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CASES DECIDED JULY – DECEMBER 2006

Administration of estates – estate – protection of pending appointment of executor – who may bring action to protect estate – action may be brought by any person having an interest – wife under customary law – right of wife to bring action

Est Utaumire & Ors v *Kadzunge & Ors* HB-113-06 (Bere J) (Judgment delivered 25 August 2006)

The deceased had entered into a marriage under the African Marriages Act. Some 14 years later he married the second applicant in terms of customary law. Not long before he died, the deceased entered into a lease agreement for premises in which he ran a supermarket and other shops, assisted by the second applicant. On his death, the first and second respondents, the lessor of the property, instructed the utilities to cease supplying electricity, water and telephone services to the premises and gave the second applicant notice to vacate. The second applicant brought an application in the name of the deceased's estate and in her own name, seeking an order to restore the services and to allow the businesses to continue to operate without interference. The respondents' counsel argued that the first applicant had no *locus standi*, no executor having been appointed, and that the second applicant could not bring an action, as she was not party to the lease. He also argued that because the second applicant did not have a registered marriage with the deceased, she could not claim to be a lawful wife for the purpose of protecting his estate.

Held: (1) it was not competent for the second applicant to act on behalf of the estate; only an executor could bring an action in the name of the estate. (2) The deceased's first marriage was potentially polygamous and so the second applicant's marriage to the deceased would safely have co-existed with the deceased's earlier marriage and would entitle her to a share of the deceased's estate. As the law relating to administration of estates recognises an unregistered customary law union, the law must also recognise the need for any woman in such a union to take reasonable steps to protect the deceased's estate whilst awaiting the formalities for the proper registration of that estate. It could not be argued that a woman in the position of the second applicant would not have *locus standi* to protect the deceased's estate. Even if she had been a mere manager of the deceased's businesses she would still be entitled at law to protect that property pending the regularisation of that estate. It is unimaginable that once someone is deceased the duty to protect his estate exclusively rests with an executor. This duty to protect such property lies with any person who can demonstrate he or she has an interest in that estate. This is particularly so given the fact that the appointment of an executor is certainly not an overnight exercise. It has its own formalities which have to be followed and in the interim the deceased's estate must be protected.

Administration of estates – estate governed by customary law – determination of who is a surviving spouse – whether Master may make such determination

In re *Estate Chirunda* HH-119-06 (Makarau JP, Chatukuta J concurring)

The deceased had divorced his first wife 11 years before his death. At the time of his death he was living as man and wife with another woman, though the relationship was not formalised in any way. The executor of the estate was unsure whether the woman was a surviving spouse and referred the matter to the provincial magistrate for decision. The provincial magistrate ruled that the woman was a surviving spouse; two of the deceased's children appealed against the decision.

Held: the magistrate had no jurisdiction to decide the matter. When the Administration of Estates Act [*Chapter 6:01*] was amended in 1997, the section giving jurisdiction of magistrates in this regard was repealed. The Master was given extensive powers to determine whether an estate is to be dealt with in terms of customary law or not and the plan in terms of which the estate is to be distributed. The amendment also provided that any party aggrieved by the decision of the Master in regard to his powers under the new law may appeal to the High Court. The Act does not specifically provide that the Master is empowered by the Act to make a determination of who is a spouse to the estate or whether such determination is appealable or reviewable by the High Court.

Administration of estates – executor dative – appointment as – eligibility – widow of customary law marriage – not disqualified from appointment

Administration of estates – executor dative – claims made on behalf of estate – causes of action which survive the deceased – personal claims – claim of former wife to an equitable share in matrimonial property after divorce – cannot be transmitted to estate of wife after her death

Administration of estates – executor dative – removal – application for – should be made to the Master in the first instance, not to the court

Matsinde v *Nyamukapa* HH-102-06 (Makarau J) (Judgment delivered 4 October 2006)

The first respondent had been living with a man as husband and wife under customary law. Before they lived together, he had been married to another woman. He and the other woman got divorced. The court ordered that the man should keep the matrimonial house but that the parties should return to court later so that the former wife's contribution towards the house could be assessed. Both of them died before the matter was brought back to court. The respondent went through a marriage ceremony with the man on the day he died. After his death, she had the estate registered. In terms of the law of intestate succession, she was entitled to inherit all the property in the estate. This included the immovable property that had been the subject of litigation in the divorce proceedings. Six months after the man died, his former wife died. The applicant was appointed executrix dative in her estate. She sought an order setting aside the respondent's appointment as executrix to the man, as well as the marriage that had taken place on the day the man died. Her main ground for doing so was that the first respondent drew up a distribution plan that did not take into account the alleged share of the former wife in the estate, especially in respect of the immovable property, the subject of the dispute.

Held: (1) it was not necessary to make a finding on the validity of the first respondent' marriage to the man. She was in a customary union with him before the alleged marriage. Even if she was not a wife under the general law, she was a wife at customary law and thus a surviving spouse and eligible to be appointed executrix of his estate. Wives at customary law are not disqualified from appointment as executrixes of their deceased husbands' estates. (2) The removal of an executor dative is the prerogative of the Master, on good ground shown. Allegations of unbecoming conduct by an executor should be made to the Master in the first instance. Any decision of the Master to remove or to retain the executor could then be brought on review. (3) Some causes of action survive the deceased and can be continued by the executor, but not all. Claims, mainly in the realms of family law, such as claims as claims for divorce, maintenance, custody and guardianship of minor children, do not survive the claimant and cannot be pursued by the executor. The applicant did not seek to complete the divorce proceedings between the two deceases spouses. She sought to be authorized to claim a share in the immovable property, based on the observation by the lower court that the late former wife had contributed to the acquisition of the immovable property and that further evidence had to be led on the value of the property to enable the court to quantify her contribution. This did not amount to a grant of a real right to her; it simply recognized her right in equity to be awarded a share in the property so as to achieve the purpose intended by s 7 of the Matrimonial Causes Act [*Chapter 7.13*]. The distribution of the joint estate of spouses is a personal claim that is peculiar to husband and wife. It is not a cause of action founded on a principle of common law. It is an action created by Parliament to achieve justice as between husband and wife in an area where the strict application of the principles of property law may work an injustice on those spouses who contribute towards the acquisition of assets registered in the other spouse's name. It is a personal right that one spouse can enforce against the other and cannot be transmitted to the estate.

Administration of estates – will – alteration of – application – residual heirs – no right to apply for alteration until they have expectation of benefit

Kadengu & Ors v *Kadengu & Ors* HH-113-06 (Kudya J) (Judgment delivered 1 November 2006)

The applicants were residual heirs under a will. They sought alteration of the will, claiming that the estate could no longer be wound up in terms of the will as some of the clauses had with the passing of time become irrelevant. In terms of the will, after paying off various debts and making two major dispositions, the executor was obliged to liquidate the remainder of the estate and hold the monies in trust, to be applied to such matters as education and maintenance of the residual heirs.

Held: the applicants' *locus standi* depended on their having a direct and substantial interest in seeking variation or alteration or rectification of the will. The executor alone is looked upon as the person to represent the estate of a deceased person. All a residuary heir could do was seek the intervention of the court for the proper performance of the executor's duty or to seek his removal. The interest of the applicants *in casu* would arise once the trust was formed and once it was liquid. Only then would they have an expectation of benefit. That is also when they would have vesting. Once vesting was achieved, then would they have a direct and substantial interest in the provisions of the will and would be entitled to claim under the provisions of the will.

Appeal – decision of court *a quo* – reasons for – need for court to give reasons for its conclusions – effect of failure to do so

Kazingizi v *Dzinoruma* HH-106-06 (Makarau J, Patel J concurring) (Judgment delivered 11 October 2006)

Every trier of fact has to give reasons for his decision. A judicial decision that is not explained easily leaves itself open to criticisms of being arbitrary and/or capricious. Where the litigants have presented their competing facts and arguments before the trial court, they have a legitimate expectation to know whether their version of the facts and their argument have been received and, if not, why. So fundamental is the legitimate expectation of the litigants in our law that the legislature saw it fit to make it one of the duties of administrative authorities to give reasons for their decisions. See s 3(1)(c) of the Administrative Justice Act [*Chapter 10:28*]. The giving of reasons for a decision after a court hearing is thus a compulsory imperative, not only to fulfil the legitimate expectations of the litigants but also to inform them on the competing facts and arguments used as the basis of the decision for purposes of appeal or review. In the absence of reasons, the notice of appeal becomes guesswork and may arguably be held to be an appeal against the order and not the judgment. A written judgment in an appeal is imperative as it guides the appeal court in determining whether the attack on the whole or part of the judgment is legally sustainable. Without it, and in the absence of concessions made on appeal by the respondent, the appeal cannot be determined and is doomed. One could even argue that the failure to give reasons for judgment is a gross misdirection which vitiates the order given. In trials, as opposed to interlocutory matters and some applications, it is not only the order that matters; the reasons for arriving at that decision are equally important. The integrity of the order lies in the procedure used to reach that order and the reasoning employed to opt for a particular result.

Appeal – evidence – application to lead fresh evidence on appeal – evidence available at time of trial – effect of new evidence would be to allow party to argue its case differently – application refused

Chevron Invtms (Pvt) Ltd v *Chihuri & Anor* S-36-06 (Gwaunza JA; Sandura & Ziyambi JJA concurring)

See below, under COMPANY (Directors – disposing of assets of company without assent of shareholders).

Appeal – High Court – court's powers on appeal – may exercise review powers when faced with patent irregularity or illegality in proceedings of court *a quo*

Midzi v *Est Harry* HH-123-06 (Makarau JP, Patel J concuirring) (Judgment delivered 15 Novemver 2006)

Section 26 of the High Court Act [*Chapter 7:06*], which provides for the review powers of the High Court over all inferior courts, tribunals and administrative authorities in Zimbabwe, does not confer any new powers that the court does not ordinarily have but simply acts to confirms its inherent jurisdiction. When exercising its appellate jurisdiction, the High Court can also exercise its review jurisdiction when faced with a patent irregularity or illegality in the proceedings of the lower court. The exercise of this power is subject only to the rules of the court as to the need to afford all interested parties a right to be heard before relief is granted following the review. To restrict the High Court, when acting as an appellate court, to the record of the proceedings and the grounds of appeal raised by the appellant would rob the court of its inherent jurisdiction as the sole superior court of first instance to correct injustices whenever it sees them.

Appeal – Labour Court – appeal to Supreme Court – point of law – what is – requirement for employee to disclose conflict of interest in a particular form – statement that no conflict of interest existed – whether such statement constituted misconduct involves a point of law

Export Leaf Tobacco Co of Africa (Pvt) Ltd v *Gwavava* S-45-06 (Gwaunza JA, in chambers) (Judgment delivered 6 October 2006)

The respondent was dismissed from her employment with the applicant. An appeal to the Labour Court resulted in her dismissal being set aside. The Labour Court refused leave to appeal to the Supreme Court on the grounds that the appeal did not involve a point of law.

The case against the respondent was that she had failed to disclose, in the manner prescribed by the applicant, her interest in enterprises which dealt with her employer and was therefore guilty of dishonesty or deliberate misrepresentation **and**

corruption as defined in the applicant's code of conduct. She and other senior employees had been required to complete a form indicating, *inter alia*, whether or not they had "conflicts of interest" in relation to enterprises which dealt with the applicant. The respondent filled in the form and indicated she had no conflicts of interest. It was not disputed that the relationship between the respondent and two other companies constituted a conflict of interest *vis-à-vis* her relationship with her employer. It could be accepted that before the form was completed the applicant's senior management not only knew, but had actually instigated, these dealings.
Held: the question of whether, in the face of the express conditions of employment which required disclosure of interests in a particular form, the conduct of the respondent in stating that she had no interest, constituted the misconduct charged was a point of law, as was the additional issue of whether such a conflict could be excluded by imputing knowledge of the respondent's interests upon some managers. Questions of law do not cease to be such merely because they are underpinned by factual findings.

