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CASES DECIDED JULY – DECEMBER 2004

Administrative law – review – grounds for – unreasonableness of decision being reviewed – limitations to such ground

African Tribune Newspapers (Pvt) Ltd & Ors v *Media & Information Commission & Anor* HH-139-04 (Uchena J)

Unreasonableness has an extremely limited, even an insignificant, role as a ground of review in our law. Judicial review is concerned not with the correctness of the decision but with the decision-making process. A review court can only set aside a decision if it is satisfied that the decision was so grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion.

Agent – authority – power of attorney – limits to – agent given powers to conduct transactions relating to purchase of property – not a mandate to instate legal proceedings

Mtemererwa & Anor v *Tawarwisa & Anor* HH-160-04 (Kamocha J)

By special power of attorney the applicants appointed a person to conduct all transactions relating to the purchase of a property on their behalf. When a dispute arose, the agent instituted proceedings to secure transfer of the property. The seller argued that the agent had no mandate to institute such proceedings. Held: a power of attorney must be carefully drawn and strictly construed. In particular, where it is meant to authorise litigation, it must be particular as to the nature of the action to be instituted, as well as the relief to be claimed. Authority to demand transfer does not include authority to institute legal proceedings to obtain transfer on behalf of the principal. The institution and prosecution of legal proceedings is an important step which may involve the principal in great expense and there is no justification for holding that where a principal authorises an agent to demand and receive a thing, the principal must be taken to have intended to include the authority to bring and prosecute legal proceedings.

Appeal – court martial – Court Martial Appeal Court – composition of

S v *Mupambwa & Anor* S-75-04 (Sandura JA, Ziyambi & Gwaunza JJA concurring)

See below, under MILITARY LAW (Court martial – appeal against decision of).

Appeal – evidence on appeal – further evidence – when such evidence may be led – undesirability of leading further evidence on appeal – limited circumstances in which such evidence may be led

Polaris Zimbabwe (Pvt) Ltd v *Zapchem Detergent Mfrs CC* S-68-04 (Ziyambi JA, Chidyausiku CJ & Cheda JA concurring)

The appellant, a Zimbabwean company, imported detergent powder from a manufacturer in South Africa, the predecessor company to the respondent, and marketed and distributed the powder in Zimbabwe. Initially the powder was sold in packaging supplied by the manufacturer but later locally printed packaging was used. The packaging indicated that the manufacturer was the respondent. A dispute arose between the parties and the appellant stopped obtaining detergent from the applicant; it changed to another supplier from another country but continued to market and sell detergent from that supplier in the packaging it had used before. The respondent sought and obtained an interdict from the High Court on the grounds of passing off. At the appeal, the appellant sought to introduce evidence, which was available but not led at the previous hearing, that the packaging showed that the appellant was the manufacturer of the product. Held: An application to lead evidence on appeal will only be granted where special grounds exist and where it is clear that such a course will not unfairly prejudice the other side and will enable the court to do justice between the parties. Such an application is never lightly granted and the evidence sought to be led must not with reasonable diligence have been obtainable for use at the trial. Even where the appellant was unaware of the evidence sought to be adduced the appeal court is very reluctant to allow new evidence, even if it is decisive and the appellant was unaware of it before. The particular circumstances of the case need to outweigh the general undesirability of allowing evidence on appeal. *In casu*, the evidence was available at the time of the trial and in possession of the appellant's legal practitioner. There had been no explanation by the appellant as to why the evidence was not produced at the trial, and the appellant had also failed to show that the evidence would materially affect the outcome of the appeal.

Editor's note: *see also below, under* DELICT (Passing off – goodwill).

Appeal – judgment by consent – no appeal possible

Chawatama v *UTC* S-99-04 (Malaba JA, Chidyausiku CJ & Gwaunza JA concurring)

The appellant and respondent had agreed on a sum to be paid to the appellant as damages in lieu of reinstatement following his dismissal. The Labour Court ordered that damages be paid in the agreed sum. The appellant then noted an appeal to the Supreme Court against the order, on the ground that it did not take into account the effect of inflation on the monetary value of the damages. He did not dispute that the order was granted by consent. Held: (1) An appeal against an order given by consent is not possible. Whilst it is possible to have a judgment by consent set aside on the ground, for example, that consent was obtained by fraud or a mistake common to both parties, it is not possible to attack the judgment as being wrong on account of a misdirection on a question of fact or law because no such question would have been a subject of decision by the court *a quo*. (2) Under s 92D of the Labour Relations Act [*Chapter 28:01*], an appeal lies to the Supreme Court from a decision of the Labour Court on a question of law only. The notice of appeal must specify precisely the points of law in the ruling of the Labour Court on which it is alleged there was a misdirection. That is not possible where the order was given by consent.

Appeal – notice of – requirement to state date of decision being appealed against – reason for – failure to state date – effect – notice incurably defective and incapable of being amended – procedure to follow

Matanhire v *BP Shell Mktg Svcs (Pvt) Ltd* S-113-04 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

Rule 7 of the Supreme Court (Miscellaneous Appeals and References) Rules 1992 provides that a notice of appeal against a judgment of the Labour Court or tribunal other than the High Court shall state, *inter alia*, the date of the decision which is being appealed against. The purpose of requiring the date to be stated is to enable the respondent and the court to determine *ex facie* the notice of appeal whether the provisions of r 5 of the Rules, prescribing the time limit in which the appeal should be instituted and the notice of appeal delivered and filed, were complied with. Failure to comply with all the requirements of the rule renders the notice of appeal fatally defective and a nullity. It therefore cannot be amended. What needs to be done is to draw up a new notice of appeal complying with the requirements of r 7 and make an application for an extension of time within which to deliver and file the notice of appeal and for condonation for non-compliance with the Rules.

Appeal – powers of court on appeal – decision of lower court based on exercise on discretion – limited powers of appeal court to interfere with decision

Cosmos Cellular (Pvt) Ltd v *PTC* S-77-04 (Sandura JA, Chidyausiku CJ & Ziyambi JA concurring)

An appeal court is not imbued with the same broad discretion as a trial court and its power to interfere with the exercise of a judicial discretion is limited. It is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere. It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, or if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing.

Arbitration – arbitrator – award – enforcement of – application to court to recognise and enforce award – to whom application must be made – must be an application to a judge, with notice given to affected party

Mandikonza & Anor v *Cutnal Trading (Pvt) Ltd & Ors* HH-189-04 (Uchena J)

A dispute between the applicants and the first respondent had, in terms of the contract between them, been referred to arbitration. The arbitrator found in favour of the first respondent. When the applicants did not pay, the first respondent registered the award with the registrar of the High Court. The Sheriff attached certain of the applicants' property. The applicants sought an order preventing the Sheriff from selling the property in execution. It was argued that there was no order by a judge of recognizing the award granted after the first respondent's application for recognition and enforcement; that the registration of the award was irregular as no notice was given to the applicants; and that the application for registration of the award should have been on notice to the other party and in the form of a court application made in terms

of the rules of court. Held: (1) under article 35 of the First Schedule to the Arbitration Act [*Chapter 7:06*], an arbitral award shall be recognised as binding and may be enforced on application to the High Court. (2) Under article 36, the registration or enforcement may in certain circumstances be refused at the request of the party against whom enforcement is sought. In this event, a number of matters have to be considered and it is clear that the application of a judicial mind is called for in deciding them. These matters include: the capacity of the party against whom the award is to be invoked and the validity of the law under which the award was made; whether the award is within the terms of the referral to arbitration; the validity of the agreement under the law of a foreign country; the composition of the arbitral tribunal and the propriety of the arbitral procedure; whether or not the subject matter of the dispute is capable of settlement by arbitration under Zimbabwean law; and whether the arbitration award is contrary to the public policy of Zimbabwe. Any of these questions would require the attention of a judge, not that of the registrar. (3) The fact that article 36(2) refer to the court hearing the recognition or enforcement application adjourning its decision if the other party has applied for the setting aside of the award suggests a proper court application before a judge. (4) The fact that article 36(1) entitles the party against whom enforcement is sought to request the court to refuse to recognize and enforce the award suggests that the party must be notified of the application to recognize and enforce the award.

