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CASES DECIDED JULY-DECEMBER 2005

Administrative law – administrative decisions and acts – validity of – acts performed by commission running affairs of city– commission effectively running affairs although its term had expired and its re-appointment was unlawful – whether such decisions can be legitimated on basis of theory of efficacy

Zvobgo v *City of Harare & Anor* HH-80-05 (Makarau J) (Judgment delivered 14 September 2005)

The applicant and 17 other employees of the City of Harare were suspended from duty, following the findings of a committee of inquiry set up by the Minister of Local Government in terms of the Urban Councils Act. At the time of the suspension of the applicant and the other employees, the City's affairs were under the management of a commission appointed by the Minister in terms of s 80 of the Act, following the suspension of the elected councillors. The appointment of the commission in terms of s 80(3) was for a period of six months. In spite of this limitation, the Minister re-appointed the commission, which continued in office for nearly 3 years. During the first 6 months of its tenure, the commission resolved to appoint a special committee to inquire into the allegations faced by the 18 suspended employees. After the first six months of its lifetime, the commission appointed a committee in accordance with the resolution. That committee was dissolved and another appointed, which commenced inquiries into the allegations of misconduct by the applicant in spite of objections raised by the applicant about the legitimacy of its actions. The applicant sought an order setting aside the committee's actions as void. The respondents accepted that it was illegal for the commission to continue in office after 6 months, but argued that since the commission was the only authority running the affairs of the City, its otherwise illegal acts must be legitimated on the basis of Kelsenian efficacy.

Held: (1) the fact that the committee was appointed by an illegal commission in pursuance of a resolution passed during the lawful tenure of the commission did not clothe the committee with legitimacy, as the passing of the resolution and the appointment of the committee were two separate juristic acts.

(2) The theory of efficacy has found expression mainly in international law situations to avoid vacuums created by the toppling of one *grundnorm* by another. It is only applicable in situations where the *grundnorm* has been suspended or has become defunct and a vacuum has thereby been created and will remain if the court does not validate the new *grundnorm*. It has thus been applied in cases of revolutionary changes to entire governmental regimes where such change is deemed successful, the measure of success being the response of the governed people to the coup and the fact that there is no other government in opposition to the new order. It is nothing other than a useful weapon in the arsenal of a court which intends to capitulate or seek to recognise the illegal regime as the only other option would be for the court to fearlessly declare the law as the court sees it to be, whatever the future consequences will be. It is an excuse on the part of the court to expressly support and uphold the coup or revolution without appearing to have participated in the illegality.

(3) The theory does not apply to domestic law, because there is no change in the *grundnorm*. Domestic law is itself not the fundamental law and needs no independent validation other than that which the *grundnorm* confers on it. Vacuums created by the domestic law should be filled by making reference to the *grundnorm* and applying domestic remedies. The theory cannot be invoked to destroy the *grundnorm* by legitimising acts that are illegal under the *grundnorm.* Thus, an unconstitutional act cannot be declared valid and legitimate by invoking the theory as this will lead to anarchy and self help in domestic law.

(4) The vacuum sought to be filled by the application of the theory was fictional. It was created not by the absence of relevant domestic laws but by the misapplication of those laws. Domestic remedies in the form of the express provisions of the Urban Councils Act abounded on how to fill the alleged vacuum. The commission was allowed to remain in office past its legal mandate, thereby creating the fictional vacuum. To legitimise what was clearly illegal would be to offend against the clear letter of the law as contained in the Act and to usurp the functions of Parliament by seeking to legislate from the bench by excusing that which parliament has decreed illegal.

Administrative law – review – application – domestic remedies not exhausted – domestic remedies providing effective redress – no valid reason for such remedies being abandoned – review not proper

Administrative law – review – evidence – record of proceedings of tribunal being brought on review – incomplete record submitted – review not possible

Olivine Industries (Pvt) Ltd v *Gwekwerere* S-63-05 (Gwaunza JA, Sandura & Cheda JJA concurring) (Judgment delivered 29 November 2005)

The respondent, an employee of the appellant company, was the subject of a disciplinary hearing. He refused to attend the hearing on the grounds that he was not allowed to be legally represented and because he considered representation by a member of the workers' committee was inappropriate. He was found guilty and discharged. After a discouraging letter from his head of department, he did not appeal to the disciplinary committee as provided by the code of conduct. Instead an application for review was brought in the High Court, in which the respondent sought reinstatement. Damages in lieu of reinstatement were not claimed. The High Court granted the respondent's application and the company appealed. Held: (1) The appeal procedure in the appellant's code of conduct would have allowed both a review and rehearing of the matter at the disciplinary committee stage, an appeal to the head of business and thereafter to the Labour Court. It would thus have afforded the respondent effective redress against what he perceived as an unlawful termination of his employment. The respondent had abandoned his domestic remedies for no valid reason. The High Court should have declined to hear the application. (2) Although the appellant had failed to comply with r 260 of the High Court Rules, requiring the lodging with the Registrar of the original record, and had submitted only a partial record, it was open to the judge to direct that the full record be made available, in the meantime postponing the hearing of the matter. The respondent would have been within his rights to demand the full record before the matter could be heard. Neither chose to exercise these options, and the court was accordingly not in a position to properly review the decision of the head of department. (3) An order for reinstatement must be accompanied with an alternative order for the payment of damages in *lieu* of reinstatement, where reinstatement is not appropriate. The respondent did not consider, argue for, nor, therefore, claim, an alternative order for the payment of damages and the judge should have dismissed the claim, leaving it to the respondent, if so advised, to pursue a claim for damages by way of fresh proceedings.

Agency – agent – authority – prior authority of principal – whether essential – subsequent ratification by principal of agent's actions – actions thereby validated

ZRP Bd of Trustees v *Manyangadze* S-26-05 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring)

The respondent was employed by the Police Club as its Secretary. The Club was not part of the Police Force and its employees were not employees of the Police. The Club was run by a Board of Trustees in terms of the Club's constitution. The Superintendent Amenities at the Police Depot, who was a member of the Board of Trustees, suspended the respondent from duty on allegations of misconduct and applied to the Ministry of Labour for an order terminating the respondent's employment. The letter of suspension and the application were signed by the Superintendent in his capacity as such. The order was granted. The Board of Trustees subsequently became aware of what the Superintendent had done and ratified it. On appeal, the Labour Court reversed the order. Its reasons for so doing were that the power to bring any action or suits on behalf of the Club were vested in the Club's board of trustees, not in one member of the board acting in his capacity as an officer of the Police Force. The suspension by anyone other than the Board was *ultra vires* the Constitution and so was the application for dismissal. The authority to terminate was therefore based on an illegal action and was therefore of no force or effect. On appeal by the Board to the Supreme Court, held: the superintendent was not acting on his own behalf. He was acting on behalf of the respondent's employer, the board of trustees. The board was the principal and he was the agent. He may have been mistaken as to who he thought the respondent's employer was and may not have had specific authority from the board. However, the board subsequently ratified the Superintendent's actions, and ratification of an agent's action has retrospective effect. Even if the application for dismissal and suspension did not have the prior authority of the board that would not render it illegal. It was simply voidable at the instance of the board. In a case where the employer subsequently ratifies the application for dismissal and suspension, such ratification retrospectively validates both the application for dismissal and the suspension.

Appeal – costs – appeal against order of – need for leave of judge *a quo* – effect of failure to apply for such leave

Appeal – costs – appeal against order of – when appeal court may interfere with lower court's discretion

Gasela v *Constituency Elections Officer, Gweru Rural* S-54-05 (Chidyausiku CJ, in chambers)

The applicant sought an extension of time in which to note an appeal. The order appealed against was one by the High Court dismissing an urgent application, with costs on the higher scale. The applicant sought an order ordering costs on the ordinary scale. Held: (1) in terms of s 43(2)(c) of the High Court Act [*Chapter 7:*06] an appeal against an order of costs has to be with the leave of the court *a quo*. Only if such leave is refused may application be made to the Supreme Court. No such leave had been applied for and, therefore, such leave was neither granted nor refused. The applicant was seeking an extension of time to note an appeal in respect of which he had no leave, and such leave is required in terms of the Act. He should have first applied for leave to note an appeal against the order of costs. Once such leave has been granted or refused by the court *a quo* then the applicant could approach a judge of the Supreme Court for an extension of time. If leave to appeal has been refused then the applicant can approach this Court for: (a) the granting of such leave and (b) for the extension of time within which to note an appeal. The failure by the applicant

to first seek the leave of the court *a quo* before approaching the Supreme Court was a fatal irregularity and on that ground alone the application could not succeed. (2) On the merits, the issue of costs was a matter for the discretion of the court *a quo* and the Supreme Court could can only interfere with the exercise of that discretion if there had been a misdirection or the order was so unreasonable that no reasonable court applying its mind to the facts of the case could have made such an order. There was no misdirection nor could the order be said to be unreasonable let alone grossly unreasonable.

Appeal – evidence on appeal – further evidence not led at trial – when may be led – principles – failure to lead evidence due to inexperience of legal practitioner – when relevant

Eastview Gardens Residents Assn v *Zimbabwe Reinsurance Corp Ltd & Ors* S-65-05 (Sandura JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 17 November 2005)

An application to lead fresh evidence on appeal is never lightly granted. The matters to be considered by a court in exercising its discretion are: (1) the evidence tendered could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such as is presumably to be believed or apparently credible; (3) the effect which it would have on the case; and (4) conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party. The inadequate presentation of the defence case at the trial will only in the rarest instances be remediable by the adduction of further evidence at the appeal stage.

Appeal – grounds – procedural irregularities – when may be relied on to set aside proceedings – need to show that appellant prejudiced by irregularity

Nyahuwa v *Barclays Bank (Pvt) Ltd* S-67-05 (Sandura JA, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 1 December 2005)

See below, under EMPLOYMENT (Code of conduct – disciplinary proceedings under – code providing for dismissal for gross negligence causing serious loss).

Appeal – Labour Court – noting of – effect – provision that order appealed against is suspended – amendment providing to the contrary – appeal noted before amendment came into place – not affected

Zimbabwe Phosphate Industries Ltd v *Matora & Ors* S-44-05 (Malaba JA, Sandura & Gwaunza JJA concurring)

Before the Labour Relations (Amendment) Act 17 of 2002 was promulgated, s 97(3) of the principle Act provided that the noting of an appeal in terms of subs (1) had the effect of suspending the determination or decision appealed against. The subsection was repealed and replaced, and now provides that the noting of an appeal shall not have the effect of suspending the determination or decision appealed against. There was a savings provision in the amending Act, to the effect that any proceedings that were commenced before the promulgation of the amending Act were deemed to have been commenced in terms of the appropriate provisions of the principal Act, as amended.

Before the Act was amended, the respondents were dismissed from their employment following disciplinary proceedings. Appeals under the code of conduct having failed, the respondents appealed to the Labour Court. After the amending Act came into effect, they applied for an order that they be reinstated pending the determination of their appeal. Held: (1) The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only. In particular, they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. Care must always be taken to ensure that retrospectivity is confined to the exact extent which the section of the Act provides. (2) Section 97(3) of the principal Act before it was amended gave the appellant a clear right not to reinstate the respondents in their employment pending determination of the appeal. Section 97(1) was a separate provision from s 97(3). It used to give a the right to appeal to the Labour Relations Tribunal. The new s 97(1) gave a similar right in respect of appeals to the Labour Court. Section 97(3), whether before or after the amendment, did not deal with commencement of proceedings or the noting of appeals to the Tribunal. Section 47(5) was not intended to affect the rights vested in the appellant in terms of s 97(3) of the Act at the time of the amendment came into effect.

Arbitration – award – setting aside of – grounds for – arbitrator failing to give reasons for award – failing to enforce contractual penalty which should have been awarded – award contrary to law of Zimbabwe – arbitrator awarding damages based on value determined other than at time of breach

Origen Corp (Pvt) Ltd v *Delta Operations (Pvt) Ltd & Anor* HH-101-05 (Kamocha J) (Judgment delivered 23 November 2005)

The applicant sought the setting aside an arbitrator's award while the respondent sought to have it enforced. In terms of the contract between the parties, the applicant was to deliver a specified tonnage of barley suitable for brewing, while the respondent was to deliver an equal tonnage suitable for stock feed. The contract provided that if there was a shortfall in the applicant's delivery, the applicant would pay a specified sum for every tonne short. The dispute was referred to arbitration, there being two questions for the arbitrator: (1) whether the respondent was entitled to an order for specific performance and (2) whether interest was payable. In his award, the arbitrator ordered the applicant to deliver the shortfall, failing which it should pay the respondent what it would actually cost the respondent to buy the shortfall from elsewhere. The applicant argued, in respect of the second part of the award, that the arbitrator should have enforced the penalty provision; that the award conflicted with the law of Zimbabwe; that the effect of the order was to give the respondent more than it expected and more than the law allowed; and that the arbitrator had failed to give reasons for the award. Held: (1) the arbitrator was obliged to give reasons. (2) The arbitrator had ignored a penalty stipulation which he should have enforced. (3) For a breach of contract, the damages should be assessed as at the date of performance or the date of the breach. The arbitrator had awarded damages based on a value which was determined several months later and which was much higher than the stipulated amount. For these reasons, the award would be set aside.

Bank – bank placed under curatorship – legal proceedings against – restrictions on right to bring such proceedings – interlocutory application brought by party against whom curator had instituted proceedings – right of party to bring such application

Imperial Asset Mgmt (Pvt) Ltd v *Kuipa NO & Ors* HH-95-05 (Gowora J) (Judgment delivered 11 October 2005)

The first respondent was curator of a bank which had been placed under curatorship in terms of s 53 of the Banking Act [*Chapter 24:20*]. The curator obtained default judgment against the applicant and a writ of execution was issued. The applicant sought an urgent stay of execution. The respondent opposed the application, on the grounds that (1) the applicant was not entitled to institute legal proceedings against the first respondent without first having sought and obtained the leave of the court in terms of s 54 (2) of the Act and (2) the application was premised on an application for rescission of judgment by the applicant, the latter, the respondent contended, having been filed out of the time limits provided for in r 63 of the High Court Rules. The applicant argued that the matter was an interlocutory one and that to give effect to the subsection in the manner contended for by the respondent would lead to a result which was absurd and which could not have been the intention of the legislature. As the matter was an interlocutory one which would not determine the main dispute but was incidental thereto, it fell outside the ambit of "all legal proceedings" or "legal processes" and "other legal process" as contemplated by s 54(2).