Arbitration – arbitration clause in contract – binding nature of – abandonment of – must be explicit – onus on party alleging clause invalid or incapable of performance

Capital Alliance (Pvt) Ltd v *Renaissance Merchant Bank Ltd & Ors* HH-108-06 (Patel J) (Judgment delivered 23 October 2006)

A clause in a contract to refer a dispute to arbitration is binding on the parties and a party is not at liberty to revoke this clause at any time if he wishes to do so. The question of whether a dispute falls within the arbitration clause in an agreement is primarily a question of interpretation of the agreement and the arbitration clause. Where parties have entered into an agreement which contains an arbitration clause that is clearly intended to be widely cast, the court should not be astute in trying to reduce the ambit of the arbitration clause. If the parties agree that the matter should be determined by a court of law, rather than by arbitration in terms of the agreement, the decision of the parties to abandon the arbitration clause must be specific and clearly evidenced. It cannot be implied by the conduct of, or correspondence between, the parties: the decision to change the agreement must either be in writing or else so clearly evidenced by the conduct of the parties that there is no room for doubt.

Once it is established that the dispute falls within the ambit of the arbitration clause, the onus to show why court proceedings should not be stayed falls on the party challenging the reference to arbitration. The party would have to show that the agreement to submit to arbitration is null and void, inoperative or incapable of being performed.

Arbitration – arbitration clause in contract – enforceability – party not able to enforce award if granted – party entitled to bring matter before court

Thornton v *McKenzie & Ors* HH-84-06 (Bhunu J) (Judgment delivered 2 August 2006)

The applicant sought cancellation of an agreement of sale of an immoveable property, as well as cancellation of the resulting mortgage bond due to non-payment by the defendant of the full purchase price. The agreement of sale contained an arbitration clause, but the application argued that even if she were to succeed at arbitration, the award would be unenforceable as s 8(1) of the Deeds Registry Act [*Chapter 20:05*] prohibits cancellation of a mortgage bond without a court order and an arbitrator's award can no longer be converted to a court order. Held: Whereas the old Arbitration Act [*Chapter 7:02*] had provision for the conversion of arbitral awards into court orders, that provision no longer exists. Under article 35 of the new Arbitration Act [*Chapter 7:15*], an arbitral award upon registration is simply enforced as an arbitral award without first being converted into a court order. It is the primary function of the court to resolve all legal disputes save where its jurisdiction has been expressly ousted by the law maker. All other alternative dispute resolution mechanisms are merely supporting structures meant to aid the court in its difficult primary duty of resolving legal disputes. While the courts prefer that, where there is an arbitration clause, the parties must first exhaust their domestic remedies, they will not insist on arbitration where that route is fraught with insurmountable hurdles. Thus notwithstanding the existence of an arbitration clause, where the dispute is incapable of resolution by arbitration as in this case, the question of exhaustion of domestic remedies before approaching the court does not arise.

Arbitration – award – finality of – arbitration agreement providing that arbitrator's award would be final and would be registered with the High Court for execution – award not thereby made an appealable decision of the High Court

Ropa v *Reosmart Invtsms & Anor* S-38-06 (Gwaunza JA) (Judgment delivered 13 November 2006)

A consent order was issued by the High Court in terms of which the dispute between the parties was to be determined by an arbitrator. The order provided that arbitrator's decision was binding on the parties and would be registered as an order of the High Court for execution. The arbitrator's award was in favour of the respondent. The appellant noted an appeal to the Supreme Court; the respondent argued that the appeal was not properly before the Court. The appellant argued that under s 19A of the High Court Act [*Chapter 7:06*] the arbitrator's award was adopted by the High Court and was thus appealable.

Held: the dispute was referred to the arbitrator by consent, not in terms of s 19A of the High Court Act. It was agreed between the parties that the arbitrator's decision would be final. By registering the decision as an order of the High Court, the decision was in effect a consent order, which is a final order and not one that can normally be appealed against. The parties' arbitration agreement, that is, the consent order, did not provide for a right of appeal to another tribunal. On the contrary, the order effectively provided that the arbitrator's decision would bring finality to the dispute, by binding the parties.

Bank – liability – forged cheque – no right to debit customer's account even if contributory negligence shown

Bills of exchange – cheque – forged cheque – wholly inoperative – bank having no right to enforce payment

Sino Zimbabwe Cement Co (Pvt) Ltd v *Zimbank* HB-132-06 (Kamocha J) (Judgment delivered 16 November 2006)
Employees of the respondent bank ordered a cheque book from the printers who supplied the bank, forged the signatures of directors of the applicant on various cheques, and drew large amounts of money. To support the cheques they forged the applicant's letterheads and wrote letters which purported to give authority to the bank to cash the cheques. The applicant sought summary judgment for the amount thus stolen. The bank pleaded contributory negligence on the part of the applicant.

Held: under s 23 of the Bills of Exchange Act [*Chapter 14:02*], a forged or unauthorised signature is wholly inoperative and the bank thus had no right to enforce payment of the cheque. A cheque is not the drawer's mandate if his signature has been forged or appended without his authority. If the bank pays out on such a cheque it is not entitled to debit the drawer's account. This rule applies even where general carelessness by the customer in the conduct of his affairs facilitated the deception – something of which there was no evidence in this case. Summary judgment would be granted.

Company – directors – disposing of assets of company without assent of shareholders – validity of transaction – need to show that assets being disposed of constitute whole or major part of company's assets before transaction can be held to be invalid – assent of shareholders being giving retrospectively – such assent valid – directors being sole shareholders – directors ratifying actions taken by single director – authority given in retrospect

Chevron Invtms (Pvt) Ltd v *Chihuri & Anor* S-36-06 (Gwaunza JA; Sandura & Ziyambi JJA concurring) (Judgment delivered 26 September 2006)

The appellant company, acting through an estate agent, offered an immovable property for sale. The first respondent attended on the estate agent and signed an irrevocable offer form, offering to buy the property for and to pay a little over half the purchase price as a deposit, with the balance being payable upon transfer. The following day a director of the appellant signed the offer form and the respondent signed a formal agreement of sale. A day later, he paid the deposit. On the next day, the appellant wrote to the estate agents, instructing them to cancel the contract of sale. The grounds for cancelling were that a review of the selling price was necessary given "the rate of inflation". The letter was signed by the appellant's three directors, including the director who had signed the irrevocable offer form two days previously. The respondent insisted on the appellant abiding by the contract of sale. The appellant responded by letter, advancing new grounds for wishing to have the agreement cancelled, among them being that no company resolution had been passed to dispose of the property in question. The respondent obtained an order for the appellant to sign all papers necessary to effect transfer of the property to him.
On appeal, the appellant sought to advance yet another ground for revoking the sale, and filed an application to adduce fresh evidence, that the property in dispute was the only immovable property registered in the name of the appellant and was the appellant's sole asset. Counsel for the appellant claimed that it was an "oversight" on the part of the appellant's then legal practitioner in the court *a quo* not to tender this evidence, though he also conceded that the evidence was available at the time the matter was heard and could have been obtained, except that no effort had been made to do so. The appellant also contended that s 183 of the Companies Act [*Chapter 24:03*] renders unenforceable any agreement entered

into for and on its behalf by one of its directors to dispose of the company's undertaking or the whole or greater part of its assets, without the sanction of the shareholders.

Held: (1) it was clear that the motivation for the application to adduce fresh evidence was the wish to present the appellant's case differently from the manner it was presented in the court *a quo* to lay the ground for the contention that an order upholding the agreement of sale would result in a contravention of s 183 of the Companies Act. Good grounds for adducing of fresh evidence on appeal do not include the need to argue the dispute on the basis of new facts not presented in the court *a quo*. Effectively the appellant was stating that the evidence it presented in support of its case in the court *a quo* was inadequate, hence its desire to complete or supplement that evidence by adducing additional evidence on appeal. Apart from giving the appellant another chance to argue its case differently, granting the application would result in unduly delaying finalisation of the matter. There were no special circumstances to warrant a departure from the general rule. The evidence was available and could have been easily accessed.
(2) The appellant led no evidence in the court *a quo* specifically relating either to the applicability or otherwise of s 183 or the extent of the appellant's assets and the court was entitled to decide the matter on the basis of ostensible authority.
(3) The purpose of s 183 of the Act is to protect the shareholders of a company against unscrupulous directors who might wish to dispose of its assets at will, and to the shareholders' detriment. It is not to provide the directors of a company with the means to resile from an agreement they would have validly entered into with an innocent party, when they realise that they may have made a bad bargain. The section is contravened when the directors of a company go behind the back of its shareholders and dispose of the undertaking of the company or of the whole or the greater part of its assets. However, the directors of a company can properly dispose of minor assets of the company without the authority of the shareholders. In order to establish that the asset in question constitutes a quantity the disposal of which would contravene the section, it is necessary to place before the court evidence concerning the full extent of the company's assets. No information was placed before the court *a quo* nor was the point argued, was what percentage of the total assets of the appellant was represented by the immovable property and so it was not possible for the court to ascertain, for purposes of s 183 of the Act, whether the property constituted the whole or a greater part of the assets of the company. There is nothing in s 183 to make any transaction entered into without the approval of a company in a meeting, null and void, so long as it is capable of ratification by the shareholders. There is also nothing in the Act to prohibit the authority required for purposes of s 183 being given retrospectively. Where the only shareholders and directors express – whether at the same time or not – their joint approval of a transaction contemplated by s 183(1)(b) their decision is as valid and effectual as if it had been taken at an effective general meeting convened with all the formalities prescribed by the Act.
(4) Even if the property in question was the whole or a major part of the appellant's assets, the appellant could not have resiled from the agreement of sale. The doctrine of unanimous assent would have been successfully invoked against the appellant. While calling themselves directors, the three signatories to the letter cancelling the sale were also the only shareholders of the appellant. In their joint capacities as directors and shareholders, the three commissioned the estate agent concerned to sell the property in question, on their behalf. All were present during the viewing of the property by prospective buyers, including the respondent. After the latter made an offer for the property and one of the directors accepted it in writing, the rest of the directors ratified his actions, thereby and effectively giving their authority in retrospect.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18 – right to protection of the law – right to determination of case by court "established by law" – Electoral Court – appointment of judges not in conformity with Constitution – court not properly constituted and thus not a court "established by law"

Constitutional law – Constitution of Zimbabwe 1980 – judges – appointment of – appointment of High Court judges to serve in inferior courts – may only be appointed to serve in "special courts" – procedure to be followed for appointment to serve in a special court – effect of failure to follow procedure – s 92

Marimo & Anor v *Min of Justice & Anor* S-25-06 (Malaba JA; Sandura, Cheda, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 25 July 2006)

Shortly before the March 2005 elections, the Electoral Act [*Chapter 2:13*] was amended to establish a new court called the Electoral Court with jurisdiction to hear and determine election petitions and other matters in terms of the Act. The Act also provided that the Chief Justice should, in consultation with the Judge President, appoint judges of the High Court to preside over the Electoral Court.
The first applicant was a candidate for the main opposition party. He, among others, lost the election in his constituency and brought an election petition to challenge the results. He also brought an application in the Supreme Court, attacking the constitutional validity of s 162(1) of the Act, under which the Chief Justice had purportedly appointed five judges of the High Court to sit in the Electoral Court. The applicants alleged that the Electoral Court was a "special court" as defined in

s 92(4)(b) of the Constitution and thus the appointments should, in terms of s 92 (1), have been made by the President, in consultation with the Judicial Service Commission; alternatively, if the relevant law so provided, by the Chief Justice after consulting the Judicial Service Commission, but for a specified period.