Company – director – powers of – disposal of major assets of company – requirement for approval of company in general meeting for such disposal – presumption that company's internal regulations complied with – inapplicability of

Mason v *Timore Training Svcs (Pvt) Ltd & Ors* HH-191-04 (Uchena J)

The plaintiff sought enforcement of a contract for the sale of a house. The house was owned by a company of which the two directors were husband and wife. The house was the company's major asset. The husband agreed to the sale but when enforcement was sought the wife said she had not agreed. Held: under s 183(1)(b) of the Companies Act [*Chapter 24:03*] the directors of a company are not empowered, without the approval of the company in general meeting, to dispose of the company's undertakings or of the whole or greater part of the assets of the company. The presumption under s 12(a) that a company's internal regulations have been complied with would not assist the plaintiff, as this was not a situation dealing with internal regulations. The requirements of s 183 were peremptory.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 16(1)(b) – right to reasonable notice of State's intention to acquire agricultural land compulsorily – no right thereby given to any specific notice of actual acquisition, nor to time for landowner to wind up his affairs – Land Acquisition Act – ss 8 & 9

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(9) – right to fair hearing before an impartial court – acquisition of land – State becoming owner in spite of objection being lodged with Administrative Court – right to put case before court not thereby removed

Quinnell v *Min of Lands & Ors* S-47-04 (Malaba JA, Chidyausiku CJ, Cheda & Ziyambi JJA concurring, Sandura JA expressing no opinion on this matter)

The applicant, the owner of a farm which had been compulsorily acquired by the State, raised among other things the question of the constitutionality validity of the legislation. It was argued that the right under s 16(1) of the Constitution to reasonable notice of the Government's intention to acquire the land was breached by the legislation, as it did not require the acquiring authority to give notice of when the proposed acquisition is to take place, nor did it give the landowner reasonable time to wind up his affairs. It was further argued that the applicant's rights under s 18(9) of the Constitution, to have a fair hearing before an impartial court were negated by allowing the State to acquire the land even when there was an objection lodged with the Administrative Court. Held: (1) Section 16(1)(b) of the Constitution required that reasonable notice be given of the State's intention to acquire the land, but having received the preliminary notice of the intention of the acquiring authority to acquire his agricultural land for resettlement purposes, the applicant had no constitutional right to be given a reasonable notice of when actual acquisition was to take place. There was also no constitutional right to a reasonable time to wind up his affairs. Once the land is acquired, all rights in the land vest in the acquiring authority; the former landowner's rights are extinguished. The 45 day period given by the legislation to wind up his affairs gave supremacy to public interest over the private interests of the former owners or occupiers of acquired land. It is not enough to highlight the disadvantages experienced by former owners or occupiers in having to wind up their affairs on the acquired land within 45 days from the date of the service of the order of acquisition. In a case of compulsory acquisition of private property hardships are bound to be suffered by the owners or occupiers of expropriated property especially agricultural land. (2) The amendment to s 8(1) of the Land Acquisition Act did not take away the right of the owner or occupier, where agricultural land has been compulsorily acquired, to put his case before the Administrative Court when the application for an order confirming the

acquisition is heard. That there may be nothing to show for it in a practical sense if the Administrative Court refused to confirm the acquisition, did not detract from the fact that the owner or occupier's right to be heard was not infringed.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(2) – right to trial within a reasonable time – factors to be considered – onus on applicant – effect of failure by applicant to establish all points in his favour

In re *Hativagone & Anor* S-67-04 (Sandura JA, Cheda, Ziyambi, Malaba & Gwaunza JJA concurring)

The appellants were arrested on criminal charges in 1998 and placed on remand. They denied the charges. In 1999 the charges were withdrawn before plea. Four years later, the accused were summoned to appear to answer the charges. The Attorney-General had deferred the prosecution of the applicants until the trial of the accomplice who was to be the principal witness against them was complete. This person had been prosecuted, but the proceedings were set aside and had to be restarted. The applicants brought an application for a permanent stay of proceedings, arguing that their right under s 18(2) of the Constitution to a fair trial within a reasonable time had been violated. Held: (1) in order for the application to succeed, it was necessary to consider (a) the length of delay and whether it was presumptively prejudicial; (b) the reasons for the delay; (c) whether the applicants had asserted their right to a speedy trial; and (d) the prejudice to the applicants. (2) In considering the length of the delay, the fact that the charge had been withdrawn before plea did not assist the State, as the withdrawal was not unconditional. The overall delay was presumptively prejudicial. (3) The reasons given for the delay were reasonable in the circumstances and to a large extent the Attorney-General was not to blame for the delay. (4) The applicants had failed to discharge the onus on them to show that they had asserted their right to a speedy trial. (5) The applicants were prejudiced by the fact that potential defence witnesses were not available, having either died or emigrated. (6) Nonetheless, because the Attorney-General's explanation was reasonable and because the applicants had failed to assert their rights, the application must fail.

Constitutional law – Constitution of Zimbabwe 1980 – s 31E(1) – office of Minister becoming vacant on assumption of office of a "new" President – meaning – re-election of incumbent President – not assumption of office by "new" President – Minister's office not automatically rendered vacant

Quinnell v *Min of Lands & Ors* S-47-04 (Malaba JA, Chidyausiku CJ, Cheda & Ziyambi JJA concurring, Sandura JA dissenting)

The applicant, the owner of a farm which had been compulsorily acquired by the State, raised the question of the validity of the legislation. It was argued that the legislation was invalid, having been passed in contravention of standing orders of Parliament, and because it was introduced by a person who was not a Minister by reason of his office having been automatically vacated in terms of s 31E(1) of the Constitution when the incumbent President was re-elected and took the oath of office; and on the same basis the acquisition orders had been issued by a person who was not a Minister. Held: Not every assumption of office of President has as its legal consequence the creation of a vacancy in the office of a Minister. It is only to the assumption of office by "a new President" that the framers of the Constitution subjected the creation of a vacancy in the office of a Minister. A person does not become a new President within the meaning of the section because he assumes office of President in a new term. There would only be a "new" President if the incumbent died, resigned or was removed from office or was defeated in an election. The vacation of the office of a Minister on assumption of office of "a new President" was intended to enable him to exercise the freedom to choose his own team of Ministers.

Constitutional law – Parliament – standing orders – status of – legislation passed in contravention of standing order – not necessarily invalid – introduction of bill containing same substance as another bill introduced during same session and not withdrawn – later bill introduced without leave but substantially altered during committee stage – legislation not rendered invalid by failure to comply with standing order

Quinnell v *Min of Lands & Ors* S-47-04 (Malaba JA, Chidyausiku CJ, Cheda & Ziyambi JJA concurring, Sandura JA dissenting)

The applicant, the owner of a farm which had been compulsorily acquired by the State, raised the question of the validity of the legislation. It was argued that the legislation was invalid, having been passed in contravention of Standing Order 127 of Parliament, which provides that no bill shall be introduced which is of the same substance as some other bill which has been introduced during the same session and which has not been withdrawn. The bill under which the legislation was introduced was of the same substance as another bill, but it was substantially amended during committee stage, as a result of which it was substantially different from the previous bill. Held: the presentation of a bill in contravention of Standing

Order 127 does not in all circumstances have as its necessary consequence the invalidity of the resultant Act. The provisions of the standing order are directory, not peremptory, there being nothing in the language of the order providing that its breach would result in the invalidity of the legislation. The prescription of something to be done in the course of law-making should often be treated as in the nature of a direction to the legislature and not as laying down conditions of validity for legislation.

Contract – illegality – *par delictum* rule – relaxation of – may be relaxed where defendant would be unjustly enriched at expense of plaintiff – where defendant not enriched, no basis for relaxation of rule

Evans v *Snapper* S-55-04 (Sandura JA, Cheda & Ziyambi JJA concurring)

The appellant gave a sum of money to the respondent, with which she was to acquire foreign currency from persons she knew in an embassy. She gave the money to her contacts but no foreign currency was given to her in return. The appellant sued her for the sum of money he had handed to her. Held: the contract was illegal, being in breach of the exchange control laws. However, the rule that *in pari delicto melior est condition possidentis* may be relaxed to prevent injustice between man and man and where, if relief were refused to the plaintiff, the defendant would be unjustly enriched at his expense. In this case, however, the respondent was not enriched; the money had been lost to fraudsters. Consequently, the claim must fail.

