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CASES DECIDED JULY – DECEMBER 2007

Administration of estates – executor – appointment of – who may be appointed – spouse of deceased person preferred – potential bias on part of executor – when may be a ground for setting aside appointment

Katsande v *The Master & Anor* HH-50-07 (Hungwe J) (Judgment delivered 11 July 2007)

Section 26 of the Administration of Deceased Estates Act [*Chapter 6:07*] states that the surviving spouse is to be preferred where there is competition for the appointment of an executor. The Act, in spite of the obvious interest potentially prejudicial to the interests of the other beneficiaries, recognizes the unique position of spouses in respect of their joint estates and purposely prefers the spouse ahead of others. Potential bias by the executor is not a ground for the setting aside of an appointment unless it is demonstrably clear that due to such bias the executor is completely incompetent or unable to discharge her duties as an executor. The section even allows for the appointment of a creditor as executor. Had potential bias been ranked as such, then the Act would not have included this class of persons in the category of people from which executors may be appointed.

Administration of estates – executor – removal of – application for – application under common law – who may make application – grounds on which application may be made

Katirawu v *Katirawu & Ors* HH-58-07 (Makarau JP) (Judgment delivered 8 August 2007)

The first respondent, one of the deceased's sons, by producing a fraudulent death certificate, induced the Master to appoint him as executor and sole beneficiary of his father's estate, which included a piece of land. He gave a false name to the Master. Using the same false name, he sold the piece of land to the second respondent. The applicant, the deceased's widow, filed an application for an order declaring the appointment of the first respondent as executor dative and the subsequent sale of the immovable property to the second respondent null and void and that the property be registered in the name of the estate of the deceased. The second respondent claimed to be an innocent purchaser of rights in the property and denied that she ever dealt with the first respondent. She also raised the point of whether the applicant had *locus standi* to bring an application for the removal of an executor and to compel reversal of the cession of rights in favour of the second respondent.
Held: (1) The applicant was clearly a beneficiary in the deceased's estate, as the surviving spouse. The issue was whether a beneficiary has any capacity at law to bring proceedings for the removal of an executor on any ground, because s 117 of the Administration of Estates Act [*Chapter 6:*01] gives the Master the power to approach a judge in chambers for the removal of an executor. There was no doubt that the Master could act under the section as the appointment of the first respondent was induced by fraud. (2) An executor of an estate may be removed from office at common law. The grounds for doing so inexhaustive as they are based on a broad principle. The court possesses inherent power to remove a trustee or administrator (even one appointed under a will) on the ground that his continuance in office will prejudicially affect the future welfare of the estate entrusted to him. While no person other than the Master may proceed under s 117, granting such a power to the Master was not intended to take away the right of all those having an interest in the estate from approaching the court at common law to have the executor removed if they can establish to the satisfaction of the court that the continuance in office of the executor does not augur well for the future welfare of the estate and beneficiaries. The applicant, as a beneficiary in the estate, had the capacity to approach the court at common law to move the court for the removal of the first respondent as an executor. Her application was brought at common law as she was alleging fraud. (3) Because the first respondent's appointment induced by fraud, it was null and void *ab initio*. It is as if it was never made. It is a nothing and upon which nothing of consequence can hang. This included the purported sale to the second respondent.

Administrative law – review grounds for – legitimate expectation – what party seeking to rely on legitimate expectation must establish

Matake & Ors v *Ministry of Local Govt & Ors* HB-93-07 (Ndou J) (Judgment delivered 13 September 2007)

The applicants were public servants employed at a teachers' training college. Their main task was to provide catering and cleaning services at the college. The Ministry sub-contracted private companies to provide these services, thus rendering the applicants redundant. The applicants were retrenched. They requested the first respondent to be allowed to purchase the government houses in which they had been living for many years. Nearly two years later the first respondent replied, saying that a policy was being formulated and that the sitting tenants would be advised. Eighteen months later, the Secretary to the first respondent told the applicants that their request to purchase the houses had been turned down. They were given three months' notice to vacate. The applicants did not move out or seek a review of the decision, but instead, at the expiry of the three month period they obtained a provisional order which stayed their eviction. At the hearing at which they applied for confirmation of the provisional order, they sought an order compelling the respondent to sell the houses to them. They claimed that the first letter gave rise to a legitimate expectation that the houses would be sold to them.
Held: A legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. The requirements for legitimacy of the expectation, include the following: (1) The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification. (2) The expectation must be reasonable. (3) The representation must have been induced by the decision-maker. (4) The representation must be one which it was competent and lawful for the decision-maker to make without which reliance cannot be legitimate. Based on these criteria, the applicants' case was defective from the outset. They may subjectively have had expectations, but these failed to meet the criteria in (1) and (2). There was no representation to the applicants that the houses would be sold to them – let alone a clear, unambiguous and unqualified representation. Nor were the applicants' expectations to that effect reasonable. All that the letter stated was that their request would be considered, which could mean either a favourable or an unfavourable outcome of the consideration.

Appeal – against interlocutory ruling – need for leave of judge to note appeal against such ruling – merits of matter not dealt with – not proper for Supreme Court to deal with case on merits

Total Marketing Zimbabwe (Pvt) Ltd v *Pollylamp Invstms (Pvt) Ltd* S-34-07 (Cheda JA, in chambers) (Judgment delivered 26 July 2007)

The applicant approached the High Court with an urgent chamber application seeking a provisional order. When the urgent chamber application was placed before the judge, he declined to deal with it and ruled that it was not urgent. The applicant then approached the Supreme Court, asking it to grant the order sought in the High Court.
Held: The judge *a quo,* having determined that the matter was not urgent, did not deal with the merits. This meant that the matter was still pending before the High Court. The decision by the High Court judge was interlocutory and the applicant needed leave from the judge to note the appeal. Without such leave the matter was not properly before the Supreme Court. The Supreme Court cannot be used to take over and hear applications from the High Court just because a litigant thinks that his application is urgent. This can only be done where the High Court has given reasons for declining to deal with a matter, in which case it must be shown that the court erred in arriving at such a decision. The merits in the application before the High Court were not considered, so it would be wrong for a judge of the Supreme Court to take it upon himself to consider them as if it were a court of first instance.

Appeal – lapsed appeal – reinstatement of – application for condonation – matters to be considered – failure by legal practitioners to comply with rules of court – failure amounting to wilful disdain for rules – need for finality in litigation

Maheya v *Independent African Church* S-58-07 (Malaba JA, in Chambers) (Judgment delivered 14 November 2007)

The applicant had noted an appeal against a judgment of the High Court evicting her from the house she occupied. There had been no compliance with r 34 of the Supreme Court Rules regarding preparation of and payment for the record and the appeal was accordingly deemed to have lapsed. Although the error had been pointed out, her successive legal practitioners did little to pursue the appeal for over seven years. An application was made for re-instatement of the appeal.
Held: In considering applications for condonation of non-compliance with the Rules, the court has a discretion, which it has to exercise judicially. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice. *In casu,* although the applicant blamed her erstwhile legal practitioners for non-compliance with the Rules, there had been no explanation from the legal practitioners concerned for failure to comply with r 34(1) at the time

the notice of appeal was filed. They failed to appreciate at any time during the period of seven years that the appeal had lapsed and to institute appropriate proceedings to regularize it. The absence of an explanation of the non-compliance with the Rules shows a wilful disdain for the rules of court, the consequences of which the applicant could not escape. An equally important principle applicable in this case was that there should be finality in litigation. No suggestion had been made as to why the applicant would have any right to occupy the house.

Arbitration – agreement – arbitration clause – what is – need for arbitration to be expressed or implied first choice of parties as method for resolving dispute – clause requiring parties to refer matter to mediation, failing which to refer to arbitration – not an arbitration clause ousting jurisdiction of court

Shell Zimbabwe Ltd v *Zimsa (Pvt) Ltd* HH-84-07 (Makarau JP) (Judgment delivered 28 November 2007)

A clause in the lease agreement between the parties provided that any dispute arising between the parties on connection with the agreement should in the first instance be submitted to and decided by mediation, but if mediation did not resolve the dispute within 7 days and the parties failed to agree on an extended time for mediation, then either party would be entitled to refer the matter to arbitration. A dispute arose and the plaintiff sought the eviction of the defendant from the premises. The defendant raised a special plea *in limine*, requesting the court to refer the matter to arbitration. The plaintiff argued that the clause was not an arbitration clause, as it did not put arbitration in the forefront but referred to it as a fall back position in the event that mediation failed.

Held: (1) In terms of Article 8(1) of the UNCITRAL Model Law, as modified, which is set out in the Schedule to the Arbitration Act [*Chapter 7:15*], where one of the parties to a dispute subject to an arbitration clause requests to go to arbitration, the court has no option but to stay proceedings and refer the matter to arbitration unless the court finds that the arbitration clause is null and void or inoperative or incapable of performance. However, the jurisdiction of the court remains intact. Arbitration is an alternative to litigation and cannot take away the inherent jurisdiction of the court. For an arbitration clause in an agreement to have the effect of staying court proceedings in terms of the Act, the clause must be clear and unequivocal and the parties must intend arbitration to be the procedure of first instance in resolving their disputes. In all other instances, the inherent power of the court to stay its own proceedings remains intact and the discretion rests with the court to stay proceedings or not.

(2) The jurisprudential bases underlying the place and role of arbitration procedures are (a) the apparent speed with which such procedures can yield results and (b) the contractual autonomy of the parties, not only to agree on their main obligations under the contract, but on how to resolve differences that may occur between them as they perform their respective obligations under the contract. The contractual autonomy to choose the method of resolving their differences has been described as paramount in the arbitration regime in this jurisdiction and explains the respect with which arbitration awards are treated by the courts. However, this contractual autonomy has to be viewed in the context of the inherent powers of the court to dispense justice to all who seek it from the court. While the court is bound to give effect to arbitration clauses in agreements, it is not bound to do so in circumstances where arbitration is not the expressed or implied first choice dispute resolution mechanism of the parties. *In casu* the parties did not intend arbitration to be the first procedure to be resorted to; they chose mediation in the first instance. It would be appropriate to describe this agreement as one subject to a mediation clause.

(3) There would be further delay if the matter were referred to mediation, to be followed by arbitration. It was also relevant that notwithstanding the mediation clause, neither party chose that route to resolve the dispute between them. Accordingly, the court would not stay its proceedings.

Arbitration – award – setting aside of – grounds for – award contrary to public policy – arbitrator granting remedies not available to parties in terms of contract – arbitrator ignoring or disregarding provision of applicable legislation – creating an issue between parties which did not arise from their submissions – arbitrator failing to give reasons for award

Delta Ops (Pvt) Ltd v *Origen Corp (Pvt) Ltd* S-86-06 (Sandura JA, Cheda & Malaba JJA concurring) (Judgment delivered 7 September 2007)

In the court *a quo*, the respondent sought the setting aside an arbitrator's award while the appellant sought to have it enforced. In terms of the contract between the parties, the respondent was to deliver a specified tonnage of barley suitable for brewing, while the appellant was to deliver an equal tonnage suitable for stock feed. The contract provided that if there was a shortfall in the respondent's delivery, the respondent would pay a specified sum for every tonne short. The dispute

was referred to arbitration, there being two questions for the arbitrator: (1) whether the appellant was entitled to an order for specific performance and (2) whether interest was payable and, of so, from when and at what rate. In his award, the arbitrator ordered the respondent to deliver the shortfall, failing which it should pay the appellant what it would actually cost the appellant to buy the shortfall from elsewhere. The court *a quo* set aside the award as being contrary to public policy.

