Latest update: 3 August 2012

CASES DECIDED JANUARY – JUNE 2012

Appeal – noting of – effect – whether suspends judgment appealed against – appeal from arbitrator to Labour Court – award not suspended – appeal from Labour Court to Supreme Court – decision appealed against suspended

Kingdom Bank Workers' Cttee v *Kingdom Bank Financial Hldgs* HH-302-11 (Patel J) (Judgment delivered 10 January 2012)

See below, under EMPLOYMENT (Labour Court – appeal).

Arbitration – award – labour matter – appeal to Labour Court – award not suspended by noting of appeal

Arbitration – award – registration – labour matter – no relief beyond registration provided for by Labour Act

Kingdom Bank Workers' Cttee v *Kingdom Bank Financial Hldgs* HH-302-11 (Patel J) (Judgment delivered 10 January 2012)

See below, under EMPLOYMENT (Labour Court – appeal).

Arbitration – award – setting aside of – application – no requirement to comply with award before bringing application

Pioneer Tpt (Pvt) Ltd v *Delta Corp Ltd & Anor* HH-18-12 (Gowora J) (Date of judgment 1 January 2012)

A dispute between the applicant and the respondent was referred to arbitration, and the arbitrator made an award against the applicant. The applicant brought an application to have the award set aside in terms of Article 34 of the First Schedule to the Arbitration Act [*Chapter 7*:*15*]. The applicant argued that the arbitrator had acted outside the provisions of the contract, which was contrary to the law on the privity of contracts and therefore contrary to public policy. It also argued that by awarding specific performance in favour of a party who, in terms of the contract, had bilateral obligations which it had itself not performed and was not in a position to perform, the arbitrator had unjustly enriched one of the parties at the expense of the other contrary to the law regarding bilateral obligations, which was also contrary to public policy. Accordingly, the applicant sought the setting aside of the arbitral award. The respondent argued, *in limine*, that the applicant had approached the court with dirty hands and ought not to be accorded a hearing, as, it claimed, the filing of an application for review had not suspended the operation of the award by the arbitrator and the applicant had not complied with the award. The applicant's counter-argument was that to deny it audience and opportunity to be heard would defeat the very basis of art 34. If the applicant were requested by the court to comply with the arbitral award first and then seek an order for its setting aside, any court order granted thereafter would be of academic interest, especially where the first respondent had sought and obtained an award for specific performance.

The second point made *in limine* by the respondent was that the agreement provided that the parties irrevocably agreed that the decision of the arbitrator would be binding upon each of them that the applicant could not have recourse against the award. Alternatively, even if they did have recourse, the application filed did not disclose a cause of action as contemplated in art 34, because only if the award was induced or effected by fraud that it can be said to have been contrary to public policy, and the applicant had made no such allegation.

Held: (1) the right of an aggrieved party under art 34 is unqualified other than that a party is not entitled to bring an application after the lapse of three months after the award has been made. The Act bestows upon a party the right to apply for the setting aside of an award on the grounds set out therein. To require a party to comply with the award before launching an application under the article would be tantamount to denying such party the right to have recourse in terms of the Article. The applicant had taken on review an arbitral award in terms of a right accorded under an Act which does not require compliance with the award before approaching the court for redress. This situation was distinguishable from that where a person who was acting in defiance of a statutory requirement approached the courts. The present case was not a situation where the applicant had dirty hands and was not entitled to be heard.

(2) Under the Act the court is empowered to set aside an arbitral award if the applicant can establish that the award is in conflict with the public policy of Zimbabwe. The concept of public policy covers fundamental principles of law and justice in substantive as well as procedural law. What the applicant needed to establish was that the decision and conclusions reached were so outrageous in their defiance of logic and reasoning that any fair minded person would have a conception that justice in Zimbabwe would be hurt by that award. In the circumstances, the applicant had failed to show meet this requirement.

Company – corporate veil – lifting of – when permissible – companies forming part of a single economic entity – when permissible to treat such companies as a whole instead of as separate units

Barnsley v *Harambe Hldgs (Pvt) Ltd & Anor* HH-84-12 (Mathonsi J) (Judgment delivered 22 February 2012)

The applicant was employed as group engineering director by the first respondent, which represented itself as a holding company, comprising several subsidies, with the second respondent as its chief executive officer. The applicant remained in employment for 11 months, and when he did not receive his salary and allowances in accordance with the employment contract, he referred the dispute to arbitration. An arbitral award was issued in his favour. He was unable to execute against the first respondent's property to recover the judgment debt because, each time an attachment of property was made, such property was claimed by a third party, one of the holding companies.
Held: The cardinal principle of our company law is that a company enjoys separate legal personality, generally referred to as the legal *persona* principle. For that reason, its property and its liabilities should be maintained distinct and separate from those of its members. However, the courts have always readily lifted the corporate veil where the company is used as a vehicle for fraud or to justify wrong. Although the companies in a group are separate legal entities, the court have in the mercantile context dealt with the group as an economic entity. This lifting of the corporate veil is indicated, especially when a parent company owns all the shares of the subsidiaries, so much so that it can control movement of the subsidies. The present case was a classic one for the lifting of the corporate veil: not to do so would enable the first respondent to rely on its legal personality to defeat a lawful claim, to justify wrong and indeed to protect fraud. If this were to be allowed, an injustice would occur.

Editor's note: see also *Deputy Sheriff* v *Trinpac Invstms (Pvt) Ltd & Anor* HH-121-11 (a judgment of Patel J, delivered 14 June 2011), included in the summaries for 2011 (1), where the corporate veil was lifted in similar circumstances.