Court – High Court – jurisdiction – labour matters – review – no jurisdiction to entertain review in the first instance

Zhakata v *Mandoza NO & Anor* HH-22-05 (Bhunu J)

Although s 89 of the Labour Act [*Chapter 28:*01] (as amended) allows a person aggrieved by a decision made under a code of conduct to "appeal" to the Labour Court, such an appeal is not an appeal in the ordinary sense. It is a special kind of appeal which encompasses a review. The jurisdiction of the High Court to entertain a review in the first instance has thus been ousted.

Court – judge – recusal – grounds for – trial of fellow judge

S v *Paradza* HH-182-04 (Bhunu J)

The judge *mero motu* recused himself of presiding at the trial of a fellow judge, pointing out that where two judicial officers are attached to the same bench as colleagues and one of them is a litigant or an accused then there is a reasonable ground for the other legal officer to be recused from trying the action. It would be more appropriate that the matter be handled by a retired judge or someone from outside the jurisdiction.

Criminal law – common law crimes – high treason – overt acts – hostile intent – discussion of possibility of treasonous acts – mere discussion in absence of incitement or agreement – not treason

S v *Tsvangirai* HH-169-04 (Garwe JP)

The accused was charged with high treason. It was alleged that one three occasions, outside the country, he had requested certain individuals to assassinate the President and to stage a military coup in Zimbabwe. The evidence did not disclose either a request or a plot at either the first and second meeting. As for the third meeting, the evidence disclosed a discussion but there was nothing to suggest that the discussion was "in furtherance of a previous plot". Held: a mere discussion of the possibility of acts of treason, not resulting in any agreement, nor including any mutual incitement, does not amount to high treason. For a man to express without incitement or conspiracy hostile sentiments will not constitute treason, not because there is no overt act but because there is no hostile intent.

Criminal law (statutory offences) – Dangerous Drugs Act [*Chapter 15:02*] – s 9(b) – possession of dagga – meaning of – normal meaning to be given to concept of possession – need for State to show physical detention as well as intention to exercise control

Attorney-General v *Mbewe* HB-91-04 (Ndou J)

The respondent was acquitted on a charge of contravening s 9(b) of the Dangerous Drugs Act [*Chapter 15:02*], that is being in possession of dagga. Two friends of her brother had brought the dagga to the lodgings she shared with her brother and told her that he had told them to leave it there. She accepted it on the basis of his instructions. The magistrate acquitted her on the grounds that she lacked the necessary *mens rea* to possess the dagga. On appeal by the Attorney-General, held: (1) the statute did not give an extended meaning to the concept of possession. (2) Accordingly, the prosecution had to show not only that the respondent had physical detention of the dagga but also that the detention was accompanied by *mens rea*. This additional factor would be present if it were shown that there was an intention on her part to exercise control on the part of the accused. Knowledge that what she physically detained is dagga is an essential factor. (3) The respondent did not have the requisite intention to exercise custody. She was not in control of the lodgings.

Criminal procedure – Attorney-General – concession by – Attorney-General's representative conceding that leave to appeal should be granted – whether such concession may be withdrawn – procedure to follow if Attorney-General seeks to withdraw concession

S v *Masuku* HB-114-04 (Ndou J)

When the applicant was convicted, the Attorney-General's representative (who had not himself prosecuted the case) conceded that leave to appeal should be granted. At the application for bail, the Attorney-General's representative (who had not appeared previously) sought to withdraw the concession. Held: the Attorney General occupies a pivotal role in the criminal justice system. His opinion in applications before the court commands respect because of his experience and the responsibility of his office. A concession made by him must be an informed one; it cannot be withdrawn willy-nilly in criminal proceedings. If he seeks to withdraw a concession, this must be properly done, giving the accused an opportunity to make submissions, as the withdrawal of a concession will, in most cases, result in prejudice to the other side. There was no submission that the Attorney-General's previous representative was aware of the withdrawal that he made on behalf of the State. Even if he were aware, he would be required, as an officer of the court, to file an affidavit in support of the withdrawal accepting blame for erroneous concession.

Criminal procedure – forfeiture – following conviction – what may be forfeited – article by which offence committed – meaning of – article must be one which enables offender to commit offence or aids offender in commission of offence

S v *Zendera* HH-157-04 (Uchena J)

The accused was convicted of contravening an order made under the Control of Goods Act [*Chapter 14:05*], the offence being one of selling petroleum products to the public while not being a holder of a licence. There was an agreement between the accused's agency and another company under which he would obtain bulk petroleum products consumers for the other company. Thereafter the company would deliver supplies for the bulk consumers and pay the accused's agency a commission. Contrary to the agreement, he supplied some of the products to members of the public not covered by the contract between him and the other company. On his arrest he was found in possession of 29000 litres of fuel. After conviction, the magistrate declared the fuel to be forfeited in terms of s 62(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Held: (1) the magistrate should have asked herself whether the fuel she was forfeiting to the State was an article by means whereof the offence was committed or one used to commit the offence. (2) An article "by means whereof" the offence is committed is one which enables the offender to commit the offence or assists or aids the offender in committing the offence. The fuel which was forfeited did not play any part in nor was it used in the commission of the offence. (3) The offence was not a Second Schedule offence, so forfeiture could not ordered on that ground.

Criminal procedure – review – grounds for – gross unreasonableness – does not include ruling on point of law

Criminal procedure – incomplete proceedings – limited grounds for exercising powers of review

Dombodzvuku & Anor v *Sithole NO & Anor* HH-174-04 (Makarau J)

When arraigned on charges of corruption, the applicants excepted to the charge, claiming that they were not public officers in terms of the relevant legislation. The presiding magistrate ruled against them. The magistrate's ruling was brought on review. It was argued that the magistrate's decision was grossly unreasonable and should be set aside. Held: an incorrect interpretation of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking it must go further and show that, on the facts before the court, the decision reached defies all logic and is completely wrong. A different opinion of the law, clearly showing how it was arrived at, cannot be said to defy logic. It may

be wrong but may not necessarily be unreasonable. There was nothing irregular in the decision by the magistrate to compel the court to use its review powers at this stage of the proceedings. The magistrate's decision was arrived at after hearing argument from both counsel and it was a carefully considered decision. The decision represented the magistrate's interpretation of the law and it could only be an incorrect decision and not an irregular one. Incorrect decisions are redressed by way of appeal.

Criminal procedure – review – incomplete proceedings – refusal by magistrate to discharge accused at end of State case – refusal based on findings of fact – not a gross irregularity entitling High Court to interfere on review

Attorney-General v *Makamba* S-74-04 (Ziyambi JA, in chambers)

A refusal by a magistrate to discharge the accused at the end of the State case, where that decision is based on findings of fact, is not a gross irregularity entitling the High Court to interfere on review. The correctness of findings of fact is a matter for an appeal court.

Criminal procedure (sentence) – statutory offences – Sexual Offences Act [*Chapter 9:21*] – s 3(1) – committing an immoral or indecent act with or upon a young person – need for severe punishment for sexual abuse of young children

S v *Chikunguruse* HH-125-04 (Guvava J)

The accused, a young woman of 23, was convicted of committing an immoral or indecent act with or upon a young person, in contravention of s 3(1)(b) of the Sexual Offences Act [*Chapter 9:21*]. She had induced a boy of 6 to perform an indecent act on her. Expert evidence was given on the effect on young children of sexual abuse. Held: in promulgating the Act and providing a penalty to 10 years imprisonment, the legislature had recognised the growing problem of the abuse of young children. It had also accepted that the common law offence of indecent assault was not effectively dealing with the problem. The legislation was also recognition of the fact that Zimbabwe is a party to the United Nations Convention on the Rights of the Child and to the African Charter on the Rights of the Child. Under these instruments, State Parties are required to protect the rights of children by putting in place administrative, legislative and other structures to ensure the full protection of children from all forms of abuse, including sexual abuse. In most developing countries, and Zimbabwe is no exception, very little is done in terms of counselling and other forms of support due to financial constraints. However, the judiciary can play a role in the rehabilitation of the child by severely punishing the offender.

