Cases decided January - June 2008

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CASES DECIDED JANUARY – JUNE 2008

Administration of estates – executor dative – appointment of – letters of administration – form of – exact compliance with statutory form not required – equivalent compliance sufficient

Estate Garande v Masaiti & Ors HH-51-08 (Kudya J) (Judgment delivered 19 June 2008)

The letters of administration appointing the executor dative to a deceased estate are valid if they are in substantial compliance with form B, which is set out in the Second Schedule to the Administration of Estates Act [Chapter 6:01], as long as it serves to inform the world at large that the Master has appointed the named individual on a given date as the executor of a deceased estate. Thus, even though peremptory language is used, equivalent as opposed to exact compliance with the provisions of s 23 suffices to fulfill the aim and objectives of the section, that is, the identification of the duly appointed executor in a given deceased estate.

Appeal – noting of – effect – court or tribunal other than court of inherent jurisdiction – such court or tribunal has no power to order stay of execution – noting of appeal does not suspend operation of decision appealed against

Longman Zimbabwe (Pvt) Ltd v Midzi & Ors S-54-07 (Garwe JA, Sandura & Gwaunza JJA concurring) (Judgment delivered 11 March 2008)

The respondents were, in terms of the Rent Regulations1982, statutory tenants of dwellings owned by the appellant. The appellant sought their ejectment on the grounds that it required the dwellings for renovation, followed by occupation by its own employees. The Rent Board granted an application for the ejectment of the respondents and later issued a certificate permitting their ejectment. The respondents appealed against the Rent Board's decision to the Administrative Court, raising several points of law regarding the validity of the appellant's notice to quite and of the Board's certificate and order. In the mean time, the appellant applied to the High Court for an order of ejectment. The respondents opposed the application, raising the same grounds as in their appeal to the Administrative Court. The High Court upheld one of the grounds raised by the respondents, made no decision on the rest, and dismissed the application for ejectment on the grounds that the effect of the noting of the appeal by the respondents against the certificate of ejectment was to suspend the decision of the Rent Board. The appellant appealed against the High Court's decision. Apart from arguing that the High Court's

decision was correct, the respondents again raised the points being raised before the Administrative Court.

Held: (1) whilst the appeal before the Administrative Court remained pending, the issues raised before the High Court and thereafter before the Supreme Court were lis pendens. The Administrative Court would need to address its mind to the issues raised in the appeal and thereafter make a determination.

(2) The accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. The position may now be accepted as settled in this jurisdiction that unless empowered by law to do so, an inferior court, tribunal or other authority has no power to order the suspension of its own orders or judgments and, further, that the noting of an appeal against the judgment or order of such a court, tribunal or other authority, in the absence of a statutory provision to that effect, does not have the effect of suspending the operation of the judgment or order that is sought to be appealed against.

See also Kudinga v Dhliwayo & Anor HH-22-08 (Makarau JP) (Judgment issued 12 March 2008) (below, under Appeal (Noting of – effect – whether suspends operation of decision appealed against)

Appeal – noting of – effect – interlocutory order issued by High Court – when leave to appeal against such order not required – matter relating to custody of children – includes matter relating to access by non-custodian parent

Pissas v Pissas HH-35-08 (Gowora J) (Judgment delivered 9 April 2008)

After her divorce from the applicant, the respondent had been awarded custody of the children, while he had access to them. She subsequently obtained an order from the High Court permitting her to take the children out of Zimbabwe and relocate with them in the United Kingdom. The applicant had opposed the granting of the order but was unsuccessful. The applicant noted an appeal against the order. Learning that it was her intention to take the children out of the country in spite of the noting of the appeal, he applied for an urgent interdict restraining her from taking the children out of the country and requiring her to deliver their passports to the Registrar of the High Court. His attitude was that whilst he did not object in principle to the children relocating to England, such relocation should be in circumstances where it is in their best interests to do so. He did not want them removed until the details on their livelihood had been established in a satisfactory manner.