The Chief Justice then withdrew the appointments, consulted the Judicial Service Commission and the Judge President, and purported to re-appoint the same judges to the Electoral Court, with no indication of how long the appointment was for.

The applicants argued that the insistence by the judges presiding over the Electoral Court to hear and determine the election petitions and the refusal to refer the question of the contravention of the Declaration of Rights which had arisen in those proceedings to the Supreme Court for determination violated their to the protection of the law, as guaranteed by s 18 of the Constitution.

The respondents argued that because there was a right of appeal from the Electoral Court, it was not a "special court" in terms of s 94(4) of the Constitution.

Held: (1) Section 172(1) of the Act did not expressly provide that there shall be no right of appeal from a decision of the court on a question of fact; it simply stated that a judgment of that court on a question of fact shall be final. However, where Parliament intends to vest a decision of a court with finality as is the case in s 172(1) of the Act, there is no right of appeal. Section 172(1) of the Act thus embodies the definitive criterion of a "special court" set out in s 92(4)(b) of the Constitution.

(2) No provision is made in the Constitution for judges of the High Court to serve in subordinate courts other than special courts. Thus if the Electoral Court is not a special court then the appointment of judges of the High Court to preside in that court is inconsistent with the provisions of the Constitution. If the Electoral Court is a special court then the procedure set out in s 92(1) must be followed if the appointments are to be valid. The Chief Justice when acting in terms of s 91 of the Constitution can only assign a judge of the High Court to preside in an inferior court if that court is a special court.

(3) Having established a "special court" and conferred on it the judicial power to hear and determine election petitions, Parliament was bound by s 92(1) of the Constitution to provide for the appointment of persons to exercise the powers of that court in the manner prescribed by the Constitution. It was for the fundamental purpose of securing, for persons who preside over "special courts", the independence in the discharge of judicial functions of those courts safeguarded by the two pillars of security of tenure and conditions of service, that the framers of the Constitution provided that they be appointed in the manner prescribed under s 92(1). Once it established a "special court," Parliament was bound by s 92(1) to provide that persons who were to exercise the judicial power vested in that court, be appointed by the President after consultation with the Judicial Service Commission or provide in the Act that they be appointed by the Chief Justice after consulting the Commission. Consultation with the Commission is a mandatory requirement for a valid appointment of a person to exercise judicial power conferred by Parliament on a "special court"; without it there cannot be a valid discharge of the judicial functions of that court by the appointee. Parliament had no power to transfer the right to be consulted on the appointment of judges of the High Court to exercise judicial power vested in a "special court" from the Judicial Service Commission to the Judge President.

(4) For Parliament to purport to make a law which was void by virtue of s 3 of the Constitution did not deprive anyone of the "right to protection of the law" under s 18(1) of the Constitution. As long as the judicial system of Zimbabwe provides a procedure by which any person interested in establishing the invalidity of a statute (in this case s 162(1) of the Act) can obtain from the courts of justice a declaration of the invalidity, that would be binding upon Parliament itself and upon all persons attempting to act under, or enforce, the inconsistent law. However, under s 18(9) of the Constitution, the applicants in their capacity as election petitioners were entitled to a fair hearing and determination of their cases by an independent and impartial court "established by law". The Electoral Court had to be a "court established by law" before it could be able to afford the applicants the right to due process and to the protection of the law. While the Electoral Court was established by law, the judges were not validly appointed. The court in which they sat was not properly constituted and was not a court "established by law."

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – application to Supreme Court – who may bring application – need to show that Declaration of Rights has been contravened in respect of applicant

Law Society v *Min of Justice & Anor* S-16-06 (Chidyausiku CJ, Cheda, Ziyambi, Malaba & Gwaunza JJA concurring) (Judgment delivered 11 July 2006)

The Law Society brought an application under s 24 of the Constitution, challenging the constitutionality of certain amendments to the Criminal Procedure and Evidence Act [*Chapter 9:07*], relating to arrest and detention for certain offences. In its founding affidavit, the Law Society averred that it was the largest organisation representing the interests of all legal practitioners in Zimbabwe. It represented the views of the legal profession in Zimbabwe and maintains the integrity and the status of the legal profession. As such, it had a duty to consider and deal with all matters affecting the professional

interests of the legal profession. Its *locus standi* was based on its status as the public defender or protector of the rule of law and human rights. There was no averment that the impugned provision violated the right of the applicant, or of a member of the applicant. However, the Society contended that the impugned provisions violated the public's right of liberty and entitlement to a presumption of innocence as guaranteed by ss 13 and 18 of the Constitution, respectively. The applicant contended that, as an organisation representing the legal profession, it had the duty to protect the public from unconstitutional provisions of any law, and thus had *locus standi* to bring the application. Held: a litigant in an application under s 24 has no *locus standi* to seek redress for a contravention of the Declaration of Rights other than for himself or itself, the exception being where the person involved is in custody. *Locus standi* to make a direct application to the Supreme Court in terms of s 24 is much narrower than the common law. It is not sufficient to simply establish that the applicant has an interest in the matter. The applicant has to go further and establish that the Declaration of Rights has been or is likely to be contravened in respect to itself. However, in the High Court the common law test, namely having an interest in the matter under adjudication, is sufficient to establish *locus standi*.

Contract – breach – specific performance – order for – principles – when specific performance rather than damages should be ordered

Contract – completion – payment to an agent – agent expressly authorised to receive payment — obligation to make payment thereby discharged

Contract – frustration – whether doctrine of frustration still part of our law – need for "common object" of contract to be frustrated

Contract – performance – impossibility – meaning – fact that changed circumstances made performance uneconomical – not impossible for contract to be performed

Ncube v *Mpofu & Anor* HB-69-06 (Ndou J) (Judgment delivered 13 July 2006)

The applicant bought a house from the first respondent. In accordance with the agreement between the parties, the applicant paid the full purchase price to the second respondent, the first respondent's chosen estate agent. The estate agent did not pay over the full price to the first respondent, who then claimed that the contract had been "frustrated" due to the misappropriation of the purchase price. She also relied on supervening impossibility. The applicant sought an order compelling the transfer of the property.

Held: (1) a contract is performed by a party when he has done all that he is obliged to do under obligation. Payment to an agent expressly authorised to receive payment, discharges the obligation to make payment. By making payment to the estate agent, the applicant discharged his obligations in terms of the agreement. The first respondent was consequently obliged to pass transfer to the applicant. (2) Even if the doctrine of frustration is still a part of our law, the "common object" i.e. the property had not been frustrated. What seems to have been frustrated was the individual advantage of the first respondent when second respondent misappropriated part of the purchase price. This is not covered by the doctrine of frustration. (3) The fact that the unfortunate occurrence had made it uneconomical for first respondent to carry out her obligations did not mean that it was impossible for her to do so – she was the one who appointed the second respondent as her *adjectus*. She would have to bear the consequences of such appointment; she could not visit the applicant with the punishment of the sins of her own *adjectus*. (4) *Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. The court may, in appropriate circumstances, order the payment of damages instead. *In casu,* it would be just and equitable for an order for specific performance to be granted. No undue hardship would be occasioned to the first respondent because she could seek recourse through the Estate Agents Council under s 34 of the Estate Agents Act [*Chapter 27:05*]. On the other hand, the applicant would incur immense hardship should an order for specific performance be refused. He could never hope to acquire an immovable property for the agreed price in the current economic environment. He had also effected costly renovations on the property.

Contract — enforceability — sale of immoveable property — seller a tenant-to-buy — local authority requiring consent of seller's spouse before agreeing to transfer – whether authority can be compelled to transfer the property without spouse's consent

Tobaiwa v *Kaseke & Ors* HH-74-06 (Makarau J) (Judgment delivered 5 July 2006)

The first respondent was the registered purchaser of a property from a local authority under a lease-to-buy agreement of sale, in which the local authority reserved unto itself the right to consent to a cession on certain terms and conditions. Before he acquired full ownership, he sold his rights in the property to the applicant. The local authority refused to accede to the cession as it required the consent of the second respondent, the first respondent's estranged wife. The applicant sought an order compelling the compelling the wife to give her consent to the cession failing which the local authority be compelled to give effect to the cession without her consent. There were two issues for determination: (1) whether the applicant had an enforceable agreement of sale; and (2) whether, assuming he had such an agreement, the absence of the wife's consent could stop the cession of rights as between applicant and first respondent.
Held: (1) in dealing with rights in immovable properties owned by local authorities, the principles that apply in a sale of property owned outright by the seller are of no application. However, it is legally possible for a person in the position of the first respondent to enter into a contract of sale, not only of the property itself, but also of the rights, title and interest that he has under the suspensive agreement of sale and which rights will in due course mature into real rights in respect of the property. Those personal rights that are conferred by the suspensive agreement of sale are capable of being sold and bought without the prior consent of the local authority concerned. The agreement of sale/or assignment of rights was, however, binding as between the contracting parties only. It could not be enforced against the local authority to compel transfer or cession of rights. There was simply no *vinculum juris* between the buyer and the local authority and thus no cause of action could lie against the local authority at the instance of the buyer.
(2) The second issue was one aspect of the imprecise nature of the rights that spouses have in jointly acquired, but not jointly owned, matrimonial property during the subsistence of the marriage. This is an issue that eludes specific definition and resolution using the existing legal norms, as it pits the law of property against the institution of marriage and how parties within the institution view their relationship to the assets of the matrimonial estate, jointly acquired. Spouses who contribute towards the acquisition of a property registered in the name of one spouse are not joint owners of the property. Their mere status as a spouse does not affect the rights of ownership that registration creates. Attempting to resolve the issue of the exact nature of the proprietary rights of spouses during the subsistence of a marriage using principles of property law has the potential of working injustices as between the spouses. During the subsistence of a marriage, strict observance of the rules of property law as to the acquisition of ownership rights in respect of matrimonial assets may arguably lead to the destruction of that community of life that marriage automatically brings into being between the spouses.
(3) The evidence did not show whether it was a condition of the lease-to-buy agreement that the spouse's consent was required before the council could consent to transfer or whether this was merely a noble policy designed to protect spouses. The applicant had not discharged the onus on him of showing that her consent was unnecessary.

Contract – option – right of first refusal – what is – right of holder of option to obtain interdict to enforce his right

Nerger Properties (Pvt) Ltd v *R Chitrin & Co (Pvt) Ltd* S-47-06 (Cheda JA; Chidyausiku CJ & Ziyambi JA concurring) (Judgment delivered 13 October 2006)

A right of first refusal is the same as the right of an option. An option is an offer to sell, which remains open during the stipulated period. If the offer is accepted at any time before the time has lapsed, a binding contract of sale is concluded between the parties. When an option is given by a seller, he is bound by it and cannot withdraw his offer. The holder of the option has the right to obtain an interdict to prevent the delivery of the thing in question to a subsequent purchaser and to obtain specific performance on tendering payment of the purchase price that he has offered.

Contract – validity – contract sounding in foreign currency – lawfulness of – tender in settlement – rate of exchange – when official rate applies – whether judgment creditor obliged to accept tender

Zimbank v *Zambezi Safari Lodges (Pvt) Ltd & Ors* HH-95-06 (Patel J) (Judgment delivered 24 August 2006)

The plaintiff had loaned the defendant a sum of money in foreign currency. The defendant paid most then tendered the balance in local currency at the official rate of exchange, which was very much lower than the unofficial "parallel" rate. Held: because of the glaring disparity between the official and parallel rates, acceptance of the tender at the official rate would have operated so as to unjustly enrich the defendant to an exorbitant and unconscionable extent. However, because execution cannot be levied in foreign currency, there must be a conversion into local currency at the prevailing official rate for the limited purpose of enforcement – and for that purpose alone. It is thus necessary to distinguish a tender in settlement

in local currency from the requirement to convert a judgement debt into local currency at the date of execution. Both take place at the official exchange rate, but the former is only allowed if repayment in local currency is agreed by contract or otherwise accepted by the creditor. In the absence of such agreement or acquiescence, a tender in local currency does not constitute sufficient discharge of an obligation sounding in foreign currency. The options for recovering a foreign currency debt must be left to the judgement creditor's discretion. It may sometimes be possible for the creditor to recoup the debt specifically in foreign currency but if all other options for recovery fail and it becomes necessary as a last resort to execute against the debtor's local assets, the judgment debt must then be converted into local currency at the official exchange rate prevailing at the date of enforcement.

