. Reading all of the relevant provisions together, what was contemplated by the Act in relation to the procurement of services is that every procurement entity must adopt a method that complies with the general procedures set out in s 32(1), as read with the detailed procedures elaborated in the Regulations. Any departure from the prescribed procedures must be sanctioned under the Act or the Regulations. The defendant did not follow the general procedures set out in s 32(1) of the Act or the formal tender procedures stipulated by ss 4 and 8 of the Regulations. There was nothing to indicate that it adopted any other method of procurement allowed by the Regulations in its contract with the

plaintiff. In particular, there was no evidence of the quotations or approvals enjoined by s 5. The defendant's departure from the prescribed procurement regime was neither otherwise provided by the Act nor in accordance with the Act, and was clearly unsanctioned by the State Procurement Board or its Chairman.
(3) The provisions of ss 30, 31 and 32 of the Act are couched in peremptory terms and that compliance with them, as well as the Regulations, is intended to be mandatory rather than merely directory. However, the Act does not state the legal consequences of any failure to so comply.
(4) The scope of a State servant's authority is more often than not determined by statutory provisions and the requirements of the statute or regulations concerned must be complied with. If such requirements are mandatory, any contract made in breach of them is invalid and unenforceable. No State servant has the authority to circumvent or dispense with the requirements of a statute. To recognise or enforce any such contract would operate to render the applicable enactment nugatory. Although it might be argued, by analogy with company law, that persons dealing with the State are entitled to assume that the functionaries in question have duly complied with the prescribed formalities, any hardship which might befall persons contracting with the State is outweighed by the public interest in safeguarding State property and public moneys. If contracts made in material breach of statute were to be recognised and enforced, the unavoidable result would be to frustrate and defeat an explicit injunction of the legislature.
(5) A contract in breach of statute cannot be retrospectively ratified or otherwise validated because (a) the law does not countenance the ratification of a contract or transaction which, being contrary to statute, is null and void *ab initio*; and (b) the executive is not at liberty to waive or renounce a peremptory statutory obligation imposed by the legislature for the protection of State property and public moneys. Accordingly, the contract *in casu* was invalid and unenforceable.

Costs – *de bonis propriis* – when should be awarded – young and inexperienced lawyer – may be treated with more sympathy than experienced one

Njini & Anor v *Ngwenya & Anor* HB-190-11 (Cheda J) (Judgment delivered 1 December 2011)

The common reasons for awarding costs *de bonis propriis* are where the legal practitioner is guilty of improper or unreasonable conduct, or lack of *bona fides*. In making such determination, some of the factors which should be taken into account are: (a) the lawyer's age; (b) his qualifications; (c) his experience; and (d) his general character and attitude towards his work. The less experienced a lawyer is, the more sympathy he should receive from the courts; the actions of the more experienced lawyers may in contrast be viewed as deliberate.

Costs – security for – action brought by *peregrinus* – *incola*'s right to seek security for costs – court's discretion as to whether to order security – considerations

Bowes NO & Ors v *Manolakakis* HB-103-11 (Mathonsi J) (Judgment delivered 21 July 2011)

A *peregrinus* who initiates proceedings in our courts must, as a general rule, give security to the defendant for his costs, unless he has within the area of jurisdiction of the court immovable property with a sufficient margin unburdened to satisfy any costs which may arise. The presence of immovable property is a defence to a claim for security, but the doctrine has not been extended to include movable property. The object of the rule is to make sure that an *incola* will not suffer any loss if he is awarded the costs of the proceedings. The rule exists primarily to protect the interests of an *incola* who is sued by a *peregrinus*. The protection of provision of security for costs is only available to an *incola*. An *incola* is not, as a general rule, required to provide security for costs.
A party seeking the remedy of security for costs must satisfy the court that it is *incola* before the protection can flow to it. Such status is not acquired merely by having a claim within Zimbabwe which is the subject of the dispute, no matter how substantial the property is. The status of *incola* connotes the element of residence, but not merely temporary residence: it constitutes domicile.
There are no rules providing for an order for security for costs. The issue of security for costs arises out of judicial practice. The court, however, retains the exclusive discretion to make such order or not to. In exercising its discretion, the should be guided by the provisions of s 18(1) as read with s 18(9) of the Constitution of Zimbabwe, namely, that "every person" is entitled to the protection of the law and to be afforded a fair hearing within a reasonable time by an impartial tribunal in the determination of the existence or extent of his civil rights or obligations.

Costs – taxation – party and party costs – costs incurred during period before current tariff came into effect – not permissible to use current tariff to calculate costs – costs must be assessed in accordance with tariff applicable at time costs incurred

Mavurudza & Anor v *Meidler Pools & Construction (Pvt) Ltd* HH-234-11 (Bhunu J) (Judgment delivered 26 October 2011)

An award of costs following a civil action was made during the period extending from January 2009 to December 2010 when there was no statutory tariff for the claim of costs in foreign currency. The plaintiff's legal practitioner was of the view that costs were claimable in foreign currency for that period because the Zimbabwean currency had by then become dysfunctional and of no use to anyone. The Taxing Master considered that costs were claimable in terms of the governing statutory instrument as at the time the costs were incurred. He referred the matter to a judge in chambers for a decision.
Held: The taxing officer is a statutory functionary who is strictly bound by the four corners of the enabling statute. His powers in taxing party and party costs are laid down under r 308(2) of the High Court Rules 1971. This rule requires him to be guided as far as is possible by the prescribed tariff without strictly binding him to slavishly follow that tariff. He is allowed a certain measure of discretion, provided he keeps within reasonable limits of the tariff. The proviso to r 308(2) expressly prohibits the taxing officer from relying on a subsequent amendment to the tariff. During the period in question the applicable tariff was denominated in Zimbabwean currency in terms of the High Court (Fees and Allowances) (Amendment) Rules (SI 166 of 2005).There was no tariff denominated in foreign currency until 4 February 2011, when SI 12 of 2011 was promulgated. In the absence of an official conversion rate from Zimbabwean to any foreign currency, the tariff denominated in Zimbabwean dollars did not offer any guidance to the taxing officer with regard to taxation in foreign currency. That being the case, there could be no basis upon which the taxing officer could tax bills in foreign currency for the period in question other than in Zimbabwean dollars.

Editor's note: the judgment Bhunu J refers to in his judgment is In re *Est Matimura* 2010 (1) ZLR 17 (H), where Bere J pointed out that the issues to do with the current value of the Zimbabwe dollar require legislative intervention, not intervention by the courts. The situation in this case is surely one which requires appropriate legislative intervention, as taxation based on a currency that is not even in use is meaningless, not to say absurd.

Court – High Court – jurisdiction – right to interfere with order of Supreme Court – court having no jurisdiction to interfere with order of the Supreme Court allowing execution of a High Court order pending determination of appeal – irrelevance of whether Supreme Court order one given by a single judge or by full bench – order made by Chief Justice as a judge of Supreme Court – not relevant that Chief Justice is also a member of the High Court

Church of the Province of Central Africa v *Diocesan Trustees, Diocese of Harare, & Anor* HH-206-11 (Uchena J) (Judgment delivered 23 September 2011)

The applicant filed an urgent chamber application seeking an order of the High Court, staying the execution of an order granted by another judge of the High Court. After the earlier order, which the applicant wanted to be stayed, was granted, the applicant appealed to the Supreme Court. The appeal suspended the execution of that order. The appeal was dismissed for failure to comply with r 46(5) of the Supreme Court rules. The applicant applied for its reinstatement, which was granted by the Chief Justice, who ordered that the noting of the appeal should not suspend the operation of the order appealed against. His reasoning was that there had been numerous applications and counter-applications between the parties and there was a need to curtail those applications, the multiplicity of which was simply adding to the confusion and hampering expeditious finalization of the dispute between the parties.
The applicant argued that the order to be stayed was an order of the High Court and the warrant of execution was issued by the High Court, which therefore had jurisdiction to control its internal processes. The applicant also argued that s 79B of the Constitution gave the High Court jurisdiction in spite of the prior order of the Supreme Court.
The respondent argued that the Supreme Court has clearly pronounced its decision on the execution of the order pending appeal, and that the High Court simply had no jurisdiction to alter what the Supreme Court has ordered. Neither party could cite authorities from other jurisdictions supporting the proposition that the High Court had jurisdiction to hear an application seeking to stay execution of the court's order which the Supreme Court has ordered in spite of its having reinstated the appeal.
Held: (1) While s 7 of the Supreme Court Act [*Chapter 7:13*] undoubtedly leaves it to the High Court to execute and enforce judgments of the Supreme Court, this does not mean that the High Court is empowered to suspend, even temporarily, the effect of an order of the Supreme Court either made in the exercise of its appellate jurisdiction or pursuant to s 24(4) of the

Constitution. This would constitute a direct interference with the authority of a superior court by one subordinate to it. The fact that the Supreme Court did not *in casu* exercise original jurisdiction when it ordered execution pending appeal did not therefore confer jurisdiction on the High Court to interfere with the Supreme Court's order. The fact that the order was granted by the Chief Justice in chambers, sitting as a single judge of the Supreme Court, did not open his order to interference by a court subordinate to his. An order of the Supreme Court – whether by one judge or the full bench – is an order of the Supreme Court, and is binding on all courts subordinate to it and cannot be interfered with by them.
(2) Section 79B of the Constitution merely enshrines the independence of the judiciary within the ambit of its judicial authority. It does not sanction the *ad hoc* extension of such judicial authority. The effect of s 79B is that judicial officers are to act independently in the exercise of their judicial authority. They are not subject to the direction or control of any person or authority, except to the extent that a written law may place them under the direction or control of another member of the judiciary. This does not entitle a judicial officer to vary, set aside or interfere with an order made by a court superior to his, or fail to observe judicial precedents based on the hierarchy of the courts. Precedents are based on the hierarchy of the courts and simply require a subordinate court to defer to the decisions of the court superior to it. What would be a direction or control prohibited by s 79B would be an administrative order the Chief Justice can give in terms of s 79A of the Constitution as head of the judiciary, if it affects a judicial officer's exercise of his judicial authority.
(3) The fact that the Chief Justice is in terms of s 81 (2) (a) of the Constitution, a member of and can preside in the High Court as a judge of the High Court had no relevance in this case, because he did not exercise his High Court jurisdiction when he made the order which led to this application. He made the order in the exercise of his appellate jurisdiction as a judge of the Supreme Court.

Court – magistrates court – jurisdiction – distribution of matrimonial property following divorce – court having jurisdiction only over registered customary law marriages – no jurisdiction to order distribution in respect of unregistered union

Muleya v *Muleya* HB-118-11 (Mathonsi J) (Judgment delivered 15 September 2011)

See below, under CUSTOMARY LAW (Marriage).

Criminal law – offences under Criminal Law Code – pledging of a female in compensation for death of a relative (s 94) – offence not created by the Code – conduct already proscribed under Customary Marriages Act [*Chapter 5:07*]

S v *Maguya & Anor* HH-231-11 (Patel J) (Judgment delivered 11 October 2011)

The two accused pleaded guilty to contravening s 94 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code"). They had pledged the complainant, their female relative and then a minor, to the family of a person who was killed by one of their relatives in 1980, as compensation. She was pledged in 2005, before the Code came into effect. The issue arose whether the charge criminalised any conduct perpetrated before the creation of the crime in question.
Held: By virtue of s 2(2) of the Code, a reference in the Code or any other enactment to a crime mentioned in the Second Schedule shall be construed as referring to that crime as defined in the relevant provision of the Code. The crime of "pledging a female person" is specifically mentioned in the Second Schedule as corresponding to s 94 of the Code.
Under s 11(1) of the Customary Marriages Act [*Chapter 5:07*], any agreement in which a person, whether for consideration or otherwise, pledges or promises a girl or woman in marriage to a man shall be of no effect. Section 11(2) made it an offence for any person to enter into any such agreement. Additionally, s 15 of the Act penalised any person who by force, intimidation or other improper means compels or attempts to compel any female to enter into a marriage against her will. Paragraphs (b) and (c) of s 94(1) of the Code re-enact the offences proscribed by ss 11 and 15 of the Customary Marriages Act. Paragraph (a) of s 94(1) specifically criminalises the so-called practice of "noxal surrender", by making it an offence to hand over a female to another person, as compensation for the death of a relative of that person or as compensation for any debt or obligation. The crime of pledging females is not new and was clearly penalised under ss 11 and 15 of the Customary Marriages Act. The offence of noxal surrender is not new. Although the compensatory aspect of noxal surrender is distinct and peculiar to the offence under s 94(1)(a), the mischief aimed at by these offences is the same, *viz*. the non-consensual pledging of females. In practice, noxal surrender has always been treated as a species of the arrangements prohibited by s 11 of the Customary Marriages Act, and has been penalised accordingly.