On appeal, held: the award was contrary to public policy for four reasons. (1) The arbitrator granted remedies which were not available to the appellant in terms of the contract, these being specific performance and the alternative relief granted in the second part of the award. By granting the alternative relief the arbitrator disregarded the remedy agreed upon by the parties, as well as the appellant's alternative claim, and granted a remedy which had not been contemplated or agreed upon by the parties. By doing so, he violated one of the most important tenets of public policy, i.e. the sanctity of contracts. (2) By granting the alternative relief the arbitrator deliberately ignored or disregarded s 4(1) of the Contractual Penalties Act [*Chapter 8:04*]. The provision in the contract that the respondent would pay a specific sum for every tonne shortfall was a penalty clause and there was no basis for declining to enforce the penalty stipulation or for reducing it. (3) The arbitrator created an issue between the parties which did not arise from their submissions and awarded a measure of damages which went so far outside the contract as to create a new contract for the parties. (4) In terms of art 31(2) of the Model Law, the arbitrator is obliged to state the reasons upon which the award is based. *In casu*, no reasons were given by the arbitrator for granting the alternative relief. This was in conflict with the public policy of Zimbabwe and invalidated the alternative award.

Judgment of Kamocha J in *Origen Corp (Pvt) Ltd* v *Delta Operations (Pvt) Ltd & Anor* HH-101-05 upheld.

Arbitration – award – setting aside of – grounds for – award contrary to public policy – meaning – award promoting an illegality – such award contrary to public policy

Provincial Superior, Jesuit Province of Zimbabwe v *Kamoto & Ors* S-84-06 (Garwe JA, Cheda & Ziyambi JJA concurring) (Judgment delivered 10 July 2007)

A farm outside Harare was acquired by the appellant religious order in 1902. In time the appellant allowed some of the respondents to reside at the farm whilst a number of respondents settled themselves on the farm without authority. In 1975 the farm was incorporated into the Greater Harare Area by the Harare City Council. As all activities in the area now had to comply with the Council by-laws, the City's Director of Works advised the Area Board in 1998 that the settlement on the farm was not in accordance with the law and required regularizing. It was then that the appellant established a board to liaise with the Council. Eventually approval was granted in October 2002 for the subdivision of the farm into residential stands, with land also being reserved for schools, crèches, churches, commercial use and other such purposes. It had been the appellant's intention to accommodate the respondents in its development plans but because of developments that followed the appellant was prevented from doing so by the Council. The Council would only approve a low density housing scheme, which meant that the appellant was required to build roads and storm water drains in the area and to provide a water reticulation system. To do this, the respondents would have to be moved and some of their houses demolished.

The appellant brought an action for the eviction of the respondents; the matter was referred for arbitration. The arbitrator concluded that any agreement that may have been reached between the appellant and the respondents in terms of which the latter were to occupy stands on the farm was null and void in the light of the provisions of s 39(1) of the Regional Town and Country Planning Act [*Chapter 29:12*]. This provides that such any such agreement must be in accordance with a permit issued by the Council. The arbitrator also found that there was no basis in law upon which the appellant could be said to be liable to pay compensation since the buildings constructed by the respondents had to be demolished and the appellant had not been enriched in any way. The respondents filed an application in the High Court challenging the award on the basis that it was contrary to the public policy of Zimbabwe. In particular, they argued that the effect of the award was that the respondents should resettle themselves, that the award did not deal with the issue of alternative resettlement and that the award promoted the setting up of squatter camps. This, they argued, would be against the public policy of Zimbabwe. The High Court held that the arbitrator made a gross mistake in finding that the appellant had no obligation to compensate the respondents.

Held: (1) in ascertaining the meaning of the elusive concept of "public policy" in the context of the Model Law, regard must be had to the structure of articles 34(5) and 36(3), which deal with two aspects: the first relates to the circumstances connected with the making of the award, whilst the second relates to the substantive effect of the award itself. *In casu*, the latter was pertinent. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation a court would not be justified in setting aside the award. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable

inequity that is so far-reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequences apply where the arbitrator has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above. (2) The effect of s 39(1) of the Act is to render null and void any agreement conferring upon any of the respondents the right to occupy the farm for a period of more than ten years. None of the residents had stayed at the farm for more than thirty years, so none had acquired any rights through prescription. The continued stay of the respondents was unlawful. The appellant had been forced to seek the eviction of the respondents. To have allowed them to remain on the farm would have been, in the circumstances, tantamount to promoting an illegality. The public policy of Zimbabwe cannot demand of a party in the appellant's position that he perpetuates the kind of settlement found at the farm. Although the appellant felt obliged to do so from a moral rather than legal standpoint, it did attempt to provide compensation and relocation allowance to enable those families it had authorized to occupy the farm to move. The attempt was a failure. The farm having been incorporated into the Council area, the responsibility of resettling the respondents would have rested firmly on the door of Government through the relevant Ministry.

Arbitration – award – setting aside of – grounds for – award contrary to public policy – meaning of – wage settlement – award which would drive employer out of business – contrary to public policy

Tel-One (Pvt) Ltd v *Communication & Allied Svcs Workers' Union of Zimbabwe* HH-74-07 (Hungwe J) (Judgment delivered 24 October 2007)

Wages negotiations between the applicant company and the respondent trade union were referred to arbitration. The arbitrator's award, in which pay rises were ordered, was ambiguous; on one interpretation, the increase was such that the applicant would have been driven into insolvency as the increase was more than the applicant's income. On another, it was an affordable increase. The applicant sought to have the award set aside on the grounds that it was contrary to public policy.
Held: the concept of public policy is an elusive one depending on transient and sometimes subjective views on what is or what is not in the public benefit or what constitutes Zimbabwean public good. In assessing an arbitral award the court must consider the substantive effect of the award and determine whether it is not contrary to public policy in its effect. There is no doubt that the spirit of collective bargaining between employer and employee is to arrive by consensus or, if that fails, by arbitration, what a fair wage is. The idea is to preserve the employer-employee relationship. The employee makes his labour available for a fair fee. The employer engages the employee on acceptable terms and conditions. The employer employs his resources to ensure that the goose that lays the eggs for their mutual benefit continues to do so. Society expects these mutually beneficial outcomes. Awards which would drive employers out of business, thereby destroying the economic fabric of the nation, could not be said to be in the best interest of the general good of Zimbabwe.

Banking – bank – distinction from building society – whether building society can be regarded as a bank

Zimbabwe Banking & Allied Workers Union & Anor v *Beverley Bldg Soc & Ors* HH-63-07 (Patel J) (Judgment delivered 17 September 2007)

See below, under EMPLOYMENT (Trade union).

Carrier – common carrier – who is – not necessary that party's main business be carriage of goods – liability of common carrier – not possible for carrier to contract out of liability for wilful misconduct or gross negligence – liability of carrier for acts of agents to whom actual carriage entrusted

Modzone Entprs (Pvt) Ltd & Anor v *Transtech Freight Zimbabwe (Pvt) Ltd* HH-65-07 (Patel J) (Judgment delivered 24 September 2007)

The first plaintiff engaged the defendant to carry a load of fabric from Harare to Namibia. It was a term of the agreement that the goods were to be transported as one load in a container and to reach their destination safely and in good and

merchantable condition. The first plaintiff loaded all the fabric into a container. In Johannesburg, the defendant removed the fabric from the container and split the load into two different consignments. The second consignment was mixed with highly flammable goods and was loaded into a vehicle equipped with defective tyres. A tyre burst and caught fire, with the result that the vehicle caught fire. The first plaintiff's consignment was destroyed. As a result, the plaintiff suffered damages, being the invoice value of the fabric that was burnt in transit.

The defendant's defence was is that the agreement between the parties was qualified by an express term that the fabric was being transported by the defendant at the first plaintiff's risk. The defendant also challenged its citation as a public carrier. It relied on a clause in its association's standard condition which said that it was not a common or public carrier and that carriage of goods by it was merely incidental to its clearing and forwarding operations. The defendant contracted two different hauliers for the two stages of the journey. It accepted that it was responsible for the entire haulage from Harare to Namibia and that as the principal it would ordinarily be liable for any negligence or breach of contract committed by the subcontracted hauliers.

It said it was necessary for practical reasons to split the original consignment into two in Johannesburg. Furthermore, while it is accepted that the second consignment was destroyed in transit, the fire which caused the loss was not caused in any way by the defendant's conduct or omission.

Held: (1) For a party to be a public carrier, it is not necessary for that party to have as its main business the carriage of goods. When a party carries on the trade or profession of carriage of goods as part of its business, that is enough to make that party a public carrier. The defendant was thus a public carrier and its liability had to be determined by the common law rules governing the rights and obligations of a public carrier, as read with the contractual terms agreed by the parties.

(2) A public carrier is absolutely liable to restore property received by him unless he can prove that the loss or damage was caused by *damnum fatale* or *vis major*. The carrier's liability starts from the moment he takes delivery of the goods and continues until he has discharged his contractual obligation, viz. to deliver the goods to the consignee at the agreed destination. Where the goods are lost or destroyed, the measure of damages payable by the carrier will normally be the market value of the goods at their destination. A carrier who accepts the goods from the consignor and agrees to deliver them at a particular destination is responsible for the goods throughout the whole journey. If the goods are lost or damaged, it is immaterial to the consignor whether the fault lies with the original carrier or with another carrier to whom he has handed them over.

(3) While it is standard practice for carriers to introduce special terms limiting their liability into their contracts, either specifically or by way of standard conditions, such terms will be narrowly construed so as to give only that degree of exemption from liability that is expressly stated. Thus, a contract to carry "at owner's risk" does not absolve the carrier from all liability but only from liability for slight negligence, leaving him liable for definite or gross negligence. It is not possible for the parties to agree to contract out of liability for gross negligence. The reference in the contract to "wilful act" must be similarly construed to include liability for any wilful default or gross negligence on the part of the defendant.

(4) The identity of the actual hauliers in this case was not disclosed to the plaintiffs when the contract was concluded or during the course of carriage of the goods in question. That being so, the defendant remained contractually responsible for any act or omission of those hauliers, who were deemed to be the defendant's servants for the purposes of any liability towards the first plaintiff. Even if the hauliers had been disclosed to the plaintiffs, this would not enable the defendant to escape liability for the wilful conduct or gross negligence of its agents. The defendant was thus liable not only for its own wilful acts or gross negligence but also for the wilful misconduct or gross negligence of the hauliers contracted by it to ferry the first plaintiff's cargo.

(5) The burden of establishing a valid defence under a contract of carriage rests upon the carrier himself. There is no onus on the consignor to prove how the goods were damaged, lost or destroyed. It would be place an intolerable burden on him to require of him proof of what he cannot possibly know. All he can do is to establish that he handed over the goods in an undamaged condition and that they were damaged when he received them back.

(6) The division of the consignment into two smaller ones did not constitute a fundamental breach of contract or in itself caused the destruction of the goods in question. There was simply no causal nexus between the reloading of the goods and their eventual destruction by fire.

(7) The loss *in casu* was occasioned by an unexpected and unavoidable accident, ie. *damnum fatale*, and not by reason of wilful misconduct or gross negligence. While there were indicators of possible negligence on the part of the second haulier and/or its servants, these were are all matters of conjecture and, whether taken in isolation or together, did not evince any wilful misconduct or gross negligence on the part of the defendant or its agents such as to render the defendant liable for the loss incurred by the first plaintiff.

Companies – disposal of assets – when approval of shareholders required – disposal of greater part of assets of company – need for approval when over half of assets disposed of

***Sachikonye* v *Capital Allance (Pvt) Ltd & Ors* HH-5-08 (Gowora J) (Judgment delivered 7 November 2007)**

The prior approval of shareholders is required before the directors of a company may dispose of the undertaking of the company or of the whole or the greater part of the assets of the company. In this context, "undertaking" means a business or enterprise; and "the greater part of the assets" means anything over a half of the assets.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 16 – protection against acquisition of property – Acquisition of Farm Equipment or Material Act [*Chapter 18:23*] – whether complies with requirements of s 16

***Manica Zimbabwe Ltd & Ors* v *Minister of State & Anor* S-31-07 (Chidyausiku CJ, Cheda, Ziyambi, Gwaunza & Garwe JJA concurring) (Judgment delivered 5 November 2007)**

The applicants contended that ss 7, 9 and 10 of the Acquisition of Farm Equipment or Material Act [*Chapter 18:23*] were invalid by reason of their non-compliance with s 16(1)(a)(ii), (c), (e) and (f) of the Constitution. They argued that (a) the Act did not provide that the acquisition of the farming equipment had to be in terms of legislation which provided that such acquisition was for one of the purposes set out in s 16(1)(a)(ii) of the Constitution, in particular that it had to be for a purpose beneficial to the public generally or to any section of the public; (b) the Act did not require the acquiring authority to pay fair compensation before or within a reasonable time after acquiring the property, as it made no provision for compensation to be paid before the acquisition, providing instead that a quarter of the compensation should be paid at the time of acquisition or within thirty days and the balance within five years in the case of farm equipment and one year in the case of farm material; (c) the Act made no provision, as required by s 16(1) of the Constitution, to allow the owner of the property to apply to a court for prompt return of the property if the court does not confirm the acquisition, and made no provision for an appeal to the Supreme Court; and (d) the Act made no provision to allow a claimant for compensation to apply to the High Court or some other court for the determination of any question relating to compensation, and to appeal against such a decision to the Supreme Court.