Costs – contribution towards – divorce action – when contribution may be ordered

Dube v *Mavako-Dube* HB-78-06 (Ndou J) (Judgment delivered 3 August 2006)

The procedure for making a claim for a contribution towards costs in a matrimonial suit is *sui generis*. It has its origin in Roman-Dutch procedure and has been sanctioned through many decades of practice. Its basis is the duty of support spouses owe each other; its purpose is to enable a spouse, who would otherwise not be able to do so, to place his or her case adequately before the court. The court must look at the means of both parties and try to determine what is reasonable and just. The requirements for an order for contribution of costs are: (a) there must be a subsisting marriage; (b) the suit in question is a matrimonial one; (c) the applicant has a reasonable prospects of success; (d) the applicant is not in a financial position to bring or to defend the action, as the case may be; and (e) the other spouse is able to provide the applicant with this contribution. No contribution order will be granted if the spouse asking for it is well able to afford the costs of the action himself or herself, either because he or she has a substantial separate estate or because he or she has an income, savings or other assets which are under his or her control. The onus is on the applicant to show that he or she does not have the necessary means while the other spouse is able to make a contribution.

Costs – counsel's fees – counsel acting *pro amico* – successful party not entitled to costs of such counsel

Ndlovu & Anor v *Maunze & Ors* HB-137-06 (Ndou J) (Judgment delivered 23 November 2006)

Counsel for the applicants had offered to act *pro amico* for them, as they were relatives of his. The applicants turned down this offer out of a sense of pride. When the applicants succeeded, an application was made for the costs of counsel.

Held: Notwithstanding the applicants' pride and desire to be regarded as paying clients, for all intents and purposes counsel remained their *pro amico* counsel and for such gratuitous services in court, the applicants were not entitled to costs.

Costs – counsel's fees – what may be charged – whether counsel bound by Law Society tariff

Choto v *CBZ & Anor* HH-126-06 (Guvava J) (Judgment delivered 8 November 2006)

At taxation following settlement of an action the applicant did not contest any of the fees claimed by the respondent save for a claim which was for counsel's fees. The applicant submitted that the respondent was not entitled to claim these fees as they were at a higher rate than the tariff set out in the High Court (Fees and Allowances) Rules 2000. The taxing officer, after considering the submissions made by both sides, confirmed the award in favour of the respondent and allowed the amount claimed. The taxing officer's decision was brought on review.

Held: (1) Where a legal practitioner obtains the services of counsel to deal with a case, the legal practitioner must pay out as a disbursement the fees charged by counsel. The taxing officer is authorised under r 308 of the High Court Rules 1971 to allow disbursements which are reasonable, and reasonably incurred. Disbursements on the respondent's bill of costs related to the actual amount which the legal practitioner had paid out to counsel; the respondent had no choice in the amount charged by counsel.

(2) While the terms "advocate" and "attorney" were repealed in 1981 and a new all-encompassing term "legal practitioner" was introduced for all legal practitioners, the change in terminology did not in any way affect the basic differences between the two types of legal practitioners. The main objective of the amendment was to avail affordable legal representation to all litigants in the High Court and Supreme Court. Before the amendment only advocates had audience in the High Court and

Supreme Court, which meant that the cost of litigation was very high. The objective was therefore to place all legal practitioners on the same level, without distinction in relation to their ability to appear in the superior courts, but not to take away one's right to practice as an advocate.
(3) Generally, in the taxation of costs as between party and party in respect of work done in connection with judicial proceedings, a taxing officer is guided by the tariff of legal practitioners' fees prescribed in the High Court (Fees and Allowances) Rules 2000. However, the Rules recognize that there are legal practitioners who represent clients by virtue of being instructed by another legal practitioner. It is also accepted by the Rules that fees charged by legal practitioners who have been so instructed are generally regulated from the bar from which they operate. Once a legal practitioner has been instructed by another, then that legal practitioner is not bound by the tariff as prescribed.

Court – High Court – powers – review powers – may be exercised when court acting as appellate court

Midzi v *Est Harry* HH-123-06 (Makarau JP, Patel J concuirring) (Judgment delivered 15 Novemver 2006)

See above, under APPEAL (High Court).

Court – Supreme Court – powers – inherent jurisdiction to control processes and protect itself from abuse – vexatious litigant being required to obtain leave for future litigation over disputed subject

Fuyana v *Moyo* S-54-06 (Chidyausiku CJ, in chambers) (Judgment delivered 30 November 2006)

The applicant, a self-actor, had filed vast amounts of irrelevant material in a series of ill-conceived applications and would-be appeals. In doing so, he had impugned the integrity of all the judges who had handled the case, whether at first instance or on appeal.
Held: The court had inherent jurisdiction to regulate its own processes, which it can use to protect its process from abuse. In the exercise of that jurisdiction, an order would be issued, barring the applicant from instituting any litigation over the subject matter in dispute without first obtaining leave from a judge of the High Court or of the Supreme Court.

Criminal law – general principles – defences – diminished responsibility – not a complete defence – may mitigate sentence – evidence – need for medical evidence to be supported by other evidence – not sufficient to rely solely on medical reports

S v *Chikanda* S-99-05 (Cheda JA; Sandura & Malaba JJA concurring) (Judgment delivered 16 October 2006)

The borderline between criminal responsibility and criminal non-responsibility on account of mental incapacity or illness is not an absolute one, but a question of degree. A person may suffer from a mental illness yet nevertheless be able to appreciate the wrongfulness of his conduct and to act in accordance with that appreciation. Diminished responsibility only reduces the level of responsibility but does not completely absolve an accused person from his actions. Where the court finds that the accused, at the time of the commission of the act, was criminally responsible for the act, but that his capacity to appreciate its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing him.

Medical reports suggesting that a person may have been suffering from a state of diminished responsibility at the time of the commission of the offence need to be supported by some other evidence. On their own, such reports may not be conclusive. The decision as to whether there is diminished responsibility is to be made by the court and not just by medical experts. Where medical reports of diminished responsibility are not supported by some other facts from the evidence the court is entitled to reject the claim of diminished responsibility if there are other factors which justify that rejection.

Criminal procedure – trial – sentence – passing of – when may be passed by magistrate other than magistrate who convicted accused – "in the absence of the magistrate who convicted the offender" – meaning – time, distance and circumstances to be considered

S v *Manga* HH-122-06 (Kudya J) (Judgment delivered 15 November 2006)

Under s 334(7) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], sentence may, "in the absence of" the magistrate who convicted the offender, be passed by any magistrate of that court. In order to use this provision, the sentencing magistrate must, firstly, note on the record the absence of the trial magistrate and the reasons for such absence. Secondly, the accused must be given the opportunity of addressing in mitigation. Finally, it is incumbent on the second magistrate to consider the evidence recorded and upon which the verdict is returned. The words "in the absence of the magistrate who convicted" are unqualified by the statute and should be given the widest possible meaning, which is that the magistrate in question could be absent for whatever reason, e.g. retirement, leave, discharge from service, death, or lengthy absence abroad for whatever reason. While these are normal forms of absence, there can be no doubt that any absence for an appreciable length of time would bring into play the provisions of the section, especially if prejudice were to be caused if the convicted person made to await the return of the magistrate to the courthouse. Similarly, the fact that the trial magistrate is an appreciable distance away from the court would allow the provision to be invoked. The phrase must thus be measured in terms of the triad of time, space and circumstances.

Criminal procedure (sentence) – general principles – factors to consider – prevalence of offence – trivial offence – relevance of prevalence

S v *Sibanda* HB-102-06 (Ndou J, Cheda J concurring) (Judgment delivered 12 October 2006)

While the prevalence of an offence is a relevant factor in sentencing, it is not the overriding factor. It is not the function of the court to try to control crime by imprisoning people accused of crimes which the legislature, in its wisdom, considers trifling. While the courts should never be seen by the public to be trivialising serious offences, courts are equally enjoined not to make trivial cases serious. Either scenario is as much unjust as the other.

Criminal procedure (sentence) – general principles – matters to be considered – prison sentences – approach to be taken to

S v *Moyo & Ors* HB-114-06 (Cheda J) (Judgment delivered 16 November 2006)

Sentencing is the most difficult aspect in the conclusion of a trial. The judicial officer has to battle with this aspect in the midst of both philosophical and academic concepts which intrude upon the practical business of sentencing. As much as judicial officers have a duty and determination to deter or eradicate crimes in society, all their efforts in the long run seem to be equally futile. The causes of crime and their solutions lie not only in the legal system but in society itself. Ultimately, therefore, sentences imposed by the courts by and large must have support of concerned and right thinking citizens. But the same citizens can easily be revulsed by the court's imposition of unnecessary lengthy prison terms as they may view them as being out of step with the offences committed, thereby rendering them meaningless. . There must, therefore, always be a right proportion between the punishment imposed and the gravity of the offence. It is in that sense that it is said that certain crimes "deserve" certain punishment and not on any theory of retribution.

The sentence imposed on an accused should be shaped and determined by the following factors amongst others: (1) the degree of premeditation by the offender; (2) the circumstances surrounding the conviction of the offence; (3) the gravity of the crime committed, in some instances in regard to which the maximum punishment provided by statute is an indication; (4) the attitude of the offender after the commission of the conviction of the crime, as this serves to indicate the degree of criminality involved and throws some light on the character of the participant; (5) the previous criminal record, if any, of the offender; (6) the age, mode of life, climate and personality of the offender; (7) any recommendation presented to the court as a pre-sentencing report from an official designated to assist in assessing the accused; and (8) case authorities in relation to similar offences.

Prison life is a rigorous punishment and should therefore be imposed with sympathetic consideration. Irrespective of how bad an offender is in the eyes of society, he is still entitled to humane treatment, for it is his human right to be so treated. It is for this reason that the sentences imposed should not amount to total condemnation by society.

Criminal procedure (sentence) – statutory offences – Sexual Offences Act [*Chapter 9:07*] – s 3(1)(b) – committing an immoral or indecent act with or upon a young person – serious view taken by courts of sexual abuse of young persons

S v *Mbulawa* HB-62-06 (Ndou J) (Judgment delivered 13 July 2006)

The accused was convicted of contravening s 3(1)(b) of the Sexual Offences Act [Chapter 9:07], that is, committing an immoral or indecent act with or upon a young person. He was aged 30 and the female complainant was aged 12. He had fondled her breasts, kissed her and fondled her private parts on a number of occasions over a period of a month. Held: Sexual abuse of children is viewed by the courts in a serious light. Paedophilia has to be dealt with effectively. The courts have to drive home the message that such conduct will not be tolerated as it has grave consequences on the youth. Self-gratification of adults should not be at expense of debauching young persons. The accused offended against morality by not only gratifying his own sensualities, but by also exciting, encouraging and facilitating the illicit gratification of the 12 year old complainant. The sentence should not be such that it gives the impression that the court is condoning sexual abuse of children. The accused's moral blameworthiness was so high that an effective sentence in the region of two years was called for.

