CASES DECIDED JANUARY-JUNE 2005

Administration of estates – executor dative – appointment of – attorney for person accused of having murdered deceased – such person an agent of the alleged killer – contrary to public policy for such person to be appointed executor dative

Wang & Ors v *Ranchod NO & Anor* HH-50-05 (Bhunu J)

The first respondent was appointed by the Master executor dative for a deceased estate. He was the attorney for the third respondent, who had been married to the deceased. There was a dispute as the whether the marriage subsisted at the time of the death. The applicants, who were all relatives of the deceased and potentially were beneficiaries of the estate, sought to reverse the appointment, as the third respondent had shot and killed the deceased and was on bail pending trial for his murder. Held: (1) although the third respondent's liability for the deceased's death was yet to be determined, it was repugnant to all notions of justice and public policy that a person should be appointed executor to the estate of a person he has killed. The third respondent stood in great danger of being disinherited from the deceased's estate and it was unwise to appoint such a person or her agent, which the first respondent was, to administer the estate of her alleged victim. (2) It was reprehensible of the first respondent, as a legal practitioner, to strive for and accept appointment as administrator to the deceased's estate with the full knowledge that his client was facing charges of having murdered the deceased. Costs *de bonis propriis* would be ordered against him.

Administrative law – administrative authority – duty to act reasonably and in reasonable time – effect of failure to do so – not entitled to penalise other party if it has not first done its own duty

N & B Ventures (Pvt) Ltd v *Min of Home Affairs & Anor* HB-138-04 (Cheda J)

The applicant ran a hotel for which it held the appropriate liquor licence. It applied timeously for the renewal of the licence but the Liquor Licensing Board did not issue a new licence promptly, in spite of reminders. The licence was finally renewed some 18 months after the application for renewal was made. In the meantime, the applicant paid two admission of guilt fines. The police thereafter applied to a magistrate for and obtained an order to seize applicant's stock of liquor. The licence was renewed a few days later. The applicant applied for an order for the return of its liquor. Held: while technically the applicant had committed an offence by selling liquor without a licence, the conduct of the Board should be considered. The Board was charged with handling matters relating to liquor licences. It was duty bound to either to refuse an application or to issue a liquor licence within a reasonable time. Its failure to do so was a clear dereliction of duty. Administrative authorities are required to act reasonably and the failure to issue a liquor license under such unexplained circumstances was unreasonable. Where in the absence of an adverse reason an administrative authority fails to act, the courts have a duty to interfere in order to safeguard the financial and social interests of the applicant and the public respectively. Where an administrative authority is seized with a duty to perform a certain act, which act is a condition for another party to act, it can not be allowed to penalise the other party on the basis of non-performance when it has not itself performed its own part. It must first perform its part before it penalises the other party for non-performance. The forfeiture would be set aside.

Administrative law – appeal – code of conduct – provision that decision of designated authority "shall be final" – effect – appeal allowed on technical grounds, not on merits – designated authority entitled to remit matter for hearing afresh

Mackenzie v *Rio Tinto Zimbabwe* S-144-04 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

The appellant was suspended on allegations of misconduct. His subsequent dismissal was set aside by the High Court on a technicality. A rehearing was convened and he was again dismissed. He appealed to the authority designated under the code of conduct. The authority set aside the dismissal on the grounds of technical irregularities and remitted the matter for a fresh hearing in terms of the code of conduct. The appellant argued that the authority had no right to remit the matter as the code provided that the decision of the authority "shall be final". This meant that the decision should be one that concluded the matter one way or the other either by way of acquittal or a finding of guilt. It was also argued that the rehearing could not proceed, as the code provided that proceedings had to be convened within 72 hours of the submission of the complaint form. Held: (1) An appeal court or a body vested with inherent authority to hear an appeal has, at least, the jurisdiction to allow the appeal, dismiss the appeal, or remit the matter for a re-hearing. If the lawmaker does not wish the appeal court or authority to have any of these options the language of the statute has to be explicit. (2) Where an appeal is

allowed on procedural grounds, the remittal of a matter for hearing *de novo* does not breach the time requirement of the code.

Administrative law – natural justice – observance of rules of – whether principles must be observed by Minister of Justice before "specifying" a person in terms of s 6 of Prevention of Corruption Act [*Chapter9:16*]

Mawere v *Min of Justice* HH-1-05 (Uchena J)

The applicant was "specified" by the respondent Minister under s 6(1) of the Prevention of Corruption Act [*Chapter9:16*]. It was argued on review, *inter alia*, that the Minister had breached the rules of natural justice in failing to afford the applicant a hearing prior to declaring him to be a specified person. Held: the question of whether the subsection breached s 18(1) of the Constitution was not for the High Court to determine on review. The court was confined to the procedure provided in s 6(1) and the rules of natural justice. The procedure was correctly followed. The powers exercised by the Minister, though extraordinary when viewed from the natural justice angle, were permitted by the Act and were reasonably justifiable in a democratic society.

Appeal – Administrative Court – noting of appeal against order of – no power in court to order execution in spite of noting of appeal

ANZ (Pvt) Ltd v *Minister for Information & Anor* S-111-04 (Chidyausiku CJ, Cheda, Ziyambi, Malaba & Gwaunza JJA concurring)

At common law the noting of an appeal suspends the operation of a judgment. However, a court of inherent jurisdiction has jurisdiction to order the execution of its own judgments despite the noting of an appeal. It is trite that only superior courts enjoy inherent jurisdiction, these being the High Court and the Supreme Court. Courts created by statute do not have inherent jurisdiction and consequently do not have power to order execution of their judgments unless such jurisdiction is conferred on them by the statute. Section 19 of the Administrative Court Act creates a right of appeal to the Supreme Court, to be exercised within twenty-one days of the handing down of a judgment. The section does not expressly or by implication confer on the Administrative Court either the power or the jurisdiction to order execution of its own judgments despite the noting of an appeal.

Appeal – Labour Court – appeal heard and determination made in absence of affected party – application by such party for rescission – Court obliged to consider merits of application for rescission

Redstar Wholesalers v *Mutomba* S-142-04 (Chidyausilu CJ, Sandura & Ziyambi JJA concurring)

The appellant company was absent from the hearing in the Labour Court of an appeal brought by an employee whom it had dismissed. The Labour Court allowed the appeal, on the basis that the facts alleged by the employee were not challenged. The company subsequently applied to the Labour Court for rescission in terms of s 92C(1) of the Labour Act [*Chapter 28:01*]. This allows the court to rescind or vary a determination or order made in the absence of the party against whom the order is made. The Court refused the application, on the grounds that its decision had been made on the merits of the case. On appeal to the Supreme Court, held: (1) the Labour Court is required, in terms of s 92C(1) of the Act, to consider the merits of an application for rescission whenever such an application is made by the party that was in default. (2) The judgment was a default judgment, being one given in proceedings conducted in the absence of one of the parties. It was one in respect of which the absent party could apply for rescission. (3) The Labour Court was required to consider the merits of the application for rescission of the default judgment. In determining whether or not the default judgment should be rescinded or varied the Labour Court should have considered whether good and sufficient cause had been shown, relying on the usual considerations.

Appeal – Labour Court – interim determination by Labour Court under s 97(4) of Labour Relations Act [*Chapter 28:01*] – purpose of – when should be granted – determination granted in circumstances where applicant could have enforced his rights through other methods – not appropriate

Standard Chartered Bank v *Musanhu* S-122-04 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

The respondent was charged by the appellant bank with various serious acts of misconduct, mostly relating to the fraudulent or improper allocation to himself or relatives of foreign currency. The senior labour relations officer took a very

superficial view of the evidence and concluded that the bank had not established the offences charged. The bank was ordered to reinstate the respondent from the date of suspension, without loss of salary and benefits, failing which to pay him damages in lieu of reinstatement. The amount of damages to be awarded was not specified, nor was the method of their quantification stated. The bank appealed to the Labour Court against the determination. No application was made by the bank for suspension of the execution of the judgment pending determination of the appeal, but the respondent was told that the bank would not reinstate him. The respondent made an application to the Labour Court in terms of s 97(4) of the Labour Act for an interim determination that he either be reinstated or paid his salary and benefits. That application was granted. On appeal by the bank, held: (1) whilst the Labour Court has a discretion whether or not to make an interim determination in the matter, it is required by s 97(4) to have regard to the justice of the case. (2) The object of an interim determination made under s 97(4) of the Act is to give a party in whose favour the determination appealed against was made an interim right which he would otherwise not have because of the noting of the appeal. It may also be to grant the party against whom the judgment was made temporary relief from the burden of the obligation imposed by the determination which he would otherwise not have because of the appeal. (3) There was no hindrance at all to the enforcement of the rights under the determination appealed against by the respondent. Although reinstatement was no longer a matter for which an interim determination could provide, having been adjudicated upon by the senior labour relations officer and made the subject of a valid order, the respondent could have enforced the determination by the process of execution appropriate to it regardless of the appeal. He was free to have had the damages quantified and the order registered with the magistrate's court or the High Court for purposes of enforcement of payment. (4) Simply making yet another order on the same matter and in the same terms as those of the determination appealed against was not the appropriate remedy for the enforcement of the judgment appealed against. The Labour Court should not have made the order.

Appeal – Labour Relations Tribunal – determination by Tribunal – need for Tribunal to avoid determining matters on basis of technical irregularities – Tribunal determining matter by *mero motu* raising procedural irregularity not argued before it – a gross irregularity justifying interference

Proton Bakery (Pvt) Ltd v *Takaendesa* S-126-04 (Gwaunza JA, Sandura & Malaba JJA concurring)

After a lengthy hearing at which the facts were aired at length, the Labour Relations Tribunal found against the appellant company, which had dismissed the respondent from his employment. The Tribunal did so on the grounds that the appellant had never applied for permission to terminate the respondent's employment. At no time during the various hearings of the matter was this question ever raised or argued. Held: (1) the action of the Tribunal in reaching a material decision on its own was a gross irregularity justifying interference on appeal. The Tribunal had *mero motu* and after the event picked on a procedural irregularity neither raised nor argued before it, and based its determination solely on that technicality. This it did to the exclusion of the evidence placed before it on the merits of the case. (2) There is a need to avoid determining matters on the basis of technical irregularities in labour disputes, particularly where such irregularities can be cured by the leading of evidence.

Appeal – noting of – late noting of – need to give explanation for delay in seeking condonation as well as for delay in noting appeal – delay due to neglect of legal practitioner – relevance of

Ganda & Ors v *First Mutual Life Assurance Soc* S-1-05 (Sandura JA, Ziyambi & Malaba JJA concurring)

A person seeking condonation of the late noting of an appeal should give a reasonable explanation, not only for the delay in noting the appeal, but also for the delay in seeking condonation. Even if it were accepted that the failure to note the appeal timeously and the delay in seeking condonation of the late noting of the appeal were due to the fault of their legal practitioner, that would not assist the appellant. The practitioner is, after all, the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.

Appeal – record – what record of proceedings of lower court must contain – effect of lack of proper record

Ncube v *Ntombi* HB-49-05 (Ndou J, Cheda J concurring) (Judgment delivered 26 May 2005)

A record of proceedings must at least contain the following:

- date of the proceedings
- a judgment or ruling given by the court

- any evidence given in court
- any objection made to any evidence received and tendered
- the proceedings of the court in general.

In other words, all material evidence, including demonstrations, must be properly and intelligibly incorporated in the record. When this is not done it become very difficult, if not impossible, for an appeal court to determine the merits of the appeal. The appeal court is obliged to refer the matter back to the court *a quo* for trial *de novo*, at great expense and inconvenience to the parties.

Appeal – remittal to trial court – remittal for leading of further evidence – evidence such that court could not have made order it did – matter remitted

Mazodze v *Mangwanda* S-100-04 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring)

See below, under CONTRACT (Performance).

Banking – bank – bank being placed under curatorship – power of curator to dispose of assets of bank – curator not obliged to proceed in terms of Troubled Financial Institutions (Resolution) Act [*Chapter 24:28*]

Trust Hlgs Ltd v *Bailey NO & Anor* HH-23-05 (Kamocha J)

The Governor of the Reserve Bank placed 6 troubled banking institutions under curatorship in terms of s 53(1) of the Banking Act [*Chapter 24:20*] for a period of six months. One of the banks, the Trust Bank, was wholly owned by the applicant. The second respondent was appointed curator of Trust Bank. When he took over the curatorship of Trust Bank, he discovered that the applicant owed it a large sum of money, which had been granted as an interest-free loan. He tried to collect that debt for Trust Bank, but succeeded only in collecting a portion, resulting in considerable prejudice to the depositors. The applicant had in effect used depositors' funds for the personal benefit of its shareholders. In view of the sums owed and the lack of serious effort to rehabilitate the bank, the curator decided that it would be in the best interests of the bank and its creditors and depositors to sell the assets in accordance with the offer that was the third respondent. He considered that this was a preferable course to liquidating the bank. In so doing, he purported to act in terms of s 55(2)(h) of the Act. The applicant contended that the sale of the assets of the bank to the third respondent was unlawful. It argued that the Troubled Financial Institutions (Resolution) Act [*Chapter 24:28*] required that before the various provisions of that Act can be implemented in respect of a financial institution deemed to be troubled, there ought to be a declaration issued in terms of s 6 of the Act, confirmed by a judge in chambers in terms of s 9(1) of that Act, following notice to the shareholders, creditors and former members of the Board of the troubled financial institution. It also argued that s 28 also required that the scheme of resolution be approved by shareholders and creditors and that had not been done. It sought an order restraining the respondents from taking over the assets and business of the bank in the manner that they had done, pending full compliance with the law. Held: (1) the promulgation of the Troubled Financial Institutions (Resolution) Act did not preclude the curator from proceeding in terms of the Banking Act. He was not obliged to proceed in terms of the new Act and do not purport to do so. (2) The curator was specifically empowered by s 55(2)(h) of the Banking Act to sell any assets of the banking institution concerned. The respondents therefore acted lawfully in doing what they did. (3) In terms of s 55(4) a person who is aggrieved by any decision or action taken by a curator may appeal to the Reserve Bank. No acceptable explanation was proffered as to why the applicant chose to ignore the provisions of the section. The applicant should have exhausted the domestic remedies before bringing the case to court unless there were special circumstances why that could not be done.