Editor's note: s 11(2) and s 15 of the Customary Marriage Act were repealed when the Code came into effect.

Criminal law – offences under Criminal Law Code – sexual intercourse with a young person (s 70) – both parties young persons – no offence committed

S v *CF (a juvenile)* HH-143-11 (Kudya J) (Judgment delivered 6 July 2011)

Section 61 of the Criminal Law Code [*Chapter 9:23*] defines "young person" as "a boy or girl under the age of sixteen years." The offence in s 70(1)(a) of the Code (having extra-marital sexual intercourse with a young person) seeks to protect young persons from adults who take advantage of their immaturity by engaging with them in extra marital sexual activities. It is envisaged that young persons are not mature enough to appreciate the consequences of such activities. It is clear from the wording of the legislation that not only are girls protected, but young male persons are protected as well. The result is that no offence is created where a young male person engages a young female person in any consensual sexual act.

Criminal law – statutory offences – failure to pay maintenance – no mandatory sentence of imprisonment provided – court may suspend all or part of sentence imposed

S v *Nyarugwe & Ors* HH-287-11 (Patel J) (Judgment delivered 22 November 2011)

When a person who has been ordered to pay maintenance fails to do so and is prosecuted for contravening s 23(1) of the Maintenance Act [*Chapter 5:09*], there is nothing to preclude the convicting court from suspending all or any portion of the term of imprisonment imposed, on condition that the accused makes all payments due in terms of the maintenance order, including any payments which are in arrears by a fixed date. This is borne out by the wording of paras (a) and (b) of s 23(3), which specifically envisage the possibility of the accused being convicted and not necessarily being sentenced to an effective custodial term. The same possibility emerges from the opening words of s 25(1). Section 23 does not contemplate any mandatory period of imprisonment, and affords the requisite discretion, where this is deemed appropriate, to allow for the payment of arrears by a fixed date, through a suspended term of imprisonment. Such a construction does not defeat the purpose of the section. On the contrary, it accords with its application in circumstances where compliance with the maintenance order requires that the accused remain out of custody in order to fulfil his maintenance obligations. Obviously, a suspended sentence may not be appropriate in the case of a repeat offender who is prosecuted and convicted under s 23(3). At any rate, each case must be considered on its own particular merits.

Criminal procedure – bail – application for bail – principles to be observed – requirement for court to lean in favour of granting bail – grounds on which bail may be denied – propensity to disturb public order – what must be shown

S v Madzokere & Ors HH-154-11 (Uchena J) (Judgment delivered 1 July 2011)

The release of an accused person on bail is aimed at enabling him to attend trial from out of custody. It does not mean that he has no case to answer. On the other hand, the detention of an accused in custody is to secure his attendance to stand trial, if there are genuine grounds for believing that the factors mentioned in s 117(2) of the Criminal Procedure and Evidence Act [*Chapter 9:*07] have been established against him. That is why the seriousness of the charge the accused is facing is not on its own enough to deny an accused person bail. The court must therefore endeavour to strike a balance between the interests of justice and the accused's liberty. Section 117(1) leans in favour of the liberty of the accused person, where it states that the accused "*shall be entitled to be released* on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, *unless the court finds that it is in the interests of justice that he or she should be detained in custody*.**"** The intention of the legislature was to make s 117 consistent with the presumption of the accused's innocence until proved guilty. That proof or lack of it can only be established at the accused's trial. The factors to be considered in a bail applications are:

- whether, if the applicant is released on bail, he will endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
- whether the applicant will abscond if released on bail; or
- whether the applicant will interfere with witnesses or evidence if released on bail; or
- whether the release of the applicant on bail will undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or
- where, in exceptional circumstances, there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

One or more of these factors must be established. They need not all be proved before a court can find that it is in the interests of justice for the accused to be detained in custody pending trial.
If it is alleged that release on bail would undermine or jeopardise the objectives or proper functioning of the criminal justice system (including the bail system), the applicant must be proved to have done things which can affect the proper functioning of the criminal justice system or to be likely to do so.
If an applicant is likely to interfere with witnesses or evidence, he may be denied bail on this ground, but only if that interference cannot be restrained by imposition of bail conditions deterring him from doing so.
For the last ground to apply there must be clear evidence establishing the applicant's propensity to disturb public order, and undermine peace and security. What would establish a strong propensity is evidence that the applicant has previous convictions for public violence and is facing several similar cases. The words "in exceptional circumstances" clearly indicate that the legislature was conscious of the remote possibility of this ground ever being ordinarily applicable, so whenever this ground is advanced it should be carefully considered to ascertain whether that likelihood is present.

Criminal procedure – bail – grant of – notice of intention to appeal by Attorney-General against grant of bail – such notice having effect of accused remaining in custody – abuse of powers given to Attorney-General – Attorney-General should not announce such intention unless appeal has merit

A-G v *Mabusa & Ors* HB-199-11 (Mathonsi J) (Judgment delivered 16 December 2011)

Section 121 of the Criminal Procedure and Evidence Act *Chapter 9:07*] gives the Attorney-General power to veto the grant of bail to an accused person. It accords him a discretion to prevent the release of a person who has been granted bail in situations where he intends to appeal against that decision. To the extent that it interferes with the liberty of a person who has been admitted to bail, that discretion should be exercised judiciously because the legislature, in its wisdom, entrusted the Attorney-General with huge powers. It is unacceptable for any representative of the Attorney General to shoot up the moment bail is pronounced and invoke s 121 without applying his mind to the basis for such invocation. The abuse of s 121 to keep persons in custody who have been granted bail has tended to bring the administration of justice into disrepute. It must be discouraged by all means and the time has come to announce to law officers prosecuting on behalf of the Attorney General that s 121 should be invoked only in those situations where there is merit in the appeal. Admitting a person to bail is the judicial discretion of the magistrate or judge. An appeal court can only interfere with that discretion where it is shown that there was a misdirection or that the discretion was exercised injudiciously. Persons who have been properly granted bail should not be kept longer in custody merely as a way of punishment. That would be an improper exercise of the discretion given to the Attorney General by s 121.

Criminal procedure – forfeiture – article forfeited at conclusion of criminal case – conviction set aside – possession of article an offence – former possessor not entitled to have article returned to him

Chiadzwa v *Comr-General of Police & Ors* HH-224-11 (Bere J) (Judgment delivered 11 October 2011)

The applicant had been convicted of possession of diamonds, which were, following his conviction, declared forfeit to the State. The conviction was quashed on review. The applicant then sought an order under s 61(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for the return of the diamonds, and their transmission, via the Registrar, to the Minerals Marketing Corporation of Zimbabwe.
None of the cited respondents bothered to defend the action. Neither the Attorney-General nor the Minister of Mines was cited by the applicant. However, the Attorney-General wrote a letter to the judge, complaining of not having been joined as a party.
Held: (1) Under r 87(1) of the High Court Rules 1971, no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party. In any event, the provisions of s 8 of the State Liabilities Act [*Chapter 8:14*] disabled the court from *mero motu* raising issues to do with non-compliance with s 6 of the Act.
(2) Once a matter has been argued before a court and is awaiting judgment or determination, there should be no direct communication with the presiding judge over the merits or demerits of that case. To do so would be an attempt to influence the decision of the court using unorthodox and unprofessional means. The Attorney General's approach was a desperate attempt to influence the decision of the court by addressing the court through the back door. It is both unethical and unprofessional to do so. If the Attorney-General felt the applicant had unfairly treated his office or that his office had an

interest in this matter, the proper course of action would have been formally apply for joinder in these proceedings in order to create a proper platform for him to be heard.
(3) Given the security risk associated with the diamonds, the Registrar could not assume their custody, given that hitherto he had never enjoyed such custody. Even if he had enjoyed such custody, he would have become *functus officio* the moment the order for forfeiture was pronounced. It would therefore not be competent for the Registrar to accept the diamonds merely to pave way for the applicant to lay his claim to them.
(4) Section 3 of the Precious Stones Trade Act [*Chapter 21*:*06*] *inter alia* would criminalise possession of the diamonds by the applicant. To return the diamonds to the applicant would be to sanction the commission of an act of illegality on the part of the applicant, and such an order would thus not be competent.

Criminal procedure – plea – guilty – explanation of charge and elements – purpose – essential to ensure accused understands charge and that he has no defence – multiple accused – need to put specific questions to each accused, not general questions to all of them

S v *Mubvimbi & Ors* HH-239-11 (Uchena J, Chiweshe JP concurring) (Judgment delivered 11 October 2011)

Section 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9.07*], requires that, before he can convict an accused person in proceedings under that section, the magistrate should be satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor.
The purpose of canvassing the essential elements of the offence when a plea of guilty is tendered is to satisfy the magistrate that the accused committed the offence charged In doing so the magistrate seeks to satisfy himself that the accused is not tendering an ill informed plea of guilty. He does so by explaining the essential elements of the crime charged and verifying the accused's admission of those essential elements by putting them to him in a series of questions covering each essential element of the crime, and ensuring that he has no defence to offer to the crime charged.
In a trial involving several accused persons who are alleged to have participated in the commission of the crime at different places and in different ways, to put general questions to the several accused at the same time, which each accused would answer one after the other, is not the correct way of canvassing the essential elements. Where several persons are charged jointly with culpable homicide, there should be a diligent inquiry during the canvassing of the essential elements with each accused, one at a time, to establish which accused used which weapon, where he or she struck the deceased's body and his or her culpability. Each should be questioned to reveal exactly what it was that he was admitting. The purpose of such questioning is not to test the accused person's credibility or to trap him into further admissions, but simply to determine precisely what it is that he is admitting.
It is not possible for a magistrate to be satisfied, as required by s 271(2)(b), if he asks general questions to many jointly charged accused persons whose answers can only be "yes" or "no" because of the manner the questions will have been put to them. Section 272 requires the magistrate to alter the plea to one of not guilty if the accused's response to his questions raises a doubt as to whether or not his plea of guilty is based on his accepting that he acted in the manner alleged and that he accepts the essential elements of the crime charged.

Criminal procedure – review – automatic review or upon referral by scrutinising regional magistrate – consideration of whether proceedings in lower court are in accordance with "real and substantial justice" – meaning – what reviewing judge must consider in making assessment – scrutiny by regional magistrate of proceedings in a lower court – similar principles apply

S v *Kawareware* HH-268-11 (Uchena J) (Judgment delivered 15 October 2011)

In scrutinising criminal proceedings terms of s 58(3)(a) of the Magistrates Court Act [*Chapter 7:10*], all the scrutinising regional magistrate is required to do is to satisfy himself that the proceedings are in accordance with real and substantial justice. If they are, he should certify them. If he is in doubt, he should refer them for review by a judge of the High Court. A judge of the High Court reviewing criminal proceedings of an inferior court is required by s 29(2) of the High Court Act [*Chapter 7*:*06*] to determine whether or not the proceedings are in accordance with real and substantial justice. If they are, he should confirm the proceedings. If they are not, he can withhold his certificate, alter or quash the conviction, or reduce or set aside the sentence as the circumstances of the case may require.
"Real and substantial justice" is the considerable judicious exercise of judicial authority by the trial court, which satisfies in the main the essential requirements of the law and procedure. Failure to comply with minor requirements, minor mistakes and immaterial irregularities, should not, however, result in a scrutinising or reviewing judicial officer's refusal to certify

proceedings as being in accordance with real and substantial justice. "Real and substantial justice" is proof that the conviction is safe despite the imperfections in the proceedings.
The main features to look out for in scrutinising or review proceedings are:

- the correctness of the charge preferred;
- the agreed facts or State and defence outlines;
- compliance with statutory requirements in taking a plea of guilty or in conducting a trial where the accused pleads not guilty;
- the acceptance or proof of the facts on which the charge is based;
- the assessment of evidence i.e matching of the law and the accepted or proved facts;
- the trial court's reasons for judgment;
- the correctness or otherwise of the conviction; and
- the justifiability of the charge or sentence.