Criminal procedure (sentence) – statutory offences – stock theft – penalties applicable – person committing offence before but being convicted after penalties increased – increased penalty not applicable – theft of equine animal – does not include theft of a donkey

S v *Ndlovu & Anor* HH-70-06 (Kamocha J, Garwe JP concurring) (Judgment delivered 12 July 2006)

The two accused were convicted of stock theft, the offences having been committed before but the convictions occurring after an amendment to the Stock Theft Act came into operation. That amendment introduced a mandatory minimum sentence of imprisonment for theft of bovine or equine animals unless special circumstances were found. The first accused stole 4 donkeys. The accused were both sentenced on the basis of the new sentences applicable.

Held: (1) the first accused should not have been sentenced on the basis that he stole an equine or bovine animal, a donkey, by definition, being neither. (2) The general rule at common law is that statutes are not to operate retrospectively, unless it is expressly enacted that an enactment shall be retrospective in its operation or it is a necessary implication from the language used. This was not the case here.

Editor's note: this decision should be compared to that in *S* v *Mzanywa & Ors* HB-9-06 (Ndou J) (judgment delivered 23 February 2006), where the opposite conclusion was reached. With respect, it would appear that the later decision is to be preferred, being in accordance not only with principle but also with s 18(5) of the Constitution, the relevant portion of which provides that "no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence *at the time when it was committed*" (emphasis supplied).

Damages – assessment of – delictual – *actio injuriarum* – defamation – factors to be taken into account

Delict – *actio injuriarum* – defamation – defamatory nature of words used – tests to be applied – defences – privilege – article published in newspaper about prominent public figure – when bounds of privilege may be exceeded

Masuku v *Goko & Anor* HH-127-06 (Patel J) Judgment delivered 30 November 2006)

The plaintiff was a medical engineer by profession. He had held various posts in the public sector, and was founder chairman of the Gold Mining and Minerals Development Trust. In that position he had to deal with all sectors of the mining industry, including the Zimbabwe Miners Federation. In 2003 the Federation held a meeting at which five of its members were instructed to investigate press reports over alleged corruption on the part of the plaintiff. Minutes were produced of the meeting. The plaintiff considered the minutes to be defamatory and sued the Federation and its principal office bearers, who settled the case out of court. However, the second defendant, a newspaper publisher, published an article written by the first defendant. The article set out the contents of the minutes, which the first defendant had obtained from the then Minister of Mines, but did not publish the plaintiff's comments. The plaintiff had advised the first defendant to investigate the matter further before publishing excerpts from the minutes. No comments from the Federation requested or included. The minutes that were received were unsigned and unconfirmed. The first defendant contacted the person who took the minutes but did not discuss specific details of the minutes.

The plaintiff claimed that the article was defamatory , in that it was selective in terms of its emphasis and coverage of the minutes and in essence suggested that he was involved in underhand dealings and corruption. The latter suggestion was particularly injurious because of his involvement in the crusade against corruption. The defendants claimed that the publication was privileged or justified or both.

Held: (1) In determining whether or not a person has been defamed, the court should adopt a three-stage approach: (a) consider whether the words complained of are capable of bearing the meaning attributed to them, that is, whether the allegedly defamatory meaning is within the ordinary meaning of the words; (b) assess whether that is the meaning according to which the words would probably be reasonably understood; and (c) decide whether the meaning identified is defamatory.
(2) The plain meaning of the article was that the plaintiff was being investigated for improper or unethical behaviour and that he had committed acts of corruption rendering him unfit to hold public office. Its overall tenor suggested that he was already under investigation and that the case against him had overtaken mere allegations of corruption.
(3) Applying the tests cited, the words, as understood by the ordinary reader, were defamatory of the plaintiff, in that they cast aspersions on his character, lowered im in the estimation of ordinary reasonably persons and, having regard to the diverse public offices he held, exposed him to public ridicule and contempt.
(4) The defence of privilege requires the defendant to establish that he had a duty or interest in publishing the statement and that the persons to whom it was published had a similar duty or right to receive it. Newspapers have a right to keep their readers informed about matters of public interest involving public figures. Even if the elements of privilege are established, the defence is vitiated if the plaintiff shows that the defendant was actuated by malice or that he abused or exceeded the bounds of privilege. Here, the plaintiff's conduct was a matter of public interest and the defendants' newspaper had a duty to report on his activities as a public figure. However, the contents of the article were published recklessly and exceeded the bounds of privilege, in that (a) the article was unbalanced and selective, reproducing only two out of ten resolutions passed at the meeting and did not include any comment from the Federation itself; (b) the defendants acted contrary to the clear advice offered by the plaintiff to withhold publication until they had investigated further; and (c) the article's reference to earlier press reports of alleged corruption on the part of the plaintiff was unsubstantiated. It could thus not be said that the contents of the article were even partially true, let alone completely or substantially true.
(5) In assessing damages, it is necessary to consider a number of factors, including: (a) the content and nature of the publication; (b) the plaintiff's standing in society; (c) the extent of the publication; (d) the probable consequences of the defamation; (e) the conduct of the defendant; (f) the recklessness of the publication; (g) comparable awards in other cases; and (h) the declining value of money. In applying those factors, it must be borne in mind that damages are intended as a *solatium* and should not as a rule be punitive. Here, the defendants' conduct was aggravated by their failure to investigate further before publication; by failing to verify the authenticity of the minutes; by failing to publish any retraction or apology; and by persisting with their denial of liability even after the action was instituted.

Delict – liability – vicarious liability – employer's liability – driver carrying passenger in contravention of explicit instructions to the contrary and injuring passenger due to his negligent driving – prohibition limiting sphere of employment – employer not liable

Khosa v *Cargo Carriers* HH-90-06 (Uchena J) (Judgment delivered 23 August 2006)

The plaintiff sustained serious injuries due to the negligence of the driver of the defendant's lorry. The driver had, in spite of specific instructions that passengers were not to be carried in the lorry, given the plaintiff a lift and charged him a fee for the lift. The plaintiff argued that the defendant was vicariously liable because the driver drove negligently and caused the plaintiff's injuries during the course of his duties. The defendant submitted that as the driver was prohibited from carrying passengers he acted outside the sphere of his employment, therefore the defendant is not vicariously liable. Held: there was no deviation from the route the driver was to use while carrying his employer's cargo. His only digression was to carry the plaintiff against his employer's instructions. These were two distinct aspects of the driver's behaviour to be looked at as a whole course of conduct: (1) the more immediate cause of the injury to the plaintiff, that is, the driver's bad driving, and (2) his conduct in causing the plaintiff to be a passenger exposed to the risk of injury by bad driving. Both aspects of that conduct had to occur for the plaintiff to be harmed: if either of them had been absent the plaintiff would not have been injured. Unless both aspects of the driver's conduct can properly be said to be acts done in the exercise of the functions to which the driver was been appointed, he did not act throughout as the defendant's servant in inflicting harm on the plaintiff, and there is no room for the operation of the principle of vicarious liability of the master for the conduct of his servant. The driver was instructed not to carry passengers. He carried the plaintiff in disobedience of his master's instruction. It cannot therefore be said that in so doing he was acting within the sphere of his employment.

Elections – Electoral Court – appointment of High Court judges to preside over Electoral Court – need to follow procedure set out in s 91 of the Constitution – system of appointment under Electoral Act not in conformity with Constitution – appointments invalid

Marimo & Anor v *Min of Justice & Anor* S-25-06 (Malaba JA; Sandura, Cheda, Ziyambi & Gwaunza JJA concurring) (Judgment delivered 25 July 2006)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 18 – right to protection of the law – right to determination of case by court "established by law").

Employment – code of conduct – proceedings conducted under – when may be referred to a labour relations officer – no referral allowed once determination made under code of conduct – referral before determination made only permissible after 30 days – such referral optional – time limits within which labour officer may hear matter

Watoka v *ZUPCO (Northern Division)* S-87-05 (Cheda JA, Chidyausiku CJ & Gwaunza JA concurring) (Judgment delivered 25 September 2006)

The appellant was dismissed from his employment for an act of misconduct. The determination to dismiss was made under the employer's code of conduct. The appellant appealed successfully to a labour relations officer; the respondent then appealed to a senior labour relations officer and finally to the Labour Court, which upheld the respondent's appeal. On appeal to the Supreme Court, there were three main issues: (1) the jurisdiction of the labour relations officer to hear the matter; (2) the hearing by the labour relations officer being outside the prescribed time limits; and (3) the merits of the case. Held: the labour officer had no jurisdiction to hear the case, for two reasons: (1) s 101(6) of the Labour Act [*Chapter 28:01*] provides for a referral of the matter to a labour relations officer if it has not been determined within 30 days. It does not provide for a referral of a matter that has been determined, which was the case here. The referral to a labour relations officer is a relief granted to a party who is concerned about the delay in the determination. It is not a referral intended to challenge a determination that has already been made. The party concerned does not have to refer the matter to the labour relations officer. Once the 30 days have lapsed that party can choose to refer the matter to a labour relations officer or wait for a determination to be made. In this case, although the determination was made more than 30 days after the matter arose, the delays were largely due to the appellant. It was also clear from the facts that the appellant intended to wait for the determination to be made. It was also clear that there was no agreement between the parties to refer the matter to a labour relations officer, as required by s 93(1)(b) of the Act. (2) Under s 94(1)(b) of the Act, in the form which applied at the time of this dispute, any referral to a labour relations officer had to be made within 180 days of the dispute arising. The labour relations officer entertained the complaint about a year after the 180 day period had expired. (3) On the merits, the appellant was clearly guilty of the misconduct alleged.

Employment – retrenchment – decision by Minister – whether Minister obliged to receive submissions from parties

Zindoga & Ors v *Min of Labour* HH-75-06 (Patel J) (Judgment delivered 5 July 2006)

The retrenchment of an employee impinges upon his rights, interests and legitimate expectations, as well as the rights and interests of his employer. It follows that they are both entitled to a fair hearing within the period specified or within a reasonable time as required by s 3(1) of the Administrative Justice Act [*Chapter 10:28*]. To that end, they must be afforded adequate notice of the intended hearing and a reasonable opportunity to make adequate representations in accordance with s 3(2) of the Act. Section 12C of the Labour Act [*Chapter 28:*01], which deals with retrenchment procedures, is substantially consistent with the *audi alteram partem* rule, but falls short of the rule to the extent that it does not invariably and peremptorily require representations from all of the affected parties. On the other hand, it is entirely concordant with the requirements of s 3 of the Administrative Justice Act, having regard to the departures envisaged in s 3(3) of that Act. Given the specific time limits that were previously in s 12C of the Labour Act, the Minister was obliged to deal with the matter solely on the papers forwarded to him by the Board. He practicably could not be and consequently was not required to invite the interested parties to make further written or oral representations in the matter. The position now may arguably be different, following the amendment of s 12C by Act 7 of 2005, which removes the time limitations.

Employment – retrenchment – procedure for – role of works council – employer and employees reaching agreement without involvement of works council – works council subsequently ratifying agreement – retrenchment lawful

Mugabe & Ors v *Zvimba RDC* S-29-06 (Malaba JA, Chidyausiku CJ & Sandura JA concurring) (Judgment delivered 31 July 2006)

The appellants had been retrenched from their employment with the respondent council. Before the retrenchment took place, the respondent's representatives put forward their proposed retrenchment package and the representatives of workers were asked to come up with their own proposals. Most of the items proposed by the workers' representatives were accepted by the respondent and a final retrenchment package was agreed upon by the parties. The respondent gave notice to the Works Council of its intention to retrench the workers whose names it listed. The first appellant, in his capacity as the chairman of the workers' committee, and the secretary of the committee sent a memorandum to the respondent, which they signed, agreeing with the retrenchment and the package. Thereafter the works council gave its formal approval to the retrenchment. The appellants appealed, unsuccessfully, to the Labour Court, and then to the Supreme Court, where they argued *inter alia* that the respondent had not complied with the legal requirements for the retrenchment of appellants.
Held: The object of the procedure prescribed under s 12C of the Labour Act [*Chapter 28:*01] is to ensure that the retrenchment is by agreement between the employer and employees concerned, or their representatives, with the approval of a third party. The role of the Works Council in the procedure is that of a mediator to secure an agreement on the retrenchment, its terms and conditions between the employer and the employees concerned or their representatives. Here the representatives of the employer and the employees concerned reached an agreement on the retrenchment and its terms and conditions without the involvement of the works council. The works council, which was required by law to approve the retrenchment in terms of the agreement, did so. It could not be said that the procedure followed in this case was not in accordance with s 12C of the Act.