Delict – *action injuriarum* – 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

Moyo v *Chipanda* HB-98-04 (Chiweshe J)

The plaintiff brought an action against the defendant for defamation. The statement, published in a widely circulated newspaper, did not refer to him by name or by description. However, the same newspaper subsequently published articles in which the plaintiff was identified and linked to the earlier statement. The defendant excepted to the declaration. It was argued that a subsequent publication cannot cure the defect in a previous publication. Held: Publication of defamatory words and identification of the person intended to be defamed need not occur contemporaneously. It would be absurd to hold that a summons was excipiable merely on the ground that identification of the plaintiff occurred after the publication complained of and in subsequent publications. The evidence of such subsequent publication was therefore admissible and could be summoned to support the plaintiff's case.

Delict – negligence – gross negligence – what is – total disregard for duty by employee resulting in loss to employer

Standard Chartered Bank v *Chipiningu* S-104-02 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

See below, under EMPLOYMENT (Termination – grounds for – gross negligence)

Delict – negligence – sudden emergency – limits to – need for proximate connection between act taken to avoid danger and the damage caused by that act – where no such connection, actor cannot rely on sudden emergency

Commercial Union Ins Co Ltd & Anor v *Chingwaru & Anor* S-50-04 (Malaba JA, Sandura & Ziyambi JJA concurring)

Where a person is placed in danger by the wrongful act of another, that person is not negligent if, in the agony of the moment, he exercises such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances. However, this principle cannot be taken too far. Not every act taken in a situation of sudden emergency excuses the actor from the duty to take reasonable care and use reasonable skill to avoid foreseeable harm to others. In each case in which the defence of sudden emergency is raised the question whether or not the act which caused the actionable damage is evidence of what a reasonable person would have done in the circumstances will depend on the particular facts. There must be a proximate connection in time and space between the act undertaken in the spur of the moment to avoid a dangerous situation created by some one else and damage caused by that act. The question is how much allowance should be made in each case for the suddenness of the thing when determining whether there was a want of reasonable care and reasonable skill. In this case, the driver of a car coped with a critical situation which confronted him when a bus suddenly and unexpectedly stopped in front of his motor vehicle by swerving to the right. This was a thing any reasonable driver faced with the same situation would have done. However, when he subsequently collided with an oncoming vehicle, the sudden emergency which had occurred was no longer dictating the manner in which he drove his motor vehicle. The sudden emergency did not have a proximate connection with his failure to act reasonably to avoid the subsequent collision.

Delict – passing off – goodwill – right to – product manufactured by one person but sold or marketed exclusively by another person – limited circumstances where trader can acquire goodwill in respect of goods manufactured by another

Polaris Zimbabwe (Pvt) Ltd v *Zapchem Detergent Mfrs CC* S-68-04 (Ziyambi JA, Chidyausiku CJ & Cheda JA concurring)

The appellant, a Zimbabwean company, imported detergent powder from a manufacturer in South Africa, the predecessor company to the respondent, and marketed and distributed the powder in Zimbabwe. Initially the powder was sold in packaging supplied by the manufacturer but later locally printed packaging was used. The packaging indicated that the manufacturer was the respondent. A dispute arose between the parties and the appellant stopped obtaining detergent from the applicant; it changed to another supplier from another country but continued to market and sell detergent from that supplier in the packaging it had used before. The respondent sought and obtained an interdict from the High Court on the grounds of passing off. The appellant opposed the grant of the interdict on the grounds that that it and not the respondent had the necessary goodwill in the product. Held: The owner of goods, or the person who has proprietary rights in the goods, or the assignee of the goods, has the *locus standi* to sue for passing-off if his rights are infringed by the act complained of. A determination as to the ownership of the goodwill in the detergent powders would settle the question of *locus standi*. The only situation in which a trader in the position of the appellant could acquire goodwill in respect of a product which is manufactured by another but sold by itself is where such a person is not a mere conduit for the goods of another but marketed its own product under its own name. This was not the case here, as the packaging indicated that the goods were manufactured by the respondent. There was an infringement of the respondent's rights of ownership of the goodwill in the detergent powders by the appellant, which packed and sold its own detergent powder in boxes carrying a get-up identical to the respondent's. The intention can only have been to deceive the public into thinking that the product contained in the boxes was that manufactured by the respondent.

Editor's note: *see also above, under* APPEAL (Evidence).

Delict – passing off – requirements to establish claim – need to show existence of reputation and goodwill – likelihood of deception – similar products, sold to similar clientele, bearing similar trade names

Unilever plc & Anor v *Vimco Pvt) Ltd & Anor* HH-175-04 (Omerjee J)

The applicants for many years had been the registered owners of the trade mark "Vim", which was the name given to a household scouring powder. That powder had been sold in this country for many years. The respondent company, Vimco (Pvt) Ltd, sold several products, among them a scouring powder. Their scouring powder had the name "Vimco" prominently featured in three places on the container, but in only one was the word joined to the words "(Pvt) Ltd". The applicants sought an order interdicting the respondent from infringing its trade mark and from passing off its goods as those of the applicants. Held: (1) If the mark "Vimco" were being used on the label merely to indicate that the product was that of the respondent, it would not be necessary to have the mark appearing prominently at the top of the label, as the name of the company and its contact details appear at the bottom of the label. Apart from the mark appearing at the top of the label, there was no other feature which was descriptive of this product and which would sufficiently differentiate the respondent's product from that of the applicants. The trade mark used by first respondent so nearly resembled the applicants' registered

trade mark as to be likely to deceive or cause confusion. (2) Where relief is sought on the grounds of "passing off", a party has to establish a goodwill or reputation acquired or associated with it in connection with the mark or "get-up" copied by another entity. Proof of reputation is a prerequisite to a successful passing-off action. The applicants' product had been sold in this country continuously for some 37 years, using the same name. Goodwill therefore attached to the name. (3) The products in question were both scouring powder. They were marketed at similar outlets and displayed on shelves close to each other, for sale to a wide cross-section of customers. The trade marks were similar. The product was commonly used and purchased by a wide cross-section of consumers in this country. There were no particularly distinctive features by which the general public would identify the defendant's product and distinguish it from the applicants' product. The potential for confusion would appear to be greater when the product is of a common nature, purchased by the average ordinary consumer.

Employment – appeals under labour legislation – appeal from Labour Court – appeal allowed only on question of law – judgment of Labour Court granted by consent – no point of law raised

Chawatama v *UTC* S-99-04 (Malaba JA, Chidayusiku CJ & Gwaunza JA concurring)

See above, under APPEAL (Judgment by consent).

Employment – appeals under labour legislation – appeal to Labour Relations Tribunal – notice of appeal – validity – not defective if it does not set out relief sought

Standard Chartered Bank Ltd v *Chinyemba* S-87-04 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring)

A notice of appeal to the Labour Relations Tribunal is not defective if it does not set out the relief sought. The regulations allow the Tribunal to seek clarification in respect of notices of appeal which are not clear.

Employment – appeals under labour legislation – provision that noting of appeal would not suspend determination – amendment of such provision before appeal heard – accrued rights under previous provision not affected

Barclays Bank v *Nyahuma* S-86-04 (Chidyausiku CJ, Sandura & Gwaunza JJA concurring)

The appellant bank had noted an appeal to the then Labour Relations Tribunal against a determination of an appeals board that the respondent should be reinstated to the position he formerly held with the bank. At the time the appeal was noted, s 97(3) of the Labour Act provided that an appeal would have the effect of suspending the determination appealed against. Before the appeal was heard, the Act was amended. A Labour Court was created. Section 97(3) was amended, to provide that an appeal would now not have the effect of suspending the determination appealed against. The Labour Court refused to hear the appeal, on the ground that the appellant had to reinstate the respondent before the appeal could be heard. Held: although the amended section was retrospective, that retrospectivity did not take away the appellant's right to suspend the respondent which had accrued at the time of the amendment. Only those rights that had not accrued at the time of the amendment were affected retrospectively. There was nothing in the language of the amendment that evinced the law giver's intention to take away accrued rights such as the appellant's right to suspend the respondent pending appeal.