Held: (1) it was sufficiently clear that the compulsory acquisition in terms of the Act is for the purpose of furthering the land reform programme, which is not a private activity but a programme that is beneficial to the public generally and certainly to sections of the public.

(2) The plain language of s 16(1)(c) of the Constitution is that compensation should be fair and that it should be paid within a reasonable time. There was nothing in the language of the section or the context of the provision that suggests that such payment cannot be made in instalments. The fact that the Constitution was silent on this issue in that it did not specifically prohibit or specifically authorise payment in instalments could not be construed as prohibiting payment by instalments. The outside time limits set out in the Act were indications of what the Legislature considered as the outer limits of reasonable time for payment. They did not circumscribe the discretion of the court, which would decide the reasonableness of the time for payment on the basis of the facts of each case.

(3) Both s 16(1)(e) of the Constitution and s 8 (5) and (6) of the Act deal with a situation where confirmation of the acquisition has been refused. In that event, the Constitution confers on the claimant the right to apply to the High Court or any other court for the prompt return of the property. Although s 8(5) of the Act, unlike s 16(1)(e) of the Constitution, does not confer on the claimant the right to apply to the High Court or any other court, it however directs the Administrative Court to order the return of the property to the claimant upon its refusal to confirm the compulsory acquisition. Thus, whenever the Administrative Court refuses to confirm a compulsory acquisition, it is required as a matter of law to order the return of the acquired property to the claimant; it has no discretion in the matter. Thus, the claimant is granted the order for the return of the property without having to apply for such an order. Section 8(5) of the Act thereby relieves the claimant of the burden of having to apply to the High Court or any other court for the return of the property. There was thus no inconsistency between s 16(1)(e) of the Constitution and s 8 (5) and (6) of the Act that rendered the Act invalid.

(4) In terms of s 16(1)(f) of the Constitution, the Act should enable an applicant or claimant to apply to the High Court or to any other court for the determination of any question relating to compensation and to appeal to the Supreme Court against such determination. The section guarantees a claimant the right to have the contestation for compensation to be adjudicated upon by either the High Court or by any other court. It also guarantees the claimant the right to appeal, as of right, against that adjudication to the Supreme Court. The wording of s 16(1)(f) makes the claimant the *dominis litis*. However, s 8 of the Act provides, among other things, that whenever compensation is contested the acquiring authority is required as a matter of law to apply within thirty days to the Administrative Court for the confirmation of the acquisition. Thus, in the event of a dispute relating to compensation, the dispute as a matter of law will be determined by the Administrative Court in terms of s 8 of the Act. The only variation between the Act and s 16(1)(f) of the Constitution is that whereas the Act makes the acquiring authority the *dominis litis*, s 16(1)(f) of the Constitution provides for the claimant to be the *dominis litis* in the proceedings. The difference between the Constitution and the Act relates to procedure and not substance. The fact that the Constitution makes the claimant the *dominis litis* while the Act makes the acquiring authority the *dominis litis*

does not amount to an inconsistency that would render the Act invalid. The critical issue is that the dispute is subject to determination by the High Court or by any other court, and that is provided for in the Act.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(9) – right to fair hearing within a reasonable time – disciplinary hearing – members of Central Intelligence Organisation – not members of public service – not governed by public service regulations – disciplinary board set up by CIO – not an adjudicating authority established by law – no protection given by Constitution

Mawere & Anor v *Central Intelligence Organisation* S-30-07 (Sandura JA, Chidyausiku CJ, Cheda JA, Ziyambi JA & Malaba JA concurring) (Judgment delivered 15 October 2007)

The applicants were members of the Central Intelligence Organisation, an organisation established in the President's Office for the protection of national security. In October 1998 they were suspended from duty on disciplinary grounds, the allegation being that they had defrauded the State. In 2006 a disciplinary board was eventually convened. When the CIO set up the Board it purportedly acted in terms of the Public Service Regulations 2000, published in SI 1 of 2000. The Regulations were made by the Public Service Commission in terms of s 31 of the Public Service Act [*Chapter 16:04*], with the concurrence of the Minister of Public Service, Labour and Social Welfare. The applicants asked the Board to stop the hearing in order for them to file an application with the Supreme Court in terms of s 24(1) of the Constitution, in which they sought a declaratory order that the delay by the respondent in dealing with their suspension from duty for more than eight years was a violation of their right to a fair hearing within a reasonable time guaranteed by s 18(9) of the Constitution.
Held: (1) The first question was whether the Board was a court or other adjudicating authority established by "law", as defined in s 113 of the Constitution. (2) In terms of s 14(e) of the Public Service Act, members of the CIO are not members of the public service. This being so, the applicants were not governed by the Act and the Regulations, and the disciplinary procedure set out in the Regulations did not apply to them. (3) The Board set up by the CIO, purportedly in terms of the Regulations, was thus not covered by the expression "other adjudicating authority established by law" in s 18(9) of the Constitution, as it was not set up in terms of any law governing the members of the CIO. (4) The fact that, in terms of the contract of service, the conditions of service, including disciplinary procedures, were in general aligned to those of the public service, did not mean that s 14(e) of the Act had been amended and that the employment contract had made the applicants part of the Public Service. That could only have been done by means of an Act of Parliament. Nor did it mean that the disciplinary authority set up by the CIO was a disciplinary authority established by law, because the Board was not set up in terms of any "law". Consequently, the right claimed by the applicants in terms of s 18(9) of the Constitution did not exist, and the application could not succeed.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 19 (protection of freedom of religion) – what constitutes a religion – Rastafarianism – whether a religion – act done which infringed constitutional right – act done in terms of rules of a school – such rules not constituting a "law"

Dzvova v *Min of Education & Ors* S-26-07 (Cheda JA, Chidyausiku CJ, Sandura, Ziyambi & Malaba JJA concurring) (Judgment delivered 10 October 2007)

Acting in terms of school rules, the headmaster of a State primary school sought to exclude the applicant's child from the school on the grounds that the child did not comply with the school requirement that children keep their hair short. The child's father said that as a Rastafarian he was not allowed to have his hair cut. An application was brought to the Supreme Court in terms of s 24 of the Constitution, alleging that the child's right to freedom of religion guaranteed by s 19(1) of the Constitution had been violated. The questions for consideration were (1) whether the exclusion of the child was done under the authority of a law as envisaged in s 19(5) of the Constitution; and (2) in the event that the court found it was done under the authority of a law, whether such law as reasonable justifiable in a democratic society.

Held: (1) in terms of the dictionary definition of religion, as well as various precedents, Rastafarianism was a religion. (2) Every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual which are stipulated in the Constitution, subject to certain limitations. Religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. Every shade of religious belief, if genuinely held, is entitled to due protection. (3) What the headmaster did was based on the school rules, which he signed. In terms of s 69 of the Education Act [Chapter 25:04], the

Minister of Education may make regulations proving for discipline in schools and the exercise of disciplinary powers over pupils attending schools. No such power was given to headmasters, nor was the Minister empowered to delegate his powers. Such regulations had been made by the Minister, which provided inter alia that every pupil who enrols in a Government or non-Government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff. It could not be argued that having long hair at the school was indiscipline or disobedience to the school staff; it was only a manifestation of a religious belief, unrelated to the child's conduct at school. To ask pupils to conform to a standard of discipline would not include an aspect that infringes on a pupil's manifestation of his religion. (4) The school rules were thus not made under the authority of a law. Accordingly, it was not necessary to consider the issue of justification.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 21 (freedom of association) – right to join trade union – effect of such right – limitations on right – does not oblige employer to pay union fees to unregistered trade union

Zimbabwe Banking & Allied Workers Union & Anor v *Beverley Bldg Soc & Ors* HH-63-07 (Patel J) (Judgment delivered 17 September 2007)

See below, under EMPLOYMENT (Trade union).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – application under – limited to alleged breaches of rights set out in Declaration of Rights – averment that provisions of legislation were in conflict with other provisions of the Constitution – cannot alone form basis for application under s 24 – need to show that applicant's rights have been violated – correct procedure to obtain relief

MDC v *Min of Justice & Ors* S-48-07 (Chidyausiku CJ, Cheda, Malaba, Gwaunza & Garwe JJA concurring) (Judgment delivered 26 September 2007)

The applicant brought an application, seeking relief under s 24 of the Constitution. It averred that certain sections of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] were in conflict with s 61 of the Constitution, which establishes the Commission. With respect to the sections of the Act dealing with voter education, the applicant averred that these also breached s 61 of the Constitution, alternatively, that they breached s 20 of the Constitution, which protects freedom of expression.

Held: (1) s 61 of the Constitution does not fall within the Declaration of Rights and consequently the applicant could not allege that its fundamental rights, as guaranteed by the Declaration of Rights, had been violated. As the application was for a breach of s 61 of the Constitution, which is not part of the Declaration of Rights, it could not form the basis of an application in terms of s 24(1) of the Constitution. Section 24(1) was never intended to apply to a violation of the Constitution other than the Declaration of Rights. This did not mean that other violations of the Constitution have no redress. They do have: they can be redressed via the High Court and by the Supreme Court on appeal. (2) The Supreme Court is essentially an appeal court without original jurisdiction, but s 24(1) of the Constitution confers original jurisdiction on the court in respect of specific cases that fall within the four corners of s 24(1) of the Constitution. If the applicant had stated its cause of action as a violation of s 18 of the Constitution, in that its right to protection of the law guaranteed by s 18 had been, or is likely to be, violated by the application to it of a law that was invalid by reason of its being *ultra vires* the Constitution, that might have brought the application within the ambit of s 24. (3) For a litigant to establish *locus standi* in terms of s 24(1), he must aver that a violation of the Declaration of Rights has occurred or is likely to occur in respect of himself. The only exception provided for in s 24 is in respect of a person in custody on whose behalf an application can be made by another person. In respect of the averment that ss 15(1)(d) and 15(2) of the Act violated s 20 of the Constitution, there was no averment that the applicant's right to freedom of expression had been violated. The averment that other people's rights protected under s 20 had been violated was insufficient to found an application in terms of s 24(1).

Contract – evidence – parol evidence rule – written contract – when parol evidence may be led – may be led to prove contract conditional upon an event which has not occurred

Nhundu v *Chiota & Anor* S-28-07 (Ziyambi JA, Cheda & Malaba JJA concurring) (Judgment delivered 1 October 2007)

When a contract has been reduced to writing, the document is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given, save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence. However, the parol evidence rule does not preclude extrinsic evidence that the contract is conditional upon the happening of an event which has not occurred; but if the object of leading such extrinsic evidence is not only to prove the alleged oral condition precedent but to incorporate it into the agreement of sale and then to enforce the said condition by relying on the respondent's failure to comply therewith then the extrinsic evidence would be inadmissible.