Church – dispute – between church and official – power of church to dismiss official – hierarchical nature of church – failure of church to follow correct procedures – effect

Apostolic Faith Mission of Portland, OR & Anor v *Baltzell & Ors* HB-48-05 (Ndou J) (Judgment delivered 19 May 2005)

The second applicant was the Southern African Overseer in charge of all the church branches of the first applicant church in seven Southern African states in terms of the constitution, as well as being pastor for the Bulawayo Southern African Headquarters of the church. In terms of its constitution, the church was a branch of the parent church in America. Its doctrines and rules were identical with those of and could not be changed without the recommendation and approval of the parent church. The second applicant, as Overseer, was appointed by the parent church. An emissary from the

parent church told him that the parent church wished him to resign on the grounds of his age. This was confirmed by a meeting of the local board, which nominated a successor. The second applicant refused to resign and sought a court order setting aside the board's actions.

Held: there was nothing in the church's constitution to suggest that any of the posts in the church were to be for life, so some provision of the dismissal of the overseer ought to be implied in the constitution. The basis for saying so was that he who has the power of appointment must as a necessary corollary have the authority to dismiss, because the lack of the latter power derogates from the former. The intention, here, was to leave the question of the overseer ultimately in the hands of the parent church. (2) The applicants essentially were seeking judicial review of the proceedings that resulted in the second applicant being told to resign. This was because the application was premised on absence of jurisdiction on the part of the authority concerned and failure to adhere to the principles of natural justice. (3) The respondents had not complied with the laid down procedures for the board meeting. This would entitle the applicants to a provisional order setting aside the dismissal, pending the hearing of the review.

Company law – corporate veil – lifting of – when justifiable – investigation of corruption allegations

Mawere v *Min of Justice* HH-1-05 (Uchena J)

The applicant was "specified" by the respondent Minister under s 6(1) of the Prevention of Corruption Act [*Chapter9:16*]. It was argued on review *inter alia* that the Minister was not entitled to specify the applicant for offences alleged committed by companies. Held: While in general a company is a separate *persona* from its sponsors or shareholders and it should be personally held accountable for its actions, when the notion of a legal entity is used to defeat public convenience justify wrong, protect fraud and defend crime, the corporate veil may be pierced.

Constitutional law – Constitution of Zimbabwe 1980—Declaration of Rights – s 15(1) – protection against inhuman treatment – delay in carrying out death sentence – sentence passed after 13th Amendment of Constitution – delay not a breach of s 15

S v *Nyambo* S-24-05 (Cheda JA, Sandura & Gwaunza JJA concurring)

The appellant was sentenced to death for murder in October 1994, nearly a year after the coming into effect of the 13th amendment to the Constitution. This amendment provided that any delay in carrying out sentence of death should not be treated as a violation of the convicted person's right under s 15 of the Constitution (which prohibits inhuman or degrading punishment or treatment). He noted an appeal on the appropriate prison documents, but for reasons unexplained the documents did not reach the court for another 10 years. It was argued that the delay amounted to a violation of the appellant's fundamental rights under s 15(1) of the Constitution and that the sentence should be altered to life imprisonment. Held: In view of the provisions of the amending Act, which came into effect before the appellant was sentenced, he was not entitled to the relief he was seeking.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 15 – prohibition against inhuman or degrading punishment – mandatory minimum sentence irrespective of seriousness of offence – test of disproportionality – to be determined by current norms of society – effect of providing for lesser sentence of special circumstances shown – effect of subsequent repeal of impugned law

Chichera v *A-G* S-98-04 (Ziyambi JA, Sandura, Cheda, Malaba & Gwaunza JJA concurring)

The applicant was caught at the border in 1993 with a quantity of drugs such as to raise a presumption that she was dealing in the drugs. Under s 44(2) of the Medicines and Allied Substances Control Act [*Chapter 15:03*], as the subsection stood before its amendment in 2001, a person dealing in a prohibited drug was liable to imprisonment for a period of not less than 15 years or more than 20 years and a fine of $15000 or, in default of payment, imprisonment for an additional period of not less than 5 years or more than 10 years. No portion could be suspended. If the convicted person could show that special circumstances existed, the sentence was imprisonment for up to 15 years or a fine up to $15000 or both. The mandatory sentence was imposed, the magistrate finding no special circumstances. In 2001 the subsection was amended and the mandatory nature of the penalty was revoked. The applicant sought redress under s 24 of the Constitution. It was argued that the mandatory minimum sentences for contraventions of the Act were unconstitutional because they infringed upon the provisions of s 15(1) of the Constitution, constituting cruel and unusual punishment in that (a) they took no account of the level of culpability or the personal circumstances of the particular offender; (b) they gave rise to hugely disproportionate

sentences in relation to the level of the crime and the ultimate intent of the accused, to such an extent that the punishment meted out does not fit the crime; (c) the provision for a finding of special circumstances so as to avoid the imposition of a mandatory minimum term does not constitute a sufficient safeguard to avoid these evils. In addition, the imposition of an additional minimum fine, or in default of payment, the minimum period of imprisonment placed an accused person in the position whereby it was impossible to pay the fine meant that the accused was obliged, in the vast majority of cases, to serve a mandatory minimum period of twenty years in all. Held: (1) The question whether a sentence can be regarded as so inhuman or degrading in its disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty – the punishment being so excessive as to shock or outrage contemporary standards of decency – is to be determined having regard to the current norms and expectations of the society in which the sentence is imposed and at the time it was imposed. The legislature at the time took a strong view of the dangers caused to society by the use of certain drugs. When one has regard to the possible deleterious effect of these drugs, the mandatory sentence could not be described as grossly disproportionate. Parliament is in a better position to determine the class of crimes which endanger the economic and moral fabric of the nation and the extent of the damage caused by that particular offence. The legislature, being representative of the people, is in a better position to determine both the attitude of society to specific crimes and the type of sentence which would be acceptable by society for certain types of criminal conduct. The minimum sentence prescribed in this case was then regarded by the legislature as the appropriate sentence for this kind of offence. (2) The concept of special circumstances was intended to mitigate the harshness of the minimum sentence and to provide an avenue for the exercise of the trial court's discretion where special circumstances were found to exist. The fact that the legislature did not ascribe a meaning to the term "special circumstances" meant that the decision as to whether special circumstances exist was left within the province of the courts. That was a sufficient safeguard against the imposition of a sentence which was so unfit having regard to the offence and the offender as to be grossly disproportionate. (3) The fact of the repeal of the subsection did not render the provisions unconstitutional. The applicant was sentenced at a time when a very serious view was taken of the offence of which she was convicted.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(3)(e) – right of an accused person to facilities to obtain the attendance and carry out the examination of witnesses to testify on his behalf – limits to right – need to show materiality of evidence and that it would be favourable to the defence

S v *Samakomva* HH-8-05 (Makarau J)

The applicant, a Reserve Bank official, was convicted on corruption charges. Evidence against him was given by accomplices, whose testimony the magistrate accepted. The applicant had at the start of the trial indicated that he wished to call two persons in his defence. The trial was adjourned to allow the witnesses to appear, but they declined to do so. When the applicant suggested that the witnesses be compelled to attend, the magistrate said that they might turn out to be hostile. In the event the witnesses were not called. At an application for bail pending appeal, the applicant argued that the prospects of success on appeal were good because the trial proceedings were so irregular as to violate his right to a fair trial. Held: the right granted to an accused person under s 18(3)(e) of the Constitution to facilities to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court did not mean that a request to have defence witnesses compelled by the court could be had just for the asking. The accused must demonstrate that the testimony of such witnesses will be both material and favourable.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 22(1) – right to reside in Zimbabwe — right of citizen to have alien spouse reside in Zimbabwe with her — interference with such right — removal of prohibited persons – husband a prohibited person at time of marriage due to expiry of visitor's permit – parties not attempting to regularise his position and attempting to deceive authorities – State's interests outweighing those of citizen

Jonasi-Ogundipe v *Chief Immigration Officer & Ors* S-13-05 (Gwaunza JA,Sandura & Ziyambi JJA concurring)

The applicant, a Zimbabwean citizen, married a Nigerian man in Zimbabwe. He was in the country on a temporary visitor's permit which had expired by the time the marriage took place. For some 5 years after the marriage he remained in Zimbabwe without the parties attempting to regularise his position with the immigration authorities. When his presence was fortuitously discovered by them he was deported. The applicant contended that the deportation of her husband constituted a contravention of her right to freedom of movement as enshrined in s 22(1) of the Constitution. She sought an order permitting him to return to Zimbabwe and reside with her. Held: (1) The husband was at the time of the marriage an illegal immigrant. In terms of s 14(1)(i)of the Immigration Act [*Chapter 4:02*] that fact alone rendered him a prohibited person. It was not necessary for him to be formally declared a prohibited person. His marriage to the applicant did not convert his

status from prohibited to non prohibited person. To attain the latter status, he still needed the requisite permit. (2) It was necessary to determine how the State's interests, in deciding who does or does not stay within its borders, were to be balanced against a Zimbabwean citizen's constitutional right to freedom of movement, in particular the right to have her spouse reside with her in Zimbabwe. The applicant's husband was declared a prohibited immigrant and deported because he had defied the laws of the country by staying for a period in excess of five years without a valid residence permit. He thus breached the duty imposed on an alien to observe the laws of his host country and conduct himself in a manner compatible with the good order of the State. Even though the applicant's husband did not commit a serious crime – indeed he was not even prosecuted – his conduct was aggravated by the actions of his wife, the applicant. She also jeopardized her chances of succeeding in the application, because instead of encouraging her husband to go back to Nigeria and submit his application for a residence permit from there (thereby submitting himself to the law), the applicant actively and knowingly aided and abetted him in his continued defiance of the law. When discovery was imminent, she sought to mislead the authorities. The scales thus tilted in favour of considerations of public interest, and the application must fail.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – challenge to constitutionality of statutory provision – need for applicant to show how his rights would be affected – not usually enough to make a bare allegation

ANZ (Pvt) Ltd v *Minister for Information & Anor* S-111-04 (Chidyausiku CJ, Cheda, Ziyambi, Malaba & Gwaunza JJA concurring)

Section 24 of the Constitution entitles a litigant to approach the Supreme Court on the allegation that the litigant's fundamental right has been violated. When such an applicant seeks to impugn a statutory provision the nature of the challenge should be set out in some detail. In particular, the application should set out the manner in which it is alleged that the offending provisions violate the applicant's constitutional rights. If this is not done respondents will have difficulty in understanding what case they have to meet. It will equally be difficult for the Court to fully appreciate the issues which it is required to determine. It is not enough to make a bare allegation unless such violation is obvious. The factual basis for such an allegation has to be set out in a manner that enables the Court to understand the nature of the allegation.

Constitutional law – Parliament – privileges of – right of Parliament to punish members for contempt of Parliament – status of Parliament when so doing – not sitting as a court of law – not bound by normal sentencing principles – Speaker's certificate stating matter to be one of privilege – finality of

Bennett v *Parliament of Zimbabwe* HH-18-05 (Hungwe J)

The applicant, an opposition member of Parliament, was involved in a fracas in Parliament with a Minister. A Parliamentary Select Committee on Privileges was established two days later and tasked to enquire into the conduct of the applicant and to report its findings to Parliament. Before the committee could present its report before Parliament the applicant filed an urgent application in which he sought an interdict preventing the committee from tabling its report, pending the determination of the effect of the prorogation of Parliament and a constitutional challenge he intended to mount. The Speaker issued a certificate in terms of s 6(1) of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*]. The certificate cited two grounds of privilege: (a) the privilege of absolute control over the internal proceedings of the House and (b) the parliamentary privilege of exclusive jurisdiction over a committal for contempt of the House. The High Court stayed the proceedings thereby giving effect to the Speaker's Certificate. The Committee tabled its report to Parliament. Following upon a debate of the report, the applicant was found guilty of contempt of Parliament and sentenced to an effective term of 12 months' imprisonment. He was then committed to prison.

An application was launched to secure his release pending the determination of an appeal to the Supreme Court and of review proceedings and constitutional challenges to be instituted shortly thereafter. It was argued that while s 13 of the Constitution, which guarantees the right to personal liberty, has an exception where deprivation of liberty is in execution of an order of Parliament punishing him for contempt, the Committee which inquired into the allegations had a majority of ruling party members who were biased against him. His right to a fair trial as enshrined in s 18(2) of the Constitution was infringed. It was also argued that once the proceedings of the Parliament were terminated with applicant's committal, the court could not be prevented from reviewing the whole process by the mere production of the Speaker's certificate.