Held: (1) the purpose of s 54 of the Act was to guard and to protect the banking institution and preserve the assets for the benefit of the creditors and depositors. The aim was to suspend all litigation against the banking institution that would result in the depletion of the assets of the institution and thus prejudice the depositors and creditors. It was also intended to protect the institution from frivolous and vexatious suits. It is only to those litigants with suits that appear to the court to be well founded that leave is granted to pursue their claim against the institution. (2) It was not the purpose to of the section prevent those litigants against whom the banking institution has mounted legal suits from being able to exercise their right to defend the suits or litigation brought against them. Such an interpretation would lead to absurdity and unreasonableness. It would also lead injustice as, in order to exercise his right to a fair trial, a litigant would have limitations set upon him which are prejudicial, by being required to obtain leave at additional expense to be heard in a legal wrangle started by the financial institution. It could not have been the intention of the legislature to thus fetter a person's right to a fair trial. It can also not have the intention of the legislature to take away a procedural right vested in a litigant to defend himself against a suit brought by another. Where, as here, the court is dealing with procedure rather substantive law, it is better to avoid the strictly logical path in favour of a pragmatic or expedient interpretation, if that is at all possible. (3) In interlocutory proceedings deriving from proceedings instituted by the banking institution, it is thus not necessary that leave be obtained from the High Court before such interlocutory proceedings are embarked on. (4) On the merits, it was not clear whether the application for rescission was out of time or not, but this would not prevent the present application being heard.

Bank – curatorship – purpose of – curator's powers to sell or dispose of bank's assets – limits to such powers – curator may not sell all assets of bank

Bank – curatorship – curator – decision of – appeal against – appeal must be made to Reserve Bank

Bank – officer of – bank placed under curatorship – officer's right to bring legal action – curator's permission required

Mzwimbi v *RBZ & Ors* S-35-05 (Sandura JA, Malaba & Gwaunza JJA concurring)

The appellants were directors of a bank which was placed under curatorship by the Reserve Bank in terms of s 53(1) of the Banking Act [*Chapter 24:20*]. The curator examined the affairs and transactions of the bank, and submitted a report to the Reserve Bank, alleging, *inter alia*, that the appellant had violated certain provisions of the Companies Act [*Chapter 24:03*]. The Reserve Bank subsequently announced the implementation of a "Troubled Bank Resolution Policy", one of the features of which was that troubled banking institutions would be amalgamated into one entity, the ZABG. The Troubled Financial Institutions (Resolution) Act [*Chapter 24:28*] was promulgated on 14 January 2005 to give effect to this policy. Thereafter, on 20 January 2005, the curator and the ZABG concluded an agreement of sale, in terms of which the curator sold to the ZABG all the assets of the appellants' bank. It was common cause that the curator did not purport to act in terms of the Troubled Financial Institutions Act. The appellants filed an urgent chamber application in the High Court against the respondents, seeking a provisional order calling upon the respondents to show cause why a final order should not be made restraining them from, *inter alia*, using the premises, motor vehicles and other assets of the bank, and setting aside any purported disposal or alienation of the business or assets of the bank to the ZABG Held: (1) the principal objective in placing a banking institution under the management of a curator is not to liquidate the institution but to enable it to become a successful concern. Accordingly, the curator's power under s 55(2) of he Banking Act to sell any asset or branch of the banking institution concerned could only be exercised in order to achieve that objective. Such an objective cannot be achieved by selling all the assets of the banking institution. The curator therefore acted unlawfully when he sold the assets of the bank to the ZABG. (2) Because the unlawful sale and transfer of the assets adversely affected the value of the shares held by the appellant, they had the requisite *locus standi*. However, in terms of s 54(1) of the Banking Act the appellants could not exercise their power to sue the respondents without the curator's permission, which permission they did not have. (3) In terms of s 55(4) of the Banking Act, the appellants should have appealed to the Reserve Bank against the curator's decision to sell the bank's assets to the ZABG. Any adverse decision given by the Reserve Bank in such an appeal could have been challenged by the appellants in the High Court.

Bills of exchange and negotiable instruments – promissory note – distinction between promissory note and bill of exchange – Bill of Exchange Act [*Chapter 14:01*] – s 95(3) – inapplicability of certain provisions to promissory notes – does not cover presentment for payment – s 44(1)(a) – effect of failure to present promissory note on maturity date

Zimbank v *Trust Finance Ltd* HH-97-05 (Uchena J) (Judgment delivered 2 November 2005)

Negotiable certificates of deposit were issued by the defendant. They matured approximately 2 months after the date of issue and were to be presented for payment to the defendant on the endorsed maturity dates. The plaintiff, who was the bearer, did not present them on those dates but a few months later. The defendant did not pay and the plaintiff sought provisional sentence. The defendant opposed the claim, arguing that because the negotiable certificates of deposit were not presented on due dates the defendant was discharged in terms of s 44(1)(a) of the Bills of Exchange Act [*Chapter 14:01*]. The plaintiff argued that because of the wording of s 95(3), s 44(1)(a) was not applicable to promissory notes.. Under s 95(3), the provisions relating to bills in respect of presentment for acceptance do not apply to promissory notes.
Held: (1) s 95(3) does not cover presentment for payment as opposed to presentment for acceptance and s 44(1)(a) applied, whether the documents were bills or promissory notes.
(2) The difference between a bill of exchange and a promissory note is that in the case of a bill of exchange the issuer of the bill gives an order to another to pay to a third party, while in the case of a promissory note the issuer makes a promise to pay.
(3) The wording of the negotiable certificates of deposit showed that they were not bills of exchange but promissory notes. There was no order to another party to pay. The documents were an unconditional promise by the defendant to pay a stated period after sight to the order of the bearer.

Bills of exchange and negotiable instruments – signatory to – personal liability of – signatory signing on behalf of employer – failure to put words indicating that he is signing on behalf of another – effect – need to examine bill as a whole to ascertain intention

Thomas Meikle Stores Ltd v *Muvirimi & Anor* HH-99-05 (Bhunu J) (Judgment delivered 23 November 2005)

The respondents, employees of a discount house, were signatories to their employer's bank account. In that capacity, they signed a cheque issued to the applicant. The cheque was clearly inscribed on the face of it with the name and bank account number of the respondents' employer. The respondents did not use any recognised symbols such as "p.p." or

"for" to show that they were signing in their representative capacities. The discount house was placed under provisional liquidation and the cheque was dishonoured. The applicant sought summary judgment against the respondents, relying on s 25(1) of the Bills of Exchange Act [*Chapter 14:02*], which provides that where a person signs a bill as drawer and adds words indicating that he signs for and on behalf of a principal or in a representative character, he is not personally liable. The applicant argued that the respondents' failure to disown personal liability rendered them personally liable. Held: although there is a "universal rule" that a person who puts his name to cheque makes himself personally liable unless he states on the cheque that he is signing for another, personal liability may be excluded by inference upon a careful examination of the totality of the disputed instrument. Whether or not the inscription of the discount house's name and account number provided sufficient cover so as to exclude personal liability by necessary inference was a matter of evidence and interpretation. A triable issue was thereby raised and summary judgment would be refused.

Company – director – legal action on behalf of company – right of individual director to bring action – need for action to be authorised by board – when individual directors or shareholders may bring action to protect company

Madzivire & Ors v *Zwariwadzwa & Ors* HH-74-05 (Makarau J)

The first three applicants were directors of the fourth applicant, a registered company. The applicants brought an application in which the wrong complained was done primarily to the fourth applicant, in that its records had allegedly been falsified. The falsified records comprised returns filed on the allotment of shares in the company which excluded the second and third applicants and two annual returns for the company which allegedly bore the forged signature of the first applicant. The first, second and third applicants purported to bring the application on behalf of the fourth applicant, as well as on their own behalves as directors of the fourth applicant. In support of the application, the first applicant filed an affidavit in which he claimed that, as the managing director and as a shareholder, he was authorised to make the subsequent statements on behalf of the fourth applicant. The second and third applicants submitted affidavits, in which they purportedly authorised the first applicant to depose to the contents of the founding affidavit on behalf of the company and themselves. Held: (1) outside a board meeting, individual directors of a company cannot speak for and in the name of the company, even if they are of the same mind and are in the majority, as they were *in casu*. Consequently, the first, second and third respondents had no authority to bring the application on behalf of the company nor to seek, on its behalf, the relief that they were seeking. (2). In general, according to the rule in *Foss* v *Harbottle*, no member (or shareholder) can sue to redress a wrong done to the company. Thus, where the company itself can use its corporate character to obtain redress for the alleged wrong, no suit can lie at the instance of shareholders. The right of directors or shareholders to bring an action on behalf of the company on allegations of fraud relates mainly to minority shareholders who, in a formal meeting, fear defeat by the fraudulent majority. This was not the case here, the applicants being in the majority. (3) The applicants had thus not established a proper basis upon which they, as members, could bring this application, nor had they proved that they were authorised to bring this application for and on behalf of the fourth applicant**.**

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 15(1) – applicability – application under s 24(1) – application not a citizen – applicant entitled to protection of section

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 15(1) – protection against inhuman or degrading punishment or treatment – detention in police holding cells – cells not complying with elementary norms of human decency – detention in such cells constituting inhuman or degrading treatment

Kachingwe & Ors v *Min of Home Affairs & Ors* S-145-04 (Chidyausiku CJ, Sandura, Cheda, Malaba & Gwaunza JJA concurring)

The first two applicants had been detained, on different occasions, by the police at different police stations, on suspicion of having committed an offence. In both cases, the cells in which they were detained had no windows, were unlit, and overcrowded. The only toilet available was in the cell itself, in full view of all the inmates. Excrement and urine were collected in the open toilet bowl. There was no soap, toilet paper or running water, nor was there any drinking water. The applicants alleged (though the respondents denied it) that contrary to Police standing orders they were not supplied with blankets or with any food. The applicants said they were forced to wear only one garment despite the low temperatures at night. In those conditions they were deprived of any footwear. They were allowed out of the cell into an enclosed area for about 10 minutes each day. The cells were not cleaned as required by standing orders.

The third applicant was human rights organisation whose object was to encourage the growth and strengthening of human rights at all levels of Zimbabwean society. It contended that all the police cells in Zimbabwe are much the same as those described by the first two applicants.

The applicants brought an application under s 24(1) of the Constitution, alleging that the conditions under which they were was detained constitute inhuman and degrading treatment and violated the fundamental right conferred by s 15(1) of the Constitution. They sought a *declaratur* that all police cells throughout Zimbabwe were unfit for the holding of criminal suspects, and sought a series of orders requiring the police to take appropriate corrective measures.

The respondents pleaded scarcity of resources for the failure to provide better facilities in the holding cells.

It was argued for the respondents that the first applicant had no *locus standi* to bring these proceedings as she was a non-citizen (although she was a resident) and, as such, was not entitled to any protection under the Constitution, in particular s 15. It was also argued that she was not entitled to the relief set out in the draft order as it was too wide and did not relate to her. On the merits of the matter, the respondents argued that although s 15(1) of the Constitution prohibits inhuman and degrading treatment, the applicants' treatment did not amount to inhuman and degrading treatment. It was argued that the conditions of the police holding cells where the applicants were held, and prisons in general, are not required to and cannot match those of a free person. The order sought by the applicants was of an administrative nature which the courts were unable to regulate. The obligations sought by the applicants from the respondents were dependent upon the resources available for such purposes and that the corresponding rights themselves were limited by reason of lack of resources.

Held: (1) It was quite clear from the language of s 15(1) that there is no distinction between a citizen and a non-citizen in respect of the protection availed under that section. The subsection prohibits the subjection of any person, irrespective of the status of that person, to torture, or to inhuman or degrading treatment. There was nothing in the language of s 15(1) that the lawmaker intended to limit the protection provided therein to citizens only.

(2) In regard to the relief sought, the Court must be satisfied that the applicant's interest in the relief sought in the draft order satisfies the following criteria:

(a) a direct interest that is not too remote from the relief sought;

(b) a substantial interest that is not too abstract or academic;

(c) a real interest not a hypothetical one;

(d) a sufficient or patrimonial interest.

(3) The law maker intended s 15(1) of the Constitution to protect all persons irrespective of whether or not they are imprisoned or detained in police cells. Indeed, detained and imprisoned persons must have been in the forefront of the lawmaker's mind when he enacted s 15(1) of the Constitution. Incarcerated persons are particularly vulnerable and in need of such protection as they are liable more than anyone else to torture, inhuman and degrading treatment. Convicted persons are not, by the mere fact of their conviction, denied the constitutional rights they otherwise possess and no matter the magnitude of their crime they do not forfeit the protection afforded them by s 15(1). The same reasoning would apply equally to persons who are detained in police holding cells on suspicion of having committed criminal offences.

(4) The question of whether or not the police carried out their duties as set out in the standing orders was essentially an administrative issue and not a constitutional one and thus more of a matter for review than a constitutional issue.

(5) In terms of numerous international instruments torture, inhuman or degrading punishment is universally proscribed. Numerous judgments and reports showed that detention in filthy and crowded conditions were a breach of such instruments. Even if certain of these instruments were not part of the national law, Zimbabwe being a signatory to them, their provisions were almost identical in effect to s 15(1). The holding cells in which the applicants were detained overnight did not comply with elementary norms of human decency, let alone comply with internationally accepted minimum standards, and constituted inhuman and degrading treatment.