With regard to sentence, since the codification of our criminal law, all sentences are provided for in the Criminal Law Code [*Chapter 9:23*] or in the statute which creates the crime charged. All the reviewing or scrutinizing judicial officer should do is check whether the sentence suits the offence and the offender, within the range of sentences provided for in the Code or other statute. He must also check the trial court's reasons for sentence to determine whether or not the correct sentencing principles were applied in passing sentence. Where a crime was committed under common law before codification, the judicial officer should be guided by precedents in similar cases. In all cases, the scrutinising or reviewing judicial officer should bear in mind the trial court's sentencing discretion, and not interfere unless the sentence imposed induces a sense of shock or unless the trial court misdirected itself in a manner which warrants the intervention of the reviewing judge.

Criminal procedure – trial – date – "fast tracking" of trials in magistrates courts – such procedure permissible provided a fair trial ensues – effect of failure to grant postponement on request

S v *Chawira* HH-42-12 (Uchena J, Mwayera J concurring) (Judgment delivered 29 September 2011)

The practice of "fast tracking" criminal trials is not is specifically provided for by that name in the Criminal Procedure and Evidence Act [*Chapter 9:07*], but that does not mean it is an unlawful procedure. It is, in fact, a useful procedure which, if well managed, helps to contain and or reduce the courts' backlogs of criminal cases and ensures the delivery of timeous justice. All that has to be done is to ensure that it is used in compliance with the provisions of the Act and other laws which provide for a fair trial. Under s 163 of the Act, when an accused person is arrested and is to be prosecuted in the magistrate's court, must shall be brought to trial on the next possible court date, which means on the day when the court will be sitting next after the decision to prosecute him in the magistrate's court will have been made. This, however, does not mean the trial has to start on that day without fail. It is desirable that it should, but regard should be had to the provisions of s 165 of the Act which provides for postponements where necessarily.
Undue haste in bringing a person to trial could constitute an irregularity. The haste could be due to the refusal of an accused person's request for a postponement to enable him to prepare for the trial or to engage the services of a legal practitioner. It could also be due to the trial proceeding without complying with the requirements of a fair trial. However, in the absence of a valid request for the postponement of the pending trial, and if the trial complies with the requirements of a fair trial, a magistrate's court can proceed with an accused person's trial on the "next possible court day", as provided by s 163. A magistrate's failure to ask the accused if he needs the services of a legal practitioner is, on its own, not a ground for upsetting the conviction. However, if the accused applies for a postponement, the magistrate would err if he ignores the accused's request and orders the trial to proceed in spite of such a request, as the request would have been made on the accused's first appearance in court.

Criminal procedure (sentence) – general principles – youthful offender – probation officer's report and recommendations – weight to be given to recommendations as to sentence – sentencing court should give reasons for not following recommendations – need for recommendations to be specific, not vague and generalised

S v *Tsingano* HH-279-11 (Mutema J) (Judgment delivered 28 October 2011)

See below under CRIMINAL PROCEDURE (SENTENCE) (Offences under Criminal Law Code – rape – juvenile offender).

Criminal procedure (sentence) – offences under Criminal Law Code – possession of a dangerous drug (s 157(1)) – possession not necessarily less serious than dealing – substantial amount of drug in accused's possession – permissible to infer that drug not only for personal use – sentence requiring treatment for addiction – need for evidence of addiction

S v *Sikoti* HH-283-11 (Zimba-Dube J, Bhunu J concurring) (Judgment delivered 25 January 2012)

The appellant pleaded guilty to a charge of contravening s 157(1)(a) of the Criminal Law Code [*Chapter 9:23*]. He had been found in possession of dagga weighing 2 kg hidden in a maize field. He was sentenced to 18 months' imprisonment, of which 6 months' imprisonment were suspended for 5 years on appropriate conditions. He appealed against sentence only.
Held: Whilst the legislature did distinguish between the offences of possession and dealing by creating two different offences, this did not necessarily make the offence of possession more trivial than dealing, deserving in every case a fine or community service. Each case has to be determined on its own circumstances. The appellant was found in possession of 2 kg of dagga, which is a substantial amount. He was a repeat offender. It is permissible for the court, at the sentencing stage, to infer on the basis of possession of large quantities involved that the dagga was not for personal use. The onus would be on the appellant to displace the inference that the large quantity of dagga was not for supply or sale. It would not be incompetent for a court to impose a sentence requiring treatment for addiction in terms of s 157(2) of the Code in the absence of evidence of proof of addiction, and there was no such evidence in this case.

Criminal procedure (sentence) – offences under Criminal Law Code – rape – juvenile offender – need to avoid imprisonment – different sentencing approach required

S v *Tsingano* HH-279-11 (Mutema J) (Judgment delivered 28 October 2011)

The accused, a 17 year old, was convicted if the rape of a 14 year old girl. The probation officer recommended "a corrective and rehabilitative sentence" in terms of s 358(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which provides for the passing of sentence but ordering the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify. The trial magistrate disregarded the probation officer's recommendation, without saying why, and sentenced the accused to 9 years' imprisonment of which 2 years were conditionally suspended. On review:
Held: (1) while the court is not bound by the recommendation of a probation officer, this does not mean that the court should or can dismiss such recommendation out of hand without giving reasons. Probation officers are well trained professionals in their field and their recommendations ought to be accorded due weight unless they are clearly out of line. Probation officers must not be vague in their recommendations. They should say exactly what sentence they think should be meted out, instead of giving a vague and generalised recommendation.
(2) Against the appropriate increase in the severity of sentences imposed for rape needs to be balanced the consideration of the age of the offender. While it may be for the benefit of a youthful offender that he be punished so as to reduce him to a sober frame of mind and make him appreciate the seriousness with which society views his conduct, such punishment must be geared principally towards the correction of the youth in the hope of preventing him from ruining his life. In view of the accused's age and personal circumstances, it was a gross error of judgment to sentence him to an effective term of imprisonment, let alone one of 7 years. Elementary common sense and the need for rehabilitation demanded a different sentencing approach, such as a moderate correction of cuts, coupled with a wholly suspended term of imprisonment to enable the accused to carry on with his education and be rehabilitated. There was absolutely no justification for brutalising him by incarceration.

Criminal procedure (sentence) – offences under Criminal Law Code – stock theft (s 114(2)(a)) – penalties applicable – mandatory minimum sentence in absence of special circumstances – offence committed before mandatory minimum sentence introduced – accused person convicted after penalty increased – increased penalty not applicable

S v *Mapanzure & Anor* HH-141-11 (Kudya J) (Judgment delivered 6 July 2011)

The accused were convicted of stock theft, the offence having been committed before but the convictions occurring after an amendment to the Stock Theft Act [*Chapter 9:18*] came into operation in 2004. The Stock Theft Act itself was repealed by the Code in 2006, which re-enacted the provisions of that Act in s 114. That amendment had introduced a mandatory

minimum sentence of imprisonment unless special circumstances were found. The magistrate based his various sentences on the assumption that the mandatory minimum sentence was applicable, having found no special circumstances to exist. Held: The general rule at common law is that statutes are not to operate retrospectively, unless it is expressly enacted that an enactment shall be retrospective in its operation or it is a necessary implication from the language used. This was not the case here. If the legislature intended the section to have retroactive effect it would have expressly said so. It did not. After all, it was radically increasing the punishment for the theft of a bovine or equine animal. In addition, the legislature repeated the same wording which was held in a 1976 decision to have no retrospective effect. The legislature is assumed to have been aware of that decision when it promulgated the present section in identical terms.

Editor's note: this decision is in accordance not only with principle but also with s 18(5) of the Constitution, the relevant portion of which provides that "no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence *at the time when it was committed*" (emphasis supplied).

Customary law – application – when a person is subject to customary law – person married under general law – what must be shown for customary law to apply

Zawaira v *Nyamupfukudza NO & Ors* HH-241-11 (Chitakunye J) (Judgment delivered 3 November 2011)

See below, under SUCCESSION (Intestate – heirs *ab intestato*).

Customary law – marriage – unregistered customary law marriage – division of property following termination of marriage – magistrates court not empowered to distribute matrimonial property – claim for share of estate must be based on other recognised causes of action

Muleya v *Muleya* HB-118-11 (Mathonsi J) (Judgment delivered 15 September 2011)

Unregistered customary law unions are not recognised marriages in our law and as such s 7 of the Matrimonial Causes Act [*Chapter 5:13*] does not apply to them. While the courts have always been willing to assist women who are married in terms of an unregistered customary union and would readily divide property acquired during the subsistence of an informal union, that can only be done where well-founded claims for a share of the estate are made and a proper and recognisable cause of action is pleaded and certainly not on the basis of the union *per se*. Section 11(b)(iv) of the Magistrates Court Act [*Chapter 7:10*] allows magistrates to preside over divorce cases of persons married under the Customary Marriages Act [*Chapter 5:07*] but it has no application to unregistered customary law unions. The existence of an unregistered customary law union does not on its own clothe the magistrates' court with jurisdiction to distribute the matrimonial property, the union not being a marriage. Other recognised causes of action, such as joint ownership, tacit universal partnership, unjust enrichment or equity, should be pleaded.

Damages – assessment – delictual – *actio injuriarum* – wrongful arrest and imprisonment – approach to be taken

Muyambo v *Ngomaikarira & Ors* HH-138-11 (Patel J) (Judgment delivered 7 July 2011)

See below, under DELICT (*Actio injuriarum* – unlawful arrest and detention).

Defamation – damages – factors to be taken into account – purpose of award of damages

Defamation – defences – fair comment – principles – what must be shown – need to statement to be a comment – facts on which comment based must be true – comment must be on a matter of public interest

Defamation – defences – truth and public interest – what must be shown – material allegation must be true – relevance of other matters of public interest arising in same matter

Defamation – plaintiff – reference to – defamatory statement not identifying plaintiff – subsequent publication of a statement disclosing plaintiff's identity and linking him with previous defamatory statement – plaintiff entitled to base action on earlier statement

Manyange v *Mpofu & Ors* HH-162-11 (Patel J) (Judgment delivered 6 September 2011)

After 16 years in his post as mining commissioner in Kadoma, the plaintiff was instructed that he had been laterally transferred to Bulawayo in terms of an earlier notice and instructing him to assume duty at his new station without any further delay. Subsequently, two articles appeared in a newspaper, containing statements attributed to the first defendant, in his capacity as Minister of Mines, to the effect that certain mining commissioners had been transferred because of their corruption and that they were refusing to transfer as per letters from their lawyers. The plaintiff's lawyers had written to the Secretary for Mines contesting his transfer. This letter was copied to the Minister and Deputy Minister of Mines. There followed two further articles in the same newspaper relating to the transfer of Ministry officials and specifically referring to the plaintiff by name. The plaintiff claimed damages for defamation arising from the newspaper articles, citing the first defendant in his personal capacity, as well as the editor and the publisher of the newspaper. The plaintiff had never been charged with any act of misconduct involving corruption or other illegal activity. He was never interviewed by the newspaper to present his side of the story. He argued that the newspaper articles, taken together, justified the inference that he was one of several corrupt officials being transferred by the Ministry of Mines. The articles, he claimed, impacted negatively on his professional career in the future as he intended to leave the Ministry of Mines at some stage for other pastures.

It was argued for the defendants that the first defendant, as Minister of Mines, had a public duty to speak out against corruption. The statements made by him were truthful and accurately reflected the endemic corruption and malpractices within the Ministry. The second and third defendants contended that they were justified in publishing the articles *in casu* and were discharging their duty of informing the public which has a clear interest in being informed of the matters reported. They had a duty to report on the corruption of public officers and their resultant transfers and reassignment, and the public had a reciprocal interest in receiving such information. They also argued that the articles were a fair comment on a matter of public interest.

Held: (1) In an action for defamation, the plaintiff is required to prove that the injurious statement referred or related to him, not necessarily that he was specifically mentioned by name. The test for this purpose is an objective one, *viz.* whether the ordinary reasonable person reading or hearing the statement would have understood the words complained of as applying to the plaintiff. As regards a series of statements, the publication of defamatory words and the identification of the person intended to be defamed need not occur contemporaneously. Evidence of a subsequent statement identifying the plaintiff is admissible as proof that an earlier defamatory statement referred or related to him.