Company – director – liability – for acts of company – company in contempt of court order – director not cited in original proceedings – need to show that director was served with or aware of court order before committal for contempt permissible

Zellco Cellular (Pvt) Ltd v *NetOne Cellular (Pvt) Ltd & Ors* HH-32-12 (Gowora J) (Judgment delivered 1 February 2012)

See below, under COURT (Contempt).

Constitutional law – Parliament – powers – standing orders – need for Parliament to obey such orders – motion passed in breach of standing order – such motion a nullity

Constitutional law – Parliament – privilege – Speaker's certificate – validity – need for certificate to be specific and detailed

Constitutional law – Parliament – staff – Clerk of Parliament – appointment of – appointed by Committee on Standing Rules

Zvoma v *Moyo NO & Ors* HH-23-12 Bere J) (Judgment delivered 20 January 2012)

The applicant, the Clerk of Parliament, filed an application seeking an interdict against the respondents, to prevent them from moving or accepting any motion from any member of the House of Assembly to dismiss him without the matter of his dismissal first being brought before the Committee on Standing Rules and Orders (CSRO) or its sub-committee or some other independent and impartial disciplinary authority. Members of Parliament had continued to debate the alleged shortcomings of the applicant when his matter was already awaiting determination in the High Court and passed a motion

for the applicant's dismissal. The first respondent, the Speaker of the House, issued a certificate of privilege which, the respondents argued, ousted the jurisdiction of the court. The applicant argued that the certificate should not be accepted as it breached s 62(d) of the House of Assembly Standing Orders, which precluded members from debating or referring to any matter on which a judicial decision is pending. The applicant also argued that the certificate of privilege must be specific in its disclosure of the matters of privilege that it seeks to be protected and that the court should not have to speculate on such issues. The applicant also argued that the only body that supervised him in the execution of his duties was the CSRO, chaired by the Speaker, and that it was this committee which was mandated to initiate disciplinary proceedings against him should the need arise. He argued that s 48(2) of the Constitution, under which he was appointed, did not preclude s 57 of the Constitution, the House of Assembly Standing Orders, Officers of Parliament (Terms of Service) Regulations 1977 and the Labour Act [*Chapter 28:01*] from regulating his employment relationship with Parliament.

Held: (1) the court is empowered to consider the jurisdictional basis of a certificate of privilege first before it can be accepted to stay proceedings. The certificate produced was completely silent on detail and thus was incapable of ousting the jurisdiction of the court.

(2) The rules of natural justice would be seriously eroded if the applicant's dismissal were to be initiated by members of Parliament instead of by the CSRO which appointed him in the first place. He who hires must be empowered to fire or initiate disciplinary proceedings. The CSRO is provided for by s 57 of the Constitution of this country and may not be subordinated to any other committee appointed by the respondents in terms of their amended motion.

(3) While the three arms of government – Parliament, the executive and the judiciary – are separate and independent of each other in so far as the exercise of their powers is concerned, the power enjoyed by Parliament is not absolute. If it were, that would mean that Parliament would do virtually everything it desired with impunity, including violating its own rules and regulations to the detriment of its citizen. Under standing order 62(d), when a matter is pending before the courts or when a matter is *sub judice*, House members are obliged to respect the court process until a determination on that matter is made. The order did not mean that the members of the House can only be stopped from debating the issue if at the time there was a court order barring them from so acting. That disobedience by the House to its own standing orders must be visited with "nullity" over what it did.

(4) The applicant, being a constitutional appointee was not covered by the Labour Act and his attempt to seek refuge in the Labour Act was misplaced. Section 3(1) of the Act made that quite clear. However, the legislature had given the CSRO the mandate to appoint the applicant and consequently the power to supervise him and other staff of Parliament. The CSRO was the administrative arm of Parliament and only it had the power to initiate the dismissal of the applicant by following due process. It followed that members of Parliament lacked *locus standi* to initiate, debate and vote on a motion to determine the fate of the applicant.

(5) The motion was simply to dismiss the applicant, but as it stood had no provision for proper disciplinary proceedings. The right to be heard is one of the core values of the rules of natural justice. The Officers of Parliament (Terms of Service) Rules 1977 were approved by Parliament in terms of s 48 of the Constitution. These rules cover in sufficient detail the appointment procedure and conditions of service, including the procedure to be adopted in the termination of the employee's service should the need arise. There is no provision for the CSRO through the Speaker of the House of Assembly to relinquish or to delegate its administrative functions to the ordinary members of Parliament. Only when the CSRO has conducted a proper inquiry against the applicant and the applicant found to be guilty can the speaker then advise Parliament in terms of s 48(2) of the Constitution; and it is only then that the House can then resolve to have the applicant removed.

(6) The appointment by the House of a special committee to consider the applicant's case did not rectify the situation. The committee's terms of reference made it impossible for the committee approach the inquiry with an open or impartial mind; its mandate was simply to find the applicant guilty and consider the nature of punishment to be meted out. Such an approach would be a clear violation of the applicant's constitutionally recognised right to be afforded a fair hearing before an impartial body.

Contract – formation – offer and acceptance – need for offer to be positive and unambiguous – need for court to ascertain from external facts whether minds of parties had come together with requisite *animus contrahendi*

Victoria Falls Municipality v *Nyathi & Ors* HB-2-12 (Ndou J) (Judgment delivered 19 January 2012)

The plaintiff sought the eviction of the defendants from the various houses they occupied in the town of Victoria Falls. The plaintiff claimed that these were pool houses for use by the plaintiff's employees and that the defendants were given these pool houses by virtue of their employment with plaintiff. It was further contended that upon termination of such employment, each individual defendant will cease to occupy the property in issue. The defendants' counter claim was for an order directing the plaintiff to take all necessary steps to transfer the various stands to each defendant on the basis that the defendants purchased the stands on a rent-to-buy scheme.