Contract – formation – sale – essential requirements – if all requirements are present, absence of detail does not vitiate agreement

Kovi v *Ashanti Goldfields Zimbabwe Ltd & Anor* HH-83-07 (Kudya J) (Judgment delivered 28 November 2007)

On 1 November 2003 the respondent company, represented by its general manager and finance director, executed a memorandum of agreement with its employees, who were represented by the chairman and two committee members of the workers committee. Under the agreement, the company agreed to "dispose of" various of its housing units to its employees "who were sitting tenants effective 1 December 2003". An attachment to the agreement contained the names of the employees, the relevant house numbers, the new valuations and the monthly repayment rates. On 10 December 2003, the company entered into a 5 year lease agreement with the applicant, commencing on 1 January 2004. The stated rent, with a provision for escalation, was to be deducted from the applicant's salary. The agreement gave the applicant the option to buy the property after 60 months and provided that the rentals paid would reduce the purchase price. It also provided that if employee left the service of the respondent, the respondent was entitled to terminate the agreement. Rents were never deducted from the applicant's salary, but over the next three years he paid the full purchase price in three instalments. When he asked for transfer of the property, the respondent disputed that an agreement of sale had been concluded. It averred that the subsequent lease agreement complemented the original agreement, which it said was merely an expression of intent. At the hearing, the issues were whether the original agreement constituted an agreement of sale; whether the lease agreement was a valid and binding agreement and whether the relief of specific performance was available to the applicant.

Held: (1) In interpreting contracts, courts give effect to the grammatical and ordinary meaning of the words used in the particular contract. In this case, "to dispose of", in the context of the memorandum of agreement, should be interpreted to mean "to sell". The date on which the sale was to commence was not indicated in the memorandum of agreement: it was neither the date of signature nor 1 December 2003. The sale would commence on some unknown future date to those employees who were sitting tenants as from 1 December 2003. (2) Until the lease agreement was concluded, the applicant was not a "sitting tenant". (3) As long as the essential requirements of an agreement of sale are present, the absence of detail does not vitiate the agreement. There are three essential requirements of a contract of sale. These are agreement (*consensus ad idem*); a thing sold (*merx*); and a price (*pretium*). Neither delivery nor payment is necessary to the creation of the contract, for they both fall within the category of its performance. *In casu*, both the price and the thing to be sold were clearly identifiable in the memorandum. As to whether both parties mutually evinced an intention to be bound by the agreement, the first respondent agreed to sell the house to the applicant for an agreed price (the valuation figure), once he became a sitting tenant. (4) This was not an inchoate agreement, where the offeree knew or ought to have known that it was intended to be accepted on a provisional basis only and that the conclusion of a binding contract was to be dependent on agreement on further points. The parties entered into a valid agreement of sale on 1 November 2003. That agreement would come into effect on the execution of a lease agreement, such an agreement being a condition precedent of the agreement of sale. (5) The lease agreement did not novate, annul or supplant the agreement of sale. It was designed to make the payment of the purchase price easier for the employee. (6) By accepting the full amount of the purchase price in circumstances where it was clear that it was not for rental but for the payment of the house, the first respondent was deemed to have waived the operation of the clause in the lease agreement which gave an option to purchase after 5 years. Once the applicant had paid the purchase price in full, he could not be evicted if he left the respondent's service. (7) As the applicant had fulfilled his part of the bargain by paying the purchase price in full, he was entitled to specific performance.

Contract – restraint of trade – validity – no competition restraint – when enforceable – may be used to protect trade connections – mere restraint against competition unreasonable and unenforceable

Greendale Hardware & Electrical (Pvt) Ltd v *Bangaba* S-15-07 (Malaba JA, Sandura & Cheda JJA concurring) (Judgment delivered 10 July 2007)

The appellant company was a member of a group of companies, carrying on the business of retail and wholesale of general hardware, specialized mining and industrial cutting tools and protective clothing. The respondent was a former employee of the appellant. He was engaged as a clerk/counter salesman in 1998 and was later promoted to the position of external sales representative. After six years in the appellant's employ, the respondent left and entered the services of another company. When the respondent entered into the contract of employment with the appellant he acknowledged that, by virtue of his duties, he would become possessed of knowledge of proprietary rights of the appellant in the business carried on, including trade secrets and details of trade connections. To protect these rights against the abuse of their knowledge by the respondent during the period of employment and after he left employment with the appellant, the respondent signed a restraint of trade agreement. He agreed that for two years after he left the appellant, he would not become interested, even as an employee, in any undertaking involved directly or indirectly in any of the business undertaken by the appellant's group of companies. The company that the respondent joined carried on the business of suppliers of mining and industrial tools and equipment, electrical, building materials, abrasives and general hardware. It was involved in the business of selling specialized mining and industrial tools. Like the appellant, it also dealt in general hardware. When it discovered where the respondent was employed, the appellant sought an interdict restraining the respondent from continuing in his job. The High Court rejected the application on the grounds that the restraint of trade was unreasonable.
On appeal, held: (1) A restraint of trade is an obligation voluntarily undertaken by an employee to refrain from the exercise of freedom of trade in favour of the employer in the exercise of freedom of contract. It is therefore *prima facie* valid and the onus is on the employee who seeks to resile from its burden to show that it is nonetheless against public interest and unenforceable. (2) The correct test for the validity of a restraint of trade in a contract of employment is whether there are proprietary rights for the protection of which the restraint was imposed by the employer and undertaken by the employee. If there are proprietary interests to be protected, the next question is what are they being protected against and whether the restraint is more than is reasonably necessary for the protection of the proprietary interests. (3) A restraint of trade which does no more than protect the employer against mere competition from a former employee by preventing him from carrying on business similar to that undertaken by him or entering the services of an undertaking carrying on business similar to that undertaken by him, in the fear that in doing so the employee would exercise the knowledge and skill acquired during employment with him, is an unreasonable restraint. So is a restraint of trade which is too wide as to time or place or scope, depending, of course, on the nature of the business carried on and the duties of the employee. This means that the employee is entitled to use to the full any personal skill or experience even if it has been acquired in the service of his employer. It is this freedom to use to the full a man's improving ability and talent which lies at the root of the policy of the law regarding this type of restraint. The additional knowledge and skill acquired during employment belong to the employee and their exercise cannot be lawfully restrained by an employer as they are not his property. To preclude a former employee from carrying on his natural trade in any part of the country on his own, or in association with others, is a very strong prohibition which requires exceptional justification. (4) However, a no-competition restraint can be used for the protection of trade connections where, if competition were allowed, the employee would take advantage of the employer's customer connections. It must, though, be shown that the proprietary rights in the trade connections could only be adequately protected against prejudicial interference by the employee, if the no-competition restraint is imposed and enforced. In other words, there must be no other restraint protecting the same proprietary rights. (5) *In casu*, the no-competition restraint did not protect the appellant's proprietary rights. It was not in collocation with the other restraints, but stood alongside the other restraints, from which it was severable. The anti-solicitation restraint covered the trade connection and being severable from the no-competition restraint, would have been enforceable. This was not a case in which, from the nature of the respondent's duties, the only method by which the appellant could obtain protection for its trade connections was by prohibiting competition on the part of the respondent after he left its employment. The restraint was, in the circumstances, a restraint against competition only and was, therefore, unreasonable and unenforceable.

Contract – sale – land – instalment sale – agreement to pay by instalments – agreement made after substantive contract concluded – sale still governed by Contractual Penalties Act [*Chapter 9:04*]

Chimpondah & Anor v *Muvami* HH-81-07 (Makarau JP) (Judgment delivered 21 November 2007)

The provisions of the Contractual Penalties Act [*Chapter 9:*04] apply to afford protection to all purchasers of land where the purchase price is to be paid in two or more instalments, regardless of when the instalments were agreed upon. Thus, where the parties initially agree on a cash sale but later convert it to an instalment sale, the initial intention of the parties

does not override the clear letter of the law as provided for in the Act. The sale does not become an instalment sale by reference to the intention of the parties but by operation of law. Once the parties agree that the purchase price is to be paid over in three or more instalments, the provisions of the Act come into operation and the seller has to give the purchaser the notice provided for in s 8 of the Act.

Contract – validity – offer – need for offer to be certain and definite – uncertainty as to what was promised or when it was to be fulfilled – no binding agreement

Nestoros v *Innscor Africa Ltd* HH-73-07 (Patel J) (Judgment delivered 29 October 2007)

The plaintiff, a director of a company, sought an allocation of shares similar to what other directors, who had been in the company much longer, had received. The deputy chairman of the defendant company explained that the plaintiff's allocation was lower because of his shorter time in office but promised to "sort out" the plaintiff's shareholding.
Held: what distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's acceptance. It is fundamental to the nature of any offer that it should be certain and definite in terms. It must be firm, that is, made with the intention that when accepted it will bind the offeror. An offer to enter into a binding contract must be distinguished from preliminary discussions, invitations to treat, offers to negotiate, statements of intention and mere puff. The terms of a contractually binding offer must be firm, certain and definite. Vagueness or uncertainty in the terms of an offer is fatal to the existence of the supposed contract. *In casu*, the purported offer was not couched in certain and definite terms sufficient to constitute an offer for the purposes of a binding contract. It was uncertain as to when the promise would be fulfilled and as to what was actually promised. The deputy chairman's promise thus did not constitute a binding agreement giving rise to any clear contractual undertaking by the defendant.

Court – Supreme Court – jurisdiction – review – court's powers of review – no power to entertain review launched by a party – limits to court's powers to undertake review of proceedings of lower court

Nherera v *Kudya NO & Anor* S-45-07 (Chidyausiku CJ, in chambers) (Judgment delivered 18 October 2007)

The applicant had been convicted in the regional magistrates court. An application to the High Court for bail pending appeal was rejected. The applicant then launched an application in the Supreme Court, purportedly in terms of s 25 of the Supreme Court Act [*Chapter 7:13*], for a review of the proceedings in the regional court.
Held: although the Supreme Court and its judges have the same review powers as do the High Court and the judges thereof, it is quite clear that s 25 of the Act does not confer on an applicant the right to apply to the Supreme Court or a judge of the Supreme Court for the review of proceedings of a regional magistrate's court in the first instance. However, the Supreme Court or a judge of the Supreme Court can review such proceedings *mero motu* in terms of s 25(2) of the Act. Section 25(2) deals with irregularities in respect of which no appeal or application is before the Supreme Court. The review is undertaken at the instance of the Supreme Court and not of any litigant. Reviews of such irregularities would, but for the provisions of s 25(2), fall outside the jurisdiction of the Supreme Court acting in terms of its appellate jurisdiction or sitting in terms of s 24 of the Constitution. Section 25(3) expressly prohibits any attempt to approach the Supreme Court as a court of first instance in an application for review.

Criminal procedure – trial – conduct of – unrepresented accused – judicial officer's role and duties

S v *Tambo* HH-56-07 (Uchena J) (Judgment delivered 12 July 2007)

The Zimbabwean system of criminal justice is essentially adversarial in nature. The essential characteristic of the adversary system is that the presiding officer appears as an impartial arbiter between the parties. Although a judge must ensure that justice is done, it is equally important that the judge must ensure that justice is seen to be done. When the accused is unrepresented, the judicial officer is in the invidious position of being an arbiter and, at the same time, an adviser of the accused because he must explain the rules of procedure and evidence to the accused. Over the years, there has been a steady progression in the fashioning of rules by the courts in order to mitigate the harshness of putting an unrepresented accused on trial, particularly for serious offences. These rules require positive conduct by judicial officers to assist

unrepresented accused in a variety of ways. They are all judge-made rules, and have their origin in the fundamental principle of fairness which is the bedrock of law that requires trials to be fair and justice to be equal.

Criminal procedure (sentence) – common law crimes — assault – accused in a position of authority – serious view taken of abuse of authority – appropriate sentence

S v *Shumba* HH-79-07 (Hungwe J) (Judgment delivered 19 October 2007)

The accused, a member of the local neighbourhood watch, was, together with seven colleagues, investigating crimes. They suspected one of a group of seventeen people had been in possession of some dagga which had been dropped on the floor. They severely assaulted the members of the group in order to try to extract information from them. The accused pleaded guilty to 17 counts of assault and was sentenced to a minor fine.
Held: the sentence was too lenient. As a member of the neighbourhood watch committee the accused was in a responsible position of trust, which position he abused. The use of force was totally uncalled for as none of the suspects had resisted arrest or done anything to warrant the use of force. The courts take a serious view to offences involving the abuse of authority, callousness and brutality. The community is rightly outraged when the very people whose function is to protect them turn against them in this way. This case cried out for a community service related penalty or at the very least a hefty fine coupled with a wholly suspended term of imprisonment.