(2) A reasonable person would have understood the articles as possibly, but not necessarily, alluding to the plaintiff, by reference to his office and the fact of his resisting transfer through his lawyers. Once the later articles, which mentioned the plaintiff by name, were published, the reasonable reader, taking all four articles conjunctively, would undoubtedly have identified the plaintiff as one of the mining commissioners who was being transferred on the grounds of corruption. The articles taken together imputed on the part of the plaintiff (amongst others) a proclivity towards corrupt behaviour, illegal activities, dishonest and unprofessional conduct and attempting to cover up illegalities. Such imputations were unquestionably defamatory in accordance with the applicable tests laid down by the courts.

(3) For the defence of public interest or justification to succeed, the statement alleged to be defamatory must be true and must be made in the public interest. It is not necessary for the truth of every word to be established. It suffices that the statement is substantially true in every material respect. The element of public interest lies in telling the public something of which it is ignorant and which is in its interest to know. As for the element of truth, what must be true is the "sting of the charge" or the material allegation only. The articles contained information that was undoubtedly of considerable public interest, as the alleged malpractices within the Ministry and the consequent reassignment of Ministry officials were of unquestionable public importance. However, what was relevant was whether the material imputation that the plaintiff himself was corrupt and dishonest was factually true. The defendants proffered nothing to verify that imputation. In the absence of any evidence to substantiate the utterances of illegality and impropriety against the plaintiff, the claim of justification in the public interest could not avail the defendants.

(4) For the defence of fair comment to succeed, the defendant must show (a) that the statement complained of was an opinion or comment and not a statement of fact; (b) that the comment was fair and not excessive; (c) that the factual allegations on which the comment is based were true; (d) that the comment was based on facts expressly stated or clearly indicated in a document or speech containing the defamatory matter; and (e) that the comment was on a matter of public interest. There was nothing approximating a comment or opinion in the offending articles, which contained statements of fact, drawn from the first defendant's utterances and from correspondence by the plaintiff's lawyers. There was nothing by way of comment or opinion expressed in the articles. Even if one were to stretch the notion of comment to include the content of the articles, the defendants failed to show that the factual allegations on which the supposed comment was based were true. The defendants could not rely on the defence of fair comment.

(5) In assessing the quantum of damages, a variety of factors had to be considered, including the content and nature of the defamatory publication; the plaintiff's standing in society; the extent of the publication; the probable consequences of the defamation; the conduct of the defendant; the recklessness of the publication; comparable awards of damages in other

defamation suits; and the declining value of money. Damages for defamation are intended to compensate the plaintiff for sentimental loss and should not as a rule be punitive.

Delict – *actio injuriarum* – unlawful arrest and detention – when committed – presumption of *animus injuriandi* in event of illegal arrest or imprisonment – what defendant must show to establish lawful arrest

Muyambo v *Ngomaikarira & Ors* HH-138-11 (Patel J) (Judgment delivered 7 July 2011)

The delict of unlawful arrest and detention is committed when a person, without lawful justification, restrains the liberty of another by arresting or imprisoning him. The plaintiff need only prove that the arrest or imprisonment was illegal and not that there was intention to act illegally or to cause harm. In our law, unlike South African law, *animus injuriandi* is presumed and, therefore, intention is not a requirement for this delict. Moreover, the use of force is not a prerequisite and neither is pecuniary loss. Damages can be awarded for any affront or humiliation stemming from the unlawful arrest and imprisonment of the plaintiff. Although this action is usually brought against members of the police or other uniformed force, a private individual can also be held liable for this delict committed against another private individual. In order to establish the lawfulness of an arrest without a warrant, the onus lies upon the defendant to show probable cause or reasonable suspicion. In exercising the power of arrest, he must act as an ordinary honest man would act, on suspicions which have a reasonable basis, and not merely on wild suspicion. In other words, the arrestor must act on such circumstances as would ordinarily lead a reasonable man to form the suspicion that the arrestee has committed an offence. It is not the function of the police to arrest at large and to use the interrogatory process in order to determine whom to charge. As regards damages for wrongful imprisonment, the deprivation of personal liberty is an odious interference and constitutes a serious infraction of fundamental rights, attracting an exemplary assessment of reparation. The longer and more oppressive the period of detention, the higher should be the quantum of damages.

Elections – by-elections – vacancy in Parliament – whether President is obliged to call by-election within 14 days of notice of vacancy – no public funds available – President not required to call by-election in absence of funds

Bhebhe & Ors v *Chrmn, ZEC & Ors* HB-139-11 (Ndou J) (Judgment delivered 13 October 2011)

The three applicants had been members of Parliament elected for one of the main political parties. They fell out of favour with their party and were expelled from the party in 2009. The party ensured that the applicants had their membership of parliament terminated in terms of s 41(1)(e) of the Constitution the Clerk of Parliament notified them that their membership of the august house had been terminated with effect from 22 July 2009. On 17 August 2009, the Speaker of the House of Assembly notified the President, the third respondent, in terms of s 39(11) of the Electoral Act [*Chapter 2:13*] of the vacancies in the applicants' constituencies. Section 39(2) of the Act states that "The President shall, within a period of fourteen days after … he … has been notified … of a vacancy in the membership of Parliament … publish a notice in the *Gazette* ordering a new election to fill the vacancy". For over 18 months no such notice was published. When the application was brought to compel the President to publish a notice to hold by-elections, the respondents argued that s 39(2) should be interpreted as being directory and not peremptory, and that such an interpretation would be reasonable given the lack of funds for holding elections.

Held: language of a predominantly imperative nature is generally taken to be indicative of peremptoriness. The verb "shall" is one such word. However, to determine whether a particular provision is peremptory or directory, the court must construe the language of the concerned provision in the context, scope and object of the Act of which it forms part. The mere use of labels such as the word "shall" does not necessarily mean that the provision is peremptory. Such language, in many cases, represents little more than the first stage of the enquiry. The court must carefully examine the object at the Act and the public importance of compliance with it. Such case has to be considered on its merits. Procedural requirements should not be construed as mandatory (peremptory) if serious public inconvenience would result. Courts frequently condone non-compliance with ostensibly mandatory provisions by weighing up all the relevant considerations such as, *inter alia*, public convenience, justice and the object of the Act. The court has to consider whether interpreting the Act in a peremptory sense would cause hardships and inconveniences to rate or tax payers. Provisions of a statute which relate to the performance of a public duty seem to be generally understood as mere instructions for guidance and government of those on whom the duty in imposed, that is to say, as directory only, where the invalidation of actions done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and where invalidation would not promote the essential aims of the legislature. Such an interpretation would be reasonable *in casu*: if the court were to make an order that by-elections be held when the relevant funds for holding such elections are not there the order would be a *brutum fulmen* – clearly an undesirable situation. If the government were to commit the little available

funds and resources to the holding of by-elections this would result in serious general inconvenience to the general public. Section 39(2) should be understood as nothing more than mere instructions for guidance to the President when he carries out his public duty to gazette election dates. To order the President to gazette by-elections in the absence of the required financial resources would not only disrupt the smooth running of the country but would cause serious inconvenience to the public.

Employment – Labour Court – appeal to – appeal against arbitral award – effect of noting appeal – award suspended

Mvududu v *ARDA* HH-286-11 (Bhunu J) (Judgment delivered 23 November 2011)

See above, under APPEAL (Notice of – effect).

Employment – Labour Court – exclusive jurisdiction over labour matters – High Court only having jurisdiction where cause of action and remedy not provided for in Labour Act [*Chapter 28:01*] – possession by employee of employer's property – intimately connected with contract of employment, giving Labour Court jurisdiction

Moyo v *Gwindingwi NO & Anor* HB-168-11 (Mathonsi J) (Judgment delivered 11 November 2011)

The applicant had been dismissed from her employment in terms of procedures provided for in the employer's code of conduct. When her final internal appeal was dismissed, she was advised that her next appeal would be to the Labour Court. She did not appeal to the Labour Court as advised and in terms of the code of conduct; instead she filed an urgent application in the High Court. A provisional order was issued in her favour. The order interdicted the respondents from evicting the applicant from a company house belonging to her employer, which she occupied by virtue of her employment. The final relief sought was an order setting aside her dismissal and granting reinstatement without loss of salary or benefits. The respondents raised two points *in limine*, namely, that the applicant had not exhausted her domestic remedies and therefore has approached the wrong court; and that this being a purely labour dispute, the High Court did not have jurisdiction as in terms s 89(6) of the Labour Act [*Chapter 28:01*] the application should have been made to the Labour Court.

Held: (1) the High Court will be very slow to exercise its general review jurisdiction where a litigant has not exhausted domestic remedies available to him. A litigant is expected to exhaust available domestic remedies before approaching the courts unless good reasons are shown for making an early approach. "Domestic remedies" *in casu we*re those remedies and the procedure set out in the code of conduct as being available to an aggrieved party to pursue. An appeal to the Labour Court from a decision of the employer's Director of Corporate services was provided for in the code of conduct. That appeal was a domestic remedy available to the applicant and it was capable of according the applicant effective redress. She had to exhaust that remedy.

(2) The occupational right of the applicant in respect of the company house was intertwined with the employment contract. That did not constitute a special reason for by passing available domestic remedies and approaching the High Court early.

(3) The Labour Court has jurisdiction in all matters where the cause of action and remedy are provided for in the Labour Act. Where the cause of action and remedy are at common law, the jurisdiction of the High Court is not ousted. The Labour Court thus has exclusive jurisdiction in matters relating to termination of employment. The possession of the employer's property by an employee in terms of the contract of employment is so interdependently linked to the contract that one cannot decide on one without deciding on the other. For that reason, if the Labour Court has exclusive jurisdiction over the one, it must have exclusive jurisdiction over the other. The applicant had therefore proceeded in the wrong court. She did not exhaust remedies available to her.

Estate agent – authority – mandate given to estate agent to manage leased property – does not imply authority to institute eviction proceedings on behalf of owner – need for specific authority to be given

Westwood v *Mercers Property Brokers* HH-281-11 (Patel J, Chiweshe JP concurring) (Judgment delivered 30 November 2011)

See above, under AGENCY (Agent – authority).

Evidence – affidavit – production of – notice required – affidavit produced without requisite notice and without accused's consent – such affidavit not admissible

S v *Chawira* HH-42-12 (Uchena J, Mwayera J concurring) (Judgment delivered 29 September 2011)

In terms of s 278(11) of the Criminal Procedure & Evidence Act [*Chapter 9:07*] an affidavit is admissible in evidence if three days' notice has been given or if the accused consents to its production without his having been given such notice. The consent of an unrepresented accused person can only be valid if his right to such notice is explained to him before he is asked whether or not he consents to its production without the requisite notice. It is not enough to merely ask if he consents to the production of the affidavit, as there is need for him to consent to its production in general and to consent to its production without the statutorily required three days notice of its production. If the affidavit is produced without the requisite notice or consent, it will not have been properly produced and cannot be used as evidence against the accused.

Evidence – civil matter – foreign law – proof of – nature of evidence which must be led

von Ahn v *Dzvangah NO & Ors* HH-192-11 (Mawadze J) (Judgment delivered 18 September 2011)

See below, under FAMILY LAW (Husband and wife – marriage – property consequences of marriage).

Family law – husband and wife – divorce – decree granted in default – whether may be set aside on normal grounds for rescission of judgment

Samabawamedza v *Chiyangwa* HH-277-11 (Gowora J) (Judgment delivered 23 November 2011)

Semble: a decree of divorce is capable of rescission. Section 9 of the Matrimonial Causes Act [*Chapter 5:09*] grants to an appropriate court the power, on good cause shown, the power to vary, suspend or rescind an order, issued in terms of s 7 of the Act, in relation to the matrimonial assets of the parties as or appropriate maintenance in respect of the minor children of the union. The Act itself makes no similar provision about the decree of divorce itself. While there is no authority in point within this jurisdiction regarding the rescission of a decree of divorce granted in default, in a number of cases in England and South Africa the courts have granted applications for rescission of decrees for divorce. Their approach has been a judgment for a decree of divorce is a judgment like any other and that in the event a party had been granted such judgment in default there is nothing in the rules precluding the court from rescinding such judgment on the usual grounds.