(6) In the absence of evidence that such conditions applied generally in police stations in Zimbabwe, the court could not make the general orders applied for. It would be declared that the first two applicants had been subjected to inhuman and degrading treatment, and appropriate orders would be issued in respect of the two police stations complained of.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 16(1)(a) – acquisition of land – requirement for acquisition to be "reasonably necessary" for one of purposes stated – provision of Land Acquisition Act [*Chapter 20:10*] effectively fettering Administrative Court's discretion to determine whether acquisition "reasonably necessary" – such provision not constitutional

S C Shaw (Pvt) Ltd v *Min of Lands* S-32-05 (Chidyausiku CJ, Sandura, Ziyambi, Malaba & Gwaunza JJA concurring)

The respondent Minister had designated certain of the appellant's farms for compulsory acquisition. The appellant objected and a confirmation hearing was held in the Administrative Court. In respect of some of the properties it was conceded that the Minister had failed to comply with certain procedural requirements. In respect of the others, the appellant's lawyer requested that the case be referred to the Supreme Court in terms of s 24(2) of the Constitution. The matter that was referred to the Supreme Court was whether the amendments made to the Land Acquisition Act by ss 3(3) and 9(2) of Act 1 of 2004 were irreconcilable with s 16(1)(a) of the Constitution, as they purported to restrict or inhibit consideration of factors which might otherwise be relevant to the issue of whether it is "reasonably necessary" to acquire the land in question. These amendments reflected a change in policy in the criteria to be used in the identification of the land that was to be compulsorily acquired in terms of the Act. The first Land Reform Programme Document published in April 2001 had a set of criteria that was used in the identification of farms for acquisition. The criteria in that document exempted certain categories of farms from acquisition. The document was later amended by removing the protection previously accorded to certain land. The amendment to the Act was intended to realign the law and the revised document. Held: It was the duty of the Administrative Court, in determining confirmation proceedings in terms of s 7 of the Act, to have the closest possible regard to what is "reasonably necessary". Unless the court was satisfied that the acquisition was "reasonably necessary" for one of the three purposes set out in s 7(4)(b) of the Act (which reflected s 16(1)(a)(i) of the Constitution), it could not confirm the acquisition. No act of Parliament could truncate what was "reasonably necessary" in acquiring land for purposes of s 8 of the Act. The impugned sections effectively prohibited the Administrative Court from taking into account factors previously set out in ss 6A and 6B of the Act in determining whether "reasonably necessary" grounds for acquisition of the land existed. That prohibition, *ipso facto*, inhibited the discretion of the Administrative Court. By effectively prohibiting the Administrative Court from considering that an acquired farm was, for example, a "plantation" in its determination of the question whether "reasonably necessary" grounds for the acquisition of the land existed, the sections fettered the discretion of the Administrative Court and were thus unconstitutional.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(9) – right to fair hearing – applicability – tribunal appointed to investigate question of removal of judge from office – not a court – not bound by s 18(9)

Paradza v *Chirwa NO & Ors* S-25-05 (Malaba JA, Chidyausiku CJ, Ziyambi Gwaunza JJA concurring, Sandura JA dissenting in part) (judgment delivered 23 August 2005)

See below, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – judge of High Court – removal from office).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 20 – right to receive and impart information – s 21 – freedom of association – s 23 – protection against discrimination – right of civic group to compel Government to receive group's proposals for constitutional reform – no right given under any of those sections

National Constitutional Association v *The President & Ors* HH-110-05 (Guvava J) (Judgment delivered 2 November 2005)

The applicant association, a civic group formed for the purpose of advocating constitutional reform, had drafted a proposed new Constitution for Zimbabwe. Efforts to involve the Government were unsuccessful. The applicant wrote a letter to the second respondent (the Minister of Justice) seeking the assistance of the Minister in facilitating a meeting with the President for purpose of the formally handing over of the draft Constitution. The Minister did not respond. The applicant sought an order compelling the respondents to receive the draft and to give the Government's response to it. The basis of the application was that (1) the applicant had been discriminated against in terms of s 23 of the Constitution; (2) its rights to receive and impart ideas had been curtailed in contravention of s 20; and (3) its freedom of association had been infringed in contravention of s 21 of the Constitution; and (4) it was being denied its lawful right of access to Government.

Held, dismissing the application: (1) no leave had been applied for or obtained to sue the President and the application against him had to be dismissed on that ground. (2) Actions may only be regarded as discriminatory under s 23 if other persons are accorded the same privileges which are being denied to the applicant. The applicant must also be discriminated against on the basis of race, tribe place of origin, political opinions, colour and creed. The Government was no consulting with anyone else about a new Constitution and thus not discriminating against the applicant. (3) The crux of the right under s 20 is the curtailment of the freedom of expression. It does not encompass a situation where persons, such as the respondent, are forced to receive information and ideas that they do not wish to receive. (4) The right which is protected by s 21 is the restriction of a person's right to associate with persons of his own choice. There was no allegation that the applicant's rights had been restricted in any way. (5) There is no law providing that citizens

have a legal right to meet Government officials and raise their concerns and that public officials have a duty to meet with their citizens.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1) – application under – relief sought by applicant – what relief applicant entitled to – interest that must be shown in relief sought

Kachingwe & Ors v *Min of Home Affairs & Ors* S-145-04 (Chidyausiku CJ, Sandura, Cheda, Malaba & Gwaunza JJA concurring)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 15(1)).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(2) – referral of constitutional question to Supreme Court – lower court's right to refuse where raising of question frivolous or vexatious – identical question already pending before Supreme Court – referral refused

Mukonoweshoro v *Mahofa* HH-60-05 (Guvava J)

The petitioner in an election petition sought a stay of the proceedings, pending the determination of a constitutional question which had been placed before the Supreme Court in another petition. The outcome of that issue would directly affect the petitioner's case and could result in considerable expense if the petition had to be re-heard. Alternatively, the petitioner sought the referral to the Supreme Court in terms of s 24(2) of the Constitution. Held: A lower court may decline to refer a matter to the Supreme Court if it considers that the raising of the question is frivolous or vexatious. In this case, the question itself was not frivolous or vexatious, but the raising of it was. The matter was already pending before the Supreme Court and no useful purpose would be served by referring numerous other cases which basically raised the same point.

Constitutional law – Constitution of Zimbabwe 1980 – judge of High Court – removal from office – tribunal to investigate question – appointment of members of – whether President must personally select members – request to Chief Justice of another country to nominate judge as member – not a delegation of President's powers

Constitutional law – Constitution of Zimbabwe 1980 – President – executive powers of – exercise of such powers – extent to which may be exercised by Minister

Paradza v *Chirwa NO & Ors* S-25-05 (Malaba JA, Chidyausiku CJ, Ziyambi Gwaunza JJA concurring, Sandura JA dissenting in part) (judgment delivered 23 August 2005)

The applicant, a High Court judge, was facing charges of attempting to defeat or obstruct the course of justice, alternatively, incitement to contravening s 4(a) of the Prevention of Corruption Act. It was alleged that he had telephoned 3 other High Court judges to ask them to show favour by varying or cancelling bail conditions imposed on his business partner, who was facing a charge of murder. The Chief Justice, acting in terms of s 87(3) of the Constitution, advised the President that the question of removal of the applicant from office ought to be investigated. The President decided to choose the members of the investigating tribunal from among judges of other countries, as provided by s 87(4)(b). Following that decision, the Minister of Justice wrote letters to the High Commissioners of three neighbouring countries, asking them to approach their respective Ministers of Justice to request the Chief Justices of their respective countries to nominate judges of their courts to be members of the tribunal. The Chief Justices of those countries forwarded to the Minister the names of the first, second and third respondents, who were judges of the Supreme Courts of their respective countries. The President subsequently appointed the tribunal, consisting of the three judges, to inquire into the question of the removal of the applicant from office.

Part of the evidence that was to be led before the tribunal consisted of a tape-recorded telephone conversation one of the Zimbabwean judges had with the applicant.

An application was made to the Supreme Court in terms of s 24(1) of the Constitution, alleging that the appointment of the tribunal was unconstitutional in that its members were not selected by the President within the meaning of s 87(4) of the Constitution, and that the adduction of the tape-recorded evidence of the telephone conversation would infringe the applicant's constitutional right to a fair hearing, entrenched in s 18(9) of the Constitution, because the evidence was obtained as a result of a breach of the applicant's right to the privacy of telecommunication enshrined in s 20(1) of the Constitution. It was argued that selection required that the President should be shown to have compared the qualities or attributes of each of the members of the tribunal with those of other persons in category (b) of s 87(4) before choosing them in preference to others. The President did not consciously apply his mind to the question of the suitability of the first three respondents for selection as members of the tribunal because he had no information on their personal attributes. The Minister had usurped the powers of the President to select members of the tribunal by

communicating with the Chief Justices of the three countries through their respective High Commissioners as if he was the repository of the power to appoint the tribunal. There was an unlawful delegation of the President's power of selection of members of the tribunal by the Minister to the Chief Justices.

Held, (Sandura JA dissenting in part): (1) the procedure under s 87 of the Constitution for termination of a judge's appointment that must be strictly observed at every stage of the process if judicial independence is to mean anything. Under the section there are specific powers vested in the President, which he is required to exercise personally, one such power being that to select members of the tribunal.

(2) Under s 31H(1) the President has the discretion to exercise executive powers vested in him directly or through the Cabinet, a Vice-President, a Minister or a Deputy Minister. The Minister's action in writing the letters of request was in the exercise of executive authority, as a Minister has no executive authority of his own outside the executive authority of the State vested in the President. His action was to enable the President to exercise his power of selection of members of the tribunal. It was an act of pure administrative agency not a usurpation of the President's functions.

(3) Although the Chief Justices of the 3 countries nominated judges, they could not be said to have made final decisions that the nominees had become members of the tribunal. The fact that the President chose the same persons whose names were submitted did not detract from the fact that he had the right to reject any or all of the. He was not bound by the nominations.

(4) Section 18(9) of the Constitution does not apply to a person when he appears before a body whose duty is to investigate and report on the facts found and make recommendations to some other person or body. The tribunal was not a court or an adjudicating authority established by law to determine the existence or extent of the applicant's civil rights or obligations; its duty was to investigate and report on the facts relating to the question of his removal from office to the President. It would not decide whether or not he should be removed from office. The applicant would be entitled to a fair hearing by the tribunal, but not in the context of the cocktail of rights guaranteed to a person appearing before a court of law under s 18(9).

(5) The tribunal was not bound by strict rules of evidence as it was not a court of law or adjudicating authority and did not administer justice. In any case it was not the law that evidence obtained as a result of an unlawful interception of a telephone conversation should be excluded from use in court proceedings. The admissibility of illegally or improperly obtained evidence is a matter for determination by the court in the exercise of its discretion. Investigating bodies carrying out their constitutional functions should not be prevented from performing their functions unless they are in breach of the rules of natural justice shown to be applicable in the particular circumstances.

(6) (*Per* Sandura JA) The rôle of the person leading evidence before the Tribunal is not "to assist the Tribunal with the State's position", because the State does not have a position in such an enquiry, but to assist the Tribunal by selecting the evidence to be placed before the Tribunal and by calling the witnesses and examining them. The evidence should not be led by an official designated by the Minister, but by an independent legal practitioner selected by the Tribunal.

Contract – carriage of goods – bill of lading – applicable law – English law applicable – consignee of goods in Zimbabwe – consignee bound by bill of lading entered into between supplier of goods and carrier

Colour Fast Textiles Ltd v *P & O Ned Lloyd & Anor* HH-70-05 (Gowora J)

The applicant purchased goods from the Far East in terms of a CIF contract. The seller then concluded an agreement with the first respondent for the shipping of the goods to Harare, and issued a bill of lading placing the goods on a ship for their conveyance to a port in South Africa and their transportation by road to Harare. The goods arrived in the country and were cleared for entry into the country for customs purposes through a clearing agent appointed by the applicant. Thereafter, they were conveyed to Harare under the responsibility of the first respondent and were then conveyed to the second respondent's premises where they remained for nearly a year, when the first respondent sent the applicant a note claiming demurrage costs. The applicant claimed that the respondent should have delivered the cargo to its premises in Harare and that the detention of its cargo by the respondent was unlawful. The respondent had not been sending monthly invoices to the applicant in respect of storage of the cargo. The applicant denied the existence of a contract between itself and the first respondent, as it had paid for freight when it paid the purchase price. It further claimed that in terms of the contract between the first respondent and the supplier, the former was obliged to deliver the cargo to the applicant, which had a right to receive goods lawfully purchased by it and conveyed to Harare by the first respondent under a contract of carriage with the supplier. The applicant applied for an order for the release of the cargo.

The first respondent raised a point *in limine*, that the applicant's claim was based on the bill of lading which was the contract governing the agreement. In terms of the bill of lading any claim against the carrier should be determined in accordance with English Law and in the High Court of Justice in London and as a result the court did not have jurisdiction to entertain the claim. The applicant argued that without the express abrogation of the doctrine of privity of contract, the consignee on a bill of lading who is not a party to the contract cannot be bound by its terms without

having consented thereto. The applicant contended that it was thus not bound by the terms of the contract as expressed in the bill of lading, and that barring statutory intervention, a shipper and a seller of goods cannot bind a third party, in this case a purchaser.

Held: (1) Under s 2 of the General Law Amendment Act [*Chapter 8:07*], in matters relating to maritime and shipping, English law, unless it is inconsistent with any enactment, shall prevail. Likewise, in terms of s 3 of the Act, when considering claims or disputes relating to fire, life or marine assurance, stoppage *in transitu* or bills of lading, the law to be administered by the High Court is that administered by the High Court of Justice in England, although s 4 of the Act restricts the courts in Zimbabwe from having regard to any statutes passed in the United Kingdom after 11 September 1879. It was clear, therefore, that when it comes to bills of lading, English law including common law is applied. (2) In terms of the English Bills of Lading Act 1855, every person who claims property as a consignee under the bill of lading is bound by its terms. The applicant was claiming delivery of the goods on the basis of the contract between the first respondent and the supplier in the Far East. The contract itself was the bill of lading, which the rights that the applicant was seeking to enforce were derived from. (3) *In casu*, the contract provided that any claim against the carrier had to be determined only according to English law and exclusively in the High Court of Justice in London. Accordingly, the High Court in Zimbabwe had no jurisdiction.