Held: (1) when a matter is a proceeding of Parliament, beginning and terminating within its own walls, it is outside the jurisdiction of the courts; though there may be an exception for criminal acts so far as they may be understood within the term of proceedings of Parliament. (2) A finding of guilt by Parliament on a contempt charge is not a crime in the conventional sense. In using its powers under the Act in dealing with contempt offences, Parliament is not exercising a criminal or civil jurisdiction, but rather one *sui generis*, being the jurisdiction expressly authorised by law. (3) Parliament is not a court of law properly so called. Although it sits as such when imposing punishment on its members, it is not bound by the public sentencing principles as they are known to courts of law. It is exercising a special power vested in it as Parliament. (4) Effect would therefore be given to the Speaker's certificate.

Constitutional law – Parliament – sentence of imprisonment imposed by Parliament – whether incarceration may extend beyond dissolution of Parliament

Bennett v *Parliament of Zimbabwe & Ors* HH-24-05 (Patel J) (Judgment delivered 10 March 2005)

At the time of the application, the applicant, a member of Parliament, was serving a term of imprisonment imposed by Parliament for contempt, following a fracas in the House. Parliament was dissolved with effect from the end of March 2005. The applicant sought an order for his release from prison. It was argued that (a) he was entitled to a one-third remission of sentence; and (b) the sentence should terminate at the latest when Parliament was dissolved. Held: (a) in the exercise of its penal powers, Parliament sits as a court with full jurisdictional competence to inquire into and punish the commission of offences pertaining to Parliamentary affairs. For that purpose, it is "a court of competent jurisdiction" as envisaged in s 3(3) of the Interpretation Act [*Chapter 1:01*]. The applicant was thus a "convicted prisoner" within the meaning of s 2 of the Prisons Act [*Chapter 7:11*] and was properly covered by the provisions of s 109 of that Act, which provide for remission of sentence. However, the use of the word "may" in the section meant that the grant of remission to a convicted prisoner involves the exercise of a discretionary power, subject to the usual fetters governing the use of administrative discretion. The applicant was thus not entitled, as a matter of legal right, to one-third remission of his sentence, although if, when the time for remission was due, he was denied the benefit of remission on purely arbitrary or discriminatory grounds. (b) Section 63(8) of the Constitution declares that all parliamentary business pending in Parliament at the time of its dissolution must lapse at that time. Any such inchoate business is terminated and cannot be automatically revived in the new Parliament at its inception. However, the applicant's committal to prison was a completed matter requiring no further inquiry or determination by Parliament. In a sense, Parliament was effectively *functus officio* in the matter. (c) In relation to those acts and contempts which are declared to be offences under Part V of the Privileges, Immunities & Powers of Parliament Act [*Chapter 2:08*], Parliament sits as a court of record and is empowered not only to impose fines but also to commit offenders to imprisonment for a fixed term, even beyond the duration of the current session. Part V of the Act stands apart from the general provisions of Part VII and s 32. The applicant was found guilty of contempt in the form of offences specified in the Schedule and covered by Part V of the Act. The offences encompassed by these provisions and the consequences thereof fall outside the remit of s 32, permits Parliament to commit any person to prison only during the current session of Parliament.

Contract – breach – liability for – servants of party – servants performing acts in breach of contract – when party can be said to have breached contract – need to show that servants acting as agents of party allegedly in breach – vicarious liability – not a basis for liability for breach of contract

Mashoko v *Mobil Oil Zimbabwe (Pvt) Ltd* HH-51-05 (Makarau J)

The respondent was in the business of supplying fuel and motor oils. It had a number of service stations, operated under agreements with third parties. The applicant was one such third party. He leased from the applicant a service station in Harare. It was a specific term of the agreement between the parties that the applicant should faithfully procure from, and sell fuel and lubricants belonging to, the respondent. The applicant's employees were seen to have procured fuel from another company, receiving the delivery in the early hours of the morning. The fuel was paid for with money was stolen from the applicant. It represented takings from the service station for the day. Records were falsified to cover up the theft. The employees were subsequently arrested and charged with the theft and other offences. Holding the applicant vicariously liable for the acts of his employees, the respondent terminated the lease agreement between the parties. The applicant claimed that the employees concerned were acting outside the scope of their respective authorities and intended to sell the fuel for their own benefit without the applicant's knowledge. The issue to be

decided was whether the doctrine of vicarious liability applied in contract law to terminate a valid contract on the basis that the breach complained of was occasioned by the employees of the second party.

Held: (1) the doctrine of vicarious liability arises in delict. *Culpa* is the basis of the liability as, in a way, the employer is being held responsible for employing a "negligent" employee even where no fault is attributable to the employer. The doctrine, based as it is primarily on the dual grounds of *culpa* and social policy, is peculiarly born and bred of the law of delict. It has no equal application in the law of contract. (2) Failure by one party to comply with the terms of an agreement through the conduct of his employees may amount to breach of the contract in appropriate circumstances, but liability is based on the principles of agency and not on those of vicarious liability. (3) The respondent did not allege agency but vicarious liability. Even if the respondent had not specifically alleged and argued its case on the basis of agency, the matter could have been decided on that basis had the respondent proved that the applicant's employees were duly mandated to act as they did or that, on some other recognised basis, their acts were the acts of the applicant. This the respondent failed to do. The applicant's employees were not performing any of his obligations under the agreement with the respondent when they sourced fuel from the other company. They did not have his express mandate to do so nor could such a mandate be implied from the circumstances of the matter.

Contract – donation – from one spouse to another – when proper – revocation of donation – when donation may be revoked

Malaba v *Malaba* HB-14-05 (Ndou J)

A donation, or *schenking*, is a contract whereby one person, who is not under obligation to do so, but out of sheer liberality, promises to give another person something without receiving anything in return. The motive should be a disinterested benevolence and for moral purposes. This motive of liberality, the *animus donandi*, is the distinguishing feature of a donation. A donation from a husband to his wife which took place against the background of serious illness of the donor who was wholly dependent on the donee and in the middle of gross matrimonial discord would not be a proper one. A donation may be revoked in exceptional circumstances. These include gross ingratitude on the part of the donee or ill-treatment of the donor by the donee; and malicious desertion of her husband by a woman.

Contract – formation – mistake – unilateral mistake – when may vitiate contract – no fraud, nor knowledge of mistake on part of buyer – offer already accepted by buyer when alleged mistake discovered – contract upheld

ZESA v *Smith & Ors* S-9-05 (Sandura JA, Ziyambi & Gwaunza JJA concurring)

The respondents, who were all employees of the appellant, were tenants of houses owned by the appellant. The appellant, as part of a commercialization exercise, resolved to sell all its "non-designated" houses to the sitting tenants, and as required by the relevant legislation, obtained Ministerial consent to the sale. Contracts of sale were drawn up, and the respondents made the necessary payments. When it came to transfer, the appellant refused to do so. It claimed that it had made an error, in that the houses should not have been classed as "non-designated". It wrote to the respondents, purporting to withdraw the offer of sale. The respondents sought and obtained an order of specific performance. On appeal, held: (1) Even if there was a mistake in this case it was a unilateral mistake, one which exists when one party to the contract is mistaken but the other is not. Such a mistake would not justify the cancellation of the sale agreements. The appellant agreed to sell and did sell the houses in question to the respondents who paid the purchase prices in full. That is what the parties intended doing and that is what they did. (2) Where an offeror mistakenly makes an offer that is accepted by the offeree, the offeror will only be able to rescind the contract if (a) the offer was induced by fraudulent misrepresentation by the offeree; or (b) the mistake was a material one and the offeree knew or ought to have known that the offer had been made in error.

Contract – interpretation – contract of sale – provision that purchase price payable upon receiving a mortgage and within stipulated period – not a condition precedent – party not in default not entitled to cancel contract

Maguta v *Chikunichawa* S-102-04 (Chidyausiku CJ, Malaba & Gwaunza JJA concurring)

The parties entered into a contract for the sale of a house. The contract provided that the purchase price was payable in cash upon the purchaser receiving a mortgage bond within a period of four weeks from the date of signature. It also provided that in the event of a breach not being remedied within 14 days of the posting of a written notice to the purchaser to do so, the seller was entitled to cancel the contract. The purchaser failed to obtain a bond within the stipulated period and the seller cancelled the contract, without giving the purchaser notice. It was contended by the seller that the provision

about the purchase price was a condition precedent that was unfulfilled and accordingly the contract had not come into operation. Held: where the language clearly indicates that the securing of the purchase price and its payment is a condition precedent of the agreement of sale coming into force, failure to comply with such agreement means the agreement of sale never comes into operation until that condition is fulfilled. In this case, however, a proper interpretation of the contract clearly indicated that it was not the intention of the parties to make the failure of payment of the purchase price a condition precedent to the coming into effect of the agreement of sale. The clear intention of the parties was that in the event of the other party breaching any condition of the agreement, including the payment of the purchase price by the stipulated date, it would entitle the other party to give notice of fourteen days of such breach and demand compliance. In the event of the other party failing to comply within the stipulated fourteen days after being placed in *mora*, only then would cancellation of the agreement become lawful. As the seller had not placed the purchaser in *mora*, he was not entitled the contract.

Contract – performance – condition precedent – condition that purchaser of house obtain loan from specific bank – loan obtained from building society – equivalent performance entitling purchaser to take transfer

Mazodze v *Mangwanda* S-100-04 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring)

The appellant sold a house to the respondent. One of the conditions of the sale was that the respondent should obtain a loan from a specific bank. Instead of obtaining a loan from that bank, the respondent obtained a mortgage bond from a building society. He tendered payment but the appellant sought to resile from the contract on the pretext that the transference was not strictly in accordance with the wording of the agreement. The High Court upheld an application by the respondent for an order that the house be transferred to him. On appeal, the appellant sought to lead further evidence that he had, on purporting to cancel the agreement, sold the house to a third party. This fact had not been disclosed to the High Court. Held: (1) even though there was a condition precedent the respondent had satisfied it by tendering the purchase price within the stipulated period even though the money was not from the specific bank. (2) However, when the High Court issued the order for specific performance the property was registered in the name of the third party, who was not a party to the proceedings. Had the court had been aware that the property an order had already been transferred to a third party, it would have directed that the third party be joined to the proceedings and given an opportunity to defend his rights in the property. Accordingly, the matter would be referred back to the High Court, so that the third party could be joined and a determination reached after that party had shown whether or not he was an innocent purchaser.

Contract – termination – fixed term contract – when may be terminated before end of contract period – early termination lawful if provided for in the contract

Dairibord Zimbabwe (Pvt) Ltd v *Lighton Trading (Pvt) Ltd* S-97-05 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring) (Judgment delivered 23 May 2005)

The appellant and the respondent entered into a franchise agreement, in terms of which the latter was appointed the sole franchisee of the appellant to sell and distribute its milk and other dairy products in the district of Kwekwe for a five year period from the date of signature of the agreement. To facilitate the operation of the franchise the respondent was allowed to occupy the appellant's business premises in the town and to lease a house at a fixed monthly rental. The contract provided that either party might terminate the agreement at any time after the expiration of one year from the date of the agreement by giving to the other party two months' notice in writing. It also provided that on termination of the agreement for any cause the respondent had to deliver up the premises from which it operated the franchise and all the appellant's equipment. If for any reason the respondent contested the termination, it was still obliged to deliver up the premises which it operated from and all the appellant's equipment contained therein, pending the outcome of the dispute. When the appellant gave the requisite notice and demanded the return of its premises, the respondent argued that it was not entitled to do so. Held: There is no law to the effect that once parties have entered into a franchise agreement and fixed the period of its termination they cannot provide in the same contract for its termination by either of them on notice to the other. In the absence of such a law it would not be unlawful for the parties to have as a term of the franchise agreement the stipulation that it may be terminated by either party on notice at any time before the expiration of the fixed period.

Costs – *de bonis propriis* – legal practitioner – legal practitioner accepting appointment as executor dative – client accused of having murdered deceased – reprehensibility of such conduct

Wang & Ors v *Ranchod NO & Anor* HH-50-05 (Bhunu J)

See above, under ADMINISTRATION OF ESTATES (Executor dative – appointment).

Costs – legal practitioner and client scale – deceitful conduct of unsuccessful party

Mazodze v *Mangwanda* S-100-04 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring)

See above, under CONTRACT (Performance).

Court – Administrative Court – appeal noted against order of court – court having no power to order execution of judgment in spite of noting of appeal – not a court of inherent jurisdiction

ANZ (Pvt) Ltd v *Minister for Information & Anor* S-111-04 (Chidyausiku CJ, Cheda, Ziyambi, Malaba & Gwaunza JJA concurring)

See aboe, under APPEAL (Administrative Court – noting of appeal against order of).

Court – contempt – disobedience to court order – imprisonment for – release from imprisonment – need for contemnor to purge contempt by obeying order

Fuyana v *Moyo & Ors* HB-39-05 (Cheda J)

The applicant was imprisoned for contempt of court. In earlier litigation he had been ordered to surrender the title deeds to a property, failing which he would be imprisoned for 3 months. He refused to surrender the deeds and was imprisoned. The order also stated that duplicate deeds could be issued for the purpose of transferring the property. This was done and the property was transferred. The applicant then sought his release from prison, arguing that the contempt had been cured by the transfer of the property and that imprisonment served no further purpose. Held: the applicant had missed the point. The issue was that he refused to obey a court order, the sanction for which was a period of imprisonment. To avoid further incarceration he should obey the court order and surrender the title deeds.