Family law – husband and wife – divorce – division of matrimonial property following divorce – unregistered customary law union – how division of property may be determined – need to plead recognised cause of action

Muleya v *Muleya* HB-118-11 (Mathonsi J) (Judgment delivered 15 September 2011)

See above, under CUSTOMARY LAW (Marriage).

Family law – husband and wife – marriage – property consequences of marriage – determined by law of husband's domicile at time of marriage

von Ahn v *Dzvangah NO & Ors* HH-192-11 (Mawadze J) (Judgment delivered 18 September 2011)

The applicant, a German national, married the deceased, a Zimbabwean woman in Germany, where the applicant was then domiciled. They lived together in Germany for 27 years and moved to Zimbabwe when the applicant retired. The movable property acquired by the couple, including household goods, farming implements, industrial equipment and other assets, was shipped to Zimbabwe. The bills of landing and customs clearance certificates were in the wife's name to facilitate easy access. In Zimbabwe, the couple acquired various immoveable properties, which were registered in the wife's name, the applicant having been informed that as a foreign national he could not have immovable property registered in his name or the joint names with his wife. An offshore bank account was also acquired in the wife's name. The wife executed a will, in which bequeathed her entire estate to the second respondent, her daughter by a previous relationship. The wife died about six years after the couple had settled in Zimbabwe.

The applicant sought an order claiming five-eighths of the estate. He contended that it was German law that governed their marriage and that, in the absence of a pre- or ante- nuptial contract, such a marriage was in community of property. Under German law, when the wife bequeathed her entire estate to her daughter, it could only have been in respect of her one half of the joint estate. According to German law, he was entitled to the other half of the joint estate; and, on the basis of the

principle of forced heirship, since his late wife disinherited him in terms of the will, he could only lay claim to a quarter of her half, that is, one eighth of the joint estate. In support of his contentions as to what German law provided, he attached a declaration by an official in the German Embassy in Harare and a legal opinion by a practising German attorney.
The respondents argued, *inter alia*, that the marriage was one of convenience. On the merits, the main issues were the law governing the proprietary rights of the applicant and his late wife and whether the applicant had proved what German law was on the matter.
Held: (1) the marriage had lasted for 33 years and had only been terminated by the death of the wife. There was therefore no basis to suggest that this was a troubled marriage or that it was one entered into for the primary purpose of evading the immigration laws in Germany or Zimbabwe or that the couple had no intention of living together as husband and wife.
(2) It is an accepted principle of private international law that, where there is no ante-nuptial contract, the proprietary consequences of a marriage are governed by the husband's domicile at the time of the marriage, in this case Germany. This rule is absolute and admits of no exceptions.
(3) As to whether the applicant had proved what German law was on the matter, the requirements of s 25(3)(a) to (c) of the Civil Evidence Act [*Chapter 8:01*], although not mandatory, gave useful guidance. The letters from the German lawyer did not state the lawyer's qualifications and experience as a practising attorney, and his opinion was not supported by any relevant material like German case law, statutes, text books or German common law. The format of the letter and its contents were of such a nature that the court could not rely on it as sufficient proof of German law on the point in issue.
(4) While the order sought could not be granted, it would be grossly unjust to dismiss the application on this point alone. The matter should be referred to trial so that proper and sufficient evidence on the position of the German law on the point in issue could be led.

Family law – maintenance – failure to pay – conviction for – no mandatory sentence of imprisonment provided – court may suspend all or part of sentence imposed

S v *Nyarugwe & Ors* HH-287-11 (Patel J) (Judgment delivered 22 November 2011)

See above, under CRIMINAL LAW (Statutory offences) (Failure to pay maintenance).

Human rights – freedom of information – freedom of speech – right to privacy – record of information kept on individuals and supplied to subscribers needing to assess individual's creditworthiness – record of criminal conviction – whether there should be a limit on how long such information may be retained

Pazvakavambwa v *Portcullis (Pvt) Ltd* HH-175-11 (Patel J) (judgment delivered 13 September 2011)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – s 20 – right to freedom of expression).

Insurance – claim – subrogation – right of insured person to bring action against wrongdoer although already compensated by insurer – duty of insured to become trustee for insurer – need for insured to make clear that action is for benefit of insurer

Tsodzai v *Mageza & Anor* HH-193-11)Bere J) (Judgment delivered 16 Sept 2011)

The plaintiff brought an action against the defendants for damages arising out of a motor vehicle accident. The defendants' liability was not in question, the only issue being the nature and extent of damages to the plaintiff's motor vehicle and the quantum thereof. The quantum was established but during the course of his evidence, the plaintiff mentioned that he had been paid the same amount he was claiming in this action by his insurers (who were, incidentally, his employers). This admission triggered the issue of plaintiff's *locus in judicio* in bringing the action and a consideration of the principle of subrogation. The plaintiff argued that he had a recognised right to bring this action against the defendants. The defendant argued that the plaintiff, having been indemnified by his insurer, could not possibly have had a right to initiate action against the defendants to recover the same amount paid to him.
Held: Subrogation means the substitution of one person for another so that the person substituted or subrogated succeeds to the rights of the person whose place he takes. It expresses the insurer's right to be placed in the insured's position so as to be entitled to the advantage of all the latter's rights and remedies against the third parties. The law of subrogation rest on the principle that no-one should be paid twice in respect of the same loss. The effect is that a person insured against accident has the right to recover damages from a wrongdoer for any wrong done to him even though he has already been compensated in respect of such wrong by the insurers. However, under the principle of subrogation, the insured, if fully

compensated by the insurer, becomes a trustee for any compensation paid him by the wrongdoer and is bound to hand over to the insurer whatever money he receives from the wrongdoer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. Where the insured institutes an action against an offending party as *in casu*, the pleadings must leave no doubt that the insured is taking action for the benefit of his insurer. Anything short of that would lead to the inevitable conclusion that he intends to have a double benefit over the same loss. The court must not be left to speculate as to whether the plaintiff may or may not hand over the benefits of his litigation to the insurer.

Interpretation of statutes – directory and peremptory provisions – distinction between – principles of how to ascertain whether provision is directory or peremptory

Chirosva Minerals (Pvt) Ltd & Anor v *Min of Mines & Ors* HH-261-11 (Patel J) (Judgment delivered 15 November 2011)

See below, under MINES AND MINERALS (Tribute agreement).

Interpretation of statutes – directory and peremptory provisions – meaning of – determination of whether a provision is directory or peremptory – use of word "shall" – not necessarily indicative of peremptoriness – factors court must consider in making determination – serious public inconvenience – may be a reason for holding provision to be directory

Bhebhe & Ors v *Chrmn, ZEC & Ors* HB-139-11 (Ndou J) (Judgment delivered 13 October 2011)

See above, under ELECTIONS (By-election).

Interpretation of statutes – retrospectivity – statutes not having retrospective effect unless clearly stated or retrospectivity a necessary implication

S v *Mapanzure & Anor* HH-141-11 (Kudya J) (Judgment delivered 6 July 2011)

See above, under CRIMINAL PROCEDURE (SENTENCE) **(**offences under Criminal Law Code – stock theft).

Land – acquisition – rural land – former owner of acquired land – no right to remain on land – offer letter or other document in respect of acquired land – person to whom such document is issued has right to occupy land – Minister stating that land should be subdivided and former owner allowed to remain on portion – holder of offer letter entitled to eviction order unless offer letter amended

Zhanda & Anor v *T J Greaves (Pvt) Ltd & Ors* HH-185-11 (Mtshiya J) (Judgment delivered 14 September 2011)

Where rural land has been acquired, the former owner of the land has no right to remain on the land. The holder of an offer letter has the legal right to occupy and use the land allocated in terms of the letter and has the right to seek the eviction of the former owner of the land. This is so even if the owner is occupying the land following advice from Government officials and notwithstanding an affidavit from the responsible Minister that the land should be subdivided and that the former owner be allowed to occupy one of the sub-divisions.

Landlord and tenant – lessee – right to possession after expiry of lease – no right of retention as a lien against claim for compensation for improvements

Cochrane v *Mackie* HH-303-11 (Musakwa J) (Judgment delivered 7 December 2011)

The applicant brought an action against the respondent for ejectment from the property the latter was leasing, for arrear rentals and for holding over damages. He then applied for summary judgment. The respondent resisted the claim on the grounds that he was a statutory tenant, that he had effected repairs to the premises, the cost of which he wished to set off against any rental owed and that he had a right to remain in possession pending settlement of his claim for the value of repairs.

Held: in terms of r 73 of the High Court Rules 1971, it was permissible to grant summary judgment in respect of the claim for the respondent's ejectment whilst granting the respondent leave to defend the claims for arrear rentals and holding over damages. With regard to the claim to be entitled to remain in possession, a tenant has no *ius retentionis* after the termination of the lease as a lien against compensation for improvements. Consequently, summary judgment would be granted for ejectment, and leave to defend granted in respect of the claim for arrear rentals and holding over damages.

Legal practitioner – conduct and ethics – communication with judge – impropriety of contacting judge directly – correct course of action where joinder in proceedings sought

Chiadzwa v *Comr-General of Police & Ors* HH-224-11 (Bere J) (Judgment delivered 11 October 2011)

See above, under CRIMINAL PROCEDURE (Forfeiture).

Local government – urban council – resolution – rescission of – process to be followed – Minister of Local Government – no power to rescind resolution – may direct council to do so – district administrator – no power to rescind or suspend council resolution

MWI Zimbabwe (Pvt) Ltd v *Ruwa Town Council & Anor* HH-237-11 (Kudya J) (Judgment delivered 2 September 2011)

The first respondent town council had invited tenders for the supply of water to the town. The council's technical committee had recommended that the tender be warded to the second respondent, which was the lowest bidder, but the council resolved to award the tender to the applicant. The district administrator for the area wrote to the secretary of council, directing that the resolution to award the tender be suspended in terms of s 314(1) to (3) of the Urban Councils Act [*Chapter 29:15*]. A special full board meeting of the council was held on the issue as a result of the district administrator's letter. A motion to rescind the previous resolution and accept the technical committee's recommendation was adopted and the tender awarded to the second respondent. A week later, the Minister of Local Government, purportedly acting in terms of s 314 of the Act rescinded the resolution, which had already been purportedly rescinded by the council. He said that the resolution violated s 211 of the Act, as it was not in the best interests of the inhabitants of the town, who had not had safe and adequate water supply for a long time.

The applicant then filed an application, seeking an announcement of the results of the tender within 4 days of the order and an interdict against the award of the tender to any party other than itself. On the return day it proposed to seek a declaration of nullity of the rescission of the tender and an order that it be confirmed as the winner of the tender process. It was argued for the applicant that the resolution still subsisted and that it granted a legitimate expectation to the applicant that it won the tender. It was argued for the council that the resolution was properly rescinded by council in terms of s 89 of the Act. It was also argued that until the results of the tender were officially communicated to the applicant, the applicant did not have a *prima facie* right or any legitimate expectation of those rights to the award of the tender to itself.

Held: (1) the procedure for rescission of a council resolution is set out in s 89. That procedure was not followed: no committee was set up that recommended cancellation of the resolution, nor was there evidence that seven' days notice of motion, signed by not less than one-third of the membership of the council, was moved through the chamber secretary before the meeting at which the resolution was purportedly rescinded.

(2) The district administrator had not authority to usurp the Minister's powers in s 314 of Councils Act, nor did he have power to suspend the resolution pending discussion.

(3) The Minister is not empowered by s 314 to rescind council resolutions. He may, if he is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the council area or is not in the national or public interest, may direct the council to reverse, suspend or rescind such resolution. It is council that reverses, suspends or rescinds or does any such action directed by the Minister. It is not the Minister himself who does it. All that council is enjoined to do is to obey the Minister.

(4) Here, the rescission was not properly rescinded and was still extant. The council had yet to comply with the Minister's directive.

(5) Under s 88(6)(b)(ii) of the Act, the public has no right to inspect or obtain copies of minutes relating to a tender where the lowest bid is not the one accepted by the council. Accordingly, until the offer was communicated, the applicant had no legitimate expectation that the tender would be awarded to it. Further, the process of oversight by the minister or council over council decisions demonstrated the absence of any legitimate expectation by any tenderer in the process until the conclusion of the oversight role.