Contract – interpretation – "free of deduction" – meaning

Wood & Anor v *Mudungwe & Anor* S-148-04 (Malaba JA, Sandura & Gwaunza JJA concurring)

The appellants sold a house to the respondents. The contract provided that the price should be paid "free of deduction" to the seller, payment being made to the seller's agent, his legal practitioner. The buyers duly paid the amounts specified in the contract, but when the agent presented his account to the appellants, certain sums had been deducted, particularly for capital gains tax and a sum in settlement of the appellants' mortgage bond with a building society. The appellants refused to sign the deed of transfer, claiming that there had been a breach of contract, in that they had not received the full amount of the purchase price, with no deductions. Held: In the absence of express enumeration of the things not to be deducted from the purchase price, the words "free of deduction" should be confined to such deductions as might reasonably have been in the contemplation of the parties at the time they entered into the contract. In other words, the phrase would refer to things for the payment of which a purchaser would ordinarily be expected to make deduction from the purchase price. Capital gains tax is not, properly speaking, a deduction but a charge, which the legislature imposes on the person who receives capital gain; and the mortgage bond imposed an obligation on the first appellant and his wife to pay their debt to the building society. The purchaser had no obligation, in the absence of express agreement, to pay the money for them. There was nothing in the context in which the words "free of deduction" were used to suggest that when the parties entered into the contract they treated capital gains tax and the other debts listed in the statement of account, ordinarily expected to be paid by the sellers, as coming under the meaning of "deduction". Consequently, the words should be construed in their limited meaning, which would secure for the seller relief from the burden of things that are in the ordinary sense "deductions" expected at law to be made as of right from the purchase price by the purchaser.

Costs – appeal – against order of costs – need for leave of court *a quo* to appeal against order

Gasela v *Constituency Elections Officer, Gweru Rural* S-54-05 (Chidyausiku CJ, in chambers)

See above, under APPEAL (Costs – appeal against order of).

Costs – *de bonis propriis* – against police officer – when appropriate

Sikazwe & Ors v *Mchada & Ors* HB-121-05 (Cheda J) (Judgment delivered 15 December 2005)

Police officers work under very difficult circumstances in an attempt to maintain law and order. There is, therefore, a need for the courts to adopt a robust approach when scrutinising their behaviour in the conduct of their duty. In an environment where the police are being accused of corruption, the courts should do everything they can to avoid unnecessary condemnation of their otherwise genuine actions. Such condemnation can easily dampen the spirit of honest police officers in the execution of their duties. However, the courts cannot support unlawful and wrongful police actions where this has been proved to have taken place. Police officers are enjoined to execute their duties within the confines of the law. Police officers**,** being human like all of us**,** do make errors in their duties, which errors at times need not to be condemned without just cause. It is against both public policy and the interest of justice for the courts to punish police officers who in the execution of their duties make genuine errors in the mistaken belief of the law of by reason of error of judgment. The consequences of such impetuous orders will discourage the police from fighting crimes in society.

Costs – successful party – includes person against whom action has been withdrawn – such party entitled to his costs

Moyo v *Nyatanga NO & Ors* HH-64-05 (Bhunu J) (20 July 2005)

The applicant instituted proceedings against the four respondents in a matter relating to a deceased estate. He subsequently filed a notice of withdrawal on the basis that each party pays its own costs. The first three respondents, or their representatives, signed the notice of withdrawal, indicating that they accepted the withdrawal on that basis, but the fourth respondent did not. Held: the withdrawal meant that the fourth respondent had been wholly successful. The application had put him to unnecessary expense, particularly as no specific order had been sought against him. In the absence of special circumstances, the courts do not lightly depart from the general rule that costs follow the event. No such circumstances having been suggested, the fourth respondent was entitled to his costs as a matter of right.

Court – contempt of – unsubstantiated allegations by counsel of improper pressures brought to bear on judges – such allegations scandalizing court and constituting contempt

S C Shaw (Pvt) Ltd v *Min of Lands* S-32-05 (Chidyausiku CJ, Sandura, Ziyambi, Malaba & Gwaunza JJA concurring)

The respondent Minister had designated certain of the appellant's farms for compulsory acquisition. The appellant objected and a confirmation hearing was held in the Administrative Court. In respect of some of the properties it was conceded that the Minister had failed to comply with certain procedural requirements. In respect of the others, the appellant's lawyer requested that the case be referred to the Supreme Court in terms of s 24(2) of the Constitution. One of the grounds raised was to allege that the acceptance of offers of land by judges prior to the determination of the validity of the acquisition of the land, together with improper pressures brought to bear on judges by members of the government and cabinet, was not compatible with constitutional concept of a fair trial before an independent tribunal. No evidence was submitted in support of this allegation, and the Administrative Court refused to refer the matter to the Supreme Court on the grounds that it was frivolous and vexatious. Held: Courts in Zimbabwe have a responsibility to protect their dignity. Where legal practitioners, who are officers of the court, and as such, are expected to know better, make irresponsible submissions scandalizing the court mere admonition is inadequate and action should be taken to punish such legal practitioners for contempt of court.

Court – Supreme Court – jurisdiction – review powers – when Supreme Court may exercise review powers – no right for litigant to institute review before Supreme Court

Chairman, Zimbabwe Electoral Commission & Ors v *Bennett & Anor* S-48-05 (Ziyambi JA, Sandura & Cheda JA concurring) (Judgment delivered 1 November 2005)

The Supreme Court is an appellate court. It has no original jurisdiction except when it sits as a constitutional court by virtue of s 24 of the Constitution. Although s 25(1) of the Supreme Court Act [*Chapter 7:13*] gives the court or a judge of the court the same review powers as the High Court, the effect of subsections (2) and (3) is that, although the Supreme Court may correct an irregularity in proceedings or in the making of a decision which comes to its attention (which may not necessarily by way of appeal or application), no person has the right to institute any review in the first instance before the court.

Criminal law – common law offences – robbery – recent possession – evidence of recent possession may in appropriate circumstances be relied on to convict a person of robbery

S v *Kawadza* HH-5-06 (Uchena J, Garwe JP concurring) (Judgment delivered 15 November 2005)

The doctrine of recent possession is based on an inference being drawn that the possessor of recently stolen property stole the property. It may be relied on where if he cannot give an innocent explanation of his possession and the inference that he stole the property is the only reasonable inference that can be drawn from such possession. There is no reason why the doctrine cannot be used in any case of which theft is a component, like robbery. If the only inference that can be drawn from the totality of the evidence is that he stole the goods then he can be convicted of the robbery of those goods and others robbed from the complainant at the same time.

Criminal procedure – charge – exceptions, provisos and exemptions – when a statutory provision may be regarded as such rather than as part of the substantive offence

Criminal procedure – review – incomplete proceedings – when such proceedings may be taken on review – limited circumstances in which incomplete proceedings are subject to review

A-G v *Makamba* S-30-05 (Malaba JA, Chidyausiku CJ & Gwaunza JA concurring) (Judgment delivered 29 July 2005)

The respondent was being tried before the regional court on charges under s 11(1) of the Exchange Control Regulations. This states that "Subject to subsection (2)" a Zimbabwean resident is not allowed to make payments outside the country unless authorised. Subsection (2) states that this restriction does no apply to payments made with "free funds". A number of payments were admittedly made by the respondent. Before the close of the State case, the defence made the bald allegation that the payments were made with free funds, but did not elaborate. The magistrate refused an application for discharge at the end of the State case. The respondent took the decision on urgent review to the High Court, which upheld the respondent's application to set aside the magistrate's decision. On appeal by the Attorney-General, held: (1) The phrase "subject to subsection (2)" meant that the prohibition in subs (1) applied in all circumstances except where those described in subs (2) existed. Subsection (2) did not create a negative element of the offence set out in subs (1) which had to be alleged and proved by the State. It was not an element of the offence and failure by the State to incorporate its particulars in the charge sheet did not affect the disclosure of the offence by the charge as framed. Section 11(2) created a special defence, the onus of proving which rested on the respondent in terms of s 146(2)(b) of the Criminal Procedure and Evidence Act. (2) One of the principles to be adopted in determining whether an exempting provision which accompanies the description of an offence is actually an exception to the offence or an additional element in the offence is to decide whether, if all references to the exceptions relevant to the case before the court is eliminated from the indictment, what remains of the indictment discloses the offence. In this situation, if subs (2) did not exist, the remainder of the section would clearly create an offence of general application. (3) The general rule is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant. There was no allegation or proof of any gross irregularity in the proceedings or decision of the lower court warranting review. In determining the question of the discharge of the respondent at the close of the case for the prosecution, the regional magistrate took into account the evidence placed before her and did not consider any extraneous factors.

Criminal procedure – trial – completion of – when trial completed – murder case – verdict of guilty – trial complete after determination of whether extenuating circumstances exist

S v *Sibanda* HH-59-05 (Garwe JP) (judgment delivered on 24 August 2005)

See below, under CRIMINAL PROCEDURE (sentence) (Common law crimes – murder – extenuating circumstances – finding of).

Criminal procedure (sentence) – common law crimes – murder – extenuating circumstances – constructive intent to kill – not necessarily a circumstance of extenuation – need for court to weigh up other factors very carefully before finding no extenuating circumstances exist

S v *Siluli* S-146-04 (Chidyausiku CJ, Malaba & Gwaunza JJA concurring)

Where, on a charge or murder, only a constructive intent to kill is proved, the court need not necessarily find that this is a circumstance of extenuation, but the court should examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances. A constructive intent to kill is a factor which must be put in the credit side in the accused's favour in that weighing-up process.

Criminal procedure (sentence) – common law crimes – murder – extenuating circumstances – finding of – such finding part of verdict, not of sentencing process

S v *Sibanda* HH-59-05 (Garwe JP) (judgment delivered on 24 August 2005)

The accused was found guilty of murder but before the court decided the question of extenuating circumstances, the presiding judge retired. He did not complete the trial, as he was entitled to do under s 86(4) of the Constitution. A few months later he was arrested on allegations of attempting to defeat the course of justice. The charges were subsequently withdrawn before plea and the judge left the country. He refused to return even after the Director of Public Prosecutions had stated that he declined to prosecute. The question for determination was whether following a conviction for murder another judge of the High Court can proceed to deal with the question of extenuation and thereafter impose a sentence.

Held: (1) Although in terms of s 333(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] another judge may pass sentence if the trial judge is unavailable, this did not apply to the determination of whether extenuating circumstances existed. (2) In a criminal trial in the High Court, any question of fact arising at a criminal trial must be decided by the majority of the court, the court consisting of a judge and two assessors. A trial is the determination of the matters put in issue, and it concludes with the verdict or, in the case of a verdict of guilty of murder, with the decision of the question whether there are extenuating circumstances. Although the judge and the assessors are required, after convicting an accused person of murder, to consider the question of extenuation, in reality there is but one composite verdict of guilty with or without extenuating circumstances. The expressed opinion by the triers of fact that extenuating circumstances are or are not present is not part of the sentence or part of the judge's reasons for sentence; it is a distinct procedural step in relation to the power to sentence a convicted murderer. (3) Consequently, the proceedings must be considered a nullity.

Criminal procedure (sentence) – statutory offences – Gold Trade Act [*Chapter 21:03*] – s 3(1) – dealing in gold – consequent prohibition under s 24 on entering mining location – requirement for court to enquire into and record reason for ordering otherwise

S v *Masike* HH-78-05 (Bhunu J) (Judgment delivered 26 October 2005)

Under s 24 of the Gold Trade Act [*Chapter 21:03*], a person convicted of, *inter alia*, unlawfully dealing in gold is automatically prohibited such person from entering or being upon any precious metals mining location during the period of five years from the date of his conviction unless the court for any reason (which it shall record) thinks fit to order otherwise. The trial court thus has discretion as to whether or not a convict should automatically be banned from entering any precious metal mining location. This discretion must be exercised fairly, judiciously and responsibly. The mere fact that the section obliges the court to record its reasons if it thinks that the accused should *not* be banned from entering a precious metal mining location does not relieve the court from the duty of recording the proceedings if it thinks otherwise.

Customary law – application – when customary law should be followed – application by choice of parties – need for parties to choose expressly – application due to surrounding circumstances of the case – parties living in urban area following an urban life style – closer to general law than customary law

Mabuto v *Bhila* HB-108-05 (Cheda J, Ndou J concurring) (Judgment delivered 20 October 2005)

The parties were married under customary law but lived in an urban area. Their lifestyle was urban rather than rural. A divorce action brought by the husband and was heard in the community court, which applied customary law in its determination of how the matrimonial assets should be distributed. The wife ostensibly agreed that she was not entitled to any of the property because she had not contributed anything. On appeal, held: (1) under s 3 of the Customary Law & Local Courts Act [*Chapter 7:05*] customary law applies where the parties have expressly or impliedly agreed that customary law should apply or where, regard being had to the nature of the case and surrounding circumstances, it appears just and proper that it should apply. These circumstances include the relative closeness of the parties to customary law or general law of Zimbabwe as the case may be. *In casu* customary law should not have been applied. There was no evidence that the parties had agreed that customary law should apply. The parties should make a choice and that choice and/or consent should be made expressly. The parties were urbanised and their life styles were completely different from those in the rural areas. The nature and surrounding circumstances therefore put them in the category of an urban couple whose life style would be governed by general law. (2) As an unrepresented litigant, the court should have made a further enquiry in order to establish whether the respondent was freely abandoning her claim to some of the property. The vulnerability of an African woman because of the ever present male dominance as a result of deeply rooted cultural beliefs can not be ignored. The courts should always bear in mind that the docility of an African woman can easily be mistaken for consent when in fact it is merely an external manifestation of societal pressure. It is therefore necessary for the courts to assist them in enforcing their propriety and other rights.