The respondent contended that the appeal had not been properly filed in the absence of leave from the

court because the appeal was against an interlocutory order. The applicant contended that the order, although issued as a provisional order, was final in effect due to the nature of the relief granted.

In terms of s 43(2) of the High Court Act [Chapter 7:06], no appeal shall lie to the Supreme Court from the High Court from an interlocutory order or interlocutory judgment, without the leave of either the judge concerned or a judge of the Supreme Court, except, inter alia, where the custody of minors is concerned or where an interdict is granted or refused. The applicant argued that the matter concerned custody and an interdict had been granted; the respondent argued that the matter was concerned with access, not custody.

Held: (1) Access is an incidence of custody and the two go hand in hand where there are rights of more than one parent at stake. It cannot have been the intention of the legislature to give to parents who are engaged in issues relating to custody an automatic right of appeal to the Supreme Court, whilst not granting the right to parents wishing to enforce rights to access. Were access to be excluded in the exception to the section it would lead to an absurdity such as would not have been the intention of the legislature.

(2) Even if this approach was incorrect, part of the order from the judgment appealed against was an interdict and on that basis the appeal would qualify under the exceptions referred to in s 43(2).

(3) The noting of the judgment by the applicant had the effect of suspending the order issued by the High Court until the conclusion of the appeal and the respondent was not entitled, without having obtained leave to execute the judgment, to remove the children from the jurisdiction of the court.

Appeal – noting of – effect – whether suspends operation of decision appealed against – decisions of courts or tribunals other than the superior courts – whether suspended by noting of an appeal

Kudinga v Dhliwayo & Anor HH-22-08 (Makarau JP) (Judgment issued 12 March 2008)

The settled approach of the High Court – that the common law principle to the effect that the noting of an appeal suspends the decision appealed against – only applies to judgments of the superior courts. There is, however, a ruling of the Supreme Court to the effect that the operation of any judgment is suspended by the noting of an appeal. The correctness of that statement is questionable and the decision ought to be revisited.

Appeal – record – inspection of by parties – procedure to be followed – party and Registrar not in agreement on what should be included or omitted – procedure to follow

Bubye Minerals (Pvt) Ltd v The Registrar & Ors HH-49-08 (Chitakunye J) (Judgment delivered 18 June 2008)

Part of the process of preparing the record for a civil appeal is that parties, or their legal representatives, should inspect the record in order to ensure that it complies with rule 15(8a) of the Supreme Court Rules 1964 (RGN 380 of 1964). The word '"inspect" may be defined as "to look at carefully; to examine or review officially". Where such examination has occurred it is then expected the examiner will certify so. A party examining the record must of necessity append a seal in the form of a signature confirming the examination. To merely examine without such a seal would be of no relevancy to the process. Equally, merely to append one's seal by way of signature without examining the record would not be in compliance with the rules. Without that certificate the registrar cannot comply with r 15(10), which requires that after completion of the record the registrar shall certify that it is correct. This certification by the registrar is only possible where the parties have inspected the record and certified so. Where there is a dispute arising from the preparation of the record – for example, about what should or should not be included – the parties may, in terms of r 15(9), submit the dispute to a judge.

Rule 15(8b) provides that where the appellant has not inspected the record within the time given or extended, the registrar shall notify the registrar of the Supreme Court of that fact, and thereupon (meaning immediately thereafter) the appellant shall be deemed to have abandoned his appeal. Where such has occurred the appellant has to take steps to have the appeal re-instated if he is still interested in the appeal.

Appeal – set-down – notice of – appellant not receiving notice – appropriate course for court to take

Jamu v City of Harare S-53-07 (Malaba JA, Chidyausiku CJ & Cheda JA concurring) (Judgment delivered 4 March 2008)

The appellant had noted an appeal against a decision of the Administrative Court. Heads of argument were filed on her behalf. The appeal was set down for hearing, but on the hearing date there was no appearance for the appellant. It emerged that the appellant was not served with the notice of set down and had no knowledge of the date of the hearing of the appeal.