Employment – suspension – unlawful – remedies open to employee who is unlawfully suspended from employment – effect of taking other employment

United Bottlers v *Kaduya* S-34-06 (Chidyausiku CJ, Sandura & Cheda JJA concurring)

An unlawful suspension of an employee is a repudiation of the contract of employment by the employer. The employee can elect either to accept the repudiation or enforce the contract. A wrongfully suspended employee has a duty by operation of law to remain available for employment by his employer. If he accepts alternative employment, by that fact alone he accepts the employer's repudiation and his only remaining remedy is to sue the employer for damages for breach of contract. His damages for wrongful dismissal can only be calculated from date of wrongful suspension until the date he took the other employment. A wrongfully dismissed employee, on the other hand, has a duty to mitigate damages by finding alternative employment as soon as possible.

Employment – strike – right of employee to participate in strike – disciplinary proceedings under code of conduct – may be brought against employees participating in unlawful strike

Employment – trade union – right to participate in legal proceedings – review proceedings – trade union brining application in its own name although not directly a party to proceedings being brought on review – right on union to bring application

Tel-One (Pvt) Ltd v *Communication & Allied Svcs Workers' Union* S-26-06 (Chidyausiku CJ, Cheda & Ziyambi JJA concurring) (Judgment delivered 12 September 2006)

Employees of the appellant corporation, at least some of whom were employees rendering an essential service, took part in a strike. The Minister of Labour issued a disposal order which was set aside by the Labour Court on technical grounds. In the meantime, the appellant suspended the striking workers without pay and charged them under the applicable code of conduct. The striking workers were all dismissed as a result of the disciplinary proceedings. The respondent trade union brought the matter on review in the High Court in its own name, not in the names of any of the employees. Three questions arose for determination: (1) whether the union had *locus standi* in the matter; (2) whether the High Court should have heard the matter, domestic remedies not having been exhausted; and (3) whether the appellant should have followed the procedures laid down in the Labour Act [*Chapter 28:01*] and was barred from proceeding under the code of conduct. In this regard it was argued that strike action is a collective game of power between an employer and an employee and that an employee who participates in this game of power cannot be disciplined for narrow breaches of his contract of employment arising from engagement in that game of power. Whenever there is collective job action the issue is no longer one of the narrow breach of the contract of employment, and the code of conduct is ousted and has no application.
Held: (1) generally speaking, only parties to the proceedings can challenge on review or appeal the outcome of such proceedings. Section 29 of the Act confers on a trade union the right to sue or to be sued or to be joined as a party to proceedings but does not make the respondent, by virtue of its being a trade union, a party to the proceedings. However,

in this matter the disciplinary proceedings were part and parcel of the ongoing dispute between the appellant and the employees and their representative union, the respondent. To insist in the light of these facts that the respondent was not a party to the disciplinary proceedings, which were part of the ongoing dispute between the appellant and the respondent, is pedantic and too technical. In addition, the employees were members of the respondent and they authorised the respondent in writing to institute the proceedings.
(2) The High Court had a discretion to hear the matter and it had not been shown that the exercise of that discretion was unreasonable.
(3) An employee cannot be dismissed from employment for participating in a lawful collective job action, even if such participation contravenes a code of conduct, such as absence from work in excess of five days contrary to the provisions of the code of conduct. There was nothing in the language of the Act, either express or implied, that codified the proposition advanced by the respondent, that once employees were participating in a strike, the code of conduct was *ipso facto* ousted. None of the relevant provisions of the Act barred an employer from disciplining employees engaged in an unlawful collective job action in terms of a code of conduct. Nothing in the Act limited an employer to taking disciplinary action against employees to situations where there is specific prescription of unlawful collective job action in the code of conduct. It was lawful for the appellant to charge the employees with absence from work in contravention of the code of conduct. It was open to the employees to plead participation in a lawful collective job action. This they did not do, and probably could not have done, as they were employed in an essential service.

Employment – urban council employee – disciplinary proceedings against – need not be referred to labour relations officer – power of council to dismiss employee

City of Mutare v *Samupindi* S-20-06 (Cheda JA, Chidyausiku CJ & Gwaunza JA concurring) (Judgment delivered 25 September 2006)

The respondent was dismissed from her employment with the appellant urban council for an act of misconduct. Although the council could have dismissed her in terms of s 141(2)(b) of the Urban Councils Act [*Chapter 29:15*], it chose to refer the matter to a labour relations officer, who ordered her reinstatement. Such a referral was permissible under s 93 of the Labour Act [*Chapter 28:01*] as it stood at the relevant time. An appeal by the council to the Labour Court resulted in that court referring the matter back to the labour relations officer and considering the case on its merits.
Held: (1) under the Labour Act [*Chapter 28:01*] as it stood at that time, the labour relations officer had no jurisdiction to exercise his discretion in sympathy with the respondent's situation. Section 12B of the Act, introduced in 2002, provided for such a discretion. (2) It would have been appropriate to refer the matter back to the Labour Court to decide it on its merits, but no good purpose would be served by doing so since the record shows clearly that the respondent admitted her wrong doing, and s 141 of the Urban Councils Act provides that the appellant was entitled to dismiss the respondent once the misconduct was proved. The matter had to be brought to finality and the respondent's dismissal would be confirmed.

Family law – child – custody – following divorce – joint custody – whether can be awarded – when appropriate

Beckford v *Beckford* HH-124-06 (Kudya J) (Judgment delivered 20 December 2006)

The authority of the court to grant custody of children following divorce is based on the provisions of s 10(1) and (2)(a) of the Matrimonial Causes Act [*Chapter 5:13*]. Custody encompasses two aspects. These are of physical custody and legal custody. The former entails the control of the body, while the latter is concerned with the decision-making authority over that physical body on a day to day basis. On divorce custody is usually granted to only one party, but where the circumstances justify the award of joint custody, the court should not be precluded from making such an award, which would be permissible under s 10(2) of the Act. The prerequisites for a joint custody order would be that (a) both parents are fit; (b) both desire continuous involvement with their children; (c) both are seen by the children as their source of security and love; and (d) both are able to communicate and cooperate in promoting the children's interests. In addition, the court can look to such factors as –

- the parties' ability to deal with the issue in a sensible, mature, responsible and temperamentally stable manner
- whether the relationship between the parties has been remarkably good despite the collapse of the marriage
- whether they respected, trusted and remained fond of each other
- whether they had shared the duties of parenthood amicably and constructively
- whether they had similar outlooks and values
- whether compromise rather than altercation had been their way of coping with differences

- whether they did not disparage each other in the eyes of the children but praised one another in the children's presence
- whether they had willing acted as joint custodians since their separation.

A custody order made by a court is itself an act of clairvoyance. No one can foretell the future. A court is presented with evidence of the past and current situation and a custody order is made on that evidence, experience, and probability and in hope. Such an order anticipates continuance or change but never permanence.

If the parents had used the children as weapons of war to get at each other, or if there was evidence of antipathy on the part of the children to either parent, joint custody would be inappropriate.

Family law – husband and wife – divorce – contribution to costs – principles – when contribution may be ordered

Dube v *Mavako-Dube* HB-78-06 (Ndou J) (Judgment delivered 3 August 2006)

See above, under COSTS (Contribution towards – divorce action).

Family law – husband and wife – divorce – matrimonial estate – claim for share in – such claim not transmissible to estate of spouse

Matsinde v *Nyamukapa* HH-102-06 (Makarau J) (Judgment delivered 4 October 2006)

See above, under ADMINISTRATION OF ESTATES (Executor dative – claims made on behalf of estate).

Family law – husband and wife – property rights – immoveable property acquired during marriage and registered in name of one spouse only – rights of other spouse in respect of property

Tobaiwa v *Kaseke & Ors* HH-74-06 (Makarau J) (Judgment delivered 5 July 2006)

See above, under CONTRACT (Enforceability).

Human rights – protection of the law – Minister using police to act contrary to court order at instigation of senior colleague – abuse of office

Masunda v *Min of State & Anor* HB-75-06 (Bere J) (Judgment delivered 20 July 2006)

See below, under LAND (Acquisition – allocation of land).

Insolvency – sequestration – application – need to show that respondent was a debtor and had committed an act of insolvency – director of company – not *per se* responsible for debts of company

Sole v *Kazi* HH-111-06 (Gowora J) (Judgment delivered 13 September 2006)

The applicant sought to place the estate of the respondent under provisional sequestration. He had paid large sums of money to various companies, of which the respondent was a director, for the purchase of raw materials. The goods were not supplied and the applicant demanded a refund from the respondent. Cheques drawn against one of the companies, and signed by the respondent, were not met as the account was closed. Held: it is necessary that the respondent in such an application has committed an act of insolvency. An instance of such an act is where the debtor gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts or if he has suspended payment of his debts. The applicant in this case had the onerous burden of establishing that the respondent was a debtor as defined by the Insolvency Act. He also bore the onus of establishing that the sequestration of the respondent's estate was to the advantage of his creditors. All the payments made by the applicant were to the various companies. The applicant, although describing the companies as the nominees of the respondent, adduced no evidence to that effect. Although the respondent was alleged to be the principal officer of one of these companies, that did not make the company in question a nominee of the respondent. The applicant had not instituted process for the recovery of any amounts of money either from the

respondent or his so-called nominees. The respondent had not given notice that he had suspended the payment of his debts.

Land – acquisition – allocation of land appropriated from original owner for resettlement – offer by responsible Minister – once accepted, may not be withdrawn unilaterally by Minister

Masunda v *Min of State & Anor* HB-75-06 (Bere J) (Judgment delivered 20 July 2006)

The applicant had been allocated a farm appropriated from its original owners in terms of the Land Acquisition Act. The responsible Minister had, in writing, offered him the farm, which included a safari lodge. The applicant was assured that the lodge was part of the portfolio offered and accordingly accepted the offer. The second respondent, who was the Speaker of the House of Assembly, had been allocated a farm adjacent to that allocated to the applicant. He claimed that the lodge was part and parcel of his land and sought to evict the applicant. He brought an application for summary judgment for ejectment, but when this was rejected, he withdrew his application. Nonetheless, he continued to threaten the applicant with eviction. The applicant obtained an interdict restraining the second respondent from interfering with his occupation of the land. In spite of the interdict, and in spite of the fact that there was no court order for his eviction, the applicant was ejected from the lodge by armed police who up to the time the present application was made, had remained at the applicant's lodge to ensure that no tourism or other related operations were carried out. A few days later, the applicant was served with a letter from the first respondent advising him that the offer of land previously made to him had been withdrawn with immediate effect and that he should cease all operations on the land and vacate it immediately. The applicant sought an order setting aside the first respondent's decision and restoring him to occupation of the land.