Employment – code of conduct – appeal against determination made under code – effect of – determination not suspended

Barclays Bank of Zimbabwe Ltd v *Mahachi* S-62-04 (Sandura JA, Ziyambi & Gwaunza JJA concurring)

The respondent, a managerial employee of the appellant bank, had committed dishonest acts inconsistent with the articles of his employment when he allocated foreign currency to a company of which he was the sole shareholder. A hearing board convicted him on 2 counts and imposed a penalty of dismissal. An appeals board upheld the conviction on one count but reduced the penalty to a written warning, and set aside the conviction on the other count. The bank appealed to the Labour Relations Tribunal. The respondent did not cross-appeal against the upholding of his conviction on one count. The Tribunal ordered that the bank pay the respondent his salary and benefits pending the hearing of the appeal. The bank appealed to the Supreme Court against that order. Held: (1) the Tribunal had misdirected itself in holding that the respondent's prospects of success were bright for a number of reasons, and so the Court would exercise its own discretion. (2) While s 97(3) of the Labour Act provides that an appeal against a determination made under an employment code of conduct shall not have the effect of suspending the determination or decision appealed against, the code itself provided that a decision of the Appeals Board would be binding unless appealed against within fourteen working days to the Labour Relations

Tribunal. The bank had appealed within that time, so the appeals board's ruling did not become operative. The respondent was thus not entitled to his salary.

Employment – code of conduct – decision made in terms of code of conduct – once made, cannot be revoked – decision-maker *functus officio*

Delta Operations Ltd v *Mpepula* S-60-04 (Malaba JA, Sandura JA & Cheda JA concurring)

The respondent appeared before a disciplinary committee operating under the appellant's code of conduct. He was charged with poor work performance and found guilty. The committee recommended his dismissal but the managing director imposed the penalty of another final written warning on the respondent instead of dismissal. The respondent took a long time to acknowledge the warning and the managing director, considering that the respondent was taking the management's decision as weakness, revoked the decision to give the respondent a final written warning and substituted it with dismissal. Held: the managing director, having made the decision on the facts before him, became *functus officio*. An official cannot make a decision which affects or abolishes rights which his previous act has already created. Such a favourable decision may only be revoked with the consent of the beneficiary. The purported dismissal was unlawful.

Employment – code of conduct – determination made under – review of – must be heard by Labour Court – no jurisdiction in High Court to entertain a review in the first instance

Zhakata v *Mandoza NO & Anor* HH-25-05 (Bhunu J)

See above, under COURT (High Court – jurisdiction – labour matters).

Employment – code of conduct – proceedings under – conduct complained of – whether work-related – acts taking place when employee not actually working – acts committed while employee staying at accommodation provided by employer and adversely affecting fellow employees – such conduct work-related and subject to code of conduct

Makwiro Platinum Mines v *Paradzayi* S-46-04 (Ziyambi JA, Chidyausiku CJ & Malaba JA concurring)

The respondent, an employee of the appellant, behaved in a drunken and unruly manner when he was staying at the compound erected by the appellant for the accommodation of those of its employees who were on duty at the mines operated by the appellant. As he had been disciplined for such conduct previously, he was, following an enquiry under the company's code of conduct, dismissed. He argued that he should not have been dismissed because the conduct took place when he was off duty and was therefore not work-related. Held: to accept that argument would create a fertile ground for violence outside the work place which may have its origins inside the workplace and a working relationship. The appellant was on duty that weekend; that was the purpose for which he was booked in the compound. His undisciplined behaviour created a stressful atmosphere and made it impossible for the other employees to get any sleep, factors which could adversely affect his co-employees at work. He had threatened to ill-treat the son of a workmate, who was his subordinate at work. Ill-treatment of a subordinate by his superior is likely to have adverse effects on the victim and his work to the detriment of the employer. The conduct of the respondent was thus work related, and the only test to be applied was whether the respondent's conduct amounted to misconduct as defined in the code of conduct. If it did, the appellant was entitled to proceed in terms of the code of conduct.

Employment – contract – terms of – collective bargaining agreement – "hours of work" – meaning – such hours not including thirty minute break allowed during every shift

Lever Bros v *Bimha & Ors* S-85-04 (Gwaunza JA, Chidyausiku CJ & Malaba JA concurring)

Where a collective bargaining agreement set limits on the number of hours worked by employees during a shift and over a period of a week, the hours worked did not include the thirty minute break that the workers were allowed per shift. That time, although spent at the workplace, was not part of the time the workers were productively engaged; the workers could use it for their own purposes, such as taking a nap, having refreshment or attending to personal business. Consequently, the workers were not entitled to overtime pay.

Employment – termination – grounds for – gross negligence – what constitutes "gross" negligence – total disregard of duty resulting in loss to employer

Standard Chartered Bank v *Chipiningu* S-104-02 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

The respondent, a bank teller, was one of the two co-custodians of treasury cash entrusted with a set of keys to the strong room at his branch. The strong room could only be opened when both sets of keys were used. There was a standing instruction that he was not to hand over his set of keys to the strong room to anyone, including the co-custodian, without first obtaining authority from the Branch Manager. Contrary to the instructions, he handed his keys to his co-custodian who had been asked to get more cash for one of the tellers. It was later found that a large amount of money was missing. The respondent was charged with gross negligence causing serious loss to the bank and dismissed. An appeals board and the Labour Relations Tribunal found that the negligence was not "gross" and set aside the dismissal. On appeal by the bank, held: (1) "gross negligence" is a nebulous concept the meaning of which depends on the context in which it is used. It is a futile exercise to seek to provide a definition which would be applicable to all circumstances. It connotes recklessness, an entire failure to give consideration to the consequences of one's actions, a total disregard of duty. It signifies more than ordinary inadvertence or inattention, but less than conscious indifference to consequences; it is, in other words, merely an extreme departure from the ordinary standard of care. An example of "gross negligence" is the case of a person who, when he has taken charge of property, leaves it so exposed that thieves may carry it off. (2) *In casu* there was total disregard of his duty by the respondent. In handing over the set of keys to his co-custodian he totally disregarded his duty to take care of treasury cash against possible theft by the co-custodian.

Employment – contract – termination – grounds for – misconduct inconsistent with terms of employment – no evidence of intention to defraud – when dismissal justified

Mvere v *Tanganda Tea Co Ltd* S-130-04 (Malaba JA, Sandura & Gwaunza JJA concurring)

The appellant was employed by the respondent as a taxation manager. One of the terms of her contract of employment was that she would preserve official documents in her custody in their complete and regular state. The procedures at the company required that bank reconciliation statements prepared by her would be checked and signed by her immediate superior. She resented this and when she came across statements she had prepared bearing his signature she tore off that portion of the document. She argued that her conduct had no significant effect on the documents, as she had not intended to commit fraud against the respondent. She said her intention was to draw attention to her view that the instruction that the statements be reviewed had not been communicated to her in a proper manner. Held: (1) evidence of misconduct inconsistent with the fulfilment of the express or implied conditions of a contract of employment entitles an employer to dismiss an employee unless the latter shows that the misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable that the remedy of dismissal was not warranted. (2) She clearly breached her duty to preserve the integrity of the documents when she tore her superior's signature off. Even if she did not intent to defraud the company, her conduct undermined both the relationship with the company and the company's chain of authority. She must have known that her superior's signature was placed on the documents in the performance of his duties; the work was not done for his personal benefit. Nor were the bank reconciliation statements prepared for the appellant's personal benefit. The documents belonged to the company and it was not for her to decide as to whose signature should be on them. By her own conduct she had demonstrated unwillingness to remain bound by the implied conditions of employment.