Mines and minerals – tribute agreement – necessity for such agreement to be registered and approved by mining commissioner or Mining Affairs Board – invalidity of agreement not approved

Chirosva Minerals (Pvt) Ltd & Anor v *Min of Mines & Ors* HH-261-11 (Patel J) (Judgment delivered 15 November 2011)

The first plaintiff concluded a tribute agreement with the second and third defendants. The agreement was to last for 10 years, but the agreement was rejected by the Mining Commissioner on the ground that a 10 year tribute agreement was not registrable. It was then superseded by a second, 3 year, tribute agreement entered into the next day. That agreement having expired, the first plaintiff entered into a third tribute agreement with the second plaintiff, and sought the eviction of the second and third defendants. It also sought an order nullifying the 10-year agreement and registering the third agreement. The application for eviction was resisted on the grounds that the first tribute agreement was still valid. The High Court had, in referring the matter for trial litigation, previously ruled that the first agreement was novated and superceded by the second.

Held: (1) It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. The disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected. It is impossible to lay down any conclusive test as to when a legislative provision is directory and when it is peremptory, though the fact that the provision is couched in a negative form means that it is to be regarded as peremptory rather than directory. Ultimately, the court must determine the intention of the legislature. Where powers are granted with a direction that certain regulations or conditions shall be complied with, it is neither unjust nor inconvenient to insist on a vigorous observance of them as essential to the acquisition of the authority conferred, and it is therefore probable that such was the intention of the legislature.

(2) Under s 284 of the Mines and Minerals Act [*Chapter 21:05*], every tribute agreement must be reduced to writing. The agreement, together with the prescribed number of copies thereof, must be submitted to the mining commissioner for examination and approval by the Board or the mining commissioner. A tribute agreement which conforms to a standard agreement drawn up and approved by the Mining Affairs Board may be approved by the mining commissioner. Any other agreement must be submitted to the Board for examination and approval. Section 286 prescribes the criteria for approval of tribute agreements by the Board. Under s 289, it is an offence for any party to a tribute agreement to exercise any right under such agreement unless and until such agreement has been examined and approved by the Board or a mining commissioner. Section 290 prohibits and penalises the disposal of minerals under an unapproved agreement.

(3) Sections 289 and 290 of the Act are couched in negative form and any contravention of their proscriptive injunctions is to be visited with penal sanctions. Accordingly, these provisions are intended to be peremptory rather than merely directory. No person may exercise any right under a tribute agreement or exploit any minerals thereunder unless and until the agreement is approved by the mining commissioner or the Board. Taking into account the criteria for approval enumerated in s 286, the object of these provisions is to ensure, *inter alia*, that the interests of both grantor and tributor are adequately safeguarded and, more importantly, that the mine in question is mined to best advantage so as to avoid the premature cessation of mining operations. To allow the parties to operate a mine under an unapproved tribute agreement would be to totally disregard the critical factors that Parliament has prescribed as being essential to the orderly and beneficial exploitation of mining locations generally. The first tribute agreement was therefore invalid and unenforceable. It followed that the second agreement was valid, but, that agreement having expired, the second and third defendants must vacate or be evicted.

Practice and procedure – absolution from the instance – principles – quantum of proof that must have been shown – preference for allowing case to proceed

Manyange v *Mpofu & Ors* HH-162-11 (Patel J) (Judgment delivered 6 September 2011)

The test to be applied as to whether to grant absolution is not whether the evidence for the plaintiff establishes what would finally be required to be established to obtain judgment. It is whether the plaintiff has made out a *prima facie* case against the defendant on the basis of which the court could or might find for the plaintiff. A reticent defendant should not be allowed to shelter behind the procedure of absolution from the instance. In practice, the courts are loath to decide upon questions of fact without hearing all the evidence from both sides, and have usually inclined towards allowing the case to proceed. At this stage of the trial, it is not pertinent to evaluate the weight of the evidence adduced or the preponderance of probabilities, save where such findings are manifest from the evidence already heard.

Practice and procedure – application – subject matter of application – when proceedings may be brought by application rather than summons – claim for money owed – may be brought by application proceedings if facts not in dispute and claim liquidated

China Shougang Intl v *Standard Chartered Bank Zimbabwe Ltd* HH-310-11 (Bere J) (Judgment delivered 23 November 2011)

See above, under BANK (Duty to client).

Practice and procedure – application – urgent application – certificate of urgency – legal practitioner's duties – need for practitioner to apply his mind to contents of certificate

KHB Ests (Pvt) Ltd & Anor v *Pambukani & Anor* HH-209-11 (Mavangira J) (Judgment delivered 5 October 2011)

The first applicant was the former owner of a farm which had been expropriated; the second applicant resided on a portion of the farm. The first applicant was the holder of the offer letter in respect of a portion of the farm. The first respondent issued a writ for the ejectment of the applicants from that portion of the farm. The writ was predicated upon an order issued by a magistrate, in which leave was granted to execute the applicants' ejectment notwithstanding the noting of an appeal to the High Court against the judgment. The applicants applied for an order setting aside the ejectment order, but by the time the respondents' papers had been filed, the ejectment had taken place. The applicants amended their application for one restoring them to possession. The basis for the application was that the second applicant had had meetings with the then acting Minister of Lands, at which he was advised that a decision would be made at Presidential level as to which area he should continue to operate on and that the proceedings for his ejectment should be stayed. In fact, they were not stayed. Secondly, by the time that this matter was heard, there was no indication that either of the applicants had since been issued with lawful authority to remain in occupation of the piece of land in issue.
The certificate of urgency signed by the applicants' legal practitioner was so written that it read as though the legal practitioner himself and his employees were being ejected. The respondents objected to the certificate, arguing that it did not comply with the rules of court; that it related to an application which had since been amended; and that the matter was not urgent because there was no potential irreparable harm to the applicants, as no potential harm could be occasioned by the stopping of unlawful activities or the stopping of a criminal offence. In response to the last point, the applicants argued that their occupation was not unlawful in view of various documents in terms of which their occupation was sanctioned. These documents had been handed to the magistrate after the ejectment order was given.
Held: (1) When issuing a certificate of urgency, a legal practitioner must state his own belief in the urgency of the matter that invitation. He is not permitted to make as his certificate of urgency a submission in which he is unable conscientiously to concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. *in casu*, it was not the legal practitioner's ejectment that was imminent and to that extent the certificate of urgency was of no relevance. More probably, the legal practitioner did not apply his mind to the contents of the certificate of urgency when he affixed his signature to it. It is an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. It is equally an abuse for a lawyer to put his name and affix his signature to a certificate the contents of which he has not addressed his mind to. Further, the certificate of urgency related to an application in which was sought, *inter alia*, stay of execution of the ejectment order issued by the magistrates court, but the relief now being sought was restoration to the applicants of occupation, possession and use of a portion of the farm from which they were evicted. Thus, there was no certificate of urgency pertaining to the application now purportedly before the court and there would be no basis to consider whether or not there was justification for exercising its discretion as to whether to treat the matter as urgent.
(2) Documents that may have been furnished to the magistrate after he had made his determination would not have been properly before him and could not be relied on for any purpose.
(3) The applicants had no *locus standi* to make the application and the application for review as they were not the owners of the land. The land was acquired by the State and the first respondent was issued with an offer letter. The applicants had no lawful authority to remain in occupation of the land.

Practice and procedure – application – urgent – certificate of urgency – requirements – must be product of certifying practitioner's own mind, not an uninformed endorsement of another practitioner's opinion – invalidity of such a certificate

Chidawu & Ors v *Shah & Ors* HH-108-12 (Uchena J) (Judgment delivered 18 November 2011)

An urgent chamber application can only be properly before the court or be heard on an urgent basis, if the applicant is legally represented, if the legal practitioner files a certificate certifying its urgency. If the certificate filed is not the product of the mind of legal practitioner who purports to have issued it and is patently inadequate, to the extent of its not being a valid certificate, the case cannot be heard on an urgent basis, and will in fact be improperly before the court. It will be similar to a case where a legally represented applicant comes to court without a legal practitioner's certificate of urgency. Such an application would be improperly before the court, and must be dismissed.
A certificate of urgency must be prepared by a legal practitioner after personally carefully assessing the urgency of the application. It should be based on his or her honour. It should not be an uninformed endorsement of another legal practitioner's previous opinion. A certificate of urgency can only be valid and of assistance to the court if it is the legal practitioner's honest opinion of the urgency of the case derived from an analysis of the facts of the case.

Practice and procedure – application – urgent – delay in bringing matter to court – delay reasonable in circumstances – such delay not defeating urgency of case

Trustco Mobile (Pty) Ltd & Anor v *Econet Wirelss (Pvt) Ltd & Anor* HH-158-11 (Mutema J) (Judgment delivered 4 July 2011)

See above, under CONTRACT (Cancellation).

Practice and procedure – default judgment – rescission — time limits – need for application for rescission to be made within a month of applicant having knowledge of the judgment – not necessary for application to be heard within that month

Moyo & Ors v *Sibanda & Anor* HB-125-11 (Mathonsi) (Judgment delivered 22 September 2011)

A decision had been taken by the applicants to remove the first respondent from the positions he held in the church in which he was a minister and to appoint the first applicant as his replacement. The firs respondent brought an urgent application and obtained interim relief allowing him to remain in his posts pending the finalisation of the dispute. Shortly thereafter, he filed a court application for the review of the decision to remove him from his posts and the appointment of the first applicant in his stead. The application was served on the respondents and gave them 10 days to file opposition. They did not do so. At about the same time the parties engaged each other in out of court deliberations aimed at resolving the dispute. During those deliberations it was the understanding between them that court action would be held in abeyance. It was not apparent from the papers whether a proposed round table conference was ever convened. However, the applicants did nothing at all about the court application that had been served upon them until it was set down on the unopposed roll about 2½ years later, whereupon the applicants sought a postponement of the matter. The application for postponement was rejected and the order sought by the first respondent was granted. The applications sought rescission of the order. It was argued that the applicants have given a reasonable explanation for their failure to file opposition timeously, in that when the parties agreed to hold litigation in abeyance, it was on the understanding that should negotiations fail and litigation was to be resumed, that would be on notice to the other party and that when the respondents sought default judgment, they did not give notice to the applicants and that the applicants only got to know about the existence of the judgment when they attempted to evict the first respondent from the church premises he occupied.
Held: (1) The proper interpretation of r 63(1) of the High Court Rules 1971 is that an applicant for rescission of judgment must file the application within one month after he has had knowledge of the judgment. Where that has been done, there is no need for condonation if the application is not heard within one month.
(2) The court may, if there is "good and sufficient cause" for doing so, rescind the judgment. Among the considerations is the reasonableness of the explanation for the default. Here, no attempt had been made by the applicants to shed some light as to when the moratorium in litigation was to take effect and when it was to end. Litigation was only suspended until the round table conference was convened and completed, but there was no indication as to the timing of this event. When negotiations between the parties failed, the applicants were required to take steps to oppose the application.

Practice and procedure – exception – when may be taken – several claims arising from one cause of action – not permissible to except to one claim without excepting to main claim

Gweru Tourism Promotions (Pvt) Ltd v *Sadler & Anor* HH-258-11 (Gowora J) (Judgment delivered 12 October 2012)

See below, under PROPERTY AND REAL RIGHTS (Ownership – vindication).

Practice and procedure – execution – judgment sounding in local currency – local currency not in use at time of execution – not competent for judgment creditor to revalue debt in foreign currency – need for judgment creditor to make court application for conversion of currency

Shava v *Bergus Invstms (Pvt) Ltd & Anor* HH-226-11 (Mutema J, Chiweshe JP concurring) (Judgment delivered 26 October 2011)

The appellant and the first respondent had entered into a lease agreement for certain domestic premises in 2003. In March 2008, the first respondent, following its cancellation of the lease agreement, obtained an order in the magistrates court for the eviction of the appellant and payment of holding over damages, which were calculated in Zimbabwean currency. The first respondent did nothing about enforcing the order until a year later, by which time Zimbabwean currency was no longer in use. It then enforced the eviction order and executed against the appellant's property, having revalorised the claim in US dollars on execution. The appellant filed an urgent chamber application in the High Court to stay execution of the writ. Among the issues to be determined was whether the first respondent was entitled to revalorise its claim on execution.
Held: The claim was in Zimbabwe dollars, as was the judgment of the court *a quo*. The revalorisation of the claim in US dollars on execution was not only incompetent for arbitrariness but offended against the time honoured principle of currency nominalism. That principle holds that a debt sounding in money has to be paid in terms of its nominal value, irrespective of any fluctuations in the purchasing power of the currency. The first respondent ought to have made a court application for the conversion of the currency.