Held: in terms of r 36(4) of the Supreme Court Rules, where there is no appearance for the appellant and the appellant has had notice of set-down, the court has a discretion, depending on the circumstances of each case, to hear the appeal or strike it off the roll or to postpone the hearing. Where, as here, the appellant had not had notice of set-down, the sub-rule does not apply. The court is not in a position to hear the appeal and the best course to take is to strike off the appeal from the roll with no order as to costs.

Appeal – set-down – set-down on urgent basis – appeal against provisional ruling which would have effect of settling main dispute – desirability of hearing appeal before main case heard – urgent set-down ordered

Diocese of Harare v Church of the Province of Central Africa & Anor S-2-08 (Chidyausiku CJ, in Chambers) (Judgment delivered 13 February 2008)

The parties had been engaged in acrimonious litigation. The litigation followed a split within the Anglican Church in Zimbabwe. The main dispute was to which of the formations was legitimate. Access to and use of the church premises and property was hotly contested. The dispute between the parties had given rise to multiple litigation and court applications. The applicant made an urgent chamber application in the High Court wherein it sought a provisional order against the respondents. In the provisional order, the applicant sought to prevent the respondents and their adherents from using church property under control of the applicant and to interdict the second respondent from holding himself out as bishop of the Diocese of Harare. Before judgment was handed down, further orders were granted by the High Court, regulating the use of the churches in the diocese. When judgment was given in the chamber application, the effect of the judgment was that the applicant was non-existent and had no locus standi to bring the matter to court. This judgment in effect determined the issues raised in the main case between the parties. The applicant appealed against the ruling and sought to have the appeal set down on an urgent basis. It argued that the issues should not have been determined in a chamber application for the issuance of a provisional order seeking to govern the relationship between the parties in the interim period while awaiting completion of the main case; the ruling would have the effect of tying the hands of the judge deciding the main case.

Held: the dispute between the parties should be resolved as a matter of urgency. Further, the appeal against the judgment should be determined before the main trial. This gave some urgency to the set down of the appeal, and set-down on the earliest available date would be ordered.

[Note: The judgment appealed against was Diocese of Harare v Church of Province of Central Africa & Anor HH-6-08. See below, under CHURCH (Government of). – Editor.]

Appeal – striking out – failure to comply with Supreme Court Rules – appeal noted out of time and no application made for condonation – judge in chambers not having jurisdiction to strike out appeal

Church of the Province of Central Africa vKunonga & Anor S-7-08 (Chidyausiku CJ, in chambers) (Judgment delivered 13 March 2008)

The applicant obtained an interdict from the High Court against the respondents, who filed a notice of appeal. The notice of appeal was not filed timeously in terms of r 30 of the Supreme Court Rules 1964. The applicant applied to a judge of the Supreme Court, in chambers, for the notice of appeal to be struck out. The issue for decision was whether a judge in chambers had the jurisdiction to strike out an appeal for failure to comply with the Rules.

Held: Rule 31 specifically gives a judge who dismisses an application for extension of time jurisdiction to have the notice of appeal struck out after the refusal to grant the extension of time within which to note the appeal. Where, however, there is no application for condonation, a judge who strikes a matter off the roll for non-compliance with the Rules pre-empts the discretion of the court to grant condonation or not and assumes that power. There is no provision in the Rules that authorises the dismissal of an appeal other than on the basis provided for in the Rules. Where an appeal does not comply with the Rules, it is up to the court, and not a judge in chambers, to order the striking off of the matter for failure to comply with the Rules or to grant the indulgence for failure to comply with the Rules. A distinction must be made between those matters where the notice of appeal is invalid by reason of failure to comply with the provisions of the statutes and a situation where a notice of appeal is invalid by reason of failure to comply with the Rules. Where the notice of appeal does not comply with the provisions of an Act of Parliament, the court has no discretion in the matter and the defect is incurable. In a situation like that, it is open to the court, and indeed to a judge of the Supreme Court, to order that the appeal is a nullity and is incurably defective. However, where the notice of appeal does not comply with the Rules, it is not incurably defective because the court has a discretion to overlook the defect. A judge in chambers should not preclude the court from considering whether the failure to comply with the Rules should be condoned or not.