Criminal procedure (sentence) – common law crimes – murder – extenuating circumstances – what are – payment of compensation to family of victim – mitigating but not extenuating

S v *Sithole* S-16-07 (Garwe JA, Sandura & Cheda JJA concurring) (Judgment delivered 17 July 2007)

An extenuating circumstance is fact associated with the crime which serves, in the minds of reasonable men, to diminish, morally albeit not legally, the degree of the accused's guilt. A circumstance will not be of extenuating character in relation to a murder unless it is associated with the crime at some stage of the chain leading from motive to execution, both inclusive, although a circumstance which has reference to the mentality or the personality of the accused may be extenuating. Payment of compensation to the deceased's relatives by the accused, made in accordance with tradition in order to show remorse for the death of the deceased, is a factor that a court would normally take into account in assessing an appropriate sentence. It is not however a circumstance that is associated with the crime or one that would throw light on the accused's state of mind at the time of the commission of the offence. It would be a mitigating factor rather than an extenuating circumstance.

Damages – defamation – assessment – aggravating factors – bad reputation of plaintiff – relevance of – what must be shown – extent of publication – effect of – status of plaintiff – senior judge being defamed in his professional capacity – lack of apology or retraction – inflation – effect of – future inflation may not be considered

Delict – defamation – what is defamatory – ordinary meaning of words used – reasonable reader's understanding of words used – context in which words are used – defences – qualified privilege – variance between true facts and what was reported – inference of improper motive – defence failing

Garwe v *Zimind Publishers (Pvt) Ltd & Ors* HH-70-07 (Gwaunza JA) (Judgment delivered 10 October 2007)

The plaintiff was Judge-President of the High Court when he presided at the trial for treason of Morgan Tsvangirai, the leader of the main opposition party in Zimbabwe. The trial was lengthy, spread over eighteen weeks, and at its conclusion the plaintiff indicated that judgment would be delivered on a stated date some five months later. When that date came, the judgment was postponed to a future date. The first respondent's newspaper published an article in which it stated that the assessors in the trial had "blocked" the plaintiff from delivering his judgment before they could review transcripts of the trial proceedings. The plaintiff wrote to the editors, explaining the procedures involved in criminal trials and asking for a retraction. The defendants denied that the statement was defamatory or that they had suggested that the plaintiff had already prepared his judgment.
The plaintiff issued summons for defamation. The amount claimed was revised upwards on the date the matter came for trial, on the grounds of the rate of inflation affecting the country. He claimed that the words were defamatory because an

ordinary reader would understand them to mean that he had improperly reached a decision without consulting his assessors and would have delivered a single man's verdict unless the assessors had stopped him. Evidence was led of articles, published outside the country, which directly alleged that the plaintiff had decided on a verdict without consulting the assessors, although the plaintiff denied any knowledge of such articles. These articles also claimed that the assessors had stopped the judge from delivering his judgment.

The defence denied that the article was defamatory or that substantial damages were justified. The defence also raised the defences of qualified privilege, justification, fair comment and lack of *animus injuriandi*.

Held: (1) the ordinary meaning of words is determined by looking at the context in which they were uttered. The judge must decide both whether the words in their ordinary significance are *capable* of bearing a defamatory meaning and whether a reasonable reader *would* regard the words in a defamatory light. The reasonable reader is a person who gives a reasonable meaning to the words used, within the context of the document as a whole. *In casu*, the context included the environment that led to the investigations into the matter being carried out by the newspaper.

(2) In the context in which the words were published, the ordinary reader would have understood the word "blocked" by its ordinary dictionary meanings of "stopped" or "prevented. To expect the reader, even after reading the entire article, to understand the word "blocked" to mean "delayed" would be to expect too much from him. Such a reader would not have engaged in an exercise to subtly, elaborately or intellectually analyse the word in order to come up with a meaning different from the one ordinarily assigned to it. Similarly, the ordinary reader who reads about anything to do with the courts or with a judge would understand the word "judgment" to mean the verdict or the judge's decision on the matter.

(3) The ordinary reader would have understood that the assessors had stopped the plaintiff from passing his (single man's) prepared judgment in the criminal case and that the plaintiff wished to do this improperly, if not corruptly, without consulting the assessors.

(4) With regard to the defence of qualified privilege, the defendants relied on the situation relating to the discharge of a duty to a person who has a corresponding right to receive the information. While the criminal trial and its outcome were matters of public importance, the variance between what the defendants established to be the true facts concerning the postponement of the judgment, and what they went on to report, was difficult to explain except in terms of their being driven by an improper motive. They thus forfeited their right to the protection of the defence of qualified privilege.

(5) With regard to the defence of justification, what the defendants wrote was untrue. The language used in the statement complained of went beyond mere exaggeration: the defendants, having established the truth about the circumstances surrounding the postponement of the judgment, went on to publish statements that directly contradicted such truth.

(6) For the defence of fair comment to succeed, the allegation in question must be a comment (opinion), it must be fair, the factual allegations on which the comment is made must be true and the comment must be on a matter of public interest. The words complained of could not be said to be a correct interpretation of the facts. Even allowing for the exaggeration that normally characterises the reporting of facts or events in newspaper articles, the words exceeded the limits of exaggeration, and so could hardly be said to be fair comment. The defendants' use of words such as "blocked" and "demanded", when they knew very well that this was not what had happened, smacked of dishonesty and malice.

(7) *Animus injuriandi* is a subjective intention on the part of an individual as opposed to the mass media to defame or injure the reputation of the plaintiff. This intention covers *dolus directus, dolus indirectus* and *dolus eventualis*. The evidence showed that the defendants, in writing and publishing the words complained of, were motivated by *dolus directus* as well as the other forms of *dolus*. The two defendants reduced what were essentially rumours doing the rounds concerning the postponement of the judgment, to writing, and published them in a local newspaper. They must have foreseen the eventual harm to the plaintiff of the statement complained of.

(8) With regard to "punitive" damages, factors aggravating the defendant's conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*. While evidence of the general bad reputation of a plaintiff may be pleaded in mitigation of damages, evidence that other people had made similar defamatory statements about the plaintiff is not admissible to show that the plaintiff already had a tarnished reputation. Although not a large number of copies of the newspaper were sold, the extent of the publication of the newspaper (which included internet access) and therefore the article complained of was fairly wide. The defamation was a serious one: given the plaintiff's position as the most senior High Court judge at the time, to suggest that he would have attempted to so depart from established procedure as to wish to improperly exclude the assessors in the process of formulating and handing down judgment in a case that they had heard together was highly damaging to his professional integrity. To the extent that the defendants' subsequent statement might be termed a retraction of sorts, it clearly was neither prompt (they refused to retract when asked to do so by the plaintiff before the matter was taken to court) nor was it as prominently displayed as was the article complained of. The timing and brevity of the statement suggested reluctance on the part of the defendants to make it, and also that it was grudgingly not spontaneously made.

(9) The court could take judicial notice of the hyperinflationary environment then and currently obtaining in Zimbabwe. However, it could not base its assessment on speculation as to the rate at which inflation may continue to rise, nor could it do so on the basis of whether it will rise at all. There was no basis for taking future inflation into account.

Education – school rules – legal status of – whether they constitute a "law" for purposes of Constitution

Dzvova v *Min of Education & Ors* S-26-07 (Cheda JA, Chidyausiku CJ, Sandura, Ziyambi & Malaba JJA concurring) (Judgment delivered 10 October 2007)

See above, *under* CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 19 (protection of freedom of religion)).

Employment – appeal – to Labour Court – court's functions on appeal – do not include substituting one charge for another where evidence did not support charge preferred by employer

Zimasco (Pvt) Ltd v *Chizema* S-38-07 (Gwaunza JA, Sandura & Cheda JJA concurring) (Judgment delivered 12 November 2007)

The appellant brought disciplinary charges against the respondent, alleging theft and fraud after he had, with permission, borrowed a machine from which a motor was later found to have been stolen. The appellant's disciplinary committee found him guilty and dismissed him. An appeal to the Labour Court succeeded, the court finding no evidence of theft or fraud, and the respondent's reinstatement was ordered. The appellant appealed to the Supreme Court, arguing that the Labour Court erred in not finding that the facts showed that the respondent had committed a dismissible offence, that is, "an act inconsistent with the fulfillment of the express or implied conditions of his contract". It argued that the Labour Court had thereby decided the matter "on a legal technicality".

Held: (1) At no stage during the disciplinary proceedings, or during the appeal hearing in the Labour Court, was it indicated that the respondent was being charged, in the alternative, with committing an act or conduct inconsistent with the fulfillment of his contract of employment. **I**t clearly was not the responsibility of the Labour Court to amend the "charge sheet" by substituting the charge preferred against the respondent with another one. The court's function is not to formulate charges or cases for litigants; it is to determine, on the basis of evidence placed before it, whether or not a case has been proved against the respondent. He who alleges anything against another person must prove such allegation. The appellant failed to prove, on the facts presented, that the respondent committed fraud or theft. (2) The Labour Court had not decided the case on a technicality by failing to substitute one charge for another. What the court was called upon to do was to determine whether, on the basis of the facts, the offence with which the respondent was charged had been established on a balance of probabilities. For the court to go beyond this mandate to rewrite the "charge sheet" for the appellant, and then try the respondent on a charge not preferred against him on the papers (a charge, moreover, to which the respondent would not have had an opportunity to respond) would have resulted in a miscarriage of justice. It would also have been unprocedural and improper for the court so to act.

Employment – appeal – to Labour Court – need for matter to have been determined by the tribunal *a quo* – tribunal failing to make decision – no appeal possible – correct course for employee to take

Zimbabwe Revenue Authority v *Mpindiwa* S-85-06 (Sandura JA, Chidyausiku CJ & Gwaunza JA concurring) (Judgment delivered 17 July 2007)

The respondent was employed by the appellant. She was charged with two acts of misconduct in terms of the appellant's code of conduct. She was found guilty by the disciplinary and grievance committee, and appealed to the appeals committee. At the end of the appeal hearing, the committee adjourned. It agreed to have minutes of the proceedings typed and later come up with a final overall verdict. About a week later, the chairman of the appeals committee wrote to the appellant, saying that the committee did not reach a consensus but recommending that the verdict passed by the disciplinary and grievance committee be upheld. After another few days, he wrote to the respondent, saying that after the committee deliberated over the matter, he, as the chairman, found no reason to interfere with the decision of the disciplinary and grievance committee. He told her she could appeal to the Labour Court, which she duly did. The Labour Court found that the appeals committee had not determined the respondent's appeal. It then proceeded to determine the appeal which ought to have been determined by the appeals committee. It set aside the decision of the disciplinary and grievance committee, and ordered the appellant to reinstate the respondent or pay her damages in lieu of reinstatement.

On appeal to the Supreme Court, held: (1) the appeals committee did not determine the appeal. The chairman had no authority to decide the appeal on behalf of the appeals committee, so his decision was null and void, and of no force and effect. There was, therefore, no decision or determination against which the respondent could have appealed to the Labour

Court. Her appeal was premature and was not, therefore, properly before the Labour Court. On that basis alone it should have been struck off the roll. (2) It was not competent and proper for the Labour Court to determine the respondent's appeal which should have been determined by the appeals committee. It could only do so if there was a determination to appeal against. (3) The correct course for the respondent should have been to seek an order compelling the appeals committee to determine her appeal.