Held: Agreement by consent is the foundation of contract. In order to decide whether a contract exists one looks first for the true agreement of two or more parties and, because such agreement can only be revealed by external manifestations, one's approach must of necessity be generally objective. The court can only judge from external facts whether the minds of the parties have come together. The most helpful way of determining whether there has been agreement, true or based on quasi-mutual assent, is to look for an offer and an acceptance of that offer. A binding contract is as a rule constituted by acceptance of an offer. But offer and acceptance must never be sought for their own sake but as aids in deciding whether an agreement has been reached. A true offer means an express or implied intention to be bound by the offeree's acceptance – the *aminus contrahendi*. The offer must be unequivocal i.e. positive and unambiguous.
Looking at the evidence led by the plaintiff there was no meeting of minds that these houses were being sold to the defendants. There was no such offer to the defendants. The rent cards produced did not constitute an offer made with the requisite *animus contrahendi*. There were no unequivocal offers of sale made to the defendants. That fact it was not easy to ascertain the alleged purchase price points to the relationship between the parties as being one of lease and not purchase and sale. On the evidence, there was no agreement by consent or true agreement, or a meeting of minds, or a coincidence of wills, or *consensus ad idem* between the parties and the only credible explanation is that these houses were pool houses for use at the discretion of the plaintiff. The plaintiff was therefore entitled to the order it sought.

Contract – sale – option – when option can be said to exist – need for certainty in terms – where offer is vague or capable of more than one meaning, no option exists

Firstel Cellular (Pvt) Ltd v *Sefaidiga & Anor* HH-70-12 (Hungwe J) (Judgment delivered 22 February 2012)

An option is an "offer" which is irrevocable by the grantor during the period stipulated in the contract or, if there is no such provision, within a reasonable time. If the option is exercised, the potential contract contemplated by the parties to the option agreement is complete. The option holder has merely to accept the offer in the manner and within the time prescribed by the contract, and a new contract comes into existence between him and the other party. An option constitutes nothing more than an offer coupled with an arrangement (express or implied) to keep the offer open for a certain period of time. It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, it must be made with the intention that, when it is accepted, it will bind the offeror. If an offer, which is an essential element of any option, is vague or at all capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby convert it into a binding contract. Where there is an "offer" which provides that certain terms were to be "renewed" or to be "negotiated" or to "stand over" for decision at a later stage, then, pending agreement on such outstanding terms, neither party has any rights against the other. Similarly, where no time is specified and no price is fixed or ascertainable, no option can be said to exist.

Contract – sale – validity – jointly owned matrimonial property – wife not consenting to sale – sale to innocent purchaser – whether specific performance should be granted – wife having right to her share of sale price – specific performance granted to purchaser

Stupendis Entprs (Pvt) Ltd v *Kasi & Ors* HH-72-12 (Hungwe J) (Judgment delivered 22 February 2012)

The applicant company bought a house from the first two respondents, who were husband and wife. Litigation ensued over the sale, and default judgment was obtained, ordering the transfer of the property to the applicant. The default judgment was rescinded on the application of the wife. The applicant then sought specific performance of the contract of sale. The wife objected, on the basis that she was joint owner of the property and had not agreed to the sale and that the power of attorney in which she had purportedly agreed to the sale was a forgery. She averred that the marriage had foundered and that a divorce was pending.
It was argued for the applicant that the court should order specific performance as the wife would not suffer any prejudice since she could still call upon the husband to account for the sale of the proceeds of the sale of the matrimonial assets in the pending divorce action. Since at common law she was regarded as co-owner of the asset in issue, she would be entitled to a share in the property proportionate to her shareholding. The husband need not have obtained his wife's consent before disposing of his half-share and the sale of his half share to the applicant could not be impugned. If the applicant did not obtain transfer, the result would be that the applicant, a company, and the wife would become co-owners of a residential property, which would be absurd.
The wife applied for an order declaring the sale to be null and void.

Held: a co-owner may not purport to alienate the property which is jointly co-owned without the consent of the other owners; and that alienation of jointly owned property can only be effected by the joint action of all the owners. However, there may be circumstances in which a court may be called upon to consider whether or not to recognise an alienation which violates this principle of law. A common occurrence of such a circumstance occurs in matrimonial property, where a court, in the interest of justice and fair play, has the power to take part of a spouse's share in property jointly owned to give it to the other spouse if, by doing so, it could place the spouses in the position they would have been had a normal marriage relationship continued between them.

In this case, the husband misrepresented that he had the power of attorney to enter into the agreement of sale in respect of his wife's half share in the property. However, the applicant had no reason to suspect that there was such a misrepresentation and there was no reason to find that the applicant was not an innocent party. A plaintiff is always entitled to specific performance and, if he makes out a case, his claim will be granted, only subject to the court's discretion. Although this discretion must be exercised judicially, it is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.

In favour of the granting of an order of specific performance were the following: (a) the applicant entered into the agreement of sale without any suspicion that the first defendant may have forged his wife's signature to the agreement; (b) the applicant had made full payment for value to the husband, who was obliged to disgorge his ill-gotten gains in favour of his estranged wife; (c) in view of the pending divorce proceedings, the wife would not suffer any prejudice by making a claim for her share in those proceedings, taking into account the findings against her husband made in this matter; and (d) the balance of convenience favoured the applicant.