Damages – delictual – assessment of – date at which loss assessed – effect of inflation – whether plaintiff may claim damages based on true value of loss – interest rate – should reflect inflation rate

Komichi v *Guest & Tanner* HH-104-05 (Makarau J) (Judgment delivered 23 November 2005)

The plaintiff claimed damages for the loss of her car, which was written off by the insurers after an accident for which the defendant was admittedly responsible. The car could have been repaired but the plaintiff did not at the time have the necessary funds. She sought to prove that because of the high inflation rate, the replacement value of the car at the time of the issue of the summons was, in monetary terms, far higher than the insured value. Held: (1) the measure of

delictual damages in our law is the calculation of an amount of money which is necessary to place the plaintiff in the (hypothetical) financial position he would have enjoyed had the delict not been committed. The principle of currency nominalism holds that a debt sounding in money has to be paid in terms of its nominal value, irrespective of any fluctuations in the purchasing power of the currency. This places the risk of depreciation of the currency on the creditor and saddles the debtor with the risk of appreciation. (2) The unsatisfactory result reached in adopting currency nominalism could be resolved by the Minister of Justice aligning the Prescribed Rate of Interest Act [*Chapter 8.10*] to the inflation rate, the current prescribed rate of interest being woefully out of step with inflation. (3) The applicability of the traditional sum-formula approach in a inflationary environment, where the face value of the plaintiff's estate after the delict is higher that the pre-delict value, was a matter that might have fallen for consideration had the plaintiff not adopted a wrong approach. She sought the replacement value of the motor vehicle at the time summons were issued. In so doing, she erred: she did not lose her vehicle as a direct result of the negligence of the first defendant. Her vehicle could have been repaired at a given cost and put back on the road. It was the cost of those repairs that constituted her loss or the extent to which her patrimony was diminished. No evidence was placed before the court as to the value of the vehicle before and after the accident. (4) Consequently, absolution from the instance would be granted.

Education – university – Midlands State University – employees of – not part of public service

Education – university – Midlands State University – legal status of – whether Ministerial approval required for expenditure – university a separate legal *persona* – not a designated corporate body under Audit and Exchequer Act [*Chapter 22:03*]

Midlands State UniversityCouncil v *MSU Lecturers' Assn* S-42-05 (Chidyausiku CJ, Cheda & Ziyambi JJA concurring)

After the lecturers at a State university went on strike, the matter was referred for compulsory arbitration in terms of the Labour Act [*Chapter 28:01*]. Neither party attended the hearing. The arbitrators awarded various general and specific increases in salary for lecturers at the university. The arbitrators made it clear that one of the problems they had was that the Government, through the Ministry of Education, provided funds for the State universities. It also controlled the level of fees paid by students. Not knowing the Ministry's attitude or wishes, the arbitrators set what they considered to be fair and reasonable wages.

The appellant (the university council) appealed to the Labour Court, although the appeal was due to a *bona fide* error noted well out of time. However, the Labour Court refused the application on that basis that the appellant's prospects of success on appeal were non-existent as the appeal was based on a question of fact, and not law. It held that the appellant was a legal *persona* with capacity to employ the respondent and determine the respondent's salaries without the consent of the Minister. On appeal to the Supreme Court, the essential issue was whether it was competent for an award to be made for increases which had not been approved by the responsible Minister. The appellant argued that the Minister's consent had to be obtained before the appellant could increase the salaries of the lecturers.

Held: (1) the university was a legal *persona* created by the Midlands State University Act [*Chapter 25:21*]. There was no provision in the Act requiring the Council to submit any statements of financial estimates to the Minister, nor was there any provision for the approval of the Minister to be sought for any financial purpose unless he has designated certain employees. The lecturers concerned had not been so designated.

(2) The University was not included in the description of designated corporate body that was prescribed in terms of s 32 of the Audit and Exchequer Act [*Chapter 22:03*] and so s 33, under which expenditure had to be approved by the responsible Minister, did not apply to it.

(3) The lecturers were not public servants as defined in s 113 of the Constitution.

(4) Although the government was the *de facto* paymaster while the appellant was the *de jure* paymaster of the lecturers, neither the Minister nor the government had any legal obligation to pay the salary increases to the lecturers. Neither the arbitrators nor the Labour Court nor the Supreme Court could issue an order obliging the government to pay the salary increases to the lecturers.

Election – election petition – allegations made in petition – must be proved beyond reasonable doubt – grounds not particularised in petition – court not entitled to rely on such grounds to set aside election

Hove v *Gumbo (Mberengwa West Election Petition Appeal)* S-143-04 (Malaba JA, Chidyausiku CJ & Ziyambi JA concurring)

The electoral process should not be reversed and an elected candidate thrown out unless the grounds on which the Electoral Act says the election may be declared void have been proved beyond reasonable doubt. An election petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and

grounds on which an election may be set aside must be found in the statute and nowhere else. Section 132 of the Electoral Act [*Chapter 2:*01] provides that an election petition may be presented "by reason of want of qualification, disqualification, corrupt practice, illegal practice, irregularity or other cause whatsoever". This wording indicates that the causes specifically mentioned therein are not exhaustive and that the petition may be presented on any cause of complaint known to the petitioner. This does not however mean that the court may set an election result aside on a ground that has not been pleaded as a cause of complaint in the petition at the time of its presentation. For a court to set aside an election the cause of the complaint should have been pleaded in the petition at the time of its presentation and established by evidence beyond reasonable doubt. The respondent is entitled to know the reason why his election is being challenged so that he is able to answer the case. The relief which the High Court may grant to a petitioner depends on the nature of the cause of the complaint against the election result as pleaded in the petition. Any grounds not particularised in the petition must not be relied upon to set aside an election.

Note: the judgment appealed against was reported as *Mberengwa West Election Petition* 2002 (1) ZLR 233 (H). – *Editor*

Election – election petition – grounds for – general violence – what must be shown – acts of violence constituting undue influence – distinction from general violence – such acts extensively prevalent – election may be set aside on that ground

Chauke v *Mare (Chiredzi North Election Petition Appeal)* S-147-04 (Malaba JA, Chidyausiku CJ & Cheda JA concurring)

Acts of violence that constitute extensively prevalent undue influence on voters in a constituency are not necessarily evidence of general violence, which is a condition akin to break-down of law and order in a constituency. General violence manifests itself through riotous behaviour which must have been so grave as to amount to intimidation liable to induce persons of ordinary courage to refrain from exercising their votes. It must be general and of a nature that the result of the election might reasonably be supposed to have been affected, without proof that it was in fact affected – in other words conditions must have prevailed which negative the concept of a free election.

To prove general violence as a cause of an undue election, a petitioner does not have to show that particular voters were induced to vote or to refrain from voting, as is the requirement for the establishment of undue influence within the meaning of s 105 of the Electoral Act. Whilst acts of violence constituting corrupt practices which extensively prevailed in a constituency may have the same effect as general violence – that of producing an undue election – they are different causes which must be pleaded by the petitioner at the time of presentation of the petition to the High Court.

Section 105 prohibits the commission of undue influence on a voter by "any person" and an election may be set aside if corrupt practices found by the court to have been committed by persons other than the respondent or his agent were so extensively prevalent in the constituency as to have negatived the existence of freedom of choice in the electorate. The existence of corrupt practices had been pleaded as a cause of complaint against the election result. The evidence established that corrupt practices committed by war veterans, in the form of undue influence on voters to refrain from voting at all or to vote for ZANU-PF, extensively prevailed in the constituency so that it could not be said the election was free and fair.

Election – election petition – need for precision in – need to contain essential averments on which petitioner relies – court not entitled to rely on grounds emerging during hearing but not averred in petition

Muchena v *Muzira* (*Mutoko South Election Petition Appeal)* S-132-04 (Ziyambi JA, Chidyausiku CJ & Makaba JA concurring)

The cause of action in an electoral petition being derived from statute, the court has no power to exempt a petitioner from strict adherence to the terms of the statute. An election petition must contain the essential averments on which the petitioner intends to rely, as well as the relief sought. It is impermissible for the petitioner to allege one cause of action in his petition and then rely on a different one at the trial. The respondent is entitled to know at the time when the petition is served on him what case he is being called upon to meet. The grounds on which it is sought to set an election aside must be clear to the petitioner at the time he files his petition. While under s 124(a) of the Act a candidate is liable for corrupt practices such as intimidation committed by his or her agent, where there was no averment in the petition that the persons who allegedly committed the corrupt practices were agents of the appellant, the court should hold that the petition discloses no cause of action.

Note: the judgment appealed against was reported as *Mutoko South Election Petition* 2001 (1) ZLR 308 (H). – *Editor.*

Elections – election petition – parties to petition – whether proper to cite Electoral Supervisory Commission

Elections – Electoral Supervisory Commission – Constitution of Zimbabwe 1980 – independence of – does not preclude challenge to legality of its actions – constitution of – whether appointment of members must be notified in *Gazette* – number of members required to form a quorum – s 114(3a) and (3b) – Interpretation Act [*Chapter 1:01*] – s 31(2)

Tsvangirai v *Mugabe & Anor* HH-109-05 (Hlatshwayo J) (Judgment delivered 28 November 2005)

The petitioner challenged the outcome of the 2002 Presidential election. Among the respondents cited was the Electoral Supervisory Commission (ESC). The ESC objected to being joined, on the grounds, *inter alia*, that that the manner it conducts its election supervision was a matter beyond the court's jurisdiction, its independence being established by s 61(6) of the Constitution. The applicant argued that the ESC was not properly constituted, the appointment of its members not having been published in the *Gazette* and there being only four members in stead of the stipulated five. He argued that the election was thereby invalidated. In the petition the applicant challenged the constitutionality of s 158 of the Electoral Act [*Chapter 2:01*], but 3 days after the expiry of the time for lodging a petition a further draft order was submitted. The petitioner argued that it was necessary for him to show either that the election was not conducted in accordance with the principles laid down in the Electoral Act or that the failure affected the results. The respondents argued that in terms of s 149 of the Act both elements had to be shown.

Held: (1) Our law recognizes two classes of parties that must or may be joined: necessary and convenient parties or substantive and nominal parties. While necessary parties are generally substantive, must be joined and are affected by an order of costs, convenient parties may be substantive but are usually just nominal, their joinder is typically discretionary and may not be affected by an order of costs as they, more often than not, remain neutral abide the decision of the court. The joinder of ESC as a convenient party "whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon" was quite proper. (2) The entrenchment of the independence of a body or person is a well-established constitutional device which does not then put such body or person above the law; their actions are still subject to legal review. The kind of protection that the constitution extends to the ESC is the independence in the conduct of its duties of monitoring. But if the grievance is that the ESC was not properly constituted, acted illegally or failed to discharge its duties altogether, such a challenge cannot be answered by reference to the provision which constitutionally entrenches the independence of the ESC. (3) There was no factual basis for finding that only four members had been appointed to the ESC. Assuming it had been properly constituted, a quorum consisted of three members. Publication of the names in the *Gazette* was not mandatory, being merely evidentiary. (4) Strict adherence to procedure is necessary in election petitions and for that reason the further draft would be disregarded. (5) The original version of s 149 of the Electoral Act had the two elements separated by the word "or". This had been changed by the Law Reviser, in compiling the Revised Edition of the Statutes, to "and". It was possible to speculate on the reasons for the change, but the change was *ultra vires*. Examination of the history of the provision showed that that the legislature perceived two types of non-compliance with the provisions of the Act; one involving principles enshrined in the Act and the other involving ordinary provisions, and to separate the two the preposition "or" and not "and" would be appropriate. Provisions which form the bedrock of the concept of democratic elections, of free, fair and unimpeded choice, like universal suffrage and the secrecy of the ballot will constitute principles, while administrative and certain procedural provisions can be regarded as ordinary provisions.

Election – election petition – requirement for petition to be determined within 6 months of date of presentation – application for stay pending determination of constitutional issue being raised in Supreme Court – outcome of issue having direct bearing on petition – requirements of Electoral Act mandatory – application dismissed

Mukonoweshoro v *Mahofa* HH-60-05 (Guvava J)

The petitioner in an election petition sought a stay of the proceedings, pending the determination of a constitutional question which had been placed before the Supreme Court in another petition. The outcome of that issue would directly affect the petitioner's case and could result in considerable expense if the petition had to be re-heard. Held: in any other matters than election petitions, the stay would have been appropriate. However, s 182 of the Electoral Act [*Chapter 2:13*] required that an election petition be determined within six months of the date it was presented. This requirement was mandatory and the court could not stay the proceedings.

Election – Electoral Court – status of – whether a special court in terms of 92(4) of the Constitution – appointment of judges to by Chief Justice in terms of 162(1) of Electoral Act [*Chapter 2:13*] – in conflict with s 92(1) of the Constitution – whether Electoral Court can decline to hear petition before Supreme Court has ruled on constitutionality of provision of Act

Election – election petition – application by petitioner to examine electoral material – limited circumstances when application may be refused

Nyathi v *Ncube (Gwanda Election Petition)* HB-100-05 (Ndou J) (Judgment delivered 22 September 2005)

In terms of s 79 of the Constitution, the judicial authority in Zimbabwe vests in the Supreme Court, the High Court and such other courts subordinate to the Supreme and the High Court as may be established by or under an Act of Parliament. The Judicial Services Commission must be consulted before any person is appointed to a special court. The Electoral Court, established by s 161 of the Electoral Act [*Chapter 2:13*] is an inferior court to the Supreme Court. The fact that the Act gives a very limited appeal in respect of election petitions to the Supreme Court, being appeals on points of law only, does not remove the Electoral Court from the status of special court. If it did, that would mean that Parliament could easily circumvent the provisions of Chapter VIII of the Constitution and ensure that courts with wide-ranging functions could be established without the Judicial Services Commission being involved. The Act does not require the Chief Justice to consult the Commission before appointing judges to the Electoral Court and this would appear to be in conflict with s 92(1) of the Constitution. The Electoral Court could not merely decline to hear a matter brought to it unless that provision of the Electoral Act was set aside or declared unconstitutional by the Supreme Court.