Court – Labour Court – exclusive jurisdiction of over labour matters – matter ancillary to issue of whether employment properly terminated – not competent for High Court to determine such a matter

Zimtrade v *Makaya* HH-52-05 (Makarau J)

See below, under EMPLOYMENT (Labour court – exclusive jurisdiction over labour matters).

Court — small claims court — review of decision of – procedure – normal review procedure to be followed – grounds for review – limited to method by which court's decision arrived at

Zhou v *Global Motors & Anor* HH-11-05 (Makarau J)

The Small Claims Court was set up in 1993 for the adjudication of small civil claims in an inexpensive fashion. It is not a court of record and procedure therein is largely informal. No appeal lies from its decisions. It is not permissible to bring an appeal under the guise of a review. An application for review must be limited to attacking the manner in which the decision of the small claims court was arrived at rather than the merits of the decision. The review must be brought by way of court application on notice to the other side and to the small claims court whose decision is to be reviewed.

Court – Supreme Court – jurisdiction – application for stay of execution pending appeal – application ancillary to appeal already noted – Court having jurisdiction to deal with application

Court – Supreme Court – jurisdiction – review – rectification of irregularity – Deputy Sheriff issuing warrant of execution despite noting of appeal – an irregularity that may be corrected on review

Net-One Cellular (Pvt) Ltd v *Net-One Employees & Anor* S-40-05 (Chidyausiku CJ, in chambers)

The respondents, who were employees of the applicant, went on strike. The matter was referred to arbitration in terms of s 98 of the Labour Relations Act [*Chapter 28:01*]. The arbitrator ruled in favour of the employees. An appeal by the employer to the Labour Court having failed, the arbitrator's award was registered with the High Court in terms of s 98(14) of the Act. An appeal by the employer to the Supreme Court was pending. The employees, in the meantime, had taken out a writ of

execution against the applicant's property. An application was made to the High Court for a stay of execution pending the determination of the appeal by the employer against the decision of the Labour Court. The application for the stay of execution was dismissed on the grounds that the applicant did not establish any of the limited grounds upon which a superior court might interfere with the arbitral decision. An appeal was noted against this ruling, and the applicant applied to the Supreme Court for an order that there should be no sale in execution until the two appeals had been determined. The respondents argued that the Supreme Court had no jurisdiction to hear the matter, as its original jurisdiction was limited to constitutional cases. Held: (1) The application was not one involving original jurisdiction. It was ancillary to two appeals the court was already seized with, and once the court is seized with a matter it has inherent jurisdiction to control its judgment. The inherent jurisdiction to control the court's judgment includes jurisdiction to control the court's process, that is, jurisdiction to determine whether or not execution of a judgment should be permitted pending the hearing of an appeal. (2) At common law a decision of a lower court in respect of which an appeal has been noted cannot be executed upon. It can only be executed upon after leave to execute has been granted, and no such leave was applied for or granted *in casu*. Although the applicant sought to stay the execution on the grounds that an appeal had been noted, it was entitled to a stay of execution by operation of the law once the employer noted an appeal. None of the appeals in this case were made in terms of s 97(1) of the Act and thus protected from suspension upon the noting of an appeal. (3) The Supreme Court had jurisdiction, in terms of s 25 of the Supreme Court Act [*Chapter 7:13*], to rectify, on review, an irregularity which had occurred in a lower court. The issue of a warrant of attachment on the basis of a judgment that had been appealed against and was therefore not executable was such an irregularity.

Criminal law (statutory offences) – Official Secrets Act [*Chapter 11:09*] – s 4(2) – having possession of information and publishing such information – nature of information that must be published – must relate to military and related matters

S v *Chiyangwa* HH-21-05 (Hungwe J)

The applicant, a member of Parliament, had been arrested and placed on remand in custody on an allegation of contravening s 4(2) of the Official Secrets Act [*Chapter 11:09*]. It was alleged that he had passed information to an agent in South Africa concerning the issues of who was going succeed the President and corruption investigations against senior member of the Politburo of ZANU(PF). Held: an offence under the section is committed by a person who (a) has possession of information relating to military matters or the preservation of the security of Zimbabwe or the maintenance of law and order by the police force or any other body so lawfully established for the purposes of assisting in the preservation of the security of Zimbabwe and (b) publishes or communicates such information to any person in any manner for purposes prejudicial to the safety or interests of Zimbabwe. Where one of these elements is lacking and is not alleged either in the request for remand form or verbally by the prosecutor, it could not be objectively said that a *prima facie* case for reasonable suspicion has been made out, justifying placing a person on remand.

Criminal procedure – admissions – procedure to be followed where prosecutor seeks admissions from accused – prosecutor not entitled to interrogate accused to obtain admissions

S v *Kajokoto* HH-32-05 (Gowora J)

The accused in a criminal trial pleaded not guilty and outlined the basis for his defence. The prosecutor applied for admissions. When the application was granted, the prosecutor proceeded to interrogate the accused, as a result of which the accused made various admissions. Held: the magistrate did not comply with the requirements of s 314(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The magistrate should have ascertained from the prosecutor what facts it was intended to be sought as admissions. It was the duty of the magistrate, not the prosecutor, to ask the accused person if he was willing to admit the facts concerned in order to obviate the need to adduce evidence. The admissions envisaged by the section are for purposes of clarifying the facts in issue or those facts which do not appear to be in dispute. It is not intended under this section to give the prosecutor an opportunity to cross-examine the accused and force him to make admissions in the absence of any evidence from the State.

Criminal procedure – charge – dismissal of – failure to start trial within 6 months of case being presented – when case is considered to be pending before the High Court

Criminal procedure – trial – venue – change of – when High Court may order change of venue – High Court may not order trial to be transferred to magistrates court

Mukuze & Anor v *A-G* HH-2-05 (Uchena J)

The applicants were indicted for trial before the High Court. Some 6 months after they were indicted, they appeared before the court but the trial did not get under way. Shortly after that the Attorney-General instructed that they be tried before the regional magistrates court. They applied for an order under s 160 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] dismissing the charges against them, as the trial had not started within 6 months of the indictments having been served on them. It was argued for the Attorney-General that as the applicants had not pleaded, the indictments had not been "presented" in terms of s 161 of the Act. Held: (1) once the indictments had been served on the applicants and lodged with the Registrar, the case was in terms of s 137 pending before the High Court. (2) The provisions of s 161 authorising the High Court, upon application, to order that the trial be held at another place than that specified in the indictment did not mean that the Court could order the trial be held in a court other than the High Court. It merely meant that the trial could take place in another venue of the High Court. It was not competent for the Attorney-General to change the venue. (3) The six-month period mentioned in s 160 could be interrupted (a) if the accused person is through circumstances beyond the control of the Attorney General not available to stand trial or (b) if the Attorney-General has in terms of s 108 ordered a further examination to be taken.

Criminal procedure – charge – dismissal of for failure to start trial within 6 months of committal for trial – meaning of dismissal – not tantamount to an acquittal

Mukuze & Anor v *A-G (2)* HH-17-05 (Mavangira J)

Section 160(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that if an accused person is not brought to trial after the expiry of six months from the date of his committal for trial, his case shall be "dismissed". Such "dismissal" does not amount to an acquittal, nor does it relate to prescription. It relates to the committal and the effects or consequences or implications thereof. The subsection is meant to protect accused persons from being unreasonably kept under committal for trial for longer than six months when the trial has failed to take place during that period, as well as to ensure that the Attorney-General ensures that trials of accused persons committed for trial are expeditiously conducted.

Criminal procedure – review – remittal to trial court – when matter may be remitted – trial court not having considered mandatory provisions regarding punishment for driving offence – matter remitted for sentence to be passed afresh

S v *Mhona & Anor* HB-56-05 (Ndou J) (Judgment delivered 30 June 2005)

The two accused were bus drivers who had been convicted, in separate trials, of negligent driving. They were sentenced to a fine and were prohibited from driving for 6 months. The legislation requires that, unless the court that there are special circumstances justifying a shorter period, a bus driver who is convicted of negligent driving must be prohibited from driving for at least two years. There was no enquiry carried out by magistrate on the existence of special circumstances and thus there was no finding in this regard. Held: there is no other specific situation, apart from s 29(5)(b) of the High Court Act [*Chapter 7:06*] in which a reviewing court may remit a case to the trial court for sentence, but the court's wide powers to remit the case to the trial court, with instructions about the further proceedings to be had in the case, would entitle it, in appropriate circumstances, to confirm the conviction entered by the magistrate but send the case for sentence to be passed afresh, in the light for example, of further evidence which the magistrate is instructed to hear. Accordingly, the matter would be remitted to the trial court for the magistrate to impose sentence afresh, having regard to the mandatory provisions regarding prohibition.

Criminal procedure – specification of person suspected of corruption offences – requirement for Minister to have reasonable suspicion that offence committed – how such requirement may be satisfied – applicability of procedure to non-citizens

Mawere v *Min of Justice* HH-1-05 (Uchena J)

The applicant was "specified" by the respondent Minister under s 6(1) of the Prevention of Corruption Act [*Chapter9:16*]. It was argued on review *inter alia* that (a) the Minister did not have the jurisdictional facts to entitle him to exercise his discretionary power to declare the applicant to be a specified person; and (b) the Act did not have extra-territorial application and created no crime or conduct that has extra-territorial effect. Held: (1) The issue to be decided was whether or not the Minister had information on which he would reasonably suspect that the applicant had done something for which he could be specified. The Minister is expected to act on reasonable suspicion. This does not require the firm resolution of conflicting evidence that guilt beyond reasonable doubt demands, nor even a preponderance of probability. Suspicion is not certainty

as to the truth; it is a state of conjecture or surmise without proof of what is suspected. The test to be applied is the same as that for arrest without a warrant. The Minister is not required to possess anything more than information that would lead a reasonable person to suspect that any of the stated offences may have been committed. He is allowed a wide and unfettered discretion, only qualified by the requirement of reasonableness. That requirement is met if in fact there was in existence an objective foundation of fact or evidence on which the suspicion could be justified. (2) The fact that the applicant had ceased to be a citizen did not mean that the Act did not apply to him. The crucial issue was the allegation that the applicant and another person were externalizing foreign currency earned through the sale of products from a Zimbabwean company the applicant has interests in. If the applicant were a foreigner who had no property or business in Zimbabwe and could not contravene ss 6(1)(a) - (e) of the Act then the Act would certainly have been inapplicable to him.

Criminal procedure – trial – conduct of – right of accused to court's assistance to secure presence of witnesses – limits to right – accused must show materiality of evidence and that it would be favourable to the defence

S v *Samakomva* HH-8-05 (Makarau J)

See above, under CONSTITUTIONAL LAW (Declaration of Rights – s 18(3)(e)).

Criminal procedure (sentence) – principles – suspension of portion of sentence – magistrate declining to suspend portion of sentence on grounds that accused were foreigners – whether a misdirection

A-G v *Steyl & Ors* S-11-05 (Chidyausiku CJ, in chambers)

The respondents had been sentenced by a magistrate to a term of imprisonment on a charge of contravening the Immigration Act. The magistrate had refused to suspend portion of the sentence on the grounds that the respondents were foreigners. They appealed to the High Court, alleging that the sentence was manifestly excessive. No misdirection was alleged. At the hearing, the Attorney-General's representative conceded that part of the sentence should have been suspended. The High Court altered the sentence accordingly, holding that the magistrate had misdirected himself in ruling that it was not competent to suspend a sentence or portion of a sentence imposed on a convicted foreigner. The Attorney-General applied for leave to appeal against the High Court's decision. Held: leave should be granted. An appellate court can only interfere with a sentence imposed by a lower court on two grounds. Firstly, when the sentence imposed is manifestly excessive and, secondly, when the lower court misdirects itself leaving the appellate court at large to consider an appropriate sentence. The probabilities were that an appeal court would conclude that the court *a quo* misdirected itself by holding itself at large on the question of sentence. Further, there were conflicting decisions of the Supreme Court on whether it was competent to suspend a sentence imposed on a foreigner. This conflict could best be resolved by the Court and not by a judge in a chamber application.

Criminal procedure (sentence) – common law offences – public violence – serious nature of offence – factors which should be considered

S v *Mangena & Ors* HB-22-05 (Ndou J, Chiweshe J concurring)

Public violence, *vis, publica*, is generally a serious offence striking at the roots of orderly and peaceful co-existence. It is aimed at a vital and main objective of criminal law itself. Public violence usually calls for exemplary sentences. Aggravating factors would include the fact that a large number of persons were involved; that other persons were assaulted; that property was damaged; that weapons were used; that the accused played a pivotal role in the offence; and that the authority of public officials was challenged. Against all these factors the ages and personal circumstances of the accused must to be considered. The sentencing court has a duty to enquire into the subjective elements in order to individualise the punishment.

Criminal procedure (sentence) – statutory offences – Sexual Offences Act [*Chapter 9:12*] – s 16 – sentence applicable when it is proved that convicted person was infected with HIV at time of offence – test carried out after offence committed – need for test to be carried out within 30 days after the offence – test carried out later not raising presumption that accused infected at time of offence

S v *Safiko* HH-31-05 (Makoni J)

Under s 16 of the Sexual Offences Act [*Chapter9:12*], when a person who is convicted, *inter alia*, of having sexual intercourse with a young person, and it is proved that at the time of the offence he was infected with HIV, he is liable to be sentenced to up to 20 years' imprisonment. This is not a mandatory minimum sentence. Under s 18(2), if it is proved that he was infected with HIV, within 30 days after committing that offence, it is presumed, unless the contrary is shown, that he was infected with HIV when he committed the offence. For the presumption to operate, the test must have been done within 30 days after the commission of the offence. A test carried out several months later and showing that he is infected with HIV does not cause the presumption to operate.