Court – contempt – failure to obey court order – application for order holding respondent in contempt – what applicant must show – need to show that respondent was served with or aware of court's order – company director – not cited in original proceedings – application against – need to show that director was served with or aware of order

Zellco Cellular (Pvt) Ltd v *NetOne Cellular (Pvt) Ltd & Ors* HH-32-12 (Gowora J) (Judgment delivered 1 February 2012)

The applicant sought orders holding the respondents in contempt of court, following the disobedience by the first respondent, a company, to an order granted against it. The second and third respondents, who were respectively the chairman and managing director of the first respondent, and the fourth respondent, who was the company secretary, had not been parties to the initial litigation but were cited in the current application.

Held: The principal object of contempt proceedings is to compel compliance by a party to an order given by a court of competent jurisdiction. Before an applicant can be granted an order for committal on the basis of contempt of an order of court, he must establish (a) that an order was granted against the respondent; (b) that the respondent was either served with the order or informed of the grant thereof against him and can have no reasonable ground for disbelieving that information; and (c) that the respondent has either disobeyed the order or neglected to comply therewith. A party cannot be found to be in contempt of an order which has not been addressed to it or which has not been served upon it. The provisional order granted against the first respondent was an order *ad factum praestandum,* that is, an order to do or refrain from doing a thing. By its nature, such an order is an order *in personam* and consequently is only binding upon the person against whom it has been issued.

An officer of a company is not liable for acts done by the company unless he is a member of the board of directors. Thus, no liability attached to the fourth respondent.

The affairs of corporate entities are managed and run by their directors and any disobedience of court orders must be attributed to the directors of the company. A corporation can only comply with a court order through its officers. Thus it can be convicted of contempt if its officers have refused or neglected to comply with the court order. A person who also contributes to the commission of the offence, can, without being a principal, be punishable as an accomplice. Consequently, a director who has knowledge of the order and causes the company to refuse to obey the order is guilty of contempt. Since the applicant was seeking an order for the incarceration of the second and third respondents, it should have ensured that the court order be served upon each of them personally. It did not do this. It addressed a letter to the fourth respondent, but there was no evidence that the second and third respondents themselves received copies. The applicant had thus failed to establish personal knowledge of the order on their part and a wilful decision to disregard it or disobey it.

Court – contempt – failure to obey court order – when application for holding defaulter in contempt may be granted – order must be one *ad factum praestandum* – need for court to determine true nature of order granted – failure to obey orders *ad pecuniam solvendam* not punishable as contempt – need for court also to consider whether order *ad factum praestandum* can be complied with and whether other remedies available

Evans & Anor v *Surte & Ors* S-4-12 (Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 13 February 2012)

Orders of court are, generally speaking, divided into two categories: orders to pay a sum of money, namely, orders *ad pecuniam solvendam*; and orders to do, or abstain from doing, a particular act, or to deliver a thing, namely, orders *ad factum praestandum*. The remedy of committal for contempt is available only in the latter category of cases. These definitions notwithstanding, the distinction between the two types of orders is in practice not as clear cut as it may seem. Thus, certain orders for the payment of money, namely maintenance orders (which one would have regarded as orders *ad pecuniam solvendam*) have been classified by the courts as orders *ad factum praestandum* on the basis that they are not really money orders at all. Essentially, they are orders that the defendant do something, namely, maintain the wife or the children. The key determinant is not the act directed but the nature of the obligation to be enforced. Where the true nature of an order was one for the payment of a debt, albeit in kind, the fact that the court ordered the delivery of fuel would not convert the order from an order for payment of a debt into an order *ad factum praestandum.* In view of the dire consequences attendant upon the failure to obey an order *ad factum praestandum*, namely, committal to prison, before granting an order which is *ad factum praestandum*, a court ought to satisfy itself as to the ability of the defendant to comply with the order, otherwise it takes the risk of issuing a hollow and unenforceable order. Another consideration is that orders *ad factum praestandum* are usually granted only where there is no other remedy available to the applicant, the rationale being that the successful party has other options to enforce an order *ad pecuniam solvendam*.

Criminal procedure – bail – grant of – factors to be considered – when bail should be refused – need for court to be satisfied that accused not likely to stand trial – factors indicating likelihood of not standing trial

S v *Madzokere & Ors* S-8-12 (Malaba DCJ, in chambers) (Judgment delivered 13 February 2012)

The purpose of the exercise of the discretionary power vested in the court considering a bail application under s 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is to secure the interest of the public in the administration of justice by ensuring that a person charged with a criminal offence upon a reasonable suspicion of having committed it will appear on the appointed day to stand trial. It is for that purpose that the section provides, in effect, that upon sufficient evidence being available to justify it, a finding that an accused person is likely not to stand trial when released on bail is a relevant and sufficient ground for ordering continued detention of him or her pending trial. Section 117 is also based on the principle that, regard being had to the presumption of innocence which is a fundamental right guaranteed under the Constitution to an accused person awaiting trial, he must be released on bail on appropriate conditions if the same object of ensuring his appearance at the trial can be achieved.

The question for determination is whether, on the facts available and regard being had to the presumption of innocence to which the accused is entitled, the court would be justified in finding that there is a likelihood that the accused would not stand trial if released on bail, even with stringent measures to ensure close monitoring by the police. Only if such a finding is justified by the available evidence can it be said that the likelihood of the accused not standing trial if released on bail is a relevant and sufficient ground for depriving him of his liberty pending trial. The following factors are a useful guide in deciding whether an accused person would abscond if released on bail:

- the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction
- the apparent strength or weakness of the State case
- the accused's ability to reach another country and the absence of extradition facilities from that country
- the accused's previous behaviour when previously released on bail; and
- the credibility of the accused's own assurance of his intention and motivation to remain and stand trial.