Where the petitioner in an election petition applies in terms of s 70(4) of the Electoral Act to examine electoral material, he does not have to disclose his hand in advance as to exactly what he intends to look for in the election material, but he has to show that the inspection "is required … for the purposes of a petition questioning an election or return". It will only be in extreme cases, where the *mala fides* of the application is shown, that the court will refuse an application brought.

Employment – appeals under Labour Act [*Chapter 28:01*] and regulations – appeal to Labour Court – noting of – effect – provision that order appealed against is suspended – amendment providing to the contrary – appeal noted before amendment came into place – not affected

Zimbabwe Phosphate Industries Ltd v *Matora & Ors* S-44-05 (Malaba JA, Sandura & Gwaunza JJA concurring)

See above, under APPEAL (Labour Court – noting of – effect).

Employment – code of conduct – disciplinary proceedings under – bias – what must be shown before allegation of bias will succeed

Musarira v *Anglo-American Corp* S-53-05 (Cheda JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 24 October 2005)

Where a charge of misconduct is preferred by an employer against an employee there is always a certain element of institutional bias, as the employer is the offended party. What is important is that the matter is dealt with in a manner that is fair and impartial and that the rules of natural justice are followed. These rules in such a case are that the party concerned: (a) must be given adequate notice; (b) must be heard or be able to present his side of the story; and (c) should be allowed to call witnesses if he so wishes. Where bias is alleged, there must be reasonable grounds for the employee believing that he could not receive justice and a fair hearing and decision.

Although s 13(3) of the Constitution refers to a right to legal representation, this does not apply in internal disciplinary hearings. Where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation. Where the relationship between the parties is governed by contract, the right of the person who is the subject of an enquiry arising out of that contract to be legally represented at such enquiry must depend upon the terms of the contract itself. Where there is a code of conduct, the employee's right to legal representation will depend on what is stated in the code.

Employment – code of conduct – disciplinary proceedings under – code providing for dismissal for gross negligence causing serious loss – what constitutes gross negligence – value judgment by court, based on facts

Nyahuwa v *Barclays Bank (Pvt) Ltd* S-67-05 (Sandura JA, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 1 December 2005)

The appellant was employed by the respondent bank as a teller. He was charged with misconduct when there was a substantial shortfall in his takings for the day. The bank alleged gross negligence causing serious loss to the bank, by

overpaying a customer. He was found guilty by a disciplinary committee and dismissed. He noted an appeal to the appeals committee, alleging that he should have been convicted of negligence causing a substantial loss, for which a lower penalty was provided. The appeals committee could not reach a decision and instead of holding another meeting within 3 days, as provided by the code of conduct, asked the management t appoint another appeals committee. The second committee dismissed the appeal. The appellant further appealed to the appeals board of the employment council, which upheld the appeal on the grounds that the time limits had not been complied with. The Labour Court upheld an appeal by the bank. On appeal to the Supreme Court, held: (1) In order to succeed in having the proceedings set aside on the basis of a procedural irregularity, it had to be shown that the appellant was prejudiced by the irregularity. (2) The short delay in convening the meeting of the first committee did not in any way prejudice the appellant in the presentation of his case to the committee. (3) The provisions of the code of conduct were not complied with when a second committee was set up to consider the matter. The code did not provide for such a procedure, and the irregularity was a serious one that vitiated the proceedings of the second committee. However, the irregularity committed by the committee did not have any effect on the determination of the matter by the Labour Court, which considered the matter on its merits. (4) It is not possible to give a universally suitable definition of the term "gross negligence". The words must be construed in the context in which they are used because they may have different meanings in different contexts. The decision as to whether the negligence was gross or ordinary must be a value judgment based on an assessment of the facts of each case. (5) The appellant's conduct in counting such a large amount of money and handing it to a customer twice, instead of doing so only once, without realising the error at the time of the transaction or shortly thereafter, was indicative of a very serious dereliction of duty on his part, amounting to gross negligence.

Employment – code of conduct – disciplinary proceedings under – code providing for dismissal for offence so serious as to amount to breach of employee's obligations – gambling on an isolated occasion – not such a breach – conduct constituting a criminal offence – not necessarily a breach of employee's obligations

Marvo Stationery Mfg (Pvt) Ltd v *Jokwani & Ors* S-47-05 (Chidyausiku CJ, Cheda & Ziyambi JJA concurring) (Judgment delivered 24 October 2005)

The respondents were dismissed from their employment, having been found gambling when at work. The code of conduct under which they were charged did not specify gambling as being an offence which warranted dismissal, but it allowed for dismissal where an offence was of so serious a nature that it amounted to a breach of, or repudiation of, the employee's contractual obligations. The Labour Court reversed the decision to dismiss the respondents. On appeal by the employer, held: (1) gambling at work during working hours is conduct which is in breach of an employee's contractual obligations. An employee is contracted to work, not to gamble during working hours. However, it was clear that not every breach of contractual obligation by an employee constituted a contravention of the code; a breach had to be of a serious nature in order to constitute a contravention. Just as a short period of absenteeism did not breach the code, so also would gambling on the odd occasion not be serious and not covered. (2) Assuming gambling constituted a criminal offence, there was nothing in the language of the code to conclude that every conduct of an employee that is criminal constituted misconduct. It would only be criminal conduct which is of such a serious nature as to amount to a breach of the employee's contractual obligation that would constitute a contravention of the code.

Employment – code of conduct – disciplinary proceedings under – investigation preceding such proceedings – member of workers' committee – not entitled to obstruct investigation

ZESA v *Mare* S-43-05 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring)

See below, under EMPLOYMENT (Workers' committee – member of).

Employment – code of conduct – disciplinary proceedings under – right of employer to bring such proceedings – employees engaged in lawful strike – employer having no right to discipline employees under code of conduct

Communication & Allied Svcs Workers Union v *Tel-One (Pvt) Ltd* HH-91-05 (Makarau J) (Judgment delivered 26 October 2005)

Employees of the respondent, members of the applicant trade union, gave the respondent notice of their intention to go on strike. The respondent applied to the Minister of Labour Welfare for a show cause order to be issued. The parties were invited to a hearing at which the matter was referred to internal dialogue and a certificate of no settlement was issued. The employees then went on strike and the respondent once again applied for a show cause order to have the strike declared illegal and stopped. A show cause order was issued and the strike was declared illegal. The applicant noted an appeal against the show cause order and the Labour Court upheld the appeal. Before the appeal was

determined by the Labour Court, the respondent wrote letters of suspension without pay and benefits to a large number of the employees who had participated in the strike. Some were charged with misconduct and dismissed. The union applied to the High Court to have the termination of the employment of these workers set aside. The respondent opposed the application. It contended *in limine* that the applicant had no *locus standi* and that the applicant should have exhausted the domestic remedies available to it before approaching the court on review. On the merits, it argued there was no law barring it from resorting to its code of conduct after invoking the provisions of the Labour Act in a bid to break the collective job action.

Held: (1) s 29 (2) of the Labour Act [*Chapter 28:01*] clothes trade unions with corporate status and specifically provides that trade unions shall be capable of doing all such acts that are authorised by its constitution. Section 29(2)(4) grants a trade union the right to make representations before any determining authority or the Labour Court. It is not limited to those roles; it may be a party before the High Court as long as its constitution allows it to sue in the subject matter and as long as it can establish a standing before the court.

(2) Representative or public interest litigation is now a feature of our jurisprudence. The party must show that it has a direct and substantial interest in the subject matter. What is required is a legal interest in the subject matter of the action. It is not necessary to demonstrate real and practical prejudice directly stemming from the outcome of the litigation. The applicant had the statutory duty of protecting the interests of its members and was seeking to protect the rights of its members not to be untreated unfairly by their employer in matters of discipline and collective job actions. A trade union plays an important role that is recognised by statute in both spheres of discipline and collective job actions. Consequently, the applicant had established sufficient and legal interest in the application to give it standing before in the proceedings before the court.

(3) The availability of domestic remedies is not a complete bar to the bringing of proceedings before the High Court but it is used as a measure to select the instances where the court will withhold its jurisdiction pending the exhaustion of domestic remedies. The approach of the court is to discourage the duplication of proceedings unless good cause has been shown. *In casu*, an attempt had been made by the applicant to invoke the domestic remedies. The dispute, as an unfair labour practice, was referred to a labour officer, who erroneously declined to hear it on the basis that he did not have jurisdiction. This meant that there was no parallel domestic procedure between the parties that is duplicated by the application before the High Court. The labour officer's refusal to entertain the matter demonstrated that he did not appreciate the nature of the dispute between the parties, thereby bringing into question the efficacy of the domestic remedy. To follow the domestic remedies to exhaustion would mean that the applicant would not be afforded an expeditious and proper determination of the matter. Just cause had thus been shown for approaching the court.

(4) Under s 102 of the Labour Act, employees, workers committees and trade unions have the right to resort to collective job action to resolve disputes of interest. Section 108 (3) affords protection to employees engaged in lawful collective action. Such employees are not liable for breach of contract and their employment may not be terminated on the ground that they engaged in a lawful collective action. Since the show cause order was discharged by the Labour Court, the strike was lawful and the respondent was barred from resorting to its code of conduct to discipline the employees concerned. The disciplinary proceedings were thus a nullity.

Employment – code of conduct – disciplinary proceedings under – right to legal representation at hearing – no absolute right – right depends on what is stated in the code of conduct

Musarira v *Anglo-American Corp* S-53-05 (Cheda JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 24 October 2005)

See above, under EMPLOYMENT (Code of conduct – disciplinary proceedings under – bias).

Employment – code of conduct – disciplinary proceedings under – standard of proof – proof on balance of probabilities required – evidence of accomplices – not subject to same scrutiny as in criminal cases

Zimbabwe Financial Hldgs v *Mafunga* S-45-05 (Gwaunza JA, Sandura & Malaba JJA concurring) (Judgment delivered 1 November 2005)

The respondent, a bank teller, was dismissed after he had facilitated several large withdrawals from a fraudulent bank account. In finding him guilty the bank's officials relied *inter alia* on affidavits from witnesses who claimed to have been the respondent's accomplices in the fraudulent opening of the account, and the subsequent withdrawals made from it. The Labour Court, in ordering reinstatement, held that no reliance could be placed on the affidavits unless the witnesses had given *viva voce* evidence and the veracity of their evidence subjected to scrutiny by cross examination and corroborated by some other evidence. Held: The Labour Court's approached suggested that it was applying a higher test for proving a case against the respondent than is required in a case of this kind. On the evidence before the court, the appellant proved, on a balance of probabilities, that the respondent had committed the acts of misconduct that he was charged with.

Employment – contract – termination – application to labour officer to terminate employment – application made by agent of employer – no prior authority to make application but application subsequently ratified – effect – validity of application

ZRP Bd of Trustees v *Manyangadze* S-26-05 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring)

See above, under AGENCY (Agent – authority).

Employment – dismissal – claim for reinstatement – need to claim alternative order for payment of damages – effect of failure to do so

Olivine Industries (Pvt) Ltd v *Gwekwerere* S-63-05 (Gwaunza JA, Sandura & Cheda JJA concurring) (Judgment delivered 29 November 2005)

See above, under ADMINISTRATIVE LAW (Review – application – domestic remedies not exhausted).

Employment – dispute – reference to compulsory arbitration – award by arbitrator – increase in salary – employee of State university – whether arbitrator may award increase without approval of responsible Minister

Midlands State UniversityCouncil v *MSU Lecturers' Assn* S-42-05 (Chidyausiku CJ, Cheda & Ziyambi JJA concurring)

See above, under EDUCATION (University – Midlands State University).

Employment – Labour Act [*Chapter 28:01*] – arbitral award under – award ordering reinstatement – need for award to sound in money either in the main or in the alternative – incompetent to award reinstatement alone

Mandiringa v *NSSA & 5 other applications* HH-95-06 (Makarau J) (Judgment delivered 17 November 2005)

The applicants had all had arbitral awards given in their favour after being dismissed by their employers. In all cases, the arbitrators had ordered reinstatement but had not made an award for the payment of damages in a specified sum in lieu of reinstatement, nor did they compute what the loss of pay and benefits to the date of the award amounted to. The applicants sought registration of the awards under s 98(14) of the Labour Act [*Chapter 28:01*]. Held: an award submitted for registration must sound in money either in the main or in the alternative. In ordering reinstatement in terms of the Act, the Labour Court, labour officers and arbitrators appointed under the Act are duty bound to assess damages in lieu of the reinstatement. Any judgment, determination or award by these officials that fails to do so is liable to be interfered with as a misdirection or as failing to comply with the Act in a material way. An award that orders the reinstatement of the applicant without awarding a specified amount in damages in lieu of the reinstatement is incomplete and, consequently, incompetent and cannot be registered in terms of s 98(14).

Employment – labour relations officer – decision by – procedure to follow by party dissatisfied with officer's decision – referral under s 93 of Labour Act – courses open to labour relations officer

Mudzi RDC v *Makwembere* S-90-05 (Cheda JA, Chidyausiku CJ & Sandura JA concurring) (Judgment delivered 15 November 2005)

The appellant rural council suspended the respondent from his employment pending an application to a labour officer to dismiss him for maladministration. The labour officer determined that the respondent be reinstated. Eleven months later the same matter was placed before another labour relations officer, who made an arbitration award setting aside the determination of the first labour relations officer, thus confirming the dismissal of the respondent. The Labour Court upheld the decision of the first labour relations officer. Held: after the determination of the first labour relations officer, an appeal should have been made to a senior labour relations officer within fourteen days. This was not done. The treatment of the matter by the second labour relations officer as an arbitration matter was also wrong. He purported to be acting in terms of s 93 of the Labour Relations Act [*Chapter 28:01*] but he did not follow the provisions of that section. Under the section as amended he could have tried conciliation, not arbitration. The matter had not been referred to him as an unfair labour practice or referred for arbitration. The only valid proceedings were those before the first labour relations officer. The proceedings before the second labour relations officer were a nullity.