Customary law – child – legitimacy – child born during subsistence of customary law marriage – presumption of legitimacy

Shumba v *Shumba* HB-25-05 (Ndou J, Cheda J concurring)

By African law, the custody and guardianship of children born in wedlock rests on the father. There is a presumption of legitimacy and that the husband is the father of the children. There is a presumption against bastardising a child. Generally, children born of, or conceived by, a wife during the course of her customary marriage, whether legitimate or adulterine, belong to her house, and so to her husband. Under Shona law, any children born in wedlock are automatically affiliated to the husband's family. This rule is ascribed to the payment of "roora" bride wealth, which operates to transfer the woman's child bearing powers to her husband.

Customs and excise – smuggled goods – forfeiture of – when forfeiture should be ordered – special circumstances for not ordering forfeiture – goods and vehicle in transit to another country – vehicle with hidden compartment – owner of vehicle unaware of modification

Frenken v *Controller of Customs* HH-27-05 (Hlatshwayo J)

The applicant, a German national working for a mission in Mozambique, arrived at a border post in Zimbabwe in a vehicle belonging to the mission though registered for convenience in the applicant's name. He was in transit to Mozambique. He did not declare the various goods which were stored in a hidden compartment in the vehicle. The applicant admitted that he personally had the compartment designed in order to create additional storage space and occasionally to conceal goods from thieves and not from customs officials. The vehicle, goods and certain sums of money were confiscated by customs. On application for the return of the confiscated items, held: (1) Under s 182 of the Customs and Excise Act [*Chapter23:02*], any person who smuggles goods is guilty of an offence. Failure to declare goods on one's person or in one's custody amounts to smuggling. Even in non-commercial cases of smuggling it is now the rule rather than the exception for the courts to order forfeiture of the goods, the only exceptions being where the offender can show that "special circumstances" exist. (2) There were special circumstances in this case. The only purpose for which the applicant imported the goods was to export them immediately, which rendered them exempt from duty. The community would not be harmed in any way by releasing them to the mission in Mozambique. (3) As for the forfeiture, s 188(3) of the Act subjects to forfeiture any vehicle which, *inter alia*, "has false bulkheads, false bows, double sides or bottoms or any secret or disguised place whatsoever adapted for the purpose of concealing goods". There being no evidence that the applicant was an inveterate smuggler, it was difficult to conclude that the modification was designed to smuggle goods and thus justify forfeiture in terms of s 188(3). At any rate, the true owners of the vehicle, the Mission, were unaware that it had been so modified. Under s 209(3)(b)(ii), forfeiture may not be ordered where the owner is unaware of the adaptation.

Election – candidate – eligibility – must be eligible for registration as voter – person sentenced to imprisonment for six months or more – person sentenced by Parliament for disciplinary reasons – not sentenced by a court of law – eligible for registration as voter and thus eligible as candidate for Parliament

Bennet v *Constituency Elections Officer, Chimanimani & Ors* EP-001-05 (Uchena J) (Judgment delivered 15 March 2005)

The appellant was serving a term of twelve month's imprisonment for contravening Item 16 of the Schedule (s 21) of the Privileges, Immunities and Powers of Parliament Act [*Chapter2:08*]. The sentence had been imposed by Parliament when he was a sitting member, following a fracas in the House. His nomination as a candidate in the 2005 general election was rejected by the first respondent on the grounds that he was serving a sentence of more than 6 months and thus, in terms of para 2(1) of Schedule 3 of the Constitution was not eligible for nomination, being disqualified as a

voter in terms of para 3(2)(c) of the Schedule. This provides that a person who has been convicted of a criminal offence and sentenced by a court to imprisonment for a term of six months or more is disqualified as a voter for the period of his imprisonment. The appellant appealed to the election court, seeking the reversal of the first respondent's decision and orders entitling him to submit his papers before the nomination court. It was argued that Parliament is not a court of law and therefore imprisonment by it does not disqualify one from registration as a voter and therefore from standing for election to the office of Member of Parliament.
Held: (1) If he had been convicted by a court of law, the magistrates court or the High Court, there was no doubt that the applicant would be disqualified.
(2) What the appellant did constituted a criminal offence under the Privileges, Immunities and Powers of Parliament Act.
(3) A finding of guilty by Parliament on a contempt offence is not a crime in the conventional sense. When dealing with contempt offences Parliament, though sitting as a court, does not sit as a court of law. Its proceedings are not in the nature of a public criminal trial. Its proceedings do not resemble a criminal trial. It does not sit as an independent and impartial court. It sits to regulate its internal affairs.
(4) Parliament can choose how it wants to deal with any one alleged to have committed a contempt offence. The nature of a contempt offence is coloured by how Parliament decides to deal with it. If it decides to deal with it itself the contempt offence becomes a contempt against the authority and integrity of Parliament. If it resolves in terms of s 22 of the Act that the Attorney-General prosecute, then the offence becomes a public crime. In this case it chose to deal with and punish the appellant itself.
(5) Parliament's finding the appellant guilty of a contempt offence did not constitute a criminal conviction in the conventional sense. The sentence imposed on him did not therefore disqualify him from registration as a voter nor from standing as a candidate for election to the office of Member of Parliament.

Employment – appeals under Labour Act [*Chapter 28:01*] and regulations – appeal to Labour Court

See above, under APPEAL (Labour Court)

Employment – appeals under Labour Act [*Chapter 28:01*] and regulations – appeal to Labour Relations Tribunal

See above, under APPEAL (Labour Relations Tribunal)

Employment – code of conduct – disciplinary proceedings under – appeal to designated authority – provision in code that decision of designated authority "shall be final" – effect – appeal allowed on technical grounds, not on merits – designated authority entitled to remit matter for hearing afresh

Mackenzie v *Rio Tinto Zimbabwe* S-144-04 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

See above, under ADMINISTRATIVE LAW (Appeal – code of conduct).

Employment – code of conduct – binding nature of – grievance procedure providing that named officer's decision would be final – limit to which such officer's decision may be interfered with

Olivine Industries (Pvt) Ltd v *Jack & Ors* S-138-04 (Cheda JA, Sandura & Ziyambi JJA concurring)

In terms of the appellants' code of conduct, disciplinary and grievance procedures were different. While disciplinary matters could result in an appeal to the Labour Relations Tribunal, grievance procedures ended with a senior management employee entitled the Head of Business. There was no provision for any further appeal. Where certain employees were aggrieved by a regrading exercise, they appealed to the Labour Relations Tribunal, which interfered with the decision of the Head of Business. On appeal by the appellant, held: the Tribunal should not have interfered with the resolution of the matter by the Head of Business, as this was in accordance with the agreement entered into by the parties. The Tribunal could only interfere where the Head of Business's exercise of its discretion was based on an error, such as where he had acted on a

wrong principle, or took into account extraneous or irrelevant matters or did not take into account relevant considerations or was mistaken about the facts.

Employment – contract – termination – application to labour relations officer for order terminating employment – misconduct proved – no discretion other than to order dismissal

Tedco Mgmt Svcs v *Chikwanda* S-23-05 (Ziyambi JA, Sandura & Gwaunza JJA concurring)

The respondent was suspended from employment without pay pending determination by a labour relations officer of an application to terminate his employment. Although the stated allegations of misconduct were proved, the Labour Relations Tribunal, on appeal, ordered that the appellant be allowed to terminate the respondent's contract of employment, subject to paying the respondent an exit package as at the date of the suspension. Held: once dismissible misconduct has been established, the judicial officer has no discretion in the matter and may not ordered anything other than the punishment of dismissal imposed by the Regulations. If, on the other hand, the grounds of suspension are not proved, he must order reinstatement. No other option is open to him.

Employment – contract – termination – grounds for – conduct inconsistent with the fulfilment of the express or implied conditions of the contract of employment – such conduct giving *prima facie* right to employer to dismiss employee – what employee must show to avoid dismissal – employee's intention – lack of intention to defraud – relevance of

Standard Chartered Bank v *Mapuka* S-125-04 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

The respondent, a senior bank employee, had, acting under a scheme to assist employees to build their own homes, obtained cheques from his bank to pay to building contractors or suppliers of building materials. Instead of paying the cheques to the payees, he altered the names of the payees and paid the cheques into his wife's account, from which he drew the bulk of the proceeds. He was charged with and convicted of conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment, and dismissed from his employment. Appeals to the grievance and disciplinary committee and the appeals board were unsuccessful, the board taking the view that the misconduct was not trivial and inadvertent but serious and deliberate. On further appeal to the Labour Relations Tribunal, the Tribunal confirmed the determination that the conduct which was inconsistent with the fulfilment of the express or implied conditions of the respondent's contract of employment, but without the question having been raised by the respondent, it nonetheless considered the correctness or otherwise of the decision by the appeals board that the misconduct gave the bank the right to dismiss him from employment. It found that the conduct did not prejudice the bank and reduced the penalty to a final warning. On appeal by the bank to the Supreme Court, held: (1) Conduct which is found to be inconsistent or incompatible with the fulfilment of the express or implied conditions of a contract of employment goes to the root of the relationship between an employer and an employee, giving the former a *prima facie* right to dismiss the latter. It is then up to the employee to show that his 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) That the respondent's intention was not to defraud the bank and that no prejudice was suffered by Standard Chartered as a result of his acts is of questionable relevance, because the alleged intention of a fraudulent employee cannot be taken as a standard with which to determine whether an employer acted reasonably in taking the view that the misconduct was so serious in nature as to justify dismissal. The unlawful intention would have been one of the circumstances which put the employee in the position in which he considered the pursuit of personal interest more important than the honest discharge of his duties to the employer. (3) The relationship between the bank and the respondent was one based upon trust and confidence. It was sufficient that in dismissing him from employment the bank felt that as a result of his own acts of misconduct it could not continue in future to repose in him the trust and confidence that he would perform his duties as a senior member of staff with a high degree of honesty.

Employment – contract – termination – grounds for – failure to obey lawful order – when order may be said to be lawful

ZCTU v *Makonese* S-141-04 (Cheda JA, Chidyausiku CJ & Malaba JA concurring)

In a case where a person is dismissed for disobeying a lawful order, the order may be said to be lawful where:

(a) it is given by the employer;

(b) it is capable of being carried out by the employee;

(c) it is for the advancement of the employer's business;

(d) it is closely related to the duties of the employee; and

(e) it is not a wrongful act.

Employment – contract – termination – grounds for – worker employed on basis of his specialised skills – failure to perform work with reasonable skill and competence – such a ground for dismissal

Total Zimbabwe (Pvt) Ltd v *Moyana* S-127-04 (Malaba JA, Sandura & Gwaunza JJA concurring)

An employee who holds himself out as being skilled to do a certain type of work and is employed on that basis impliedly undertakes that he possesses and will exercise reasonable skill or competence in that work. Throughout the period of the employment he owes a duty to his employer to perform his work with reasonable skill or competence. "Skill" embraces "care", such that facts which show lack of "due care" in the performance of work may be evidence of lack of skill which an employee charged with incapability or incompetence by implication held himself out to possess. There is no distinction in this situation between possessing skill and exercising it. When an employee signs a contract of employment which has a specialised job description, which has been brought to his attention, the implication is that he has the requisite skill for the proper performance of the work that he was engaged. In signing the contract, he has by implication undertaken to exercise reasonable skill in the performance of the work in its various facets. Failure to do so could render him liable to dismissal.

Employment – contract – termination – unlawful – damages for – when to be calculated from – employee under suspension securing another job before dismissal – effect – distinction between an employee under suspension and one who is dismissed

Tel-One (Pvt) Ltd v *Zulu* S-110-04 (Chidyausiku CJ, Cheda & Ziyambi JJA concurring)

The respondent was suspended from his employment without pay pending investigation into allegations of misconduct. Eighteen months later he secured a job with another employer. He remained there for 6 months, when he was dismissed, the appellant having told the new employer that the respondent was employed by them and under suspension. A labour relations officer approved the application to dismiss the respondent. Sixteen months later that the respondent secured another job at a lower wage than he got from the appellant. When the matter went before the Labour Tribunal, the appellant conceded that the dismissal was unlawful and that damages would have to be paid. The Tribunal ordered that the appellant pay wages and benefits from the date of suspension until the date the respondent secured the second job, less what he received from the first job; plus damages equal to the difference between what he got from the second job and what he would have got had he stayed with the appellant, up to the date the appellant agreed the dismissal was unlawful. Held: (1) An employee who is on suspension is under a legal obligation to avail himself for duty to his employer during the period of suspension. If he takes employment during the period of suspension he repudiates his contract of employment. It makes no difference whether the suspension is without or without pay. By taking up the first job, the respondent repudiated his contract of employment with the appellant on that day. That repudiation terminated the contract of employment between the appellant and the respondent. (2) An employee who has been dismissed, whether lawfully or unlawfully, is under an obligation to mitigate his damages as quickly as possible and failure to do so might cause him to be denied damages. (3) Damages would thus be paid from the date of suspension until the date the respondent started the first job.