Criminal procedure – review – incomplete proceedings – High Court's power to interfere in incomplete proceedings – limited circumstances when such power may be exercised

S v *Rose* HH-71-12 (Hungwe J) (Judgment delivered 22 February 2012)

The statutory powers of review under ss 26, 27 and 29 of the High Court Act [*Chapter 7:06*] can be exercised at any stage of criminal proceedings before an inferior court. In any event, the High Court has inherent powers of review. A wrong decision of a magistrate in circumstances which would seriously prejudice the rights of a litigant would justify the court at any time during the course of the proceedings in interfering by way of review. This principle would apply with greater force

in criminal proceedings, where a miscarriage of justice might result from a wrong decision of the magistrate or where the rights of an accused person are seriously affected thereby.
Ordinarily the High Court's power of review is exercised only after termination of the criminal case, but the court is entitled to exercise that power before the termination of the case, if there is a gross irregularity in the proceedings. It is, however, a power that is sparingly exercised. While the attitude of the Attorney-General is obviously a material element, his consent does not relieve the High Court from the need to decide whether or not the particular case is an appropriate one for intervention. In addition, the prejudice inherent in the accused being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the High Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not in itself necessarily justify the High Court in granting relief before conviction.
Under s 29(4) of the High Court Act, the High Court could set aside a conviction on the grounds of irregularity if a substantial miscarriage has actually occurred. It could do this after conviction but before sentence. The irregularity would, however, have to be so gross that it is incapable of correction by way of ordinary review or appeal. The High Court could also interfere where it would be unconscionable to await the conclusion of the proceedings before seeking redress in the normal way.

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.

Customary law – chief – appointment of – by President – customary principles of succession – President only obliged to give due consideration to such principles – not obliged to follow them

Moyo v *Mkoba & Ors* HB-7-12 (Ndou J) (Judgment delivered 19 January 2012)

Although chiefs are envisaged as hereditary holders of office, it is only official recognition by the President that carries with it the title of chief. In practice the President frequently appoints the person holding traditional title to the chieftainship, but he is not obliged to do so. Section 3(2) of the Traditional Leaders Act [*Chapter 29:17*] obviously implies that the President "should give due consideration to the customary principles of succession, if any, applicable to the community over which the chief is to preside", as investigated by Ministry of Local Government officials in particular the district administrator. However, he is not obliged to follow those principles in making his choice. Once the investigation has been made, the President is free to act as he thinks best in the interests of good governance of the community.

Customary law – chief – appointment of – selection of candidate – clan selecting a candidate – government officials having no right to interfere with nomination process and nominate another person

Machaka v *Min of Local Govt & Ors* HH-37-12 (Mathonsi J) (Judgment delivered 25 January 2012)

In compliance with s 3 of the Traditional Leaders Act [*Chapter 29:17*] a nomination process was embarked on to select a candidate for appointment as Chief Ngezi. That process came up with the name of the applicant as the candidate for

appointment by the President. Notwithstanding the selection of the applicant as a candidate for appointment, the Minister of and the Secretary for Local Government commissioned a commission to investigate the selection of the applicant. This halted the process under circumstances suggesting interference with the process of selection. The commission proposed putting forward the name of the third respondent to the President for appointment. The applicant sought an order interdicting the respondents from doing so.
Held: The process of nominating a candidate is the province of the clan and s 3 of the Act does not envisage a situation where government officials interfere with that process and dictate what should be done, whether in the form of commissions or otherwise. It was clear that the commission had rejected the selection process and the outcome of the meetings held by the clan. That commission was therefore unlikely to do anything favourable to the applicant. The order would be granted.

Employment – Labour Act [*Chapter 28:01*] – applicability – Act not applicable to staff of Parliament appointed in terms of Constitution

Zvoma v *Moyo NO & Ors* HH-23-12 Bere J) (Judgment delivered 20 January 2012)

See above, under CONSTITUTIONAL LAW (Parliament).

Employment – Labour Court – appeal – appeal to Labour Court – decision or arbitral award not suspended by noting of appeal – appeal from Labour Court to Supreme Court – decision of Labour Court suspended by noting of appeal

Kingdom Bank Workers' Cttee v *Kingdom Bank Financial Hldgs* HH-302-11 (Patel J) (Judgment delivered 10 January 2012)