Practice and procedure – execution – arrant of ejectment – notice required – earlier ejectment invalid

Giga v *Albion Properties & Ors* HH-159-12 (Uchena J) (Judgment delivered 2 December 2011)

Order 26 r 4A of the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980) provides that where a warrant of ejectment is executed, the affected person must be given notice of the date of execution, which must be not less than 48 hours after the notice is served. Any earlier ejectment is invalid, unless it is shown that one of the exceptions provided in the proviso to r 4A(1) applies. The proviso deals with circumstances when a messenger can justifiably not deliver or leave notice of ejectment or attachment.

Practice and procedure – execution – sale in execution – dwelling home – property subject to mortgage – mortgagor not entitled to claim stay of execution

Meda v *Homelink (Pvt) Ltd & Anor* HB-195-11 (Ndou J) (Judgment delivered 15 December 2011)

The applicant mortgaged her property as security for a loan from the first respondent. She failed to service the loan and the first respondent issued summons against her, claiming the sum loaned plus interest thereon and an order declaring the house specially executable. Negotiations followed, but no payment was made and the first respondent obtained summary judgment. Faced with the warrant of execution and the attachment of the house, the applicant filed an application in terms of r 348A(5a) of the High Court Rules 1971 for the suspension of the sale of the house.
Held: execution of mortgaged property is different from the property being referred to in r 348A. These were foreclosure proceedings. In such proceedings, the security which the mortgagor pledged is the one that is sold after institution of judicial proceedings for the amount of the debt, whereafter a writ of execution against the property is issued. In other words, if the mortgagor does not pay the capital when due, or if he commits any breach of the conditions of the contract entitling the mortgagee to foreclose, then the latter is entitled to have the secured property sold and obtain the amount of his debt from the proceeds of the sale. A mortgagor cannot claim a stay of execution in terms of r 348A. As a general rule a creditor who has obtained judgment is entitled to enforce such judgment by levying execution and the court has no jurisdiction to restrain the judgment creditor from enforcing such legal right. By declaring the house "specially executable", the court gave the first respondent the right to sell the house in execution to recover what was owed to it. The mortgagor's first and foremost duty is to pay the debt secured, and the mortgagee's corresponding right is to "call up" or "foreclose" the bond. The significance of mortgage bonds and all other forms of hypothecation lies in the fact that they provide the creditor with

a "real security" for the payment of his claim. If the debtor is unable to raise the necessary funds to pay the debt which is secured, the creditor is entitled to demand that the property, that being the thing which is subject matter of his security, be sold and that the proceeds of such sale are used for the satisfaction of his claim. This situation is different from an ordinary debt, as this debt is inexorably tied to the house which has been declared by the court order to be specially executable
To put residential immovable property which is a person's home into that class of assets beyond the reach of execution would be to sterilize the immovable property from commerce, thereby rendering it useless as a means to raise credit. Preventing debtors from using their homes as security to raise credit will create a class of homeless persons: those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price. It would lock up capital and prevent the home owning entrepreneur from using his home as security to finance business initiative. Members of the poor communities will not be able to obtain finance from banks, who will not advance money to purchase immovable property if the immovable property cannot be used as security for repayment.

Practice and procedure – interdict – application – requirements – clear right established – not necessary to prove irreparable injury

Trustco Mobile (Pty) Ltd & Anor v *Econet Wireless (Pvt) Ltd & Anor* HH-158-11 (Mutema J) (Judgment delivered 4 July 2011)

See above, under CONTRACT (Cancellation).

Practice and procedure – *locus standi* – agent – agent bringing action purportedly on behalf of principal – need for agent to be expressly authorised to do so

Westwood v *Mercers Property Brokers* HH-281-11 (Patel J, Chiweshe JP concurring) (Judgment delivered 30 November 2011)

See above, under AGENCY (Agent – authority).

Practice and procedure – parties – joinder – non-joinder – not fatal to application – application for joinder – correct method of making application – impropriety of indirectly seeking joinder by complaining of non-joinder in letter to judge

Chiadzwa v *Comr-General of Police & Ors* HH-224-11 (Bere J) (Judgment delivered 11 October 2011)

See above, under CRIMINAL PROCEDURE (Forfeiture).

Practice and procedure – pleadings – amendment of – when amendment should be allowed – court's discretion – principles

Butau v *Butau* HH-165-11 (Guvava J) (Judgment delivered 18 August 2011)

In determining whether or not to grant an amendment to pleadings in terms of r 132 of the High Court Rules 1971, the court is enjoined to consider two points. The first is whether the plaintiff has any prospects of success on the issue upon which the amendment is sought. The second issue is whether or not an injustice would be occasioned to the defendant which cannot be remedied by an appropriate order of costs.
Pleadings may be amended at any stage of the proceedings. The court has a discretion to allow a party to amend his pleadings or, in the case of an application, to file further affidavits at any time prior to judgment. The grant or refusal of an application for an amendment to pleadings is thus a matter for the discretion of the court, which is to be exercised judiciously, taking into account all the circumstances before it. If there has been an omission from the original pleadings, no matter how negligent or careless the first omission may have been and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

The object of pleadings is to define issues. It would be difficult for the applicant to lead evidence on an issue if that issue was not part of the original pleadings and if this omission would prevent full inquiry into the dispute.

Practice and procedure – pleadings – striking out – purpose of allowing for striking out pleadings – approach to be followed by court when application made to strike out pleadings

Corisco Design Team v *Zimsun Zimbabwe (Pvt) Ltd* HH-291-11 (Bhunu J) (Judgment delivered 30 November 2011)

Rule 141 of the High Court Rules 1971, which allows the court to strike out pleadings, vests a wide discretion on the trial court. The overriding consideration, though, is to correct pleadings by removing inconsistencies and contradictions. The rule also endeavours to clarify pleadings by removal or amendment of superfluous, extraneous or irrelevant material. The idea is certainly not to kill a case on the basis of a legal a technicality where irregularities can be corrected and put right. Striking out a pleading should be the remedy of last resort when everything else has failed to correct the irregular pleading. The ends of justice are better served when cases are won or lost on the merits rather than technicalities.

Practice and procedure – rescission – judgment capable of being rescinded – decree of divorce – whether capable of being rescinded

Samabawamedza v *Chiyangwa* HH-277-11 (Gowora J) (Judgment delivered 23 November 2011)

See above, under FAMILY LAW (Husband and wife – divorce – decree granted in default).

Practice and procedure – rescission – order granted by consent – order granting relief pending determination of appeal – appeal noted to wrong forum and thus a nullity – rescission granted

Mazuva v *Simbi & Ors* HB-155-11 (Mathonsi J) (Judgment delivered 20 October 2011)

There had been a mining boundary dispute between the applicant and the first respondent. The dispute was referred to the second respondent, the local mining commissioner, for adjudication. The mining commissioner ruled in favour of the first respondent on the ownership of the disputed mine shaft. The applicant lodged an appeal to the Secretary of Mines against the decision of the mining commissioner. As that appeal was still pending, the applicant sought an order stopping mining operations at the disputed mining claim and barring the mining commissioner from dealing with the dispute. The application was unopposed and was granted. The first respondent sought to have the order rescinded. He argued that the purported appeal was invalid, as it had been pursued in the wrong forum, instead of being noted in the High Court as provided for in s 361 of the Mines and Minerals Act [*Chapter 21:05*]. Even if it could be taken as a valid appeal, it would still not automatically suspend the decision of the mining commissioner.
Held: In deciding whether an applicant for rescission of judgment has discharged the onus of proving "good and sufficient" cause as provided for in r 63(2) of the High Court Rules 1971, the court must have regard to the reasonableness of the applicant's explanation for the default; the *bona fides* of the application to rescind the judgment; and the *bona fides* of the defence on the merits of the case. These factors must be considered not only individually but in conjunction with one another and with the application as a whole. To the extent that the appeal was purportedly made to the Secretary of Mines, it was a nullity. There was no appeal at all. The order sought to be rescinded was made pending a non-existent appeal and could not stand.

Editor's note: presumably the judgment could also have been set aside under r 449 of the High Court Rules, on the grounds that it had been granted in error.

Practice and procedure – review – arbitral award – procedure to be followed – application made in terms of High Court Rules – when may be treated as application made under Arbitration Act

Starafrica Corp Ltd v *Sivnet Invtsms (Pvt) Ltd & Anor* HH-178-11 (Patel J) (Judgment delivered 13 September 2011)
See above, under ARBITRATION (Award – review – application).

Practice and procedure – summary judgment – claim for ejectment and arrears of rental – permissible to grant summary judgment for ejectment and to grant leave to defend claim for arrears

Cochrane v *Mackie* HH-303-11 (Musakwa J) (Judgment delivered 7 December 2011)

See above, under LANDLORD AND TENANT (Lessee – right to possession).

Private international law – marriage – property consequences of marriage – determined by law of husband's domicile at time of marriage

von Ahn v *Dzvangah NO & Ors* HH-192-11 (Mawadze J) (Judgment delivered 18 September 2011)

See above, under FAMILY LAW (Husband and wife – marriage – property consequences of marriage).

Property and real rights – immovable property – property subject to mortgage – mortgagee's right to foreclose if debt not paid – execution of warrant – mortgagor not entitled to seek suspension of execution

Meda v *Homelink (Pvt) Ltd & Anor* HB-195-11 (Ndou J) (Judgment delivered 15 December 2011)

See above, under PRACTICE AND PROCEDURE (Execution – sale in execution).

Property and real rights – ownership – vindicatory action – right of owner to vindicate property in possession of third party – owner's remedy where third party has fraudulently parted with possession of property – when defendant may be ordered to compensate owner for value of property – when value of property to be determined

Gweru Tourism Promotions (Pvt) Ltd v *Sadler & Anor* HH-258-11 (Gowora J) (Judgment delivered 12 October 2012)

The plaintiff alleged that it was the owner of certain railway equipment and that the first defendant purported to sell the equipment unlawfully to the second defendant, who was alleged to be in possession of the equipment. The plaintiff demanded from both defendants the surrender of the equipment and the defendants refused or were unable return it to the plaintiff. The defendants also refused to pay to the plaintiff the value of such equipment. Consequently, the plaintiff sued both defendants for payment of the value of the equipment as at the date of its disposal to the second defendant by the first defendant. Only the second defendant entered appearance to defend the claim, the first defendant being out of the jurisdiction. The second defendant also filed an exception to the claim on the grounds that there was no averment that when the first defendant purported to sell and dispose of the equipment to the second defendant, the second defendant was aware of plaintiff's claims to ownership of the equipment. Since the English law of conversion was not part of Roman Dutch law, the fact that the second defendant might now be unable to return the equipment did not entitle the plaintiff to claim damages from the second defendant, nor was the second defendant liable for the value of the equipment, whether that value be the value as at the date of the purported sale or any subsequent date.

Held: (1) one of the incidents of ownership is the right of the owner of a thing to claim it from whoever is in possession of the thing and wherever it may be situate. Where an owner claims the return of his property or the value thereof, it is incumbent upon the defendant to justify his continued detention of the *res* against the wishes and claim by the owner for its return. Where movable property has been stolen, or where the owner has been unlawfully deprived of it in some way, and consequent to that it has been alienated in such circumstances that the owner cannot vindicate, he may claim the value of the property from the thief, or the culprit, or any person who parted with the *res* with the knowledge of the owner's claim to the property in question. Where the *res* has been consumed or destroyed the owner may also claim its value from a possessor who had knowledge of his claim. If the defendant has parted with possession of the *res*, or if the owner suspects that the defendant has parted with possession of it, the plaintiff, in seeking redress, does not mount a *rei vindicatio*; he brings an action for its return or the value thereof. The elements that the plaintiff needs to allege differ from the *rei vindicatio*.