Employment — contract — termination — wrongful dismissal — damages for — how to be calculated – entitled only to compensation for period between date of dismissal and date when could be reasonably expected to have found alternative employment

Duly Hlgs Ltd v *Spanera* S-140-04 (Chidyausiku CJ, Sandura & Ziyambi JJA concurring)

The respondent was dismissed from his employment. Some 5 months later he found another job, at a lower salary that he had enjoyed with the appellant. He stayed in that job until he left it, of his own choice, about a year later. Subsequently, the Labour Relations Tribunal found the dismissal to be unlawful, and ordered the respondent's reinstatement or, failing reinstatement, damages. The damages ordered were back pay from the time of dismissal until he took the other job, plus damages equal to his salary from the time he took the second job until the date of judgment, less what he had earned in that other job. Held: an employee who is wrongfully dismissed is entitled to be compensated only for the period between his

wrongful dismissal and the date when he could reasonably have expected to find alternative employment. The respondent was entitled to his back pay and allowances from the date of his dismissal by the appellant to the date he found employment with the second employer, but no more as his resignation from that job was his own decision.

Employment – employee – strike action by – not entitled to wages during period where labour withheld – no change to common law position

Employment – Labour Court – jurisdiction of – application for interdict – only entitled to hear applications or appeal brought in terms of Labour Act or other enactment – not thereby entitled to entertain application for interdict

NRZ v *Zimbabwe Rly Artisans Union & Ors* S-8-05 (Ziyambi JA, Chidyausiku CJ & Gwaunza JA concurring)

Members of the respondent unions, employees of the appellant, embarked upon a collective job action. A few days later the Labour Court issued a disposal order by consent, to the effect that if the employees continued with their job action after the date of the order, the appellant could proceed in terms of s 107(3)(a) of the Labour Act [*Chapter 28:01*]. There was nothing in the order requiring the appellant to pay the employees during the time they were on strike. The appellant withheld wages from the employees for that period. The respondents applied to the Labour Court for an interdict preventing the appellant from withholding the wages. The Labour Court took the view that it was interpreting its previous order and granted the application. On appeal to the Supreme Court, held: (1) At common law the obligation of an employer to pay wages is dependent upon performance by the servant of the work that he contracted to do. The common law position is restated in s 108(4) of the Act. An employee who participates in a lawful collective job action is not entitled to his salary unless that remuneration was being paid in the form of services, in which case the remuneration must be paid but may be recovered by the employer by action instituted by him in the Labour Court for this purpose. A striking employee is not entitled to remuneration even where the strike is lawful. *In casu* the strike was illegal. If a participant in a lawful collective job action is not entitled to his salary, then even more so should a participant in an unlawful collective job action have no entitlement to his salary. (2) Under s 89(1)(a) of the Act, the Labour Court is entitled to hear and determine applications and appeals in terms of the Act or any other enactment. This means that the Act or other enactment must specifically provide for applications to the Labour Court of the type that the applicant seeks to bring. Nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents. (3) Even if the application was one in which the court was being asked to interpret its order, the court was obliged to apply the basic principles of interpretation and could not ascribe to the order a meaning beyond its plain and ordinary meaning. The Labour Court did not merely interpret its order; it ascribed an interpretation to the order that not only altered the sense and substance thereof but contradicted the plain meaning of the order.

Employment – Labour Court – exclusive jurisdiction of over labour matters – matter ancillary to issue of whether employment properly terminated – not competent for High Court to determine such a matter

Zimtrade v *Makaya* HH-52-05 (Makarau J)

Following her dismissal from the service of the applicant, the respondent kept certain property which had been part of her conditions of service. The validity of her dismissal was referred for determination under the Labour Act. The applicant sought an order in the High Court for the return of the items. Held: (1) Matters relating to suspension from employment and to dismissals are specifically within the purview of the Labour Court as these are matters that are provided for in the Labour Act and the regulations made thereunder. The jurisdiction of the High Court is ousted in respect of matters of dismissals and suspensions as these are specifically provided for in the Act. (2) It is not possible to separate the determination of the validity of a suspension from employment, on one hand, from the determination of whether or not that suspension affects the benefits enjoyed by the employee, on the other hand. The two are interdependent and are both governed by the existing employment relationship obtaining between the two parties. Where the validity of the suspension of the employee or the termination of his employment is still pending, a vindicatory action cannot properly lie at the instance of the employer.

Employment – labour dispute – disposal order by Labour Court – what may be contained in disposal order – no power to order employer to lift suspension on striking employees – referral of matter to another authority – need to specify authority and set out terms of reference

ZESA v *ZESA Employees* S-106-04 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

Following industrial action by employees of the appellant, the matter was referred to the Labour Court which issued a disposal order in terms of s 107 of the Labour Act [*Chapter 28:01*]. The disposal order, among other things, directed that the appellant should lift the suspension it had imposed on some employees and that the matter should be referred for conciliation. Held: (1) while s 107(2)(b) of the Act empowers the Labour Court to suspend the collective job action pending the determination of the underlying cause of the job action, the section cannot be construed as empowering the Labour Court to order the lifting of a suspension imposed by the appellant on its employees. (2) While the Labour Court has the discretion to refer an unresolved dispute to another authority, s 98 of the Act spells out very clearly what should be done in the event of the matter being referred to compulsory arbitration. The parties have to be given an opportunity to be heard before such an order is made. The order should clearly set out the terms of reference and identify the authority to which it is referring the matter.

Employment – suspension pending application to terminate contract of employment – whether on normal salary and benefits – employee notified that suspension in terms of regulations – clear implication that suspension without pay

Nhete & Ors v *Mudzi RDC* S-92-04 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

The appellants, having engaged in unlawful industrial action, were notified by their employers that they were being suspended in terms of the relevant labour regulations, pending an application to terminate their employment. Some months later, after they had not received their normal salary and benefits, they sought an order from the Labour Court that they should be paid their salaries and benefits pending determination of the matter. Held: even assuming the Labour Court had jurisdiction to make such an order (which was questionable) the letter of suspension clearly stated that the appellants were being suspended in terms of the Regulations. The Regulations clearly provide that an employer may suspend an employee without salary and benefits. If the employer had intended to suspend the appellants on full pay and benefits in terms of the common law no reference would have been made to the Regulations. At common law, the appellants were entitled to their salaries and benefits upon suspension. The reference to the Regulations clearly implied that the appellants were being suspended in terms of the Regulations and without pay. While it is desirable that an employer should advise the suspended employee whether he is being suspended with or without pay and that such notification be in writing for easy proof, there is nothing in the language of s 3 of the Regulations which prescribes the manner and the timing of communication of that term of the suspension to an employee. In any event, where an employee is suspended pending dismissal, there is hardly any basis for expecting such suspension to be on salary and benefits.

Employment – trade union – membership of – employee's right to join trade union of his choice – employer having no right to terminate employee's membership in such union

POSB v *Chimanikire & Ors* HH-30-05 (Makarau J)

The applicant was part of the Posts and Telecommunications Corporation before the Corporation was broken up into smaller units. The applicant's employees had been represented in labour matters by the third respondent, a union representing the workers of the PTC as a whole. The applicant considered that as it was now part of the banking industry the workers should not be represented by a union representing telecommunications workers. It sought permission from the Minister of Labour to withhold the deductions paid on behalf of the workers to the union and invited its workers to attend collective bargaining discussions, by-passing the union. The Minister refused permission, on the grounds that an employer cannot decide which trade union its employees should belong to. On appeal to the Labour Court, the Minister's decision was upheld. The applicant sought an order restraining the respondents from interfering in the applicant's relationship with its staff and specifically barring the respondents from representing the interest of its staff in matters affecting conditions of service of its staff. Held: membership to a trade union of one's choice, while entrenched by the provision of the Constitution of Zimbabwe and the Labour Act, is essentially a matter of contract. The member and the trade union enter into a contract where the member is obliged to pay his dues in return for representation in certain specified matters by the union. The employer is not privy to this contract and has no *locus standi* to terminate the membership of its staff in terms of the contract between the two. Although the Labour Act gives the employer *locus standi* to make representations when seeking the variation of the registration of the trade union in a particular industry, this does not amend the common law of contract generally.

Family law – child – legitimacy – child born during subsistence of customary law marriage – presumption of legitimacy

Shumba v *Shumba* HB-25-05 (Ndou J, Cheda J concurring)

See above, under CUSTOMARY LAW (Child – legitimacy).

Family law – husband and wife – matrimonial property – division following decree of nullity – what may be included – matrimonial home owned by company which was wholly controlled by husband – part of matrimonial property

Sibanda & Anor v *Sibanda* S-117-04 (Ziyambi JA, Sandura & Gwaunza JJA concurring)

The parties were married under the Customary Marriages Act, having lived together for several years beforehand. Unbeknown to the wife, the husband's previous marriage to another woman still subsisted. When the marriage failed, the wife obtained a decree of nullity. The parties were possessed of nine immovable properties, as well as numerous vehicles. Apart from one property and one car, all the property, movable and immovable, including the matrimonial home, was registered in the name of one or and other company or nominees of the appellant. The directors of those companies were the appellant's parents and one of his girlfriends – but the sole signatory on the various bank accounts was the appellant, who controlled all the companies. The trial judge awarded the wife a house which was registered in the name of one of the companies. That house had been the matrimonial home for 10 years before the marriage was annulled. The husband contended that as the house was owned by a company wholly owned by the appellant, it did not constitute matrimonial property which fell to be divided in terms of the Matrimonial Causes Act. Held: the veil of incorporation may be lifted where necessary in order to prove who determines or who is responsible for the activities, decisions and control of a company. On the evidence, it was clear that the husband controlled the company and so the house could be considered part of the matrimonial property.

Legal practitioner – conduct and ethics – attesting of affidavits and signing of certificates of urgency – undesirable for practitioner from firm representing client to do so

Chafanza v *Edgars Stores Ltd & Anor* HB-27-05 (Cheda J)

It is undesirable for a legal practitioner who belongs to the firm that is representing a litigant to attest affidavits or sign certificates of urgency. Such a practitioner has an interest in the matter, in the sense that he has a pecuniary interest in the earning of fees from the client and that he is interested in promoting the goodwill of his company by bringing his client's affairs to a successful conclusion.

Local government B rural district council B rates and charges B objection to B procedure for dealing with objections – no requirement for council to hold consultative meetings with affected parties

Matopo Indigenous Business Development Assn v *Matopo RDC* HB-55-05 (Ndou J) (Judgment delivered 30 June 2005)
In terms of ss 76 and 96 of the Rural District Councils Act [*Chapter 29:13*], the respondent rural council published a notice to all affected parties, including the applicant, stating its intention to increase its tariffs. Various objections were made as provided for in the Act. Meetings were held which yielded no meaningful results. After a meeting with the Provincial Governor, the respondent agreed that it would take into account the applicant's objections and call another "stakeholders'" meeting, discuss the matter and reach a consensus. The respondent, however, did not do this but instead held a special full council meeting at which the council considered the proposed increases, together with objections by the applicant, amongst others. There was no disagreement amongst the councillors present to decrease some of the proposed tariffs but confirm the other increases. The applicant sought an order *inter alia* setting aside the proposed tariffs and compelling the council to meet with the applicant to agree on tariffs, failing which the matter would go to arbitration.

Held: in terms of s 76(2) of the Act, if charges or tariffs are to be increased, the proposed increases must be posted for 30 days and published in a newspaper. More than thirty voters having lodged objections to the proposed increases, s 76(3) enjoins the council to reconsider the proposed increases together with the objections. This was done. Such increases "shall not come into operation unless passed by a majority of the total membership of the council." Again, this was done: there being no disagreement amongst the councillors present, the practical need for voting did not exist. The council took into account the objections, resulting in a reduction of some of the proposed tariffs. Whilst, apparently in fulfilment of their political mandate, the councillors have held such consultative meetings with "stakeholders", there is no legal requirement for such meetings under s 76. The council adhered to the legal requirements of the section.

Pensions – disablement pension – disablement due to injury sustained during war in Zimbabwe – to whom such pension payable – need for person to have been engaged in an occupation and in receipt of earnings when injury sustained – unemployed minor sustaining injury – no pension payable

Thomas v *Commissioner of War Victims Pensions & Ors* S-128-04 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

In 1979 the appellant, who was then aged ten years, sustained an injury which resulted in a 50% permanent degree of disability in respect of a below the knee amputation to the right leg. He applied for compensation in terms of the War Victims Compensation Act [*Chapter 11:16*]. The Commissioner being satisfied that he had sustained the injury during the war in Zimbabwe and had done so before 1 March 1980, the appellant was awarded a "disfigurement compensation" in terms of s 25 of the Act, in addition to other allowances which were paid to him throughout the period of his education. When he turned 19, the appellant applied for and was awarded a "disablement pension", in terms of s 8 of the Act. Under s 8(1), the sums payable for such a pension depended on the person's earnings immediately before he sustained the disability. The appellant then applied to have the pension made payable from 1 July 1980, the dated fixed by s 9 of the Act for the payment of disablement pensions; this application was refused. An application to the High Court to compel the Commissioner to pay the backdated pension failed. On appeal to the Supreme Court, held: (1) a disablement pension payable in terms of s 8 of the Act is based upon what the claimant was earning immediately prior to the date of his injury. The appellant was an unemployed minor at the time he sustained the injury, and so could not show that he was engaged in an occupation or employment immediately prior to the date of his injury. He should not have been paid a pension at all. (2) The right to have a disablement pension paid with effect from 1 July 1980 accrues to a disabled person who before 1 January 1982 would have been suffering from a disablement whilst in employment, if its degree had reached a final and stationary condition. Although the degree of the appellant's disablement may have reached a final and stationary condition before 1 January 1982 he was not in employment at the time. Even where the degree of disability had not reached a final and stationary condition on 1 January 1982, necessitating its assessment from time to time after that date, the right to payment of the disablement pension with effect from 1 July 1980 would have accrued to a disabled person only if he satisfied the Commissioner that he had been engaged in an occupation immediately prior to the date of his injury. This right could not accrue to the appellant because his disablement was not caused by an injury sustained when he was engaged in an occupation immediately prior to the date of its occurrence.