Employment – code of conduct – proceedings under – code not covering specific situation – flexible approach to be followed – management adapting procedures to ensure fair hearing

Duly Holdings v *Chanaiwa* S-17-07 (Gwaunza JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 9 July 2007)

The appellant company, through its managing director, brought disciplinary proceedings against the respondent, who was himself a branch manager. The appellant's code of code did not provide specifically for the situation where a branch manager was charged. The managing director chaired the initial disciplinary hearing, which found the respondent guilty. The code provided for an appeal to the branch manager and the operations director in the relevant section. The managing director ensured that the appeal was determined by a committee that excluded himself. The respondent's appeal to that committee failed. The Labour Court upheld the respondent's argument that the disciplinary proceedings had not been conducted in compliance with the code of conduct. It also found that the rules of natural justice had not been observed in the manner in which the disciplinary proceedings against the respondent were held.
Held: (1) the appellant did the best thing in the circumstances in order to guarantee the respondent natural justice, in the absence of a provision in the code providing for the equivalent of a "head of department" for the respondent who, himself, was the head of his branch. (2) In the absence of a provision in the code specifically covering the conduct of disciplinary proceedings against a branch manager, the appellant had ensured that the respondent's case was properly heard before the disciplinary committee constituted and chaired by the managing director for that purpose. (3) Since the provision in the code for an appeal did not apply to the respondent, the appellant had done the best it could in the circumstances to ensure that the appeal was determined by a committee that excluded the managing director. (4) The respondent was given ample opportunity to be heard in accordance with the *audi alteram partem* rule. (5) The gap in the code left the field open for relevant senior staff to apply disciplinary procedures that, in their view, would accord justice to the offending employee. The rules of justice require no more than that the domestic tribunal acts according to the commonsense precepts of fairness. In the circumstances of this case, it could not be said that the rules of natural justice were not observed. The respondent was, therefore, not prejudiced in any way by the disciplinary procedures followed.

Employment – code of conduct – proceedings under – code not covering specific situation – person admittedly guilty of dishonesty charged with unsatisfactory performance of work – dishonesty an example of such performance – charge proper

Malimanjani v *CABS* S-47-07 (Gwaunza JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 3 September 2007)

The appellant, a bank teller, recorded a shortfall in his money and reported the matter. A few days later, he told his superiors that he had recovered the money from a client whom he had overpaid. In fact he had not overpaid anyone and had paid the money in from his own resources. He was charged under the bank's code of conduct with "unsatisfactory work performance", found guilty and dismissed. The Labour Court, to which he had unsuccessfully appealed, held that, by acting dishonestly, he had performed his duties in an unsatisfactory manner. The appellant argued that, under the code of conduct, dishonesty and unsatisfactory work performance were listed separately and, by definition, did not cover the type of conduct that led to misconduct charges being preferred against him.
Held: lying about the overpayment and the source of the refund was, by any definition, a serious offence. In a financial institution, such as the respondent, integrity and honesty are fundamental attributes forming an integral part of the employee's performance of his work. The respondent's code made it clear that such conduct as unsatisfactory performance of work and dishonesty were dismissible offences. Details of conduct that would constitute such offences must be viewed in the light of being examples. They could not possibly have been meant to be exhaustive. The conduct with which the appellant was charged constituted dishonesty and unsatisfactory performance of his work, if the ordinary meaning of those words was to be applied. One cannot strictly interpret the provisions of a code or restrict it to what the lay draftsmen stated. It would not be in the interest of justice to find that an admitted act of dishonesty was not covered in the code because the drafters shoddily drafted the offences.

Employment – collective job action – lawfulness of – dispute of interest and dispute of right – distinction between

Employment – collective job action – show cause order by Minister – not open to Minister to issue second show cause order in respect of same matter – correct course for parties to follow in event of no settlement being reached

Employment – collective job action – right to resort to collective job action – matter not settled within 14 days of notice of collective action being given – no requirement for fresh notice to be given if certificate of no settlement issued after expiry of 14 day period – collective job action lawful if resorted to within a reasonable time

Zimbabwe Graphical Workers Union v *Federation of Master Printers of Zimbabwe & Anor* S-25-07 (Sandura JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 14 September 2007)

The right given by s 104(1) of the Labour Act [*Chapter 28:*01] to employees, workers committees and trade unions to resort to collective job action is in respect of the resolution of disputes of interest and does not cover disputes of right. A dispute of right would be one concerning, for example, the infringement or interpretation of an existing legal right embodied in a statute or contract of employment. On the other hand, a dispute of interest would be one concerning, for example, the creation of new legal rights for the workers, such as higher salaries and allowances. Collective bargaining, mediation and, as a last resort, peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interest, while adjudication is normally regarded as an appropriate method for resolving disputes of right.
Where collective job action is proposed, the Minister of Labour, acting on his own initiative or upon the application of any person affected or likely to be affected by the unlawful collective action, may issue a "show cause" order directing the parties to appear before the Labour Court, to show cause why a disposal order should not be made in terms of s 107. The Labour Court may refer the matter to a labour officer to be dealt with in terms of Part XII of the Act. If the labour officer is unable to achieve a settlement, he may issue a certificate of no settlement. The matter may, if the parties agree, be referred to arbitration. If the parties do not agree on arbitration, either of them may apply to the Labour Court for an order in terms of s 89(2)(b) of the Act. There is no provision in the Act in terms of which the Minister of Labour, after once issuing a show cause order, could issue another show cause order in the same matter, and in respect of the same dispute, directing the parties for the second time to appear before the Labour Court to show cause why another disposal order should not be made in terms of s 107.
Where a trade union has given 14 days' notice of proposed collective job action, it does not have the right immediately thereafter to resort to collective job action unless an attempt has been made to conciliate the dispute and a certificate of no settlement has been issued in terms of s 93 of the Act. It is only after a certificate of no settlement has been issued to the parties that the union would acquire the right to resort to collective job action, even if the certificate is issued more than fourteen days after the notice of collective job action has been given. It is not necessary for the union to give fresh notice of such action. The right to resort to collective job action can only be lost if it is not exercised within a reasonable time, and no reasonable explanation for the delay in exercising the right is given.

Employment – contract – termination – dismissal – constructive dismissal – employer presenting employees with intolerable options

Thomas Meikle Stores v *Mwaita & Anor* S-21-07 (Gwaunza JA, Malaba & Garwe JJA concurring) (Judgment delivered 10 October 2007)

The respondents were long-standing and senior employees of the appellant. Due to restructuring, the appellant decided that their posts should be abolished and offered them lower-ranking positions, alternatively an exit package which the appellant had decided unilaterally. The respondents were told that if they did not report for work on a certain date, it would be assumed that they had opted for the exit package. The respondents rejected both options, regarding the re-assignment as an unjustified demotion and the exit package as inadequate. An arbitrator found that the respondents had been constructively and unlawfully dismissed and ordered the appellant to reinstate the respondents without loss of salary or benefits, or, in lieu thereof, pay them damages.
Held: it could not be disputed that by its actions the appellant repudiated the respondents' contracts of employment, a repudiation being nothing more than an intentional communication that the party is not going to perform. Performance by the appellant, *in casu*, would amount to it allowing the respondents to keep their original jobs with the appellant. Repudiation does not as such bring an end to a contract; it only gives rise to legal remedies. The paramount right flowing from repudiation is the right to accept the repudiation and to cancel the contract. *In casu*, the contracts came to an end when, by their conduct, the respondents effectively cancelled them. This they did, in the first place, by not insisting that the appellant

reinstate them to their previous positions; secondly, by not accepting demotion and reporting for duty; and thirdly, by demanding that they be paid a negotiated exit package (in effect, "compensation of damages") as calculated by them. Alternatively, because the appellant made it impossible for the respondents to go back to work (having abolished their posts) and went on to insist they take up inferior positions, the two were forced by the appellant to cancel their contracts of employment. This amounted to their constructive dismissal, which was also an unfair dismissal of the two respondents in terms of *s* 12B(3) of the Labour Relations Act [*Chapter 28:01*], since their continued employment would have been made intolerable.

Employment – disciplinary proceedings – charge – employer dismissing employee on basis of particular charge – evidence not adequate to support such charge – no alternative charge brought – employee entitled to acquittal

Zimasco (Pvt) Ltd v *Chizema* S-38-07 (Gwaunza JA, Sandura & Cheda JJA concurring) (Judgment delivered 12 November 2007)

See above, under EMPLOYMENT (Appeal – to Labour Court – court's functions on appeal).

Employment – dismissal – grounds for – absence from work without reasonable excuse – appeal against order for reinstatement pending – effect of noting such appeal – order for reinstatement stayed – reasonable excuse for employee to be absent

Business Eqpt Corp v *Mtetwa* S-14-07 (Gwaunza JA, Sandura & Garwe JJA concurring) (Judgment delivered 16 July 2007)

The respondent was dismissed from the appellant's employ for misconduct. He appealed against his dismissal to the Negotiating Committee, which ordered the appellant to reinstate him without loss of pay or benefits. No alternative order for damages in lieu of reinstatement was made. An appeal by the appellant to the Labour Court failed. When the respondent subsequently presented himself for duty, he was told that the appellant was going to file an appeal to the Supreme Court. He thereafter stayed away from work but proceeded himself to file an appeal to the Supreme Court against the order of reinstatement without the alternative of damages, seeking an order for payment of damages as an alternative to reinstatement. Pending the hearing of appeal, the respondent did not report for work.

Some seven months later, the appellant, although aware of the respondent's appeal, directed him to report for work, and when he did not do so, instituted disciplinary proceedings against him. These culminated in the respondent being dismissed for the second time. His domestic appeals failed but the Labour Court held that he had a reasonable excuse for not presenting himself for work while his appeal to the Supreme Court was pending. The appellant at some stage (the evidence did not establish when) abandoned its first appeal. The respondent's appeal was dismissed on the grounds that there was no evidence of the breakdown of the relationship between the parties and thus no evidence upon which the Labour Court could consider making an order for damages in lieu of reinstatement. The effect of the Supreme Court's decision was to confirm the earlier orders of the Negotiating Committee and the Labour Court, for the appellant to reinstate the respondent without the option of damages.

Held: the respondent's appeal was properly before the Supreme Court. There was nothing to justify a departure from the law concerning the effect of an appeal on the judgment appealed against. During the seven month period before he was told to come back to work, the respondent was not informed of the appellant's change of heart regarding its proposed appeal to the Supreme Court. His own appeal aside, the respondent could not, therefore, have reasonably been expected to know that he would be welcomed back to work and so had reasonable cause to stay away from work.

Employment – trade union – trade union registered for particular sector – whether employees entitled to join another trade union – whether employer obliged to deduct union dues for union not registered for that sector

Zimbabwe Banking & Allied Workers Union & Anor v *Beverley Bldg Soc & Ors* HH-63-07 (Patel J) (Judgment delivered 17 September 2007)

The first applicant trade union was originally registered in February 1991 to cover banking institutions and in April 1992 its scope of coverage was varied to cover financial institutions. Until December 2004 all the employees of the respondent building society were members of another trade union, but then many of these employees resigned from the other union and opted to join the first applicant. Nevertheless, the respondent continued to deduct union dues from all of its employees

in favour of the other union. The respondent considered that it was bound to do so in terms of ss 52, 53 and 54 of the Labour Act [*Chapter 28:*01], as read with the Collective Bargaining Agreement: Commercial Sectors (SI 45 of 1993) which applies to all commercial entities, including building societies. The first applicant contended that the respondent was a financial institution within the scope of the Collective Bargaining Agreement: Banking Undertaking (SI 273 of 2000). The applicants sought a *declaratur* that SI 45 of 1993 did not apply to the first applicant's members, coupled with an order compelling the respondent to deduct and forward to the first applicant the union dues of such of its employees as are members of the latter. The respondent argued that the first respondent was not a party to SI 45 of 1993 and was not duly registered to claim union dues from the respondent's employees. Moreover, it argued that it was regulated by the Building Societies Act [*Chapter 24:02*] and was not a financial institution within the first applicant's scope of coverage. It argued that ss 52, 53 and 54 of the Act were designed to curb the mischief of multiplicity of union representation in order to achieve uniformity and equity in the collective bargaining process.