Family law – child – custody – custody order – variation of – custodian parent effectively yielding custody to a relation – non-custodian parent seeking custody order in his favour – what must be shown

Domboka v *Madhumu* HH-179-04 (Makarau J)

The respondent had been awarded custody of her children following her divorce from her husband, the applicant. She had handed the children over to her mother to look after on an indefinite basis while she went to work overseas. The applicant sought a variation of the custody order, to grant custody to himself. Held: (1) the respondent had given up custody of the minor children in favour of her mother and thereby abdicated her responsibilities and rights that the court order granted her. Her surrender of the custody of the minor children to her mother appeared permanent. (2) It was not correct, however, to say that because the respondent had given up custody, then the applicant was entitled to be granted custody of the children. The best interests of the children were paramount. (3) A parent seeking variation of the custody order had to show on a balance of probabilities that it was in the best interests of the children that the existing order be varied; but where the variation is sought on the basis of changed circumstances, the onus is to be discharged in a two pronged attack. Such a

parent must show that it is not in the best interests of the children that they remain in the custody of the custodian parent and further that it is the best interest of the children that custody is awarded to him. The evidence *in casu* was inadequate for the court to make a determination either way.

Family law – child – guardianship – application for change of guardianship – need for application to be advertised – advertisement may not be dispensed with

Ex p *Ndlovu* HB-116-04 (Ndou J)

The applicant applied for sole guardianship of his younger sibling following the death of their parents. The provincial magistrate, operating as a juvenile court, dispensed with the requirement to advertise the proposed appointment because of the poverty of the applicant. Held: the advertisement was mandatory under s 9(3) of the Guardianship of Minors Act [*Chapter 5:08*] and non-compliance with the requirement defeated or frustrated the object of the legislation. The publication is a mechanism to prevent appointment of a guardian to the detriment of the minor. Appointment of guardianship is a major change in the status of a minor and the intention of the legislature is to make sure that it is done in the best interest of the minor. While usually proceedings involving minors are held *in camera*, this was one exception where the name of the minor and the applying "guardian" are publicised. The juvenile court is a creature of statute with no inherent jurisdiction and has no power to dispense with the provisions of s 9(3). The application should have been advertised, in spite of the applicant's poverty.

Family law – husband and wife – divorce – jurisdiction – domicile – length of husband's residence in Zimbabwe – relevance of – what must be shown to establish domicile

Latif v *Latif* S-49-04 (Malaba JA, Sandura & Gwaunza JJA concurring)

The appellant, who was born in Zimbabwe, had married a citizen of Pakistan. He came to Zimbabwe and married the appellant, who was expecting his child. Less than a year after the marriage, the appellant instituted divorce proceedings, which were unopposed. In her declaration, she averred that her husband had acquired domicile in Zimbabwe. The judge *a quo* declined jurisdiction o the ground that the appellant had to show that the respondent had resided in Zimbabwe for a period of one year or more and had the intention of remaining in the country permanently to show that he had acquired domicile of choice. On appeal, held: (1) there was no factual basis upon which to refuse to accept, as a fact proved, that the respondent took residence in Zimbabwe with the intention of making the country his permanent home. (2) There is no requirement for the purposes of matrimonial domicile that the plaintiff should show that the residence of the defendant was of a particular duration, unlike the case domicile for immigration purposes. All that has to be shown is that he is resident and that that residence is coupled with the intention permanently to reside.

Family law – husband and wife – property rights – matrimonial property – house forming part of matrimonial estate but registered in sole name of husband – husband's right to sell such property even without wife's consent

Muswore v *Makanza* HH-16-05 (Makarau J)

A married couple lived in their matrimonial home for many years. The property was registered in the sole name of the husband. Without seeking his wife's approval, he sold the property to another person and moved back to his rural area. The wife refused to join him and remained in the house. The buyer sought an order for her eviction, while she sought an order setting aside the sale and declaring her to be co-owner of the property. Held: the law regarding the legal relation of a wife to property registered in the sole name of her husband is unsatisfactory and palpably unjust. Whoever has his name endorsed on the deed conveying title is at law *prima facie* recognised as the owner of the land with the most complete and comprehensive control over that land. This individualistic approach is not realistic in a marriage which is the union of two people and, in most cases, the merging of their wealth generation capacities for mutual benefit. It is not uncommon for married couples to jointly acquire property during the subsistence of the marriage and to jointly acquire land in unclear ratios of contribution towards that acquisition. It is not uncommon, as occurred here, that the land will be registered in the name of one of the spouses, usually that of the husband. In a marriage, it is usual to refer to property acquired during the marriage as "joint" property while the marriage subsists. On the termination of the marriage through divorce or death, the principles of both family law and the law of inheritance recognise the joint matrimonial estate, which is then distributed as between the spouses, regardless of whose name appeared on the deed conferring title to the land or property. However, the law of property does not recognise the existence of the matrimonial estate. A wife cannot stop her husband from selling the matrimonial home or any other immovable property forming the joint matrimonial estate if it is registered in his sole name,

even if she contributed directly and indirectly towards the acquisition of that property. Anachronistic as it is, the legal position at present is the right of a wife to the matrimonial estate, as determined by the principles of family law, are inferior to the rights of her husband in the same property as determined by the principles of the law of property.

Insolvency – sequestration – act of insolvency – what constitutes – *nulla bona* return – writ of execution against movable property only – respondent failing to point out other disposable assets which could satisfy debt – act of insolvency committed

Insolvency – sequestration – provisional order for sequestration – confirmation of – court's discretion – circumstances justifying court in not confirming provisional order – respondent paying off capital debt and indicating steps being taken to satisfy costs

N M B Bank Ltd v *Selemani* HH-176-04 (Uchena J)

The applicant bank obtained default judgment against the respondent for a debt. A writ of execution against the defendant's movable property was issued. When the sheriff attempted to execute the writ, he was unable to locate any movable property belonging to the respondent. The respondent did not point out that he was also the owner of immovable property. The bank, on receiving the sheriff's *nulla bona* return, applied for the provisional sequestration of the respondent's estate. The application was granted. At the return day, it was argued that the provisional order was improperly applied for and granted because the warrant of execution was for movables only. It was argued that s 11(b) of the Insolvency Act [*Chapter 6:04*] was not complied with as no inquiry was made about the respondent's immovable property. Held: (1) By advising the sheriff that he had no assets which could be used to satisfy the debt, the respondent placed himself within the provisions of s 11(b) even though the writ of execution was for movables. He had thereby committed an act of insolvency as defined, because he failed to satisfy the debt and failed to indicate to the sheriff disposable property sufficient to satisfy the debt. The provisional order for sequestration of the respondent was therefore properly granted. (2) Under s 15(1) of the Act, the court has a discretion as to whether or not to confirm a sequestration order even if the requirements for the confirmation of a sequestration order have been satisfied. As the respondent had since repaid the capital debt and deposited money with the applicant's attorneys to cover the costs, it would be appropriate to postpone the case to give the applicant time to calculate its costs and to give the respondent an opportunity to clear his indebtedness to the applicant, in which case the provisional order could be discharged.

Intellectual property – trade mark – infringement of – unauthorised use of a mark so nearly resembling a registered trade mark as to be likely to deceive or cause confusion – use of similar name in prominent place on label of similar product

Unilever plc & Anor v *Vimco Pvt) Ltd & Anor* HH-175-04 (Omerjee J)

See above, under DELICT (Passing off).

Legal practitioner – conduct and ethics – duty to attend court when seized with matter in court – when may absent himself

S v *Williams & Ors* HB-160-04 (Cheda J)

A lawyer who is seized with a matter before the court has a duty to attend throughout the hearing unless he is unable to do so by reason of inability (such as illness) or has the leave of the court. A lawyer who merely absents himself other than in these circumstances risks being charged with misconduct. If the lawyer does not have the proper attire, the appropriate course would be to approach the judge in chambers through the judge's clerk to seek a postponement.