Practice and procedure – application – affidavit in support of application – who may depose to such affidavit – applicant's legal practitioner deposing to facts within his knowledge – no specific mandate required to authorise practitioner to depose to affidavit

TFS Mgmt Co (Pvt) Ltd v *Graspeak Invstms (Pvt) Ltd & Anor* HH-49-05 (Gowora J)

The applicant company sued the respondents for moneys due and repayable in terms of a loan agreement. The respondents denied owing the sum claimed and alluded to a loan in a different amount. The applicant sought further particulars. In support of the application, an affidavit was filed by the applicant's legal practitioner. The respondents challenged the authority of the legal practitioner to depose to the affidavit, on the grounds that that the affidavit did not state that the legal practitioner was authorized to depose to the affidavit. They contended that authority to represent the applicant was not synonymous with authority to swear to an affidavit and that the company should have passed a resolution authorising its legal practitioner to depose to the affidavit. Held: where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorized to do so. However, the respondents had not impugned the legal practitioner's authority to act for the applicant in the main action, and that the present application was a procedural step in the mandate given by the applicant to its legal practitioners. It would be absurd for the practitioner to be given the mandate to sue for the claim and not have authority to depose to an affidavit in the name of the applicants where such affidavit would be in relation to matters particularly within his knowledge and necessary for purposes of the successful performance of his mandate on behalf of the applicants. He thus did not require special authority to depose to the affidavit. Rule 227(4) of the High Court Rules states that an affidavit filed with a written application shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein. The legal practitioner had full knowledge of the facts pertaining to the application and his authority to depose to the affidavit could not be disputed.

Practice and procedure – application – *ex parte* – need for full disclosure of material facts – need for utmost good faith in placing material facts before the court – effect of failure to make full disclosure or place all material facts before court.

Beverley Bldg Soc v *Rgwafa* S-007-05 (Sandura JA, Ziyambi & Gwaunza JJA concurring)

The appellant building society advanced various sums of money to a company for the development of the company's immovable property. Believing that some of the money had not been used for the purpose for which it was loaned, the building society imposed strict controls. The directors of the company, annoyed by this development, laid a false allegation of fraud with the CID against two of the building society's directors. The building society's directors were arrested but the magistrate refused to put them on remand, as there was no reasonable ground for suspecting that they had committed an offence. The arresting officers were sued for wrongful arrest and detention and judgment was granted against them by consent. Thereafter the respondent, another member of the CID, sought an *ex parte* order under the Serious Offences (Confiscation of Profits) Act, requiring that certain documents belonging to the building society be handed over to the police. Held: when an applicant is bringing an *ex parte* application against another party he must make full disclosure of all the material facts that might affect the granting or otherwise of an order *ex parte*. The utmost good faith must be observed in placing material facts before the court. If an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which *might* have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure. *In casu*, the respondent must have been well aware that the most important part of the background facts – namely, that the fraud allegations against the directors had previously been investigated, that the magistrate before whom the two men had been brought for remand had refused to place them on remand on the ground that they had no case to answer, and that the arresting officers had consented to judgment against them for wrongful arrest – was deliberately withheld from the court. The application would be dismissed with costs on the higher scale.

Practice and procedure – application for directions – matter pending in Labour Relations Tribunal – not competent for High Court to give directions in respect of matter pending in another forum

Practice and procedure – judgment – finality of – limited extent to which court may alter judgment once given

Matanhire v *BP Shell Mktg Svcs (Pvt) Ltd* S-5-05 (Chidyausiku CJ, Ziyambi & Malaba JJA concurring)

The appellant was suspended from duty then dismissed on various grounds of misconduct. He noted an appeal to the then Labour Relations Tribunal. Some six months later, the respondent issued summons against the appellant in the High Court for the repayment of various sums loaned to him while he was employed. At the pre-trial conference, the judge issued an order by consent. The order depended on whether the Tribunal found the appellant's dismissal to be lawful or otherwise. If it was unlawful, the agreement was the appellant would not be liable to repay the loans that were due and owing to the respondent while the respondent would not be liable to pay damages for the unlawful dismissal. If the the Tribunal found that the appellant was lawfully dismissed he would be liable to pay the respondent the sums loaned with interest to the date of payment and costs of suit. When the matter was first heard by the Labour Relations Tribunal, it was postponed to enable the appellant to seek directions from the High Court. A different judge heard the application for directions, and ordered that Labour Relations Tribunal should determine the lawfulness or otherwise of the appellant's dismissal and the substantive issues relating to dismissal, reinstatement or package in lieu of reinstatement. The Labour Relations Tribunal determined that the dismissal was unlawful and that it was bound by the terms of the consent order. The appellant argued that the later order of the High Court should have been followed. Held: (1) once a matter has been finalised by a court, that court becomes *functus officio*. It has no authority to adjudicate on the matter again. The only jurisdiction that a court has is to make incidental or consequential corrections. It may also correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention, provided that the substance of the judgment is not affected thereby. (2) An order giving directions is not an incidental order and a judge of the High Court cannot vary or alter an order of a judge of parallel jurisdiction, short of expanding on it. (3) The order giving directions was patently irregular in that it was purportedly made in terms of Order 23 r 151 which does not authorise the High Court to grant such an order. In terms of that Order the High Court can only give directions in respect of matters pending in the High Court and not in other fora.

Practice and procedure – execution – pending appeal – need for respondent to apply for execution despite noting of appeal

Net-One Cellular (Pvt) Ltd v *Net-One Employees & Anor* S-40-05 (Chidyausiku CJ, in chambers)

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

Practice and procedure – execution – stay of – no automatic stay when proceedings brought on review – court's discretion to grant stay of execution – review brought as delaying tactic – stay refused

Practice and procedure – review – application for – does not automatically cause stay of execution

Omar & Anor v *Blue Gum Tpt (Pvt) Ltd & Anor* HB-44-05 (Ndou J) (Judgment delivered 19 May 2005)

The applicants had been the unsuccessful party in litigation and costs had been awarded against them on the higher scale. The bill of costs had been submitted by the first respondent, to the taxing master for taxation. The applicants contested the bill and the taxing master made his decision. The applicants brought the decision on review but a few days later the respondent served a notice of execution on the applicants for recovery of the taxed costs. The applicants argued that the execution was automatically stayed pending the court's decision on review.

Held: (1) the noting of an appeal suspends execution of the judgment appealed against unless the court otherwise directs, but there is no similar common law rule applicable to staying of execution pending review. (2) It would have been open to the applicants to have requested the taxing master to refer the matter to a judge in terms of rule 313 of the High Court Rules, rather than resort to the cumbersome review proceedings under rule 314. (3) The court has a wide general discretion to allow the stay execution pending review, but where the court is satisfied that the review of the taxation is not brought genuinely with the *bona fide* intention of testing the correctness of the determination of the Taxing officer, but is only brought as a delaying tactic and as a means of staving off the evil day, the court may order execution of the taxed costs to proceed. Here, the applicants did not contest all the costs but had not tendered even that which they accepted as being payable. It was clear that the proceedings were a delaying tactic.

Practice and procedure – judgment – setting aside of judgment erroneously granted – wrong order granted as result of error on part of applicant for order – applicant having used incorrect procedure

Young Blood Invstms (Pvt) Ltd v *Spearhead (Pvt) Ltd & Ors* HB-57-05 (Ndou J) (Judgment delivered 30 June 2005)

The applicant and the second respondent entered into an agreement of sale wherein the applicant sold to the second respondent certain equipment. The payment was to be made in foreign currency. When the second respondent failed to pay the final two instalments, the applicant sued the second respondent at the magistrates court for vindication. The magistrate issued a rule *nisi* calling upon the second respondent to show why a final order should not be made that equipment in the possession of the second respondent or any third party should and be permanently restored, delivered and returned to the applicant. Shortly afterwards, the messenger of court attached and removed some of the equipment which were the subject of the contract and attached one of the items from the premises of the first respondent. The latter had not been cited as a party in the vindication proceedings. The first respondent applied to the High Court for the review of the magistrate's decision; seeking the provisional stay of the magistrate's order under a certificate of urgency. A judge granted a provisional order *ex parte* with interim relief that the messenger of court return the attached goods. The applicant sought rescission of the judge's order in terms of r 449(1)(a) of the High Court Rules 1971, on the grounds that it was erroneously sought and granted in the absence of any party affected thereby.

Held: Once a court has made an order disposing of the matters in issue, the court becomes *functus officio* and may not make further orders not sought in the papers that set out and define the *lis* before the court unless the parties agree otherwise. This rule does not apply to interlocutory orders, which are subject to variation. Rule 449 of the High Court Rules 1971 is an exception to this general principle. Rescission in terms of r 449(1)(a) may be appropriate in an *ex parte* application in which a wrong order has been prayed for or granted as a result of an error on the part of the applicant. The first respondent's error was that instead of approaching the High Court, seeking a review of the provisional order granted by the magistrate, it should have approached the magistrates court either for anticipation of the return date or for the discharge of the rule *nisi* in terms of the Magistrate's Court (Civil) Rules, being a person affected by the magistrate's order.

Editor's note: see also Tiriboyi v *Nyonijani & Anor* HH-117-04 (a judgment of Makarau J, delivered 26 May 2004), which also dealt with the application of r 449.

Practice and procedure – provisional sentence – purpose of procedure – procedure where application is opposed – defects in summons or application – effect of – onus on defendant where application opposed – what defendant must show

Zimbank v *Interfin Merchant Bank of Zimbabwe* H-13-05 (Makarau J)

The procedure of provisional sentence allows a creditor, armed with a liquid document, to obtain payment of the debt without having to wait for the final determination of the dispute between the parties. It is an extraordinary remedy based on

the presumption of indebtedness created by the liquid document. It is a brisk and robust remedy granted by the court in appropriate cases, on the date of the hearing endorsed on the face of the summons, after the court has satisfied itself that the defendant has no probability of success in the principal case. Even if the application is opposed, the matter cannot wait to be determined on the opposed roll in accordance with the provisions of Order 32 of the High Court Rules 1971. Issues of convenience to the court, which is essentially sitting as an unopposed court, can effectively be overcome by the presiding judge standing the matter down to the end of the roll for counsel to make their submissions to court.

While, in provisional sentence proceedings, the plaintiff ought in principle to have his or her papers in order, the approach of the courts is not to be deterred from granting provisional sentences by technical defects on the face of the summons that can be cured by suitable amendments. This accords with the general approach of this court to amendment of pleadings, which has always been to grant such where in doing so no injustice or prejudice that cannot be cured by an award of costs is occasioned the other party. The onus rests on the defendant in provisional sentence matters to show that he has probabilities of success in the main action. Such probabilities must be substantial and should not be mere conjecture. They must be based on facts laid out in the affidavit and not upon inferences to be drawn from the facts.

Practice and procedure – *res judicata* – principles – issue necessarily decided in another forum – matter *res judicata*

POSB v *Chimanikire & Ors* HH-30-05 (Makarau J)

The applicant was part of the Posts and Telecommunications Corporation before the Corporation was broken up into smaller units. The applicant's employees had been represented in labour matters by the third respondent, a union representing the workers of the PTC as a whole. The applicant considered that as it was now part of the banking industry the workers should not be represented by a union representing telecommunications workers. It sought permission from the Minister of Labour to withhold the deductions paid on behalf of the workers to the union and invited its workers to attend collective bargaining discussions, by-passing the union. The Minister refused permission, on the grounds that an employer cannot decide which trade union its employees should belong to. On appeal to the Labour Court, the Minister's decision was upheld. The Labour Court's decision was made after the filing of, but before the hearing of, an application for an order restraining the respondents from interfering in the applicant's relationship with its staff and specifically barring the respondents from representing the interest of its staff in matters affecting conditions of service of its staff. Held: the issue in the Labour Court was whether the third respondent would effectively represent the interests of the applicant's staff after the applicant moved to the banking industry. The Minister, then the Labour Court, ruled that it was not for the applicant to choose who would best serve the interests of its staff as such staff has a constitutional right to belong to a trade union of its choice. The same issue was being raised in the present application. Both proceedings revolved around the right of the applicant, as an employer, to choose which trade union its staff should belong to. In deciding that the applicant had no right to hold back the workers' union dues, the Minister necessarily decided that the applicant had no right to interfere in the contractual relationship between the third respondent and its members. In so deciding, the Minister necessarily decided that the third respondent could represent the interests of the applicant's staff. There was thus no issue before the court which had not been necessarily decided by the Minister and in turn by the Labour Court. The matter was thus *res judicata*.