Employment – trade union – rights of – right to bring action on behalf of members

Communication & Allied Svcs Workers Union v *Tel-One (Pvt) Ltd* HH-91-05 (Makarau J) (Judgment delivered 26 October 2005)

See above, under EMPLOYMENT (Code of conduct – disciplinary proceedings under – right of employer to bring such proceedings).

Employment – workers' committee – member of – duty to defend workers' rights – requirement to act lawfully in doing so – not entitled to interfere in lawful investigation process

ZESA v *Mare* S-43-05 (Chidyausiku CJ, Ziyambi & Gwaunza JJA concurring)

The respondent was employed by the appellant. He was also a member of the workers' committee. He intercepted and forcibly took from another employee a report that that employee was preparing regarding certain misconduct proceedings involving two other employees. The confiscated report was prepared for submission to the senior depot foreman who required it for use as evidence at a disciplinary hearing into the alleged misconduct of the two employees. An altercation ensued as a result of the respondent's conduct. The respondent was charged *inter alia* with hindering or obstructing any employee from performing his duties, convicted on that charge and dismissed. The Labour Court set aside his dismissal on the ground that when the appellant intervened he had been requested to do so by the employees under investigation. In doing so, he was discharging his duties as a representative of the workers and was therefore not subject to the control of his employer. He was not acting in his capacity as an employee as he was defending a worker's rights.

On appeal by the employer, held: members of a workers' committee are not a law unto themselves. There was no legal basis for the respondent, as a member of a workers' committee, to simply, through the use of force, seize a report from a fellow employee. While a member of a workers' committee has a duty to defend workers' rights, in so doing he is enjoined to observe due process. It is lawful for an employer to investigate any alleged misconduct of its employees and after such investigation to institute disciplinary proceedings. That is due process. It is not lawful for a member of a workers' committee to forcefully obstruct the lawful investigation into an employee's misconduct. The investigation must be allowed to proceed without obstruction. It is open to a member of the workers' committee to defend the worker charged with misconduct at the disciplinary hearing.

Evidence – admissibility – civil matter – illegally obtained evidence – court's discretion to admit

Paradza v *Chirwa NO & Ors* S-25-05 (Malaba JA, Chidyausiku CJ, Ziyambi Gwaunza JJA concurring, Sandura JA dissenting in part) (judgment delivered 23 August 2005)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – judge of High Court – removal from office).

Evidence – recent possession – when such evidence may be relied on – applicability in charge of robbery – evidence of recent possession maybe used in any case where theft is an element of the crime

S v *Kawadza* HH-5-06 (Uchena J, Garwe JP concurring) (Judgment delivered 15 November 2005)

See above, under CRIMINAL LAW Common law offences (Robbery – recent possession).

Exchange control – Exchange Control Regulations SI 109 of 1996 – s 11 – making of payment outside the country – not applicable to payments made from "free funds" – onus on accused to show that payment was made with free funds

A-G v *Makamba* S-30-05 (Malaba JA, Chidyausiku CJ & Gwaunza JA concurring) (Judgment delivered 29 July 2005)

See above, under CRIMINAL PROCEDURE (Charge – exceptions, provisos and exemptions)

Family law – child – paternity – dispute as to paternity – court entitled to order child to undergo blood test if satisfied that such would be in child's best interests

Mtshingwe v *Moyo* HB-120-05 (Cheda J) (Judgment delivered 15 December 2005)

The applicant was married under customary law. A child was born during the subsistence of the marriage and the birth registered. Shortly after the child's birth, the marriage broke up. The wife left, taking the child with her. She then entered into a customary law union with the respondent. Another birth certificate was obtained in respect of the child, but this one showed that the respondent was the father. The wife died and the applicant sought the custody of the child from the respondent. Both men claimed paternity of the child, each claiming that he had the opportunity to father the child at the relevant time.

Held: The real natural father could not be determined from the mere facts presented before the court. As both men claimed fatherhood, the determination of paternity required the aid of scientific methods. It was now possible to determine the issue of paternity accurately without the mother, by analysing the blood of the child and alleged father. While any infliction of wound or prick on an individual is *per se* an assault and an interference with personal liberty and rights, the courts should adopt a robust approach in dealing with such matters, particularly when minors are concerned. Both parties agreed to undergo blood tests themselves. As far as the child was concerned, the courts will always relax their rules and practice in the interests of the children. Where two men each claimed to be natural father of the child, it was in the child's best interests that its correct biological father be determined and on that basis the court could order that the child also undergo a blood test.

Family law – divorce – husband – domicile – when domicile can be said to have changed

Chikwenengere v *Chikwenengere* HH-103-05 (Makarau J) (Judgment delivered 30 November 2005)

Domicile is not the same as residence. As distinct from residence, domicile does not only involve a physical element. There is also a mental element consisting of an intention to settle in a certain country. The acquisition of a domicile of choice is proved on a balance of probabilities. It is not subjectively tested and while the averments by the parties as to what they regard as the husband's permanent home are to be taken into account, they are not the sole determining factor. Even clear expressions of intention cannot prevail against conduct inconsistent therewith and leading to an opposite inference. To acquire a new domicile, it is essential to show that the person concerned has abandoned his former domicile *animo et facto*. The state of mind that is required is one that does not require an absolute intention to reside permanently in the country of chosen domicile but evinces at least, an intention to stay there for an indefinite period.

Family law – husband and wife – divorce – African woman – vulnerability of to male dominance – need for court to assist such woman

Mabuto v *Bhila* HB-108-05 (Cheda J, Ndou J concurring) (Judgment delivered 20 October 2005)

See above, under CUSTOMARY LAW (Application).

Family law – husband and wife – divorce – division of property following – customary marriage – misconduct during – when may be taken into account

Mpofu v *Mpofu* HB-99-05 (Cheda J) (Judgment delivered 6 October 2005)

The plaintiff obtained a divorce from his wife, the defendant. The marriage had broken down, the cause of the breakdown being that the defendant, who had six children, committed adultery resulting in pregnancy. The adultery was committed in the matrimonial home in the communal lands and the defendant was caught red handed. At the hearing to determine the distribution of the matrimonial property:

Held: a home, in general, and in the rural areas, in particular, largely derives its dignity from the conduct of the woman who runs it. Such a woman is therefore expected to exhibit high moral standards as she is a beacon of uprightness. The defendant having brazenly committed adultery under those circumstances, she could not be expected to benefit wholesale from her misdemeanour. This would be both unjust and against public policy. Consequently, it would not be appropriate to award her the properties situated in the rural area.

Family law – husband and wife – property rights – right of spouse to dispose of own property – wife selling house registered in her name – husband having personal rights only – when can stop disposal of property

Magurenje v *Maphosa & Ors* HB-69-05 (Ndou J) (Judgment delivered 21 July 2005)

See below, under PRACTICE AND PROCEDURE (Affidavit – answering affidavit).

Interpretation of statutes – Revised Edition of Laws – change made by Law Reviser – change altering meaning and effect of law – such change *ultra vires* – reference to history of provision to show true intention of legislature – Statute Law Compilation and Revision Act [*Chapter 1:03*] – s 10

Tsvangirai v *Mugabe & Anor* HH-109-05 (Hlatshwayo J) (Judgment delivered 28 November 2005)

See above, under ELECTIONS (Election petition – parties to petition).

Interpretation of statutes – presumptions – against retrospectivity — matters to be considered in deciding whether statute has retrospective effect – rights acquired under amended legislation – interpretation so that accrued rights are not removed

Zimbabwe Phosphate Industries Ltd v *Matora & Ors* S-44-05 (Malaba JA, Sandura & Gwaunza JJA concurring)

See above, under APPEAL (Labour Court – noting of – effect).

Judge – removal from office – appointment of tribunal to inquire into question – how appointment may be made – procedure before tribunal – who should lead evidence – admissibility of evidence – tribunal not bound by rules of evidence

Paradza v *Chirwa NO & Ors* S-25-05 (Malaba JA, Chidyausiku CJ, Ziyambi Gwaunza JJA concurring, Sandura JA dissenting in part) (judgment delivered 23 August 2005)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – judge of High Court – removal from office).

Judge – retirement of – judge retiring before trial completed – murder case – verdict of guilty – no finding made on extenuating circumstances – not permissible for another judge to pass sentence

S v *Sibanda* HH-59-05 (Garwe JP) (judgment delivered on 24 August 2005)

See above, under CRIMINAL PROCEDURE (sentence) (Common law crimes – murder – extenuating circumstances – finding of).

Land – acquisition – compulsory acquisition of farming land – acquisition notice issued before coming into effect of constitutional amendment No 17 – remains in force – former owner's rights limited to those set out in Land Acquisition Act

Chirikure & Ors v *Kenmast Farming (Pvt) Ltd & Ors* HH-106-05 (Uchena J) (Judgment delivered 25 November 2005)

The applicants were individuals who had been settled on a commercial farm which had been compulsorily acquired by the respondent Minister. They had been evicted from the farm on the grounds that their letters of offer were invalid because they were issued before the coming into effect of the Constitutional Amendment Act No. 17 of 2005. The first two respondents were, respectively, the owner of the farm before it was compulsorily acquired and his tenant. An order under s 8 of the Lands Acquisition Act [*Chapter 20:10*] had been served on the first two respondents before the constitutional amendment came into effect. Further letters of offer were issued to the applicants after the amendment Act came into force and the applicants sought an order to the effect that they were entitled to occupy the farm and that the first two respondents were no longer entitled to do so. Held: (1) the applicants had no *locus standi* to apply for the first two respondents' eviction as they did not have possession of the farm and the right to evict had not been ceded to them by the Minister. They however had *locus standi* to apply for an order declaring their new offer letters to be valid and other consequential orders arising from the issuance of the new offer letters. They could also apply to be allowed to go back to the farm from which they had been evicted. (2) Provisions of the Land Acquisition Act which provide for what happens after acquisition has taken place were not affected by the new s 16B(3) of the Constitution, because they are not referred to in s 16(1) of the Constitution. They therefore remain valid and operational. (3) Section 16B(6), which provides that an Act of Parliament may make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in the section or other State land, applies to existing and future enactments. (4) Immediately after the acquisition order was issued the acquiring authority was entitled to allocate the land to the applicants, provided he and the persons allocated the land did not interfere with the former owner's living quarters.

The acquiring authority remained entitled to do so after the coming into force of the Constitutional Amendment Act. (5) Section 9(1)(b) of the Land Acquisition Act, which makes it an offence for the former owner of a farm to remain there more than 90 days after the acquisition notice was served, also remains in force. That period had now lapsed and the first two respondents were not in lawful possession of the land.

Land – acquisition – Land Acquisition Act [*Chapter 20:10*] – s 7 – need for acquisition to be "reasonably necessary" for one of purposes set out in section – amendment to Act effectively restricting Administrative Court's discretion to determine whether acquisition "reasonably necessary" – unconstitutionality of amendment

S C Shaw (Pvt) Ltd v *Min of Lands* S-32-05 (Chidyausiku CJ, Sandura, Ziyambi, Malaba & Gwaunza JJA concurring)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 16(1)(a) – acquisition of land – requirement for acquisition to be "reasonably necessary").

Landlord and tenant – tenant – rights – withholding of rent – when rent may be withheld – tenant deprived of use of part of premises – not a ground to withhold rent

Landlord and tenant – tenant – statutory tenancy – creation of – when comes into effect – ejectment of statutory tenant – when tenant may be ejected – tenant failing to pay rentals either timeously or at all – no notice required for landlord to seek ejectment

Parkside Hldgs (Pvt) Ltd v *Londoner Sports Bar* HH-66-05 (Patel J)

A tenant is not entitled to withhold rent if he is denied the occupation or use of only part of the tenanted premises. He can only do so in the event that he is deprived of the occupation and use of the entire leased premises and where the lease has been duly terminated or cancelled for that reason. In all other cases, the tenant is confined to the remedies of interdict and/or damages or set-off against the cost of repairs effected by himself. He cannot withhold or claim remission of rent.
An abatement of rent, which may be appropriate during any period in which the leased premises are not wholly fit for occupation, entails a proportionate reduction in the rental amount and not the withholding of the entire amount.
A statutory tenancy under ss 22, 23 and 24 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) may be created upon the expiry of a contractual lease. Such a tenancy continues for an indefinite period on the same terms and conditions as applied to the pre-existing contractual lease. Thereafter, so long as the tenant abides by the terms of the expired lease, including paying the rent due within 7 days of due date, he is statutorily protected from eviction. However, if the tenant materially breaches any term of the statutory tenancy, the lessor is entitled to seek the eviction of the tenant through the courts. For ejectment to be granted, the lessor must show, firstly, that the lease has expired, either by effluxion of time or in consequence of notice duly given by the lessor. Secondly, the lessor must establish that he has good and sufficient grounds for requiring ejectment, other than his desire to increase the rent or to lease the premises to some other person.

Once a lease has expired, whether by effluxion of time or following notice, the landlord is entitled without further notice to apply for ejectment.