Bank – overdraft – when an overdraft can be said to have been agreed upon – bank continuing to honour client's cheques even when insufficient funds stood in client's account – bill deposited as security for overdraft – bank not entitled to negotiate bill

Madondo NO v Zimbank HH-4-08 (Garwe JA) (Judgment delivered 30 January 2008)

The applicant was the liquidator of a discount house which had an account with the respondent bank. The discount house had deposited with the bank bills issued by the Grain Marketing Board as security for its overnight loans. The bank had allowed the discount house's account to go into overdraft in an amount far exceeding the value of the bills, even though there was no formal arrangement for overdraft facilities. Early in 2004 the Reserve Bank had closed down the discount house as being an "ailing institution". Two days later, the respondent bank liquidated the GMB bills for approximately a quarter of the value of the overdraft owed. The liquidator of the discount house sought an order that the respondent bank had violated ss 42, 43 and 112 of the Insolvency Act [Chapter 6:04], in that it allowed itself to obtain security on a previously unsecured debt and thereafter liquidated the security in circumstances which amounted to undue preference.

Held: (1) The suggestion by the respondent that there was no overdraft in the ordinary sense was not borne out by the facts. An overdraft is money lent. A banker is obliged to let his customer overdraw only if he had agreed to do so or such agreement can be inferred from a course of business. Here, whilst there may not have been an express request for an overdraft, it is clear from the respondent's conduct that in continuing to honour the discount house's cheques when the account did not have sufficient funds the respondent was agreeable to an overdraft.

(2) The liquidation of the bills prima facie had the effect of preferring the respondent against the other creditors. Under s 42 of the Act, such a disposition is voidable unless it is shown that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

(3) This disposition was not made in the ordinary course of business. Before the security was delivered, it must have been evident that the discount house was unable to pay its debts. The security that was delivered was not even sufficient to cover the discount house's indebtedness to the respondent at that stage. There was a conscious effort on the part of the respondent to ensure that it, and it alone, benefited from the liquidation of the bills even though it must have been apparent that the discount house had other creditors.

(4) The respondent had no right to deal with the bills as owner and had no preference in the event of insolvency should it come about before the security had been realized. Where a bill is deposited as security for an advance, a bank is not entitled to negotiate the bill.

Church – government of – church's constitution – members and clergy bound by such constitution – effect of failure to follow procedures laid down in constitution – diocese purportedly withdrawing from province to which it belonged – diocese not following laid down procedures – legal action instituted in name of diocese – applicant having no locus standi

Diocese of Harare v Church of Province of Central Africa & Anor HH-6-08 (Hungwe J) (Judgment delivered 30 January 2008)

The applicant sought an urgent spoliation order against the first respondent, the Anglican Church's Province of Central Africa, and the second respondent, the bishop recognised by the Province as the Bishop of Harare. The applicant claimed to have broken away from the Province and thus sought to prevent the respondents from using the churches on the diocese and holding the second respondent out as being the Bishop of Harare.

There are 15 dioceses, including the applicant, which make up the first respondent. The Province is spread over Botswana, Malawi, Zambia and Zimbabwe. It is governed by a Constitution and other canons. Where a diocese wishes to withdraw from its Province to join another Province, that diocese

must act in terms of the Constitution and obtain the relevant approval for its intended course of action. The former Bishop of Harare and his group did not follow the laid down procedures in order for their move to obtain the requisite approval for their withdrawal from the Province.