Practice and procedure – *res judicata* – requisites – essentially the same relief being sought in both actions – plea of *res judicata* upheld

Muzika v *Kamhunga & Anor* S-20-05 (Gwaunza JA, Sandura & Ziyambi JJA concurring)

The appellant sold a property to the first respondent. She sought to cancel the agreement on the grounds of non-payment. An application by the buyer to the High Court for an order preventing the appellant from disposing of the property or transferring it to another person was granted. The court found that the appellant had failed to prove her allegation that the buyer had agreed to cancel the agreement in question. In addition to that, it found the appellant had not followed the agreed procedure for cancelling the agreement. An appeal by the appellant against this order was dismissed. In dismissing the appeal, the Supreme Court ruled against the appellant's argument that effect that the contract was not capable of performance because of a supervening "illegality" relating to the fixing of part of the price in foreign currency. It held that there was no agreement to pay any of the price in foreign currency. The buyer then paid the balance of the purchase price, in local currency. The appellant's next step was to produce a hand-written copy of an agreement which stated that the balance of the purchase price was to be paid in pounds sterling. This agreement had not previously been produced in the High Court, nor on appeal to the Supreme Court. She filed an application in the High Court, seeking an order compelling the first respondent to pay her the balance of the purchase price in foreign currency. She also sought an order stopping the Registrar of Deeds from transferring the property to the first respondent pending the payment of the foreign currency to her.

Held: (1) the requisites of *res judicata* are that the two actions must have been between the same parties, concerning the same subject matter and founded upon the same cause of complaint. (2) The matter before the Supreme Court involved the same parties and the same subject matter (the property) and was founded on the same cause of complaint (i.e. the agreement of sale). The appellant, in both applications in the High Court and appeals in the Supreme Court, essentially sought the same relief. (3) Her attempt to resuscitate a matter which had been finally determined was clearly an abuse of court process and could not succeed. (4) The Supreme Court, having previously made a final order on the matter, had no authority to correct, alter, or supplement it. None of the limited circumstances in which the Court might vary its decision having been alleged, the appellant had, accordingly, failed to prove a case for the rescission. The appeal would be dismissed, with costs on the higher scale.

Practice and procedure – set-down – opposed matter – applicant setting matter down as unopposed – whether respondent can be barred under rule 238 for failure to file heads of argument five days before the hearing

Union Metallurgical & Technical Svcs (Pvt) Ltd v *Sithole & Anor* HB-52-05 (Ndou J) (Judgment delivered 2 June 2005)

The applicant served heads of argument on the defendant and had the matter set down on the unopposed roll for three weeks later. The respondent's heads of argument were filed the day before the date of set-down and the applicant sought to have the respondent barred. The respondent argued that the matter was not unopposed and a trial date should have been applied for.

Held: barring in terms of rule 238 of the High Court Rules only applies to matters set down in terms of rule 223(2) as opposed matters. The applicant had wrongly sought to set the matter down as unopposed under rule 223(1), so the respondent was not barred.

Practice and procedure – summary judgment – when may be granted – need for plaintiff's claim to be unanswerable and based on clear cause of action – plaintiff having two possible causes of action and failing to elect which to rely on – summary judgment refused

Pitchford Invstms (Pvt) Ltd v *Muzari* HH-193-04 (Makarau J)

The applicant, a money-lender, had lent money to the defendant. The defendant signed an acknowledgment of debt, with a certain interest rate stipulated and a particular date from which the interest would run. He also executed a mortgage bond over his house. The mortgage bond specified a different, lower, interest rate and a different date from which the interest would run. When the defendant failed to repay the loan, the plaintiff issued summons, claiming cancellation of the mortgage bond and repayment at the higher interest rate. It then applied for summary judgment on the basis that the defendant had no *bona fide* defence to the claim. Held: (1) although the emphasis in the rules of court governing summary judgment is on the defences proffered by the defendant, the rules must be read as requiring the plaintiff's claim itself to be unanswerable and based on a clear cause of action. Where the plaintiff's claim on its own does not reveal a clear and competent cause of action, then even if no formal exception has been filed by the defendant to the claim, the court may not granted summary judgment on such a claim, in the absence of a suitable amendment to the claim. This would apply even in instances where the defendant has not proffered any *bona fide* defence. (2) *In casu* the relationship between the parties was governed by two separate documents with different provisions. The plaintiff did not make an election as to which document was binding between the two parties, to the exclusion of the other. The plaintiff's cause of action, purporting to be based on both documents, was thus confusing and not clear. No attempt had been made to reconcile the two agreements or to clearly abandon one in favour of the other. Even if the defendant has not excepted to the summons nor raised the above issues in his opposing affidavit, the inconsistencies in the plaintiff's claim were such that summary judgement should be denied even in the absence of a *bona fide* defence from the defendant.

Prisons – convicted prisoner – who is – includes person sentence to term of imprisonment by Parliament – entitlement to remission of sentence – no absolute right to remission

Bennett v *Parliament of Zimbabwe & Ors* HH-24-05 (Patel J) (Judgment delivered 10 March 2005)

See above, under CONSTITUTIONAL LAW (Parliament – sentence of imprisonment imposed by Parliament).

Revenue and public finance – income tax – appointment of bank as agent for revenue authority – taxpayer having overdraft at bank – not a reason why bank should not be appointed agent – "income" – meaning of – appointment of Reserve Bank as agent to garnishee monies held there by taxpayer's bank – no assessment issued against bank – garnishee unlawful

Hunting Industries Ltd v *Barclays Bank Zimbabwe Ltd & Ors* HH-57-05 (Gowora J)

The applicant held 3 accounts with the first respondent, its banker. The applicant had an overdraft facility on the accounts, which facility was based on the aggregate of the accounts from time to time. Overall, it was in debit. The tax authority (ZIMRA) assessed the applicant's tax liability. Although the applicant disputed its liability, ZIMRA appointed the bank as its agent in terms of s 58 of the Income Tax Act [*Chapter 23:06*]. ZIMRA expropriated by garnishee the applicant's bank's funds held by the Reserve Bank of Zimbabwe (RBZ), in satisfaction of the applicant's tax liability. The bank, in turn, debited the account of the applicant resulting in an increased debit balance. The applicant sought an order reversing the debit entry, and the bank in turn applied for an order directing that ZIMRA and the RBZ jointly and severally restore or refund its funds or an amount in the sum garnisheed.
The bank argued that it did not hold any monies for or due to the applicant as contemplated by the Act that could be paid over to ZIMRA. It could only be appointed an agent for a taxpayer in relation to income possessed, disposed of, controlled or managed by it. At the relevant time it did not possess, dispose of, control or manage any income belonging to the applicant. On the eve of the garnishee, the overall net position of the applicant's accounts with the bank was a debit balance and therefore there was no income belonging to the applicant in the possession or control of the bank. ZIMRA could not simply garnishee the bank's account with RBZ without first having made an assessment on the bank in its personal account as required by s 56 of the Act. Due to the lack of assessment of the bank, it then did not become a representative taxpayer for the applicant as would have made it personally liable to ZIMRA in terms of s 56. Additionally, the RBZ should not have acted on an unlawful instruction and/or direction from ZIMRA without giving prior notice to the bank. Nor should the RBZ have simply complied with the garnishee when there was no assessment for tax against the bank in its own name as a representative taxpayer in terms of s 54 of the Act, thus rendering the garnishee unlawful.
The RBZ contended that irrespective of whether or not any assessments had been issued in respect of the applicant or the bank and irrespective of whether or not any monies were due, it had acted lawfully and *bona fide* in complying with the notice, and accordingly made payment to ZIMRA in accordance with the provisions of s 58 and s 59 of the Act. It contended that the notice it had received from ZIMRA was valid on the face of it and it was therefore duty bound to act on it.

Held: (1) the fact that the accounts were in overdraft did not mean that the applicant did not have "income". Income means money or money's worth received. A person is not necessarily devoid of income because his account at a bank is overdrawn, especially if it is an operating account for the running of an enterprise, which overdraft has been arranged to assist the person in the conduct of that enterprise. There was therefore nothing to prevent the bank from being appointed as agent for the applicant in terms of s 58 of the Act as it controlled or managed income belonging to the applicant. (2) The liability to pay tax as a representative taxpayer is found in s 54 of the Act, which makes it clear that income in the control or possession of a representative taxpayer is liable to assessment in the name of the representative but only in that capacity. ZIMRA should have conducted an assessment in respect of the income that the bank had in its possession belonging to the applicant and based on that assessment, the bank would then have been required to pay tax as an agent. (3) At the time the RBZ was appointed agent to garnishee the bank's money, ZIMRA had not issued an assessment for tax in the name of the bank in respect of income belonging to the applicant in the possession of the bank. Tax against the bank could not have been due in the absence of an assessment from ZIMRA. There was no such assessment and thus no legal justification for the garnishee. (4) There was no suggestion that the bank alienated or disposed of money belonging to the applicant which could have been used to pay the alleged tax due. Accordingly, personal liability would not lie for the unpaid tax against the representative taxpayer in terms of s 56 of the Act. (5) The grant of an overdraft is a lending of money by the bank to its customer. The function of overdrafts is to provide the customer with working capital to enable him to manage his resources more efficiently. The borrower is thus, through the overdraft, availed of funds for use at his disposal provided that it is within the limits set by the bank providing the overdraft. Any moneys paid out by the bank in terms of the overdraft were clearly to the benefit of the applicant and the overdraft facility was therefore a useful or valuable arrangement for the applicant. The applicant could not plead that there no assets in the control of the bank to satisfy payment of the tax.

Review – small claims court – how proceedings from small claims court may be brought on review – normal review procedure to be followed

Zhou v *Global Motors & Anor* HH-11-05 (Makarau J)

See above, under COURT (Small claims court).

Statutes – Access to Information and Protection of Privacy Act [*Chapter 10:27*] – ss 39(1)(g)(i)(j)(n) and (p), 40, 41, 65, 66, 69, 70, 71, 76, 79, 80(1)(d)(2), 83 & 89 and para 4 of the Fourth Schedule – constitutionality of

ANZ (Pvt) Ltd v *Minister for Information & Anor* S-111-04 (Chidyausiku CJ, Cheda, Ziyambi, Malaba & Gwaunza JJA concurring)

The applicant challenged the constitutionality of various sections of the Access to Information and Protection of Privacy Act [*Chapter 10:27*]. These included: (1) s 39, which deals with accreditation of journalists; (2) s 40, which dealt with the appointment of the Media and Information. The applicant argued that the section failed to provide for a Board that is independent of the Minister and was therefore unconstitutional; (3) s 65, which seeks to control the ownership of the mass media services and limits the ownership of the media by non-citizens of Zimbabwe; (4) s 66, which provides for the registration of providers of mass media services; (5) s 70, which provides for the payment of fees; (6) s 71, which provides for the circumstances under which a registration certificate can be suspended or cancelled by the Commission. These include fraud or misrepresentation and failure by a mass media provider to exercise its rights within 12 months; (7) s 89, which confers on a person or organisation in respect of whom incorrect information has been published or whose rights or lawful interests have been infringed in a publication, the right to reply at no cost to him and for the reply to be published within a certain period of time.

Held: (1) Accreditation of journalists and the licensing of electronic media is constitutional as long as the requirements for such accreditation and licensing are not onerous. (2) The security for the independence of the Commission does not depend upon the nature of the appointing authority but on the existence of qualification requirements, the consideration of which induces a sense of duty in the appointing authority and eliminates the exercise of discretionary power thereby ensuring that merit alone is the basis for selection. The constitutionality of section 40 could not be successfully impeached on the mere ground that the executive has the power to appoint the members of the Commission. (3) With regard to s 65, the applicant had to show that it was affected by the section, by alleging that it was a body corporate in which the controlling interest was not held directly or indirectly whether through any individual company or association by one or more individuals who are not citizens of Zimbabwe or permanently resident in Zimbabwe. It did not show that the section affected its rights. (4) For the same reasons that a requirement for accreditation of journalists was constitutional, the requirement for providers of mass media services to be registered was constitutional. It could not be said that a requirement that a mass media service provider should register itself with the Commission in order to exercise the right of freedom of expression is not justifiable in a democratic society when its object is to ensure that citizens of the country have effective ownership and control of the mass media for the exercise of their right to freedom of expression. (5) The requirement to pay fees was not in itself unconstitutional; it might be if the fees were excessive. (6) The meaning of misrepresentation is justiciable and capable of determination, as is what constitutes a material non-disclosure. What is fraudulent is much easier to determine than non-disclosure of a material fact and misrepresentation. The Constitution confers no right on an individual to misrepresent, either directly or through non-disclosure of a material fact or to commit fraud. (7) Freedom of expression carries with it certain responsibilities, one of which is not to infringe on the rights of others, and a law that offers a remedy for the wronged party is constitutional.

Statutes – War Victims Compensation Act [*Chapter 11:16*] – disablement pension payable under Act – to whom such pension payable – need for claimant to have been engaged in an occupation and in receipt of earnings when injury sustained – unemployed minor sustaining injury – no pension payable

Thomas v *Commissioner of War Victims Pensions & Ors* S-128-04 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

See above, under PENSIONS (Disablement pension)

Words and phrases – "income"

Hunting Industries Ltd v *Barclays Bank Zimbabwe Ltd & Ors* HH-57-05 (Gowora J)

See above, under REVENUE AND PUBLIC FINANCE (Income Tax).

Words and phrases – "suspicion" – Prevention of Corruption Act [*Chapter 9:16*] – s 6(1)

Mawere v *Min of Justice* HH-1-05 (Uchena J)

See above, under CRIMINAL PROCEDURE (Specification of person suspected of corruption offences).