Media – control of – registration of mass media – cancellation of registration – grounds for – non-disclosure of material facts – failure to notify Media and Information Commission of change to ownership of registered newspaper – procedure to be followed before cancellation – need for Commission to follow procedure – cancellation on grounds of misrepresentation made during hearing – may not be relied on unless further hearing held

African Tribune Newspapers (Pvt) Ltd & Ors v *Media & Information Commission & Anor* HH-139-04 (Uchena J)

The first applicant owned a newspaper and was registered with the Commission under the Access to Information and Protection of Privacy Act [*Chapter10:27*]. All the shares in the first applicant were sold to another company, the second respondent, of which the remaining respondents were directors. The Commission was not notified of the change of

ownership, nor of the change of name of the first applicant, nor of the changes to the name, form or frequency of the newspapers published by the first applicant. The Commission also alleged that the applicant had used an unaccredited journalist, contrary to s 79(6) of the Act.

The Commission gave notice of a meeting at which the applicants would be required to show cause why the registration should not be cancelled. After the hearing, the Commission, purporting to act under s 71(1)(a) of the Act, cancelled the first applicant's licence for a year. It based its decision in part on an alleged misrepresentation made during the hearing. The applicants sought an urgent review of the decision, on the grounds (1) that the commission did not have the powers it claimed under s 71(1)(a); (2) that its decision was grossly unreasonable on various grounds, among which was that the commission, whose duty is to promote, develop and grow the media, had summarily closed a newspaper for the mere offence of failure to notify it of structural changes; and (3) that the chairman was biased, because he indicated the commission's decision in advance.

Held: (1) Section 71(1)(a) provided for the cancellation of registration if, among other things, there had been a misrepresentation or non-disclosure of a material fact by the mass media owners concerned. The misrepresentation or non-disclosure need not be one linked to the issuing of the registration certificate; it could be one occurring during the existence of the registration certificate. If the misrepresentation or the non-disclosure were limited to those occurring before registration then it would be very easy for mass media owners to avoid the local ownership requirement by complying at registration and then changing ownership and not disclosing the change introducing non-local ownership. (2) Before registration may be cancelled, the commission is obliged to notify the affected party of its intention to cancel, give notice of a hearing and allow the party to make representations. As it had not done this in respect of the alleged representations made at the hearing, it could not rely on those misrepresentations as a ground for cancellation. (3) In respect of the other charges, the correct procedures had been followed. (4) In assessing whether the commission acted grossly unreasonably, it was necessary to look at the commission's role under the Act. This was not merely to promote and develop the media, but also to monitor mass media services, enforce ethics standards and professionalism, control mass media services, act upon comments by the public on mass media services and ensure that mass media services comply with provisions of the Act. Non-disclosure of change of ownership is material, to ensure that Zimbabweans have control of the media. While the commission need not have cancelled the applicant's registration and could instead have acted under s 71(6), this did not make its decision grossly unreasonable. (5) The chairman had acted under s 71(4) of the Act by notifying the applicant of the commission's intention to cancel the registration unless the applicant showed cause to the contrary. This was not an indication of bias.

Military law – court martial – appeal against decision of – to whom appeal lies – Court Martial Appeal Court – composition of

S v *Mupambwa & Anor* S-75-04 (Sandura JA, Ziyambi & Gwaunza JJA concurring)

Until 1997, appeals from courts martial lay to the Court Martial Appeal Court, which was composed of not less than two Supreme Court judges, appointed by the Chief Justice. Under an amendment to the Defence Act [*Chapter 11:02*], the composition of the Court Martial Appeal Court was changed, and it is now composed of not less than two High Court judges, appointed by the Judge President. An appeal lies to the Supreme Court from a decision of the Court Martial Appeal Court, in all respects as though it were a decision of the High Court.

Practice and procedure – application – urgent application – when may be made – urgency of commercial nature – may found an urgent application

African Tribune Newspapers (Pvt) Ltd & Ors v *Media & Information Commission & Anor* HH-139-04 (Uchena J)

The fact that urgency is based on commercial losses does not mean that a case cannot be treated as urgent.

Practice and procedure – application – for declaratur – basis of application – may not be founded on alleged breaches of rules of court

Practice and procedure – execution – sale – sale confirmed and transfer effected – remedies open to interested party wishing to have sale set aside – limited grounds on which sale may be set aside

Chiwanza v *Matanda & Ors* HH-170-04 (Makarau J)

The applicant's property was sold to the first respondent at public auction at the instance of the fourth respondent after it had obtained judgment against him. The purchase price was not paid for four months and the Sheriff purported to cancel the sale and institute a fresh auction. Before this took place, however, he reinstated the sale and transfer was effected to the first respondent. Over two years later, the applicant sought an order setting aside the sale and evicting the first respondent. The basis of the application was said to be to seek a declaratur at common law, alternatively a review of the decision of the second respondent on the basis of various alleged irregularities. Held: (1) The rules of court do not provide for the procedure to be adopted after the sale in execution has been confirmed. A party with an interest in the sale may approach

the court by way of ordinary review to have the sale set aside. The approach must be based on the general common law grounds of review. These would include such considerations as gross unreasonableness, bias and procedural irregularities but not such grounds as an unreasonably low price or that the sale was not properly conducted as provided for under the rules unless such can be subsumed in the recognised grounds of review at common law. (2) After a sale has been confirmed and transfer of the property has been effected to a third party, interested parties may still approach the court for the sale and transfer to be set aside, but such an approach can be sustained only on equitable considerations. The purchaser's title can only be impugned on account of fraud, bad faith and prior knowledge of irregularities attendant upon the sale. (3) Where an application for review is brought outside the time frame provided for in the rules and not in accordance with the provisions of the rules, an application for condonation must be made. (4) While an application for a declaratur is not bound by those time limits, it cannot be founded on alleged breaches of the rules of court. The application should have been for review.

Practice and procedure – time – reckoning of – heads of argument – time within which heads of argument to be filed – application to Supreme Court – time period does not exclude time when court is on vacation – difference between Supreme Court and High Court practice

Lee Group of Companies v *Elder* S-88-04 (Malaba JA, in chambers)

The High Court Rules provide that, in computing the 10 day time limit within which heads of argument are required to be filed before applications, exceptions or applications to strikeout are set down, the period during which the court is on vacation shall be excluded. This does not apply in the Supreme Court: in terms of r 3 of the Supreme Court Rules, the reckoning of the time within which an applicant is required under r 43(2) of the Rules to file heads of argument includes all days embracing the period when the court is on vacation except Saturdays, Sundays or public holidays.

Practice and procedure – pre-trial conference – purpose of – agreement made at conference – effect of – matrimonial matter – party disputing agreement allegedly reached at pre-trial conference – matter referred to trial

Moyo v *Moyo* HB-112-04 (Ndou J)

The respondent sued her husband for divorce. At the time the suit was instituted, she was represented by a particular legal practitioner. A pre-trial conference was held and the matter set down for trial, the issue at the trial being the disposition of the matrimonial property. Before the trial, the respondent changed her legal practitioner. The pre-trial conference was reconvened. It was not attended by the respondent or her new representative; her former legal practitioner appeared. At the conference, an agreement was reached about the matrimonial property and a consent paper drawn up. The husband sought an order setting the matter down for trial on an unopposed basis and to incorporate the agreement reached. The respondent requested a further pre-trial conference, on the grounds that the pre-trial conference was conducted in her absence and contrary to her instruction. Held: (1) the objects of a pre-trial conference are (a) to reach agreement on as many aspects of the matter as possible with the object of curtailment of the proceedings; (b) to facilitate settlement discussions, timeous consideration of specific topics and (c) to protect a party against costs required to ward off an opponent who is unable to proceed to trial or is not serious about doing so. (2) This being a matrimonial matter, personal notice of set down on respondent would be required if the matter were to be set down on the unopposed roll by the applicant. She would be entitled to appear at the motion court hearing and be heard and could still challenge the relevant part of the pre-trial memorandum. The matter would inevitably be referred for trial on the disputed issue. (3) If the matter were set down as an unopposed one, the effect would be that she was bound by the concessions made allegedly on her behalf and in her absence and that she would be denied the opportunity afforded by the rules to lead evidence on the admissibility of the conference memorandum against her. Consequently, the matter would be referred to trial.