The respondents claimed that the applicant's "withdrawal" was unprocedural and therefore illegal as it was never endorsed by the relevant church organs as is required by the Constitution. Accordingly, the Diocese of Harare remained an integral part of first respondent as it has always been in the past. The other bishop could not claim to have taken the diocese out of the Province. As such, the second respondent contended, the Diocese had not instituted this action. Further, the respondents disputed that the applicant was in possession of the various church premises. These were owned by the first respondent which exercised its ownership through the Provincial Synod and, at diocese level, the individual Diocesan Trusts. The Diocesan Trusts thus held ownership for and on behalf of the first respondent. The possession and physical control of the church buildings, however, was vested in church wardens of the individual churches who are elected by the parishioners of the area. It is these wardens who were in physical possession and control of the churches and accordingly only church wardens could, in appropriate circumstances, bring an application for spoliation.

The applicant argued that in an application for spoliation the issue is whether there has been or has not been unlawful dispossession. The court therefore ought not to consider the issue of locus standi. The applicant also argued that it was entitled to a mandament in respect of the incorporeal right it had to minister to the faithful of the diocese. It claimed that the second respondent, by preaching in church premises under the Diocese of Harare, committed acts which amount to spoliation.

Held: (1) the applicant had no locus standi in judicio to bring the application. The applicant, through its agents in the person of the former bishop, elected not to follow the laid down procedures for withdrawing from the Province, thereby putting itself out of court. At law the applicant did not exist and therefore lacked capacity to sue.

(2) The question of locus standi was central to the determination of the availability of the remedy to the parties before a court. If the applicant's argument were taken to its logical conclusion it would mean that anyone could claim spoliation on behalf of a juristic person without the issue of that party's locus standi being inquired into. This would result in untenable situations and produce unintended consequences.

(3) A church is a voluntary association and the general principles applicable to such associations should apply. A voluntary association was founded on the basis of mutual agreement which entailed an intention to associate and consensus on the essential characteristics of the objectives of the association. The constitution of a voluntary association, which, together with its rules or regulations constituted the agreement entered into by its members not only determined the nature and scope of the association's existence but also prescribed and demarcated the powers of the association and its office-bearers. By accepting appointment to the office within the church, a minister or bishop, like any other officer-bearer, impliedly undertakes and affirms his wish to be bound by the constitution of that church. Conversely, the church, by accepting the membership of its office-bearers also impliedly confirms its obligation to

act in terms of its own constitution in the event that there is dispute regarding any aspect of the administration of the church. The applicant could not exist outside the constitution of first respondent. It had no separate constitution of its own and had no structures of its own other than those set out in the constitution.

(4) In any event, the applicant did not meet the requirements for a mandament van spolie. Civil possession, which is physical possession, detentio, accompanied by intention to hold such possession to the exclusion of everyone else, animus possidendi, would certainly qualify an applicant for the mandament. An applicant for the mandament must demonstrate that he was in exclusive possession of the property before he is entitled to the mandament. It should be recalled that the real purpose of the mandament was to prevent breaches of the peace. It was intended to protect possession not access. Assuming that the applicant was in possession of the church premises in issue, a church organ, such as the applicant, could not possess church premises to the total exclusion of other church organs and its membership, such as the respondents. By their very nature, it is inconceivable that the applicant and first respondent could competently claim the mandament over church premises as neither can possess a church building to the total exclusion of the other.

(5) In assessing whether any act of spoliation has been committed, the court has to balance the constitutional rights of the parishioners to worship, their right to be ministered by one of theirs, and their right to enjoy communion against the alleged unlawful invasion of the bishop's right to minister his flock. The inquiry must confine itself to whether, by preaching at various churches the second respondent committed an unlawful dispossession of a legally recognized right held by the bishop. It could not be said that, where a bishop of one diocese is invited by the faithful to minister in a different diocese and accepts that invitation, the services he may conduct amount to unlawful dispossession of whatever rights are held by the ordained bishop for the locality.