The applicant sought the registration of an arbitral award made in its favour, as well as an order for the payment of the sum awarded. The respondent had previously filed an appeal-cum-review of the award before the Labour Court. The Labour Court dismissed both the appeal and review. The respondent then appealed to the Supreme Court against the Labour Court's decision. The appeal was still outstanding. The respondent argued that the registration of the award was premature, as it would render the appeal academic and cause irreparable prejudice to the respondent if the award were to be enforced. The applicant argued that the noting of the appeal did not suspend the award and that it was entitled to register and enforce the award, unless and until the respondent took appropriate steps to stay its execution. At the hearing, the following issues arose for determination: (a) the grounds upon which the court could exercise its discretion to decline registration of an award in terms of s 98 of the Labour Act [*Chapter 28:01*]; (b) whether the remedies sought by the applicant beyond registration are competent under s 98; and (c) whether the noting of the appeal to the Supreme Court had the effect of suspending the award. Under s 92E(2) of the Act, an appeal in terms of subs (1) shall not have the effect of suspending the determination or decision appealed against; and under s 92E(3), pending the determination of an appeal, the Labour Court may make such interim determination in the matter as the justice of the case requires.
Held: (1) any relief beyond registration is not competent under subss (14) and (15) of s 98 of the Act.
(2) An appeal to the Labour Court against an arbitrator's decision under s 98(10) is an appeal in terms of the Act. The provisions of s 92E are unambiguous and unequivocal and apply to every appeal in terms of the Act, including an appeal under s 98(10). Section 92E precludes the suspension of the decision appealed against. The common law presumption against the operation and enforceability of judgments appealed against has thus been explicitly ousted by s 92E in the case of arbitral awards rendered under s 98.
(3) The appeals to the Labour Court provided by ss 92E(1) and 98(10) are not materially different. Under s 92E(1), an appeal to the Labour Court may address the merits of the decision appealed against, in addition to any question of law, while an appeal against an arbitrator's award under s 98(10) is confined to questions of law..
(4) The heading of s 92F reads "Appeals against decisions of Labour Court" and differs from the heading of s 92E which reads "Appeals to the Labour Court generally". While headings cannot control the plain words of a statute, they may be regarded as preambles in order to explain ambiguous provisions or words in the statute. This approach is consistent with the provisions of s 7 of the Interpretation Act [*Chapter 1:01*].
(5) The language of subss (1) and (2) of s 92E encompasses every appeal made in terms of the Act, including one from the Labour Court to the Supreme Court. However, s 92E(3) appears to be limited to the interlocutory powers of the Labour Court in relation to appeals pending before it. This would indicate that the appeals referred to in subs (1) and (2) of that section are also appeals before the Labour Court, as distinct from appeals before the Supreme Court. This apparent ambiguity can only be resolved by having regard to the context of ss 92E and 92F. Given the factors of their juxtaposition and the

contemporaneity of their enactment, it is virtually impossible to disregard their headings. Taking those headings into account, it becomes clear that s 92E is confined to appeals made to the Labour Court generally, while s 92F deals specifically with appeals from the Labour Court to the Supreme Court. An appeal under s 92F is thus not an appeal "in terms of this Act" for the purposes of s 92E. Consequently, an appeal from the Labour Court to the Supreme Court would, in accordance with the general common law rule, operate to suspend that decision, subject to the right of the successful party to apply for execution pending appeal.
(6) The application for the registration of the award under s 98(14) and (15) of the Act was therefore premature and could not be granted at this stage. The applicant must await the outcome of the respondent's appeal to the Supreme Court.

Evidence – alibi – need for State to disprove alibi if raised – need for accused to furnish State with material details in time for truth of alibi to be investigated

S v *Manuwa* HH-47-12 (Mavangira J, Hungwe J concurring) (Judgment delivered 2 February 2012)

In his defence on a charge of rape, the appellant raised an alibi. In the defence outline, it was merely stated that, at the time in question, he had been out drinking with his friends. However, no specific mention was made of the place or places where the drinking took place, nor of the names of his drinking companions, nor of the specific times. He gave a detailed account only when he gave evidence. There was no indication that he had given this full story from the very beginning, i.e. from the time of his arrest.
Held: where the accused raises the defence of alibi, it is not for him to prove it but for the State to disprove it. This principle does not, however, give the accused the option to keep his cards close to his chest until the very end. The State would have no opportunity to be able to discharge the onus on it if it is not, at the outset or at a stage that allows the police or the State to investigate its veracity, furnished with the material details of such defence of alibi as the accused relies on.

Interest – rate – rate greater than prescribed rate – interest may be charged at such rate if parties have so agreed

Chikomo v *Yehudah* HH-29-12 (Mavangira J) (Judgment delivered 8 February 2012)

The respondent borrowed a sum of money from the applicant. The loan agreement provided that if he did not repay within the agreed period of a week, interest would be charged at 25%. It was also agreed that the respondent would pay "collection charges as well as costs of suit for the legal practitioner and any other costs incurred by [the applicant]". When the applicant sought summary judgment, the respondent, although admitting that he was indebted to the applicant for the capital debt, averred that the applicant was claiming usurious interest as the applicant was not a lending institution or a registered money lender in terms of the Moneylending and Rates of Interest Act [*Chapter 14*:*14*]. Furthermore, the claim for collection commission was not within the ambit of the Law Society tariffs and has no legal basis. Under s 8 of the Act, "No lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest."
Held: (1) under s 4 of the Prescribed Rate of Interest Act [*Chapter 8:10*], "if a debt bears interest and the rate at which interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run". As there was an agreement governing the rate of interest, the respondent could not escape from the provisions of the agreement.
(2) There was no agreement to pay costs on the legal practitioner and client scale. The statement merely provided for "costs of suit for the legal practitioner". There was no ground for costs on the higher scale.

Editor's note: this decision would, with respect, appear to render s 8 of the Moneylending and Rates of Interest Act ineffectual and allow for usurious interest to be charged simply by contracting for such interest. As to what the "prescribed rate of interest" is, Chinhengo J held, in *Niri* v *Coleman & Ors* 2002 (2) ZLR 580 (H), that the rate of interest under the Moneylending and Rates of Interest Act is not that set by the Prescribed Rate of Interest Act, but that set by the Moneylending and Rates of Interest Regulations, 1985 (SI 53 of 1985).
The last time the rates (which vary according to the amount lent) were set was by SI 126 of 1993. Based on those Regulations, a rate of 35% per annum would have been permissible in respect of the sum lent in this matter. The rate set in the contract, of 25% over five months, would have exceeded the rate prescribed by the Regulations.
The rate set by the Prescribed Rate of Interest Act is currently 5% per annum. See ss 2 and 7 of the Act.