Held: (1) there could be no doubt that the Speaker had largely influenced the actions of the Minister to evict him from the allocated land. Whoever instructed the police to act in the manner they did was abusing not only his office but also the Ministry of Home Affairs. That abuse must be condemned in the strongest possible terms. In a civilised or aspiring democracy, the police must be there for both the weak and the strong. For those in positions of trust to use the police in the manner they did in this case was unacceptable. (2) Once the applicant accepted the offer within the stipulated time and in the prescribed manner, there was a clear contractual agreement between the Ministry of Lands and the applicant. The Agricultural Land Settlement Act [*Chapter 20:01*], which regulates the allocation of land, does not give the responsible Minister unilateral powers to withdraw "land offers" to beneficiaries of the land reform programme. (3) It is a very basic tenet of administrative law that before a decision is taken that adversely affects another person, the affected individual must be given an opportunity to be heard. This had not been done. To invite the applicant to make representations on his eviction after the event was incompetent.

Legal practitioner – conduct and ethics – conflict of interest – counsel for one party having previously been arbitrator in matter between parties – no information acquired which could be used to prejudice of other party – proper for counsel to act

Dobrock Hldgs (Pvt) Ltd v *Turner & Sons (Pvt) Ltd & Ors* HH-128-06 (Kudya J) (Judgment delivered 6 December 2006)

An application was made for counsel for the other party to withdraw, as he had several years earlier been arbitrator in an action between the same parties.
Held: there was no evidence that counsel had obtained any information which could be used to the prejudice of the applicant and there was no reason for him to withdraw.

Legal practitioner – counsel – entitlement of legal practitioner to practice as an advocate – fees chargeable by advocate – advocate not bound by tariff of legal practitioner's fees

Choto v *CBZ & Anor* HH-126-06 (Guvava J) (Judgment delivered 8 November 2006)

See above, under COSTS (Counsel's fees).

Local government – urban council – employee – disciplinary proceedings against – need not be referred to labour relations officer – power of council to dismiss employee

City of Mutare v *Samupindi* S-20-06 (Cheda JA, Chidyausiku CJ & Gwaunza JA concurring) (Judgment delivered 25 September 2006)

See above, under EMPLOYMENT (Urban council employee).

Practice and procedure – action – dismissal of – application for – allegation that action is "frivolous and vexatious" – need to show that plaintiff does not have an arguable case

Rogers v *Rogers & Anor* HH-116-06 (Kamocha J) (Judgment delivered 1 November 2006)

The converse to an application for summary judgment is an application by the defendant under r 79 of the High Court Rules to dismiss the action on the grounds that it is frivolous and vexatious. Much the same considerations which apply in determining whether or not a court should grant a summary judgment to a plaintiff should apply in deciding whether the court, on the application by a defendant, should stay or dismiss a plaintiff's action. The defendant must satisfy the court that the plaintiff does not have an arguable case. If the court is so satisfied, then the suit may well be characterized as "frivolous and vexatious" and an unnecessary waste of costs, and the court would be justified in the exercise of its discretion to order that the plaintiff's action be dismissed. The action will not be dismissed unless the court is satisfied that the likelihood of the case succeeding stands outside the region of probability altogether, and becomes vexatious because it is impossible.

Practice and procedure – application – for directions – purpose of – application not to be used to obtain substantive relief

Fuyana v *Moyo* S-54-06 (Chidyausiku CJ, in chambers) (Judgment delivered 30 November 2006)

In 2000 the applicant applied to a judge of the High Court for an order for directions, seeking the discharge of a provisional order which had already been referred to trial by another judge, although the draft order placed before the court was one for substantive relief (the eviction of the respondent). The application was dismissed. An appeal was filed well out of time, over a year later. The appeal was struck off the roll in 2005 on the grounds that no application for condonation had been made; until such an application was granted, an appeal itself could not be entertained. Ten months later, the application made an application for condonation. His application for condonation consisted of unwieldy voluminous affidavits, submissions and attached documents, but did not provide the one thing critical to his case, namely the explanation for his failure to file the notice of appeal in the time prescribed by the Rules.
Held: apart from the fact that there was no satisfactory explanation for his failure to file the appeal in time, the original application was one for directions. An application for directions that seeks in its draft order the eviction of the respondent is totally misconceived and should have been dismissed on that basis alone without much ado. Supporting affidavits in an application should contain essential averments in support of the relief claimed. The papers filed in this case bore no resemblance to this requirement.

Practice and procedure – application – heads of argument – delivery of to other party – must be done "immediately" after filing heads with Registrar – meaning of "immediately" – delivery must be within a reasonable time, according to circumstances of each case

Sithole v *Khumalo & Ors* HB-138-06 (Ndou J) (Judgment delivered 23 November 2006)

In terms of r 238(2) of the High Court Rules 1971, where an application out has been made and set down for hearing , the party's legal practitioner must file heads of argument with the Registrar within ten days and "immediately thereafter he shall deliver a copy of the heads of argument to every other party". Where a statute requires anything to be done "immediately", that is the same thing as "forthwith" and it implies speedy and prompt action and an omission of all delay; in other words,

the thing to be done should be done as quickly as is reasonably possible. What is intended by the rule is that the delivery to any other party should be done within a reasonable time after the filing of the heads with the Registrar's office. Delivery must, in other words, be within a reasonable time in the circumstances of each case. Delivery a day after the filing of the heads with the Registrar would be within a reasonable time.

Practice and procedure – application – urgent – when a matter can be said to be urgent – test – what matters may be subject of an urgent application

Document Support Centre (Pvt) Ltd v *Mapuvire* HH-117-06 (Makarau JP) (Judgment delivered 31 October 2007)

A matter is urgent if, when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then and if, in waiting for the wheels of justice to grind at their ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant. Urgent applications are thus those where, if the courts fail to act, the applicant may well be within his rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible, to the prejudice of the applicant. The test to be employed is an objective one, where the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned.
It follows that not every legal interest is capable of protection by way of an urgent application, irrespective of how compelling the circumstances are. For example, a spouse who finds their spouse committing an act that renders the continuance of married life insupportable would want to end the marriage there and then. While the circumstances may be compelling, the aggrieved spouse may not approach the court for a decree of divorce on a certificate of urgency. The same observation can be made for most cases of damages for defamation, personal injury and /or accident damages to property. The nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications. Some actions, by their very nature, demand urgent attention and the law appears to have recognized that position. Thus, actions to protect life and liberty of the individual or where the interests of minor children are at risk demand that the courts drop everything else and in appropriate cases, grant interim relief protecting the affected rights. The rationale for the courts to act swiftly where such interests are concerned is view clear: failure to act would result in the loss of life or the liberty of individuals or the infliction of irreversible physical or psychological harm on children. In some cases, even purely commercial interests can be protected urgently.

Practice and procedure – barring – failure to file plea – bar not automatic – steps plaintiff must take if defendant is to be barred

Chichi Clothing Mfrs (Pvt) Ltd & Ors v *CBZ & Ors* HH-88-06 (Patel J) (Judgment delivered 28 July 2006)

The plaintiff sought default judgment against the defendant after the defendant had failed to respond within the stipulated time to a notice to plead. The plaintiff argued that the defendant was barred. Held: In terms of rules 80 and 81 of the High Court Rules, the plaintiff must give the defendant five day's notice of his intention to bar unless the latter files his plea within that period. In the event that the defendant fails to file his plea within five days after being served with the notice, the plaintiff is entitled to realise his intention to bar by duly completing and signing a copy of the notice and filing it with the Registrar. The bar does not come into operation unless and until two things have occurred: the time limit stipulated must have expired **and** a copy of the notice must be filed thereafter in the prescribed format. In the specific context of rules 80 and 81, the bar is not automatic and the defendant's failure to file his plea within five does not automatically operate to bar him. The plaintiff's intention to bar the defendant can only be effectuated by filing a duly endorsed copy of the notice with the Registrar. Until this is done the bar does not come into effect.

Practice and procedure – exception – when may be filed – must be filed before pleading to the merits

Tobacco Sales Producers (Pvt) Ltd v *Eternity Star Invstms* HH-121-06 (Kudya J) (Judgment delivered 15 November 2006)

An exception can only be properly filed before the excipient pleads to the merits of the matter. It is an alternative to pleading to the merits. Once the excipient has pleaded, he is in fact telling the other party that its declaration discloses a cause of

action and that it is neither vague nor embarrassing. If it did not disclose a cause of action or was vague and embarrassing, then the defendant would of necessity raise an objection either through an exception or the other recognised ways laid out in the rules of court. After the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action.
A plea in abatement, on the other hand, may be raised at any time, even after the party has pleaded.

Practice and procedure – judgment – default judgment – application for rescission of earlier default judgment – applicant in default and application dismissed for want of prosecution – judge going into merits of case – decision still a default judgment and not appealable – further application for rescission still possible

Zvinavashe v *Ndlovu* S-40-06 (Gwaunza JA: Chidyausiku CJ & Sandura JA concurring) (Judgment delivered 6 December 2006)

The appellant was the defendant in an action brought against him by his former lover. He failed to timeously enter appearance to defend the action, leading to a default judgment being entered against him. He appellant subsequently filed two applications; the first for rescission of the default judgment and the second for a provisional order interdicting the respondent from executing the judgment pending the determination of the application for rescission. On the date of hearing of the application for rescission of judgment, the appellant was again in default, which led to the respondent's legal practitioner successfully applying for the dismissal of the application for want of prosecution. The court also discharged the provisional order referred to. However, before dismissing the application, the judge considered it "proper and prudent" to deal with the matter on the merits as they appeared from the papers filed of record. The appellant did not dispute that he was in default nor that, in these circumstances, the court was entitled to enter default judgment against him. He accepted that a default judgment cannot be appealed against and that the proper procedure is for the aggrieved party to seek rescission of the judgment. He however argued that because, in dismissing his application, the court had delved into the merits of the matter and given its reasons for the judgment against him, that the resultant judgment was appealable. His argument was in effect that the tendering of reasons for the judgment had divested what otherwise would have been an ordinary default judgment, of its "default" nature, and left in its place a judgment that was appealable.
Held: A judgment by default has been defined as one obtained by "non resistance". The essence of a judgment granted after a party fails to appear is the "default" of the absent party, that is, his failure to do what he ought to have done. *In casu,* what the appellant failed to do was to appear and prosecute the application.
A default judgment can only be set aside by a successful application for rescission of the judgment under the rules of the relevant court. The application must be made by the defaulting party himself "purging his default". In terms of r 62 of the High Court Rules the judge could simply have "absolved" the respondent from the application, that is, dismissed it, as long as he was not considering postponing the application or making any other order. The consideration by the judge of the merits of the case, and the giving of his reasons for judgment therefore had no effect on the status of the judgment given, which remained that of a default judgment. Although the court should normally go into the merits when considering the prospects of success of an application for rescission, it was not necessary for the judge to go into the merits when determining an oral application for the dismissal, for want of prosecution, of the appellant's application for rescission. The decision to dismiss the appellant's application, for want of prosecution, was correct; but that decision remained a default judgment. It was still open to the appellant to apply for rescission of the judgment dismissing his application.

Practice and procedure – parties – citation – action against Zimbabwe Revenue Authority – normally no basis for citing Commissioner in action against Authority

Tregers Industries (Pvt) Ltd v *Commissioner-General, ZRA* HH-83-06 (Garwe JP) (Judgment delivered 26 July 2006)

See below, under REVENUE AND PUBLIC FINANCE (Commissioner-General of Zimbabwe Revenue Authority – citation of as respondent).

Practice and procedure – parties – *locus standi* – heirs under a will – residual heirs – no *locus standi* to seek alteration of will until vesting of rights in them

Kadengu & Ors v *Kadengu & Ors* HH-113-06 (Kudya J) (Judgment delivered 1 November 2006)

See above, under ADMINISTRATION OF ESTATES (Will – alteration of).