Practice and procedure – process – service of – summons – service at place of employment – service at branch other than that at which defendant employed – service defective – need for place to be that where defendant is normally physically present

Marimo v *Mpofu* HB-99-04 (Cheda J)

The defendant was employed by a company at one of its rural branches. Summons was served on a responsible person at the head office of the company in Bulawayo. The defendant argued that the service was defective as she was not ordinarily employed in Bulawayo. Held: the High Court Rules do not envisage "a place of employment" as being a place other than that where the defendant is ordinarily and physically at. It is not enough to serve the summons on an official of the company by whom the defendant is employed, irrespective of the place where he is employed.

Professions and trades – estate agent – practising as such without being registered – company which had no officer or assistant as a registered estate agent – company engaging a quantity surveyor to carry out valuation – company and quantity surveyor practising an estate agent

Professions and trades – quantity surveyor – work of – valuing property – valuing buildings for purposes of sale – not part of work of a quantity surveyor

Phigidemac Consultants (Pvt) Ltd v *Zvimba RDC* HH-184-04 (Uchena J)

The plaintiff company claimed against the defendant rural council for the work done in valuing certain of the council's buildings for the purposes of selling them. The plaintiff company was not registered as an estate agent and had no estate agents in its employ. For the valuation exercise, it employed a consultant, who was a quantity surveyor. The council argued that the contract was illegal, being in breach of s 48(1) of the Estate Agents Act [*Chapter 27:05*], which forbids any company to practice or carry on business as an estate agent under any personal names which is not the name of a registered estate agent who is or was a principal, assistant or working partner of the company concerned. The company argued that although the work of valuing property is one of the acts encompassed by the phrase "practise as an estate agent", s 52 excluded a registered quantity surveyor acting in the course of his practice as such. Held: (1) because the company had no officer registered as an estate agent and engaged a consultant to carry out the valuation, it was, in the absence of any other explanation, in breach of s 48(1)(b) of the Act. (2) In this case, the quantity surveyor was not acting in the course of his practice but was acting as a consultant to the plaintiff. Under s 2 of the Quantity Surveyors Act [*Chapter 27:13*], the work of a quantity surveyor includes preparing valuations on existing buildings for purposes of mortgages, rentals and insurance. Valuations to advise an owner on the value of buildings for the purpose of selling them are clearly not covered under the work a quantity surveyor can do. The consultant was thus not acting in the course of his practice as a quantity surveyor when he did valuations for the council acting as the company's consultant. (3) Under s 53(1) of the Estate Agents Act, any business practicing as an estate agent must be under the actual control and management of a principal who is a registered estate agent who is not at the same time acting as such for another company or on his own. The estate agent is therefore expected to devote his attention to the particular company. The principal must be an executive director of the company. If the principal does not personally conduct the business then that can be done under the control of an assistant who is himself a registered estate agent. None of these requirements were met in respect of the plaintiff. (4) As a result, the contract was void for illegality.

Professions and trades – stockbroker – discipline – Committee of Stock Exchange – suspension of stockbroker and referral to Registrar for cancellation – need for Committee to properly examine case against alleged offender and make decision to refer matter – such decision reviewable

Gumbo & Anor v *Zimbabwe Stock Exchange* HH-150-04 (Gowora J)

The applicants were both registered stockbrokers. After allegations had been made against them about certain transactions they had made, as well as other alleged offences, the committee of the stock exchange, purporting to act in terms of s 35 of the Zimbabwe Stock Exchange Act [*Chapter 24:18*], suspended them and referred the matter to the Registrar of the Stock Exchange. The Registrar, having heard representations from the applicants and the Committee, cancelled the applicants' registration, as well as that of their company. An appeal to the Minister failed. Held: (1) before referring the matter to the Registrar, it was necessary that the Committee "considered" that the applicants were guilty of the conduct in question. This meant that the Committee had to examine the merits of the allegations levelled against the stockbroker as against the evidence that has been gathered or is available in support of those allegations. It must then debate the evidence available in order to come to a decision as to whether there has been an infringement of the provisions concerned and make a finding on the facts that the allegations have been proved and that its conclusion following thereon is that the registration of the stockbroker be cancelled. (2) The committee made a decision, even if it was not a final decision. The decision that it made put into motion a chain of events that ultimately led to the cancellation of the applicants' registration and was a decision that prejudicially affected the rights and interest of the applicants. The decision was thus reviewable. (3) Even if the Committee's decision were to be set aside, however, the Registrar had a discretion which was exercisable independent of the notification or the finding by the committee on the need for cancellation. Setting aside the suspension would not affect the Registrar's decision. It was the Registrar's decision which should be taken on review.

Property and real rights – immoveable property – house forming part of matrimonial estate but registered in sole name of husband – husband's right to sell such property even without wife's consent

Muswore v *Makanza* HH-16-05 (Makarau J)

See above, under FAMILY LAW (husband and wife – property rights).

Railways – negligence – public road crossing railway line – rights and duties of public and train driver – precedence given to train – speed at which train should approach crossing

Tredgold NO v *NRZ* HH-142-04 (Mungwira J)

The young woman represented by the plaintiff, her *curator bonis*, was seriously injured when her car was struck by a railway train. Due to traffic congestion the car had stopped part of the way across the railway line. The driver of the train applied brakes but was unable to stop the train in time. The crossing was not protected by booms but there were various warning signs. The defendant applied for absolution from the instance. Held: A level crossing is common both to the railway and to the public. Each has the right to pass over it, and to expect that due care will be exercised by the other to avoid mishaps; but a train cannot in the ordinary course be expected to pull up at a crossing to allow passengers by the public road to get over the crossing. The train must necessarily have the preference over passengers by road. It is the duty of the traveller to look out for and wait for the train. At the same time, the train ought to give due warning of its approach when it is nearing a level crossing of this nature, so that persons might stop and allow the train to pass. The train should not to be travelling at such an excessive rate of speed that the warning it might give should be of no avail, but it is not expected to approach a level crossing at a speed which enables it to pull up short of the crossing. As no negligence had been established, absolution would be granted.

Revenue and public finance – income tax – assessment – what notice of assessment must contain – need for assessment to be issued before taxpayer's funds may be garnished

Revenue and public finance – income tax – withholding tax on fees due to a non-resident – when fees are deemed to have been paid – fulfilment of conditions on which non-resident entitled to fees – meaning – not a reference to grant of exchange control authority for payment

Barclays Bank Ltd v *ZRA* HH-162-04 (Makoni J)

Before the Commissioner of the Zimbabwe Revenue Authority may garnishee a taxpayer's funds, an assessment must be issued. The assessment must comply with the requirements of ss 2 and 51 of the Income Tax Act [*Chapter 23:06*], in that it must show any taxable income or credits to which the taxpayer is entitled and any assessed loss ranking for deductions. It must also give the taxpayer notice that any objection to the assessment shall be lodged with the Commissioner within 30 days from the date of the notice. A document which does not comply with these requirements is not an "assessment".

Withholding tax on fees due to a non-resident is payable within 30 days of the date when the payment is deemed to have been made. There are two possible dates: the first is when the fees are actually credited to the non-residents account. The other is when, though the fees are not credited to the non-resident's account, they are so dealt with by the payer in a manner which discharges the payer's obligation to the non-resident. The phrase "conditions under which he is entitled to them are fulfilled" does not refer to the granting of exchange control authority for the payment.

Words and phrases – "consider" – Zimbabwe Stock Exchange Act [*Chapter 24:18*] – s 35

Gumbo & Anor v *Zimbabwe Stock Exchange* HH-150-04 (Gowora J)

See above, under PROFESSIONS AND TRADES (Stockbroker).

Words and phrases – "hours of work" – Collective Bargaining Agreement: Detergents, Edible Oils and Fats Industry (SI 89 of 1997) – s 6(2)

Lever Bros v *Bimha & Ors* S-85-04 (Gwaunza JA, Chidyausiku CJ & Malaba JA concurring)

See above, under EMPLOYMENT (Contract – terms of).