Companies – liquidation – liquidation and distribution accounts – when may be re-opened – account confirmed and creditors already paid – account may not be re-opened – procedure to be followed where person aggrieved by decision of Master – necessary to bring matter on review – need to follow normal review procedures

Zimbabwe Development Bank & Anor v Scott NO & Anor HH-25-08 (Gowora J) (Judgment delivered 23 January 2008)

The applicants sought to have the liquidation and distribution accounts of a company which had been placed in liquidation set aside and re-opened. They had, in August 2003, petitioned that the company be placed under liquidation. The first respondent was appointed liquidator. They proved claims which were stated in US dollars. The second respondent paid out the creditors' proven claims in local currency. The applicants returned the cheques, claiming that the second respondent had erred by using a conversion rate against the US Dollar which was prevailing at the time of liquidation instead of the rate prevailing

when payment was actually effected. The applicant therefore sought an order to have the distribution account re-opened and for the recalculation of the Zimbabwe dollar equivalent of their claims.

Held: the applicants could only rely on the provisions of the Companies Act [Chapter 24:03] for whatever relief they sought. The effect of placing a company in liquidation is to replace contractual rights that existed prior to liquidation with special rights created and governed by the Companies Act. They had to look to the Act in seeking redress in the event that the liquidator had not performed the duties required of him by the Act. The right they sought to be exercised was derived from s 283 of the Act. In terms of s 296, any person aggrieved by any decision, ruling, order, appointment or taxation of the Master under the Act may bring it under review by the court. As the Act does not make provision for the manner in which the review proceedings must be launched, proceedings for review have to done in accordance with the High Court Rules. Under the Rules, an application for review must be brought within a period of eight weeks from the date on which the suit, action or decision being complained of occurred. The applicants had only launched proceedings over a year after becoming aware of the decision.

In casu, all the creditors had been paid and the account was confirmed some fourteen or so months before the applicants thought of launching proceedings. Before a distribution account can be set aside it must be re-opened, and the applicants can only have it re-opened in terms of the Act. Section 283 of the Act precludes the re-opening of a final distribution account where there has been payment of a dividend.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 16B – acquisition of agricultural land by the State – removes right to challenge acquisition – s 18 impliedly repealed to that extent – power of legislature to amend Constitution – may amend in any way provided procedures for amendment fully complied with – s 23 – protection against discrimination – nothing on acquisition notices or s 16B referring to race of persons dispossessed of land – section not contravened

Mike Campbell (Pvt) Ltd & Anor v Min of National Security & Ors S-49-07 (Malaba JA, Chidyausiku CJ, Ziyambi, Gwaunza & Garwe JJA concurring) (Judgment delivered 22 January 2008)

The applicants were owners of a farm which had been compulsorily acquired as being necessary for implementation of the land reform program. The acquisition was challenged on a number of grounds, including that allegation that the applicants were deprived of their rights under s 18 of the Constitution and that the provisions of s 23, which prohibits discrimination on, among other things, grounds of race, were bring infringed.

Held: (1) there was nothing in s s 16B(2)(a)(i) of the Constitution and the acquisitions of the pieces of agricultural land which resulted from its operation which referred to the race or colour of the owners of the pieces of land acquired, so there was no question of violation of s 23 of the Constitution to be

considered.

(2) Underlying s 16B is the principle, which is almost a universal law, that every sovereign state has an inherent right to compulsorily acquire private property within its territory for public purposes with an obligation to pay fair compensation for the property acquired. The makers of our Constitution proceeded from the position that as the power to compulsorily acquire private property for public purposes is inherent in the state, the duty on the legislature was to determine the restrictions or conditions under which the power was to be exercised. As a result of the operation of this fundamental principle two separate but related procedures underlie the provisions of s 16B. The first relates to the actual acquisition of the land, whilst the second procedure relates to the right to payment of fair compensation. Under the first procedure, the acquisition is made to depend on the existence of a state of facts established by purely administrative acts of the acquiring authority. These facts are that the Minister whom the President has appointed as an acquiring authority publishes a notice in the Gazette identifying the agricultural land to be acquired and stating therein the purpose for which the land is required.