Practice and procedure – parties – *locus standi* – principles – need to have legal interest in subject-matter of action – Zimbabwe Stock Exchange – bringing action on behalf of stockbrokers – Stock Exchange having no legal interest at stake – stockbrokers not members of Stock Exchange – Stock Exchange having no *locus standi*

Zimbabwe Stock Exchange v *Zimbabwe Revenue Authority* HH-120-06 (Makarau JP) (Judgment delivered 8 November 2006)

The applicant, the Zimbabwe Stock Exchange, is established as a corporate body in terms of s 3 of the Zimbabwe Stock Exchange Act. It is run by a committee. A dispute arose within the Exchange as to the liability of stockbrokers to pay VAT, the respondent claiming that they were liable. The applicant sought a declaration that stockbrokers were exempt from paying VAT. The court *in limine* considered whether the applicant had *locus standi* to bring the application. The applicant argued that since it was set up to manage a fair and efficient manner of dealing in listed securities, it had an interest in the impasse between the respondent and the stockbrokers and thus had a standing in terms of the common law on the basis that it had a direct and substantial interest in the impasse.
Held: The applicant had taken it upon itself to be the voice of the stockbrokers in the application. There is no provision in the Act entitling it to do so. Under the common law, an applicant must show that it has a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action. A public authority or body will have *locus standi* in a suit where it shows that it has a legal interest in the subject matter of the suit and such interest may be prejudicially affected by the decision of the court. The applicant was not an association of stockbrokers fighting for the cause of its membership. Stockbrokers are not members of the Stock Exchange in the way lawyers are members of the Law Society. There is a distinction between *locus standi* in public interest litigation and private interest litigation: while a wider approach may be arguable for public interest litigation, a similar wide approach is not so desirable in private interest litigation. The impasse between the respondent and stockbrokers is essentially a private dispute. The applicant has an interest in how the issue will be resolved, but that interest is not direct and substantial in the sense that there is no recognizable right at law of the applicant that is at stake. It has no legal interest that is at risk in the dispute between the stockbrokers and the respondent.

Practice and procedure – parties – non-joinder – when non-joinder fatal – application not determined – nothing to preclude joinder of party

Capital Alliance (Pvt) Ltd v *Renaissance Merchant Bank Ltd & Ors* HH-108-06 (Patel J) (Judgment delivered 23 October 2006)

There is no basis in the High Court Rules to warrant the striking out of a matter for material non-joinder in every case. On the contrary, r 87(1) appears to enjoin quite the opposite result. Where the application here has yet to be determined and there is nothing peculiar in this matter to preclude the joinder of a material party, the rule expressly allows the court, either of its own motion or on application, to order the joinder of a party whose presence is necessary to ensure the effectual and complete adjudication of all the matters in dispute.

Practice and procedure – process – founding affidavit – who may sign – party a company – party's legal practitioner – when maybe regarded as duly authorised to act on behalf of company

Practice and procedure – review – of taxation – separately provided for – procedures and time limits applicable different from those for general reviews – High Court Rules 1971 – rr 257 & 314

Zimbank v *Trust Finance Ltd & Anor* HH-130-06 (Mavingira J) (Judgment delivered 20 December 2006)

In an application for a review of taxation, the founding affidavit was deposed to by a legal practitioner within the applicant's firm of legal practitioners of record. The first respondent challenged the deponent's capacity and authority to depose to an affidavit on behalf of the applicant. The deponent's replying affidavit averred that he was authorised to act on behalf of the

applicant. The respondent also alleged that the application did not comply with the requirements of r 257 of the High Court Rules.
Held: (1) The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company, annexing a copy of the resolution but that form of proof is not necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Prior dealings can be relevant. A legal practitioner is his client's agent, so the omission in the founding affidavit of the allegation that the deponent was "authorised" was not fatal, particularly in view of the history or background to the application.
(2) Review of taxation is separately provided for in r 314. The time limits and format applicable are clearly and separately stated. Rule 257, which deals with reviews generally, is not referred to or incorporated in any way in r 314 and thus has no application in reviews of taxation.

Practice and procedure – *res judicata* – principles – previous judgment concerning same parties and subject matter – parties not appealing against that judgment – judgment binding unless set aside – not permissible for party to undermine court order by bringing fresh action

Tobacco Sales Producers (Pvt) Ltd v *Eternity Star Invstms* HH-121-06 (Kudya J) (Judgment delivered 15 November 2006)

The plaintiff sought the cancellation of an agreement for the sale of property, plus damages and an order for ejectment, on the basis that the defendant had failed to pay the agreed purchase price. In earlier litigation the defendant had applied for an order authorising the transfer of the property. The plaintiff tendered transfer, subject to the payment of rentals and interest. Judgment was given accordingly. Neither party appealed against the judgment. The plaintiff demanded payment of arrear rentals and interest on the outstanding capital itself and the outstanding rentals. A dispute arose about how much interest was due, the defendant claiming that the figure was a different one from that claimed by the plaintiff. The plaintiff then brought the present action for cancellation. The defendant raised the defence of *res judicata*.
Held: for the plea of *res judicata* to succeed, it must be established that the judgment given in the prior action concerned the same subject matter; was founded on the same grounds and was either a judgment *in rem*, or was between the same parties or their privies. *In casu* the parties were the same. The effect of the previous order was that the plaintiff had elected to abide by the agreement and thus had chosen not to cancel it, for if it had chosen to cancel transfer would not have been ordered. Even if the judgment was wrong, as long as it stood, it was binding on both parties. If the plaintiff desired to cancel the sale, then it was obliged to first of all have that judgment set aside. It would be grossly irregular for the plaintiff to undermine an order of court by cancelling the agreement while that judgment was extant.

Practice and procedure – trial – postponement – application – when may be granted – when appropriate order as to costs will suffice to grant postponement

Mazibuko v *Commissioner of Police & Anor* HB-94-06 (Ndou J) (Judgment delivered 5 October 2006)

The plaintiff, a legal practitioner, was suing the defendants for damages for assault, *injuria* and impairment of dignity. Although the defendants were defending the claim, they did not bother to attend the round table conference, two pre-trial conferences and finally the trial itself. At all those proceedings they were merely represented by their legal practitioners. When the matter was referred to trial, the Deputy Registrar gave the parties four months' notice of the trial dates. When the trial began, counsel for the defendants sought a postponement in terms of r 217 of the High Court Rules. The first ground for the application was that the defendants were not present; the second ground was that she had not taken instructions as she had not seen the defendants. Cumulatively, the defendants claimed that they were simply not ready in spite of having had over four months' notice.
Held: the rule gives the court a wide discretion when an application for alteration of set down is made. The basis upon which such an application rests is that unless the postponement is granted, the applicant will suffer prejudice. The granting of such an application is in the nature of an indulgence and it lies entirely in this court's discretion to grant or refuse the application. Such discretion must be exercised in a judicial manner. The court should be slow to refuse to grant a postponement where the true reason for the party's non-preparedness has been fully explained, where the party's unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting its case. *In casu*, there was a bare allegation that the defendants would be prejudiced as they intended to defend the matter. Such a bare allegation was insufficient. By their own conduct, the defendants had not shown a serious desire to defend. An

applicant for postponement cannot as of right claim a postponement on the ground that any prejudice his opponent might suffer can always and sufficiently be overcome by an appropriate order as to costs. This was not such a case. The defendants had exhibited a cavalier approach to their application. Their stated unreadiness was mere delaying tactics.

Revenue and public finance – Commissioner-General of Zimbabwe Revenue Authority – citation of as respondent – normally no basis for citing Commissioner in action against Authority

Tregers Industries (Pvt) Ltd v *Commissioner-General, ZRA* HH-83-06 (Garwe JP) (Judgment delivered 26 July 2006)

The applicant sought the return of moneys garnisheed by the Zimbabwe Revenue Authority, being VAT due on goods sold. The applicant cited the Commissioner of the ZRA as the respondent. The applicant claimed that as the goods were exported, they were not subject to VAT. This has been accepted by officers of the ZRA previously as being correct.
Held: (1) Ordinarily there is no basis for citing the Commissioner personally as a party in a matter handled by employees of the authority. The ZRA is a body corporate capable of suing and being sued in its own name. Under s 5 of the Revenue Authority Act [*Chapter 23:11*], the operations of the ZRA are controlled and managed by the Revenue Board and s 19(4) makes it clear that the Commissioner-General's position is akin to that of a chief executive in a company. Although there is specific reference in the Value Added Tax Act [*Chapter 23:*12] to the Commissioner being responsible for carrying out the provisions of the Act, it is clear that such responsibility is subject to the control and management of the authority through the Revenue Board. The authority itself should have been cited. (2) There was no evidence, apart from the applicant's bare assertion, that the goods were exported. They were supplied to a non-resident but there was no evidence that they were exported. (3) The fact that the ZRA's employees had previously accepted that the goods in question were zero rated did not estop the respondent from arguing that their interpretation of the legislation was not correct.

Revenue and public finance – income tax – taxable income – grant of share option to senior employees as part of an incentive scheme – such an advantage or benefit in respect of employment – value of shares at date option exercised

Barclays Bank Ltd v *ZRA* S-31-06 (Ziyambi JA, Cheda & Malaba JJA concurring) (Judgment delivered 25 September 2006)

The appellant bank had a scheme whereby it would grant to its managerial employees options to purchase its shares within a certain period at prices ruling at the time of the grant of such options. This gave the employees preferential rights of allotment commensurate with their seniority within the bank. The purpose of the scheme was to provide further incentives for motivating and retaining managerial staff for the benefit of the bank. The option price payable on exercise of the option was the middle market price prevailing on the day immediately before the day on which such option was granted. The options were not transferable and terminated on such events as termination of employment or demotion. The option was to be exercised by way of a written notice signed by the participant and stating the number of shares he wished to take. The date on which the bank received the notice was deemed to be the date on which the option was granted. When the notice was given to the bank that an employee wished to exercise his option in respect of x number of shares, the appellant sold x shares on behalf of the employee, deducted from the proceeds thereof the price of the shares (the option price in terms of the scheme) and paid the balance to the employee. That was a profit obtained without the employee having to make any out-of-pocket payment. The respondent contended that this was a taxable benefit and that PAYE should have been withheld, and garnished the bank's account with the Reserve Bank.
Held: the profit received by the employee in this manner was an advantage or benefit in respect of employment, service, office or other gainful occupation in terms of s 8(1)(f) of the Income Tax Act [*Chapter 23:06*] and an amount received or accrued in respect of services rendered or to be rendered in terms of s 8(1)(b) of the Act. Upon the grant of the option, the employee received a mere expectation to make a profit from the shares, but once he exercised the option and received the shares, their value, less any amount paid for them before or upon exercise of the option, was taxable.

Succession – spouse – who is – spouse under customary law – deceased marrying a second wife under civil law while first marriage subsisted – both wives regarded as spouses for purposes of succession

Chinho v *Chinho & Ors* HH-99-06 (Kamocha J) (Judgment delivered 20 September 2006)

The applicant had been married to the deceased for many years under an unregistered customary law marriage. There were four children born of the marriage. Three years before he died, the deceased contracted a marriage under the Marriage Act

with the first respondent. After he died, the first respondent became executrix of his estate. His former employer's pension fund paid a lump sum and periodic payments to the first respondent. The applicant claimed that she was a surviving spouse and that the pension payments should be paid to the Master's office and distributed through a neutral executor. Held: under Part IIIA of the Administration of Estates Act [*Chapter 6:01*], introduced by Act 6 of 1997, when a person who is already married to someone else in terms of the customary law subsequently contracts a civil marriage, the latter is regarded as a valid marriage for the purposes of estates of persons subject to customary law; and the civil marriage is regarded as a customary law marriage. The deceased could not be said to have removed his estate from the ambit of customary law since the civil marriage he contracted must be regarded as a customary-law marriage for the purposes of persons subject to customary law. Accordingly, both the applicant and the first respondent were spouses of the deceased and were entitled to benefits from the pension fund.