Landlord and tenant – tenant – statutory tenant – eviction of – certificate from Rent Board that eviction fair and reasonable – when required – not required where statutory tenant withholds rent

Villa Real Flats (Pvt) Ltd v *Undenge & Ors* HH-86-05 (Gowora J)

The three respondents, lessees of flats, had become statutory tenants after the landlord raised the rent. The tenants did not however continue to pay the rent, though they tendered payment, through their answering affidavits, only after the landlord applied for their eviction. It was argued on behalf of the respondents that the Rent Board is required to determine whether or not is fair and reasonable for the landlord to evict his tenant, and that the landlord had to obtain a certificate from the Rent Board to that effect. Held: in terms of s 30(2) of Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), a statutory tenant, which all the respondents were, is protected from eviction either through the effluxion of time or notice having been given by the lessor unless in addition to the foregoing the lessee has caused material damage to the dwelling or his conduct has or is likely to cause material or substantial inconvenience to the neighbours or the lessor; that the dwelling is required for occupation by the lessor or, where the occupant is a sub-lessee, by the lessee; or that the lessor requires the building for reconstruction or a rebuilding scheme; or that the Rent Board has issued a certificate to the effect that the requirement that the lessee vacate the premises is fair and reasonable. The protection afforded by the subsection is available only so long as the lessee continues to pay the rent due within seven days of due date and performs the other conditions of the lease. In terms of s 30(4) of the Regulations, a

certificate from the Rent Board is required only in the situations referred to in paras (c) and (d) of s 30(2), that is (a) when the premises are required for use by the lessor or where a sub-lessee is in occupation by the lessee and (b) where the lessor has given notice to the lessee of his intention to renovate the dwelling. It is not in every situation that a certificate is required.

Practice and procedure – affidavit – answering affidavit – when may be submitted – may not be submitted after heads of argument have been filed unless court gives leave

Magurenje v *Maphosa & Ors* HB-69-05 (Ndou J) (Judgment delivered 21 July 2005)

The applicant sought to have the sale of a house set aside. The house had been registered in the name of his customary law wife (her status was disputed). He remained in the house after she and the applicant had separated. A few years later, she sold the house to the third respondent. The applicant claimed that he had contributed towards the acquisition of the house and that he should have been consulted before the disposal of the house so that he would have a say in relation to the purchase price, mode of payment and notice period for him to vacate the said house. After heads of argument had been filed, he sought to introduce more evidence by way of an answering affidavit, which was not in proper form. The applicant submitted that he was entitled to do so in terms of the rules.

Held: (1) the filing of an answering affidavit after the parties have filed heads of argument can only be done in exceptional cases and only with the leave of the Judge. To allow a party to file an affidavit at that stage would defeat the whole purpose of filing heads of argument as set out in rule 238(1)(a) of the High Court Rules 1971. For departure from the proper sequence, the indulgence from court or judge is necessary. (2) The nature of the factual disputes was such that *viva voce* evidence was necessary for their resolution. The matter should not have been brought as an application (3) The rights of the applicant, if proven, were personal and did not affect the third respondent as a *bona fide* purchaser and a third party. The applicant had not averred, let alone proved, that the third respondent was guilty of fraudulent intent. The property was registered in the name of the first respondent. The applicant could only stop disposal of the house if he showed that the first respondent was selling it in order to defeat his just rights.

Practice and procedure – application – against banking institution placed under curatorship – suit brought by curator of banking institution – right of defendant to defend himself and to bring interlocutory application arising from suit

Imperial Asset Mgmt (Pvt) Ltd v *Kuipa NO & Ors* HH-95-05 (Gowora J) (Judgment delivered 11 October 2005)

See above, under BANK (Bank placed under curatorship – legal proceedings against).

Practice and procedure – application – *declaratur* – when may be granted – subject-matter pending before another court – application refused

Khuphe v *Officer in Charge Law & Order, ZRP, Bulawayo & Ors* S-79-05 (Cheda JA, Malaba JA & Bere AJA concurring)

The appellant, a member of Parliament, was arrested and placed on remand on an allegation of holding a public meeting without notifying the police, as required by s 24 of the Public Order and Security Act [*Chapter 11:17*]. She brought an application to the High Court for a *declaratur* that the section does not oblige the organiser or convenor of a private meeting to notify the regulating authority concerned. The High Court declined to grant the *declaratur*. On appeal against the High Court's decision, held: it was common cause between the parties that s 24 does not apply to private meetings. The issue of whether the meeting was in fact private or public was to be determined by the trial court, after hearing evidence. It was neither for the High Court to take on itself to determine the issue, nor for the Supreme Court to do so on appeal.

Practice and procedure – application – domestic remedies available – approach by court – avoidance of duplication unless good cause shown

Communication & Allied Svcs Workers Union v *Tel-One (Pvt) Ltd* HH-91-05 (Makarau J) (Judgment delivered 26 October 2005)

See above, under EMPLOYMENT (Code of conduct – disciplinary proceedings under – right of employer to bring such proceedings).

Practice and procedure – application – eviction order – defence to – respondent bringing proceedings to set aside sale in execution – not a defence to claim against eviction

Practice and procedure — execution — sale — sale confirmed by Sheriff — transfer effected and price paid — when sale may be set aside by court

Twin Wire Agencies (Pvt) Ltd v *CABS* S-46-05 (Chidyausiku CJ, Sandura & Ziyambi JJA concurring)

The appellant had failed to pay the mortgage bond on a property and the respondent building society foreclosed. The property was sold in execution to the respondent. The applicant refused to vacate and the respondent brought an action for the eviction of the appellant. The appellant entered an appearance to defend. The respondent applied for summary judgment. The appellant opposed the application but the court granted summary judgment, holding that the appellant had raised no defence to the claim for eviction and that there were no triable issues that would necessitate the matter proceeding to trial. On appeal, the appellant argued that it had instituted proceedings to set aside the sale in execution and the court should accordingly not have granted the application for eviction. Held: a challenge to a sale in execution does not constitute a defence against a claim for eviction by the registered owner of the property. Once the sale of the property has been properly confirmed by the sheriff and transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 of the High Court Rules and must conform strictly with the principles of the common law. Under the common law immovable property sold by judicial decree cannot, after transfer has been passed, be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale of execution, or fraud. The proceedings brought by the appellant would not amount to an adequate challenge of the respondent's ownership of the property in question and his entitlement to possession or occupation of the property.

Practice and procedure – notice to defend – defective – when may be removed from record – correct procedure to follow – effect of failure to do so – stay of execution granted

First Factoring Co of Zimbabwe v *Sibanda* HB-101-05 (Cheda J) (Judgment delivered 13 October 2005)

The first defendant obtained summary judgment against the applicant. When it sued on the debt, the applicant entered appearance to defend, but this appearance was defective. The first respondent asked the Registrar to remove the notice from the record and when this was done obtained summary judgment. Pending an application for rescission of that judgment, the applicant sought a stay of execution.

Held: the removal of the notice of appearance to defend was unlawful as it was not done in accordance with the rules of court; the Registrar should not have removed the notice of appearance to defend on the instruction of the first respondent's legal practitioners. Once the appearance to defend has been filed, it forms part of the record and it may not be removed or destroyed without the authority of the court or a judge. It may not be removed on the mere instructions of and/or request to the Registrar by the offended party. The court could not ignore the procedural irregularity adopted by the first respondent in obtaining the summary judgment. This irregularity justified the stay of execution pending the outcome of applicant's application for a rescission of judgment.

Practice and procedure – parties – citation of – Clerk of Parliament – *ex officio* member of board of Vehicle Loan Fund – application relating to matter directly within purview of Fund's objects – not proper to cite Clerk of Parliament – Fund itself should be cited

Mukahlera v *Clerk of Parliament & Ors* HH-107-05 (Patel J) (Judgment issued 23 November 2005)

The applicant, a member of Parliament, had applied in 2001 for a motor vehicle through the Members of Parliament Vehicle Loan Scheme, the fund for which was established in terms of the Audit and Exchequer Act [*Chapter22:03*]. The Clerk of Parliament was an *ex officio* member of the board of the Fund. The Fund paid the fourth respondent, a motor dealer, for the vehicle requested, but before it was delivered the applicant decided he wanted a different type of vehicle. The vehicle originally requested was allocated in 2001 to another member of Parliament. In June 2002 the applicant's contributions were refunded to him. The respondents raised several objections to the applicant's claim that the respondents pay for a motor vehicle of the type originally requested by him. The principle objections were (1) that the claim had expired, having been instituted more than 3 years after the cause of action arose; and (2) that the fund itself should have been cited, rather than the respondents. The applicant argued that prescription was interrupted by the writing of a letter of demand to the first respondent's lawyer; and that prescription only began to run in June 2002, when the applicant's contributions were refunded. Held: (1) prescription begins to run when the cause of action arose, the "cause of action" being the combination of facts material for the plaintiff to prove in order to succeed in his action. On the facts, this was in 2001, when the car was allocated to another member of Parliament. It was not necessary to prove the refund of the applicant's contributions to found his claim. (2) A letter of demand, whether issued through a

lawyer or otherwise, does not constitute "process" in its ordinary sense nor within the meaning of that term as defined in s 19(1) of the Prescription Act [*Chapter 8:11*]. (3) The Constitution of the Fund made it clear that the Fund could sue and be sued in its own name. It was the Fund, through its Board, which administered the Scheme and disbursed the moneys required to purchase the vehicles acquired under the Scheme. The relief sought by the applicant pertained to matters directly within the purview of the Fund's objects and operations; and the respondents were acting as officers or agents of the Fund in its administration of the Scheme. The failure to cite the Fund was fatal.

Practice and procedure – parties – company – right of director or shareholder to bring action on behalf of company – need for action to be authorised by board – when individual directors or shareholders may bring action to protect company

Madzivire & Ors v *Zwariwadzwa & Ors* HH-74-05 (Makarau J)

See above, under COMPANY (Director – legal action on behalf of company).

Practice and procedure – parties – fugitive from justice – who is – litigant evading arrest and civil imprisonment – not entitled to approach court

Mavangira v *Oka & Anor* HB-73-05 (Ndou J) (Judgment delivered 21 July 2005)

The applicant had been imprisoned for contempt of court after he had failed to comply with the terms of a judgment given against him. He filed a notice of appeal and was released. The notice was invalid and the respondent sought to have him re-arrested and imprisoned. The applicant fled and evaded arrest. From hiding he launched the current application, seeking a stay of execution pending the hearing of his appeal.

Held: (1) as conceded by the applicant, the notice of appeal was invalid and there was thus no appeal pending. It would not be proper to stay execution pending an appeal that had not been filed. (2) By placing himself beyond the reach of the court, the applicant had made himself a fugitive from justice. Were the court to entertain a suit at the instance the applicant it would be stultifying its own processes.

Practice and procedure – parties – *locus standi* – principles – need for party to show some legal interest in action – no requirement to show practical interest in outcome

Practice and procedure – parties – trade union – right of trade union to bring action on behalf of members

Communication & Allied Svcs Workers Union v *Tel-One (Pvt) Ltd* HH-91-05 (Makarau J) (Judgment delivered 26 October 2005)

See above, under EMPLOYMENT (Code of conduct – disciplinary proceedings under – right of employer to bring such proceedings).

Prescription – interruption of – by issue of process – letter of demand issue through party's lawyer – not process

Prescription – running of – when begins – cause of action – meaning of – when cause of action may be said to arise

Mukahlera v *Clerk of Parliament & Ors* HH-107-05 (Patel J) (Judgment issued 23 November 2005)

See above, under PRACTICE AND PROCEDURE (Parties – citation of).

Public service – public servant – who is – employee at university created by statute – not a public servant even though Government funds university

Midlands State UniversityCouncil v *Midlands State University Lecturers' Assn* S-42-05 (Chidyausiku CJ, Cheda & Ziyambi JJA concurring)

See above, under EDUCATION (University – Midlands State University).

Revenue and public finance – income tax – tax due on interest payable to issuer of promissory notes – income deemed to have accrued when taxpayer becomes entitled to it even if it is only payable in the future – Income Tax Act [*Chapter 23:06*] – ss 8(1) and 10(7)

Barclays Bank of Zimbabwe v *Commr General, ZRA* HH-9-06 (Hlatshwayo J) (Judgment delivered 6 July 2005)

The appellant bank issued various promissory notes on which it was entitled to receive interest on the date of maturity. Its income tax on the interest was assessed on the basis that the bank was deemed to have received the interest when it was entitled to even if payment was only due under notes on the date of their maturity. Held: if these notes were true promissory notes, with capital and interest redeemable only at maturity or some other evidence of indebtedness, the taxability before the date of redemption of interest earned on a true bearer instrument would appear to be insupportable by the language of the Act. Here, maturity was only a condition of payment and not a condition for accrual. Consequently, in terms of s 10(7) of the Act, the interest was deemed to have accrued in the year of assessment in which the bank became entitled to it, despite its being only due and payable in a future year.

Sale – price – deductions from price – provision that price should be paid "free of deductions" – what deductions seller may expect relief from

Wood & Anor v *Mudungwe & Anor* S-148-04 (Malaba JA, Sandura & Gwaunza JJA concurring)

See above, under CONTRACT (Interpretation).

Succession – will – validity – document not complying with formalities of Wills Act [*Chapter 6:06*] – when such document may be accepted as a valid will – need to have some of the recognisable characteristics of a will

Gunda & Anor v *Gunda & Anor* S-39-05 (Gwaunza JA, Sandura & Malaba JJA concurring)

Under s 8(5) of the Wills Act [*Chapter 6:*06], where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that document, or that document as amended, as a will for the purposes of the Administration of Estates Act [*Chapter 6:01*], even though it does not comply with all the formalities for the execution of a will. It was not the intention of the legislator, in drafting s 8(5) of the Act, that any document said to have been drafted by a deceased person during his lifetime, no matter how confusing and unintelligible its terms may be, should be regarded as having been intended by him to be his will. For a document to be acceptable as a will in terms of s 8(5), it must have some but not all of the recognisable characteristics of a will.

Words and phrases – "free of deduction"

Wood & Anor v *Mudungwe & Anor* S-148-04 (Malaba JA, Sandura & Gwaunza JJA concurring)

See above, under CONTRACT (Interpretation).

Words and phrases – "select" – selection by President of members of tribunal

Paradza v *Chirwa NO & Ors* S-25-05 (Malaba JA, Chidyausiku CJ, Ziyambi Gwaunza JJA concurring, Sandura JA dissenting in part) (judgment delivered 23 August 2005)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – judge of High Court – removal from office).