(2) Where a plaintiff seeks to recover the value of his property from a defendant on the ground that the latter had been in possession of it and had parted with possession, it is incumbent upon the plaintiff to allege and prove that the defendant parted with the property with the full knowledge of the plaintiff's claim to ownership of it. The plaintiff must also allege knowledge of his claim to ownership either at the time of acquiring possession or at the time of disposal, consumption or destruction of the *res* being claimed.

(3) The price of stolen property which has already been sold cannot be vindicated, nor may things which have been bought with stolen money or negotiable instruments payable to bearer. The owner is, however, not necessarily without remedy. Though the *actio rei vindicatio* is primarily aimed at the recovery of lost possession, a defendant under this action who has fraudulently ceased to possess may nevertheless be ordered to make good the value of the thing as at the date of trial or judgment. Where a party claims in the alternative the value of the thing that he seeks to be restored, he is seeking is to be placed in the same position that he would be if the *res* were restored to him. Restoration can only take place at the time of judgment, so the time for assessing the value of the *res* should be the date of trial or judgment.
(4) The *actio ad exhibendum* is a personal action which is usually, but not necessarily, instituted in conjunction with the *rei vindicatio* to compel the possessor of a thing which is to be vindicated to produce it. In that situation the plaintiff is entitled to bring an *actio ad exhibendum*. If the defendant fails to produce it and is still in possession of the property, he can be ordered to compensate the plaintiff for the value thereof. If the defendant had ceased to possess the property fraudulently, an action would be brought to recover the value of the property from him.
(5) A defendant is entitled to except to any set of facts together with the relief claimed in respect thereof as being bad in law. What a defendant cannot do is to except to a declaration on the basis that it does not support one of several claims arising out of one cause of action. An exception taken in this form serves no purpose. An exception is taken in order to avoid the leading of unnecessary evidence. *In casu*, the exception would not dispose of the main claim, *viz.*, the return of the property claimed by the plaintiff. The exception was not well taken and would be dismissed.

Property and real rights – spoliation – order – entitlement to – counter-spoliation by person first despoiled – when may be defence to claim for spoliation order – need for counter-spoliation to be part of *res gestae* – invoking assistance of police to regain property – not due process and not clothing repossession with legality

Church of the Province of Central Africa & Ors v *Jakazi & Ors* HH-238-11 (Uchena J) (Judgment delivered 10 October 2011)

The parties, factions within the Anglican Church in Zimbabwe, had been involved in a long-running dispute. They had in 2009 consented to an order which allowed each party to remain in charge and control of the church property which was in their respective possession at the time of the consent order. The parties complied with the consent order until the applicants filed an urgent chamber application claiming that they had been despoiled of a particular church by the respondents. The evidence showed that the priest of that church died in May 2011. The church warden retained the keys of the church and two other priests conducted services. In September 2011 the third and fourth respondents, priests in the respondents' faction of the church, approached the warden and demanded the keys. When he refused, they sought the assistance of the police who forced the warden to hand over the keys. The applicants sought a spoliation order. The respondents resisted. They claimed that they had possession of the church before the consent order was granted and that their action was an act of "counter-spoliation", an immediate reaction to the applicants' act of unlawfully depriving them of their possession of the church, after the death of the incumbent priest.
Held: (1) the evidence supported the applicants' contention that their faction of the church was in possession of the church on the death of the priest.
(2) To prevent potential breaches of the peace, the law enjoins the person who has been despoiled of his possession, even though he is the true owner with all rights of ownership vested in him, not to take the law into his own hands to recover his possession: he must first invoke the aid of the law: if the recovery is *instanter,* in the sense of being still a part of the *res gestae* of the act of spoliation, then it is a mere continuation of the breach of the peace which already exists and the law condones the immediate recovery. However, if the dispossession has been completed, then the effort at recovery is not done *instanter* but is a new act of spoliation which the law condemns.
(3) Here, had the respondents' spoliation been completed by the time they discovered it, they would not be entitled to the defence of counter-spoliation, as that defence can only be successful if it is *instanter* and forms part of the *res gestae* of original spoliation. If the victim of the first act of spoliation fails to act *instanter* and takes the law into his own hands to regain possession of the thing after the dispossession has been completed, his conduct would constitute a new breach of the peace and would be regarded as a separate act of spoliation, entitling the first spoliator to a spoliation order against him. The tussle for the keys took place long after the alleged first spoliation and could not be a basis for a defence of counter spoliation. Counter spoliation can only succeed if the despoiled party acts by resisting the on going spoliation.
(4) The use of the police in the dispossession of the applicants did not clothe the respondents' conduct with legality, as dispossession must be through the due process of the law.

Revenue and public finance – tender procedure – need for procuring entity to follow requirements of procurement legislation – effect of failure to do so – contract in breach of such requirements void *ab initio*

PMA Real Estate (Pvt) Ltd v ARDA HH-236-11 (Patel J) (Judgment delivered 1 November 2011)

See above, under CONTRACT (Validity).

Succession – intestate – heirs *ab intestato* – children born out of wedlock – general law and customary law positions – children born out of wedlock sired by father married under Marriage Act – no purported customary law unions with mothers of such children – such children not entitled to succeed *ab intestato*

Zawaira v *Nyamupfukudza NO & Ors* HH-241-11 (Chitakunye J) (Judgment delivered 3 November 2011)

The deceased married his wife in terms of the Marriage Act. Six children were born of the union. In addition, the deceased fathered 10 children out of wedlock, by different mothers. He did not purport to marry any of those women. He died intestate. The executor lodged with the Master a second and final administration and distribution account, in terms of which he distributed the estate equally to the surviving spouse and all the children of the deceased. The applicant, one of the sons of the marriage, lodged an objection with the Master, contending that in terms of the general law children born out of wedlock cannot succeed *ab intestato* to their father or father's relatives. The Master dismissed the objection on the grounds that the laws of succession in this country treat all children of the deceased as being equal. In this regard he cited ss 3 and 3A of the Deceased Estates Succession Act [*Chapter 6:02*] and referred to s 10 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*] as further support of his contention that there is no longer any distinction between children born out of wedlock and those born in wedlock. The applicant sought a declaratory order that only the children of the deceased who were born in wedlock were the legitimate intestate beneficiaries.

Held: under the general law, illegitimate children cannot succeed *ab intestato* to their father or their father's relatives; similarly, the father and his relatives cannot succeed *ab intestato* to the illegitimate children. The issues of succession under general law would be dealt with in terms of the Deceased Estates Succession Act. The customary law position, on the other hand, is that all children, regardless of whether they were born in wedlock or out of wedlock, are entitled to benefit from their late father's estate as "beneficiaries". The issue of succession under customary law is governed by the Administration of Estates Act [*Chapter 6:01*]. For Part III of that Act to apply, it must be shown first that the deceased was subject to customary law. Section 68G of the Act creates a presumption that the general law of Zimbabwe applies to a person who, at the date of his death, was married in accordance with the Marriage Act. For that presumption to be rebutted, the respondents would have to show that, despite the deceased having married in terms of the general law, the surrounding circumstances were such that he was subject to customary law. Under s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*], customary law applies in a civil case where, *inter alia*, regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. Section 3(2) defines "surrounding circumstances" as including, *inter alia*, the mode of life of the parties and the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe. The fact that the fact that the deceased sired ten children out of wedlock with different women did not show that he was subject to customary law. Siring children out of wedlock with various women is not peculiar to people subject to customary law. Children born of a customary law union contracted before a civil marriage could be regarded as beneficiaries in terms of s 68(3) of the Administration of Estates Act [*Chapter 6:01*], but in this case the deceased was already married in accordance with the Marriages Act when he associated with other women and sired the 10 children out of wedlock. Such associations did not purport to be customary law marriages, but even if they were customary law marriages, they came after the civil rites marriage and so they could still not be valid marriages for purposes of Part III of the Act. Accordingly, the children of the deceased born out of wedlock were not legitimate intestate beneficiaries of the deceased's estate. However, those classed as dependants might have recourse to the Deceased Persons Family Maintenance Act.

Succession – intestate – heirs *ab intestato* – widow remarrying after death of husband – children of first marriage – entitlement to matrimonial property – spouse and children of second marriage – only entitled to assets acquired during second marriage

Chimhowa & Ors v *Chimhowa & Ors* HH-183-12 (Chiweshe JP) (Judgment delivered 23 November 2011)

In introducing provisions such as s 3A of the Deceased Estates Succession Act [*Chapter 6:02*] and s 68F of the Administration of Estates Act [*Chapter 6:01*] and the Deceased Persons Family Maintenance Act [*Chapter 6:03*], the legislature gave effect to its desire to protect widows and minor children against the growing practice by relatives of deceased persons of plundering the matrimonial property acquired by the spouses during the subsistence of the marriage. Under this practice, which had become rampant, many widows were deprived of houses and family property by marauding relatives, thus exposing the widows and their minor children to the vagaries of destitution. In many cases, the culprit relatives would not have contributed anything in the acquisition of such immovable and movable properties, often the result of years of toil on the part of the deceased and the surviving spouse. This is the mischief that the legislature sought to suppress. The legislature intended to protect, in the case of widows, the property acquired during the subsistence of their marriage to the deceased persons. This protection benefitted not just the widows but their minor children as well. It was not the legislature's intent to extend this protection and privilege to persons outside the marriage within which such property might have been acquired. To impute that kind of interpretation would lead to serious absurdities in the application of the law. For example, A marries B. They acquire jointly what may be termed matrimonial property. They have children. A, the husband, dies and in terms of the law B, the wife and surviving spouse, is awarded the matrimonial property. Thereafter B contracts another marriage with X, the second husband. She dies and X, the second husband and surviving spouse, inherits the matrimonial property that B inherited from A, at the expense of A and B's children in that marriage. Clearly those children will have been disinherited of their parents' property. They may as a result end up in the street, particularly if X sells the property and converts the proceeds to his own ends. The result would be that the noble intention of Parliament – to keep the property within the family for the benefit of the surviving spouse and the children – would have been subverted. The protection afforded to surviving spouses is, in terms of inheritance, limited to those assets that were acquired during the course and subsistence of that spouse's marriage to the deceased person whose estate is under distribution. In particular, surviving spouses cannot by right claim any right to matrimonial property acquired outside their own marriage. To allow them to do so would lead to the absurdities alluded to. It would be against public policy and conscience to deprive the children of deceased persons the common law right to inherit from their parents merely because at some stage the surviving parent had remarried.

Succession – intestate succession – when heirs in intestacy are to be ascertained – widow's entitlements under s 3A of Deceased Estates Succession Act [*Chapter 6:02*] – not removed by widow's subsequent death – widow's heirs entitled to inherit her estate

Nyathi & Anor v *Ncube NO & Ors* HB-123-11 (Mathonsi J) (Judgment delivered 15 September 2011)

The applicants were the surviving children of the deceased, who died intestate. A few months after he died, his wife, the applicants' stepmother, who had been appointed as executrix of the estate, herself died intestate. In terms of the first and final distribution account she had prepared before her death, she was to inherit a house and the two applicants were to receive a child's share of the deceased's estate. The deceased's widow was survived by her parents. The first applicant and the first respondent were appointed executors of the deceased's widow's estate. The latter prepared a distribution account in terms of which the bulk of the property from both estates would devolve to the deceased's widow's parents. The applicants argued that the widow's estate could not inherit from the deceased's estate, and that they should be declared the rightful heirs.

Held: intestate heirs are in all cases to be ascertained at the date when the intestacy occurs. *In casu*, this occurred when the deceased died. In terms of s 3A of the Deceased Estates Succession Act [*Chapter 6:02*], his widow became entitled to receive from the free residue of his estate the effects set out in that provision. Indeed, she had even set in motion the winding up process which was to result in the effects being transferred to her name and produced a distribution account which was filed with the Master before she died. This situation was distinguishable from that where an estate inherits intestate from another as would happen if the intestate heir dies before the intestacy occurs. It was unthinkable that after the legislature gave the widow an indisputable right to inherit from her husband's estate, such right would be wiped away by her death as to allow the applicants to inherit from their father as if his wife had pre-deceased him. Such a construction would make nonsense of the legislative intent to empower spouses to inherit, undisturbed, from the estates of their deceased spouses.