Held: (1) In terms of s 2(1) of the commercial sectors agreement, the agreement applies to all employers and employees in the "commercial sectors of Zimbabwe", which in terms of s 3 as read with the First Schedule, includes "building societies". It also includes "financial institutions excluding commercial banks, merchant banks (accepting houses) and discount houses". The banking undertaking agreement, on the other hand, was said to apply *inter alia* to registered commercial banks, registered accepting houses (merchant banks), registered discount houses and financial institutions. Although General Notice 101 of 2005, promulgated in terms s 3(3) of the Banking Act [*Chapter 24:20*], applied a significant number of the provisions of the Banking Act to every building society regulated by the Building Societies Act [*Chapter 24:02*], it did not operate to obliterate the difference between banks and building societies to such a degree that both entities must now be regarded without distinction as financial institutions. Although banks and building societies are both subsumed under the general rubric of "financial institution", the distinction between them remains legally and practically intact. The Banking Act and the Building Societies Act constitute quite separate regimes which apply to distinct financial entities, but with overlapping regulatory effect whenever this is deemed expedient by the regulating authority. The distinction between the banking sector and the building society sector is explicitly and rigidly maintained by the two separate regimes embodied in the two agreements. A building society, *stricto sensu*, is governed exclusively by the Commercial Sectors Agreement and falls outside the ambit of the Banking Undertaking Agreement.

(2) Analysis of ss 4(2), 30(3), 50(1), 52(2), 53 and 54 of the Act shows that a trade unon's right to collect union dues from its members is confined to those of its members who are employed or engaged in the undertaking or industry for which it is registered. A trade union is not entitled as of right to collect union dues from its members employed in an industry or undertaking for which it is not registered. The employer's obligation to collect union dues, by means of a check-off scheme or in any other agreed manner or pursuant to a written authorisation, and to transfer such dues to the trade union concerned must be restricted to a trade union registered in the industry or undertaking in which its members are employed. Such trade union, in effect, constitutes "the trade union concerned" for the purposes of levying union dues. To interpret these provisions otherwise would mean that an employer would be obliged to collect and transfer union dues to a trade union with no capacity to represent the interests of the employees from whom those dues are levied. That would negate the very purpose of collecting union dues from employees, viz. effective trade union representation of those employees in the industry or undertaking in which they are employed. There is nothing in law to stop an employee from joining and paying subscriptions to a trade union which does not represent his industry or undertaking but that does not oblige his employer to collect and transfer union dues to that trade union in accordance with ss 52 and 54.

(3) The ILO Freedom of Association and Protection of the Right to Organise Convention, No. 87 of 1948, prescribes the right of workers and employers to establish and join organisations of their own choosing for furthering and defending their respective interests. Section 21 of the Constitution guarantees the right of every person to form or belong to any association for the protection of his interests. However, this freedom of association does not *in se* include the right to pursue the objects, purposes and activities of a given association. If there is any such right, it certainly is not one that is constitutionally recognised and any claim to it must be established *aliunde*, viz. by statute or the common law. Sections 52 and 54 of the Act cannot be said to impede or circumscribe the freedom of association of those members or of the trade union as guaranteed by s 21 of the Constitution and by art 2 of the Convention. The limitations envisaged by the statutory provisions do not bear on the right to form or belong to any trade union. Conversely, a trade union's claim to collect union dues in a manner not sanctioned by statute cannot properly be conceived to form part of the freedom of association. The fact that a particular trade union is not entitled to levy union dues in a given industry through a check-off scheme may in practice militate against the desirability of joining or belonging to it, but the legal right to form or belong to the union remains intact and unimpaired.

Evidence – reliability – demeanour – extent to which demeanour should be relied on – should only be relied on where determination cannot be made on basis of available evidence

S v *Tambo* HH-56-07 (Uchena J) (Judgment delivered 12 July 2007)

An accused's poor demeanour does not justify a finding against him when the evidence, including that of the State, clearly supports his defence. Demeanour is a product of impressions created by the conduct of a witness in the mind of a judicial officer. Poor demeanour could be due to the witness's discomfort because he is not telling the truth. It can in some cases be due to the witness succumbing to the intimidating atmosphere of a courtroom or even to the normal character of the witness. Some people are strong while others are weak. This will have a bearing on how they present themselves before the court. Judicial officers must take these factors into consideration before condemning a witness's evidence on the basis of demeanour. It is therefore important for judicial officers to carefully examine the demeanour of a witness before drawing adverse inferences from it. Demeanour should only be relied on in cases where a determination cannot be made on the basis of the available evidence.

Exchange control – offences under exchange control legislation relating to foreign currency – reward payable to person providing information regarding such offences – when reward payable – only payable when foreign currency recovered

Chapfika v *Reserve Bank of Zimbabwe* HH-77-07 (Patel J) (Judgment delivered 26 November 2007)

The entitlement of a whistleblower to the prescribed monetary reward for providing information about exchange control offences is contingent upon the detection and prosecution of such an offence and the consequent recovery and forfeiture of funds or the recovery of funds *per se*, notwithstanding that no prosecution of an offence is instituted. In both scenarios the common and essential prerequisite is the recovery of convertible foreign currency. Once such recovery is effected, the informant is entitled to be awarded 10% of the amount recovered. If no recovery is effected, the informant is entitled to nothing, even if a successful prosecution takes place and a fine is imposed.

Family law – child – guardianship – child born out of wedlock – right of mother to guardianship – when may be deprived of custody – position and rights of natural father – child's wishes – irrelevance of – need for reform of law

Lothian v *Valentine* HH-91-07 (Gowora J) (Judgment delivered 3 October 2007)

The cardinal common law principle is that the mother of a child born out of wedlock is its legal guardian from birth until some special order is made by court. The father to such child cannot claim custody as of right, even if he pays maintenance for the minor child, but he may, in the same manner as any other third party, claim custody of such child. The court, in the exercise of its discretion, may award him access or custody of such minor child if he has made application and if the court is satisfied that it is in the best interests of the minor child to do so. It would be incumbent upon the father of such child to show the court that the mother should be deprived of custody, but the court will not intervene until or unless there is some very strong ground compelling it to do so. The child's preference does not affect the issue either. It is only the rights of the mother that are considered unless the father can show that the mother has not been exercising such rights properly. Even if it is in his best interests for him to live with his father, before the court can determine that, it, the court has to be satisfied that the mother is not exercising "her rights" over the child before it can interfere with those rights.

The inherent rights that a mother has in respect of children born out of wedlock were developed as principles a long time ago. The incidence of couples setting up house and having issue out of these informal unions was frowned upon. The children were ostracized by society in view of the manner of their birth. Times have moved on since then and society no longer frowns on such unions. It therefore defies logic that society has moved on but the justice system in this country appears to be still stuck in a time warp. Society has variously recognized that children have rights which must be given effect to. This is why when the court considers applications for custody or access, the welfare of the minor child is the overriding concern. The law should therefore recognize that in as much as the court considers that it is giving weight to the best interests of the minor child, in effect it is recognizing what rights the child has, that is, the right to be placed in an environment that is best for the child. Such child should also be accorded the right to have access to or to refuse access to a parent. It is now the court that is depriving these children of their right to relate to both parents on the legal footing of illegitimacy, itself recognized as an archaic and derogatory appellation.

Family law – child – guardianship – grant of to person other than child's parent – principles – removal of child from jurisdiction by such person – what must be shown

In re *Maposa* HB-115-07 (Cheda J) (Judgment delivered 22 November 2007)

The applicant was the aunt of a minor child. The child's mother had died but his father, who was unemployed, was still alive. With the consent of the child's father, she applied for sole guardianship of the child, her intention being to remove the child from the jurisdiction, to the United Kingdom where she lived and worked.
Held: while that guardianship of a minor child can be granted to one parent to the exclusion of the other, the courts should be slow in granting that status to a third party. The reason is that, the court being the upper guardian of all minors, it should grant guardianship and order subsequent removal from its own jurisdiction only after serious considerations of the circumstances surrounding such application. While the best interests of the child are the first and paramount consideration, they are not the sole consideration in the determination of the suitability of an applicant for guardianship. Other considerations come into play. The wishes of an unimpeachable parent undoubtedly stand first. Although *in casu* the minor's father expressed wish was in favour of guardianship by the applicant, the applicant still had to satisfy the court of her suitability as a new parent. She should satisfy the court that she was in a position to adequately look after the child and was a fit and proper person to adopt the child. In that regard the child's welfare should not be measured only by money or physical comforts, but by all factors that will affect its future. The court should not rely on the applicant's ability to support the child by her mere say-so in an affidavit; she must go further and convince the court by authentic documentary proof of her capacity to do so. This she had failed to do.

Family law – child – guardianship – grant of to person other than child's parents – principles – parent willing to transfer guardianship – limited circumstances in which parent may do so

Musonza v *The Master* HH-89-07 (Guvava J) (judgment delivered 20 December 2007)

The applicant sought an order granting her guardianship of her niece. The child's mother had died but her father was still alive and working in Zimbabwe. He had guardianship and custody rights over the child. He filed an affidavit in support of the application, asking the court to divest him of his rights of guardianship and awarding these to the applicant. The applicant, a nurse, wanted to take the child to go and live with her in England, where she had a job.

Held: parental power consists of duties and rights which parents have in respect to their minor children. Parents acquire parental power over a legitimate child at the time of its birth. The natural guardianship of parents is identical with parental power. This power cannot be waived or abandoned in favour of someone else as this is contrary to public policy. The purpose of having a public policy which is against transfer or delegation of parental power in favour of another is basically to protect the child from abuse. This could occur should the parental power fall into the wrong hands. Consequently, transfer of parental power is only allowed in very limited circumstances and normally only after a full enquiry has been conducted so as to safeguard the interests of the minor child concerned. Under the common law there are basically three categories which are recognized by law whereby guardianship or parental power may be lawfully transferred. These are adoption, *legitimatio per subsequens matrimonium* and *venia aetatis* (a grant by a sovereign or a court of the status of majority to a minor). Guardianship cannot be transferred from one person to another if it does not fall under any of these categories. The willingness of parents to give away their guardianship does not appear to have any significance in the ultimate decision by the court of whether or not to grant the guardianship of a minor child to another person. The High Court, as upper guardian of all minor children, may intervene especially in circumstances where a minor child would effectively be without a guardian. The courts may also divest a parent of guardianship where it is established that to retain guardianship in the parent would pose a danger to the child.

The inquiry into guardianship, like that of custody, cannot be one sided. It is not only an inquiry into the advantages that will accrue to the child if guardianship is granted to the applicant but also an inquiry into why the respondent must be divested of his guardianship. Thus, an inquiry seeking to divest one parent of guardianship in favour of another or of a third party must involve not only an inquiry into why and how the respondent parent must be divested of guardianship but also why the applicant is deemed suitable to be able to discharge those legal obligations that are imposed on natural guardians by law. An inquiry into guardianship is an inquiry into the suitability of a parent to discharge the legal obligations imposed by law on the guardian of a minor child. These issues relate to controlling his estate and assisting him in litigation, among other duties. It is not an inquiry into issues like where the child will live or how and where it will be educated, as those inquiries relate to issues of custody.

Insolvency – debtor – who is – officer of a company – creditor of company – cannot seek sequestration of officer's estate unless corporate veil lifted

Prime Sole (Pvt) Ltd v *Kazi* S-42-07 (Gwaunza JA, Cheda & Garwe JJA concurring) (Judgment delivered 26 November 2007)

The appellant sought an order for the sequestration of the respondent's estate as insolvent. The appellant and the respondent had negotiated an agreement, (which they did not reduce to writing) in terms of which the latter was to see to it that the former's obligations to its suppliers in South Africa, to the value of over US$100 000, were met. This was to be effected through the use of free funds held outside the country. The applicant in its turn was to pay, in local currency, and in Zimbabwe, the Zimbabwean dollar equivalent of the funds owing, less a discount. Two invoices were issued in the name of a local company. The applicant thereafter made staggered payments of the Zimbabwe currency sum agreed on. None of the payments were made directly to the respondent. Instead, they were made to the company which issued the invoices, as well as two other companies, while one payment was made to an individual. It emerged that most of the sums due in South Africa were not paid as agreed and the appellant demanded the return of the balance. Three undated cheques drawn on one of the companies were handed to him but these were dishonoured on presentation. The respondent argued that the appellant should have looked to the company which issued the invoices for payment of the sum owed to him.