Interpretation of statutes – headings – extent to which may be use to resolve ambiguity

Kingdom Bank Workers' Cttee v *Kingdom Bank Financial Hldgs* HH-302-11 (Patel J) (Judgment delivered 10 January 2012)

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

Police – discipline – trial of member before a single officer – such member not having right to elect to be tried by a magistrate

Gabarinocheka v *OC Traffic Bulawayo & Ors* HB-15-12 (Ndou J) (Judgment delivered 26January 2012)

A member of the police force who is not an officer may be tried by a single officer for minor infractions of the Police Act [*Chapter 11:10*] and regulations made thereunder. Such an officer may impose a punishment of imprisonment for up to 14 days and a fine of up to level two. Such infractions are minor disciplinary measures in the police force and are not regarded as criminal offences. A member who is summoned for trial before a single officer does not have the right under s 32 of the Act to elect to be tried by a magistrate. The election provided for in that section only applies to trials before boards of officers and not trials before a single officer.

Practice and procedure – declaratory order – principles – need for a applicant to have a direct and substantial interest in subject matter – interest must relate to existing, future or contingent right – order may not be granted to resolve academic or abstract point

Mpukuta v *Motor Insurance Pool & Ors* HB-25-12 (Ndou J) (Judgment delivered 9 February 2012)

It is not the business of the courts to dispense legal advice or express opinions on abstract points. The courts exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. It is therefore a pre-requisite to the grant of declaratory relief that the applicant must have some existing, future or contingent right that would be affected by the order of the court. The applicant must be an interested person, in the sense of having a direct and substantial interest in the subject-matter of the suit which could be prejudicially affected by the judgment of the court. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. This is the first stage in the determination by the court. At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14 of the High Court Act [*Chapter 7:06*]. In this regard, some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order. A matter that does not present a live controversy having practical consequences is not justiciable.

Practice and procedure – judgment – rescission – grounds for – error – by court – court being induced by non-disclosures and misrepresentation to make an order – such order made and error and susceptible to rescission

Kaiser Eng (Pvt) Ltd v *Makeh Entprs (Pvt) Ltd* HB-6-12 (Ndou J) (Judgment delivered 19 January 2012)

The court has both a statutory and a common law power to reverse a default judgment that has been granted in error or under circumstances that indicate some irregularity. An error on the part of the court, where the judgment would not have granted had the court been fully of certain facts, would be grounds for rescission. Where a default judgment was induced by certain non-disclosures and misrepresentations made by the respondent in its papers, the judgment was granted in error and should be rescinded.

Practice and procedure – order – types of order which may be granted – order *ad factum praestandum* and order *ad pecuniam solvendam* – distinction between

Evans & Anor v *Surte & Ors* S-4-12 (Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 13 February 2012)

See above, under COURT (Contempt).

Practice and procedure – parties – "clean hands" – requirement to come to court with – applicability – application to set aside arbitral award – applicant not having complied with award – no requirement to comply with award before approaching court for relief under Arbitration Act [*Chapter 7:15*]

Pioneer Tpt (Pvt) Ltd v *Delta Corp Ltd & Anor* HH-18-12 (Gowora J) (Date of judgment 1 January 2012)

See above, under ARBITRATION (Award – setting aside of).

Practice and procedure – pleadings – plea in bar or abatement – purpose of – allows defendant to achieve prompt resolution of factual issue which founds a legal argument which disposes of claim

Cabat Trade & Finance (Pty) Ltd & Anor v *MDC* HB-201-11 (Kamocha J) (Judgment delivered 5 January 2012)

Under r 137(1) of the High Court Rules 1971, as an alternative to pleading to merits, a party may take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case. The plea in bar is not predicated on a denial of any facts set out in the declaration as that would involve going into the merits of the case made by the plaintiffs in their declaration. The plea proceeds on the basis that the allegations in the plaintiff's declaration are correct but that the matter should nevertheless be disposed of for one reason or another that does not appear *ex facie* the pleadings. The purpose of a special plea is to permit the defendant to achieve a prompt resolution of a factual issue which founds a legal argument which disposes of the plaintiff's claim. An example would be where the defendant claims that a contract is void for illegality. Ideally a plea of illegality should be raised before the trial and not *in limine.*

Practice and procedure – set down – notice of – matrimonial matter – need for notice of set down to be given personally in all situations – notice in accordance with Form 30 – no need to serve such notice on defendant where summons in accordance with Form 30A

Mathe v *Mathe* HB-17-12 (Ndou J) (Judgment delivered 26 January 2012)

In terms of r 272 of the High Court Rules 1971, in an action for divorce or nullity of marriage, where the defendant has failed to enter appearance, the plaintiff who wishes to obtain judgment must, if the declaration has not been served with the summons, file and deliver his declaration and either simultaneously or subsequently a notice in accordance with Form No. 30. This notice calls upon the defendant, if he wishes to defend, to plead, answer or except or make claim in reconvention within 12 days of the date of delivery of the notice and informs him that in default judgment will be sought against him. If the declaration was served with the summons, the plaintiff must file and deliver the notice to the defendant after the expiry of the *dies induciae*. After that the plaintiff may set the case down for trial but must serve personal notice of set down upon the defendant. The court may not proceed to trial unless it is satisfied that the personal notice of the defendant has been drawn to the fact that the matter has been set down for trial or that for good and sufficient reason the giving of personal notice is impracticable.
However, under r 269A, the summons commencing an action mentioned may, at the option of the plaintiff, be issued in Form No. 30A, to which a copy of the plaintiff's declaration is annexed. In that event, r 272 does not apply and there is no need to serve a Form 30 notice. Nonetheless, personal service of the notice of set down must be given. This salutary rule of practice is motivated by the irreparable harm that may result in a final decree of divorce. Divorce results in a final change of status of the parties.

Practice and procedure – *res judicata* – dismissal of claim due to failure to appear at pre-trial conference – not a judgment on merits – defaulting party entitled to issue fresh process, provided order for costs met

Practice and procedure – summons – issue – whether plaintiff allowed to issue fresh summons after claim dismissed for failure to appear to pre-trial conference

Belinsky v *Chipere* HH-74-12 (Hungwe J) (Judgment delivered 22 February 2012)

The excipient had been sued by the respondent for damages arising out of a motor vehicle accident. A pre-trial conference had been set down, but the respondent failed to appear. The excipient applied for and obtained an order dismissing the respondent's claim with costs. Then respondent then issued fresh process and the matter was set down for trial. The excipient took exception to the fresh process issued by the respondent, arguing that the respondent ought to have applied for rescission of the default judgment in terms of either r 63 or r 449 of the High Court Rules 1971. Without having obtained rescission of that judgment, the respondent's claim stood dismissed with costs and the respondent was barred from instituting fresh action.

The respondent argued that r 63 was permissive and gave the party against whom default judgment was entered two options: (a) to seek rescission of that default judgment, and, after obtaining it, proceed on the same papers; or (b) to abandon those papers and issue fresh ones. As long as the order for costs had been complied with, it was open to the respondent to commence a fresh action, since the dismissal of the action at the pre-trial conference stage was akin to absolution from the instance.

Held: the excipient's argument should fail for two reasons. First, the excipient had expressly abandoned the special plea of *res judicata*. If this was meant to be just a preliminary objection, then he ought to have sought the dismissal of the respondent's case as he did, but in addition a stay of proceedings until the respondent had paid the costs in terms of the order for dismissal of the original claim. Second, rules 58, 59, 59A, 60, 61 & 62 grant the power to the court to enter judgment or make such order as it may think fit depending on the circumstances without hearing evidence. a judgment obtained in this manner amounts to a default judgment. The respondent failed to appear in person or through counsel at the pre-trial conference, and generally, in such a situation, an order for dismissal of his claim is entered. Such an order is at law not a judgment for the other party. The respondent was entitled to issue a fresh summons.

Property and real rights – spoliation – order – requirement for grant of – delay in seeking order – whether fatal

Free Methodist Church of Zimbabwe v *Dube & Ors* HH-315-11 (Patel J) (Judgment delivered 10 January 2012)

The doctrine of spoliation is encapsulated in the maxim *spoliatus ante omnia restituendus est*, that is, he who is despoiled must be restituted before all else. It is a fundamental and well established principle of our law that no one is permitted to forcibly or wrongfully dispossess another of his movable or immovable property without his consent. Whenever this occurs, the courts will summarily restore the *status quo ante*. The claimant need only prove that he was in peaceful and undisturbed possession of the property and that he has been unlawfully deprived of such possession. In spoliation proceedings the fact that the spoliator owns or has beneficial rights in the property despoiled is wholly irrelevant. Delay *per se* does not preclude the grant of a *mandament van spolie*. The court has a discretion to decline the remedy where, on account of the delay in seeking it, no relief of any practical value can be granted at the time of the hearing. An additional aspect to be considered is whether the claimant's failure to apply for relief immediately constitutes such acquiescence in what has been done by the spoliator as to deprive the claimant of the right to seek restoration of the *status quo ante*.

Revenue and public finance – Commissioner-General of Zimbabwe Revenue Authority – duties and powers – duty to assess and collect taxes – not entitled to set conditions for fulfilment of statutory obligations – where capital gains tax due on sale of property, such tax should be collected – Commissioner-General not entitled to refuse to assess such tax on grounds that no tax paid in respect of previous transfer of same property

Sabeta v *Comr-Gen, ZRA* HH-79-12 (Mathonsi J) (Judgment delivered 22 February 2012)

The applicant concluded a sale agreement with a company which owned a stand in a Harare suburb. She paid the full purchase price to the seller through mortgage finance from a building society. The seller did not co-operate in the process of transfer of the property to the applicant, resulting in the applicant obtaining a court order compelling the seller to perform its obligations in terms of the agreement of the parties and the law and, in the event of the seller failing to do so, authorising the Deputy Sheriff to carry out the necessary acts to effect transfer. In the event, the task fell on the Deputy Sheriff. One of the acts that needed to be done to enable transfer of the property to the applicant was payment of capital gains tax assessed by the respondent in this case in terms of the Capital Gains Tax Act [*Chapter 23:01*], but the respondent, the Commissioner-

General of the Revenue Authority, refused to do so on the grounds that no capital gains tax had been paid when the property was transferred to the current seller and that tax should be paid first.

Held: The Zimbabwe Revenue Authority (ZRA, which the respondent headed, was established in terms of s 3 of the Revenue Authority Act [*Chapter 23:11*] and its functions and authority are set out in s 4 as read with the 2nd Schedule thereof. Its main function is to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues. As a creature of statute the ZRA is required to act in terms of the enabling statute. The relevant statutes enjoin it to assess and collect the tax that is due. On the face of it, it cannot set conditions for the performance of its statutory obligations. if the respondent had proof that a previous owner avoided paying capital gains tax, he had the right in terms of the Capital Gains Tax Act to pursue the defaulter and recover that tax. He had both criminal and civil remedies at his disposal. The respondent should, in the meantime, assess and collect capital gains tax from the current seller.