Held: the relevant part of the Insolvency Act [*Chapter 6:04*] defines "debtor" as a person who "is a debtor in the usual sense of the word"**.** The definition specifically excludes a body corporate or company or other association of persons which may be placed in liquidation or wound up in terms of the law relating to companies. Thus a debtor, according to this definition, must be a natural person. While the appellant dealt with the respondent in negotiating the agreement in question, it tendered no proof that the respondent was representing himself personally. Given the latter's averment that he negotiated with the appellant in his capacity as a representative of one of the companies, the appellant had a heavy burden of laying a basis for a finding by the court that the respondent was acting on his own personal behalf. The appellant has not discharged that burden. The appellant took a risk when it failed to ensure that such a weighty transaction was reduced to writing. The appellant did not dispute the existence of the companies, which held active bank accounts into which the funds were deposited. In the face of this, as long as the appellant did not lift the corporate veil of these companies, they remained separate and distinct from the respondent. Thus, when one of these companies, whose separate identity from the respondent the appellant has failed to challenge, generates invoices and the appellant of its own accord makes payment to that company, it becomes difficult to challenge the respondent's assertion that he had negotiated the agreement in question on behalf of that company. Although the respondent had signed the three dishonoured cheques that were drawn on a closed account, signing a cheque on behalf of a company - even where the account on which the cheque is to be drawn may be closed - does not of itself transfer the liability of the company to the individual who signs the cheque. That such an act might have implications in respect of criminal law is not relevant to the dispute at hand. Since the respondent was not a debtor, as defined, a sequestration order could not be granted.

Interpretation of statutes – meaning of words – primary and ordinary meaning of word – secondary meaning should not be used where primary meaning is clear

Murowa Diamonds (Pvt) Ltd v *ZRA & Anor* HH-88-07 (Makarau JP) (Judgment delivered 12 December 2007)

See below, under REVENUE AND PUBLIC FINANCE (Duty and value-added tax – payment of in foreign currency when certain goods imported).

Practice and procedure – application – interdict – grant of – requirements – need for clear right to be established – material disputes of fact – clear right not established – interdict should not be granted

Nument Security (Pvt) Ltd v *Mutoti & Ors* S-32-07 (Cheda JA, Chidyausiku CJ & Malaba JA concurring) (Judgment delivered 5 November 2007)

Where there are irreconcilable disputes of fact, it is not possible for an applicant for an interdict to establish a clear right and an interdict should not be granted.

Practice and procedure – application – urgent – application for spoliation order – generally should be dealt with on urgent basis

Gifford v *Muzire & Ors* HH-69-03 (Kudya J) (Judgment delivered 18 September 2007)

See below, under PROPERTY AND REAL RIGHTS (Spoliation order).

Practice and procedure – judgment – default judgment – rescission – judgment obtained improperly or fraudulently – not a judgment granted under the rules of court – no need to seek condonation for delay in applying for rescission

Chiwhayi Entprs (Pvt) Ltd v *Atish Invstms (Pvt) Ltd* S-23-07 (Sandura JA, Cheda & Malaba JJA concurring) (Judgment delivered 7 September 2007)

A default judgment obtained fraudulently or improperly cannot be described as a default judgment granted "under these rules or under any other law", in the words of r 63(1) of the High Court Rules 1971. There would thus be no requirement on the part of an applicant to seek condonation of any delay in filing the court application for the rescission of the default judgment.

Practice and procedure – judgment – judgment by consent – claim expressed in foreign currency, alternatively in local currency at market rate – not permissible to grant judgment at "market" rate – official rate only allowed – date on which official rate to be determined

Avacalos v *Riley* HH-75-07 (Makarau JP) (Judgment delivered 31 October 2007)

The plaintiff issued summons against the defendant, claiming the sum of US$ 64 000 or its equivalent in Zimbabwean currency at the market rate prevailing on the date of payment. After initially opposing the claim, the defendant the defendant consented to judgment in the alternative prayer as set out in the plaintiff's declaration. In the consent to judgment filed of record, the defendant specifically consented to judgment in the sum of Zimbabwe $16 000 000, representing the sum of US$64 000 at the official exchange rate as at the date of the consent. The plaintiff refused to accept the defendant's consent to judgment and requested that the matter be referred to trial on the sole issue of whether the "market" rate of exchange referred to in the summons is the same as the official rate upon which the defendant made payment or is some other higher rate, known in common parlance as the parallel or black market rate. The facts not being in dispute, the matter was argued as a stated case. Three main arguments were put forward by the plaintiff: (a) that judgment should be granted to the plaintiff in the sum of US$64 000 and not in the sum of the local currency equivalent in which the defendant consented to judgment; (b) alternatively, that the sum of US$64 000 be converted to local currency at the parallel market rate; (c) alternatively, that if the local currency equivalent of the amount due to the plaintiff is to be converted at the official rate, the rate applicable should not be that which obtained on the date the consent to judgment was filed, but that which would be obtaining when the plaintiff sought to enforce the judgment.
Held: (a) a judgment may be given in foreign currency where the obligation to pay is in that currency. Since the defendant had consented to judgment, it was not possible to deal with the matter on the merits and thereby determine whether the plaintiff was entitled to judgment in foreign currency. The plaintiff worded his declaration in such a way that he gave the defendant a choice as to the currency of the judgment. (b) While there is a shortage of foreign currency in the country, it is illegal to pay at any other rate other than the official rate. While the parallel market is a reality and may be the only viable market at times, the court cannot lend itself to an illegality and validate its operations by giving a judgment that makes reference to it. (c) The principle that the amount of foreign currency in a judgment is to be converted into local currency at the date when leave is given to enforce the judgment only applies where the judgment is expressed in foreign currency. Where the judgment is expressed in local currency, then the amount of the judgment it is set and determined on the date that the consent to judgment is filed. It cannot be re-converted on the date that judgment is finally given as to do so would be highly prejudicial to the defendant, who would have unequivocally elected to have a judgment entered against him in a certain specified amount. (d) The differences between the exchange rates or markets obtaining in the country will continue to work hardships on people in the position of the plaintiff. It is hoped that the situation will normalize in the near future so that litigants will not lose faith in a legal system that is compelled by law to recognize only the official rate which is not only unrealistic but is never part of the parties' consideration when they enter into transactions involving foreign currency.

Practice and procedure – parties – citation of – need to cite natural or legal persons – failure to do so – summons a nullity and incapable of amendment

J D M Agro-Consult & Mktg (Pvt) Ltd v *Editor, The Herald & Anor* HH-61-07 (Gowora J) (Judgment delivered 8 August 2007)

The plaintiff brought an action for defamation, citing as defendants "The Editor, *The Herald*" and "*The Herald* Newspaper". Appearance to defend was entered and a plea was filed. At the pre-trial conference, the plaintiff, by consent, amended the

summons to cite, as second defendant, Zimbabwe Newspapers (1980) Ltd. No attempt was made to describe the first defendant as anything other than "The Editor, *The Herald*". At the trial, the defence took a point *in limine*, that the summons was invalid on the grounds that there were no defendants before the court. The Editor of *The Herald*, cited as the first defendant, did not exist: the editor of a newspaper is a position within the structures of a newspaper and is neither a natural nor a legal person. There was also no entity called "The Herald Newspaper" and the attempt to amend the summons at the pre-trial conference did not cure the invalidity. The plaintiff argued (1) that the defendants were not entitled at the trial stage to raise a point in *limine*. The pleadings had closed and the defendants were not entitled thereafter to raise such a point and that to do so was acting in bad faith. (2) The citation of the defendants was due to a misnomer which could easily be cured by an appropriate application to amend the summons and declaration.
Held: (1) A party can amend his pleadings at any time, provided that there is no prejudice to the other party which is not capable of being cured by an award of costs. Such an application can be made even after pleadings have closed. The point raised by the defence did not fall under exceptions or special plea as it did not attack a defect in the pleadings. It dealt with an irregularity in the summons itself which cannot be amended. The point in *limine* was a legal issue, in which the defendants averred that the summons was bad at law in that no defendant had been brought before the court and as a result the proceedings were a nullity. (2) The amendment of the summons at the pre-trial conference was without effect, as the party named as the second defendant did not exist at the time that the summons was issued and served. (3) Even though the plaintiff tried to cure the defective summons in respect of the second defendant, no attempt to do so was made in respect of the first defendant. The position of editor of a newspaper is an occupation wherein the occupant can change from time to time. It is not a natural or legal person and there was no person identified by that name. (3) That fact that the two defendants entered appearance to defend and proceeded to file a plea was irrelevant. The process of filing pleadings under those names would not have imbued the summons with any form of legality. The matter would therefore be struck off the roll.

Property and real rights – spoliation order – requirements for – peaceful and undisturbed possession – possession tainted with illegality – not peaceful and undisturbed possession

Gifford v *Muzire & Ors* HH-69-03 (Kudya J) (Judgment delivered 18 September 2007)

All that an applicant for a spoliation order has to show is that his matter cannot wait the observance of normal procedures and time frames set by the rules of court for ordinary applications without rendering nugatory the relief that he seeks. The preservation of law and order and the prevention of self help in the resolution of disputes place an application for spoliation in this unique position. To wait for the ordinary time limits and procedures to apply would undermine these salutary aims and encourage the usurpation of the due process by the strong and well connected at the expense of the weak and disadvantaged. In determining whether a matter involving spoliation is urgent, the court will in the exercise of its discretion obviously be guided by the specific averments of fact that are made in the particular case before it.
One of the requirements for a spoliation order is that the applicant must show that he was in peaceful and undisturbed possession of the property. Where a farmer who had been dispossessed of his farm under the land reform programme remained in physical control of the farm even though his continued stay had become illegal, his possession could not be peaceful and undisturbed because it was tainted with illegality.

Revenue and public finance – duty and value-added tax – payment of in foreign currency when certain goods imported – goods paid for with funds "obtained" from authorised dealer – resident of Zimbabwe exempt from paying duty in foreign currency

Words and phrases – "obtained"

Murowa Diamonds (Pvt) Ltd v *ZRA & Anor* HH-88-07 (Makarau JP) (Judgment delivered 12 December 2007)

The applicant imported motor vehicles, using funds from its foreign currency account to pay for them. The revenue authorities demanded that duty be paid in foreign currency, as the goods fell under the description of "luxury goods" in the Customs and Excise (Designation of Luxury Items) Notice SI 80A of 2007. The applicant argued that it was exempt in terms of s 3 of the Notice, which provides that "every resident of Zimbabwe who imports luxury items that were purchased using funds obtained otherwise than through an authorised dealer" must pay duty in foreign currency. The respondent argued that that when a person uses foreign currency in his account, he is merely accessing those funds and is not "obtaining" the funds from an authorized dealer for the purposes of the statutory instrument

Held: The applicant was a resident of Zimbabwe and the funds employed in the purchase of the vehicles in dispute were funds processed from a foreign currency account that it held with its commercial bank, an "authorised dealer" in terms of the statutory instrument. The ordinary or every-day of "to obtain" is "to come into possession of"; "to get" or "to acquire". The effect of replacing "obtain" with "get" would be that residents of Zimbabwe who "get" funds to import a luxury item other than through an authorised dealer are liable to pay duty and value-added tax in foreign currency. Those who "get" funds through an authorised dealer are exempt. Thus, those who have such funds processed through an authorised dealer in whatever form is appropriate for the importation are exempt from paying duty and tax in foreign currency. The exact nature of the process through which the funds are "got" is immaterial. Such funds may be got from funds already held to the credit of an account, they may be purchased from the bank or, where appropriate and acceptable, a line of credit may be extended to the importer through arrangements made by the authorised dealer. The material issue is not so much how the funds are accessed but from whom such funds are got. The meaning that the respondents would have the court use for the word "obtain" was clearly a departure from its primary and ordinary meaning. There was no scope for the court to ascribe a secondary meaning to the word "obtain" in the face of a clear primary meaning of the word. It was nonsense to say that one "owns" the foreign money deposited with a bank. This would cast such a burden on banks as to destroy the economical concept of money that has so eased commerce over the years. It is the value of the money, not the physical notes and coins, that one owns when one says one has money in a bank. There was nothing in the language used by the law maker in the statutory instrument or the context of the legislation to justify the expansion of the word as urged by the respondents.