(3) Acquisition in terms of s 16B(2)(a) of the Constitution is a lawful acquisition of the agricultural land affected. As the acquisition of agricultural land is lawful, s 16B(3) provides that subss 18 (1) and (9) of the Constitution, which provide the right to protection of law and appropriate remedies against unlawful interference with or infringements of fundamental rights, shall not apply to the acquisition.

(4) The fundamental rights set out in Chapter III of the Constitution are not immutable. The Constitution does not have any provision which entrenches any of the provisions of fundamental rights beyond the reach of the exercise of the legislature to amend, add to or repeal any of the provisions of the Constitution. All the provisions of the Constitution, including those relating to fundamental rights, share one common feature of being liable to alteration or repeal. The duty of the court is limited to determining whether in enacting s 16B the legislature complied with the prescribed procedural and substantive requirements under s 52(1).

(5) Section 52(1) empowers the legislature to enact any law the effect of which is the taking away of any of the fundamental rights specified in the Declaration of Rights, provided the restrictions or conditions of the exercise of that power prescribed thereunder are complied with. In enacting s 16B of the Constitution, the legislature complied with all the requirements of the special procedure for making fundamental law prescribed under s 52(1) of the Constitution. The section is a legitimate exercise of the legislative power to determine the conditions under which the power inherent in the State to compulsorily acquire private property in agricultural land for public purposes can be validly exercised.

(6) The clear intention of the legislature in enacting s 16B(3) was to modify the provision of subss 18 (1) and (9) of the Constitution with respect to any challenges of the acquisition of agricultural land effected in terms of s 16B(2)(a). However, the right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away.

(7) The question what protection an individual should be afforded under the Constitution in the use and enjoyment of private property is a question of a political and legislative character. It not a judicial question. The general principle is that provisions of the Constitution should not be construed so as to take away the jurisdiction of courts of law. It is however subject to the first of all principles of construction that when in clear and unambiguous language the legislature in the proper exercise of its powers has provided that courts of law shall not have jurisdiction in a specific class of cases not pending before the courts at the time the ouster is made operational, the intention of the legislature must be respected and enforced.

(8) The right to protection of law under s 18(1), which includes the right of access to a court of justice, is intended to be an effective remedy at the disposal of an individual against an unlawful exercise of the legislative, executive or judicial power of the State. It is not meant to protect the individual against the lawful exercise of power under the Constitution. Once the state of facts required to be in existence by s 16B(2)(a) does exist, the owner of the agricultural land identified in the notice published in the Gazette has no right not to have the land acquired. The question whether an expropriation is in terms of s 16B(2)(a) and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. If the purported acquisition is, on the face of the record, not in accordance with the terms of s 16B(2)(a) a court is under a duty to uphold the Constitution and declare it null and void.

(9) Payment of fair compensation for improvements effected on such land within a reasonable time after the acquisition is not a pre-condition for the acquisition.

Constitutional law – Constitution of Zimbabwe 1980 – s 24 – enforcement of protective provisions – application to Supreme Court under s 24(1) – may not be made where applicant is party to proceedings in High Court or subordinate court – exceptions

Mann v Republic of Equatorial Guinea S-1-08 (Chidyausiku CJ, in chambers) (Judgment delivered 30 January 2008)

It is not open to a party in proceedings in the High Court or a subordinate court to apply to the Supreme Court in terms of s 24(1) of the Constitution except where the presiding officer violates the applicant's right in the process of considering the application for referral. If, for example, he had, out of selfish interest and in bad faith held that the raising of constitutional question by the applicant was merely frivolous or vexatious, he would have infringed the applicant's right to the protection of the law guaranteed under s 18(1) and an application could be made under s 24(1). Otherwise, the applicant's recourse is to apply under s 24(2) for the presiding officer to refer to constitutional question to the Supreme Court.

Contract – compromise – what is – effect of compromise on original cause of action

Moyo & Anor v Intermarket Discount House Ltd S-60-07 (Ziyambi JA, Cheda & Garwe JJA concurring) (Judgment delivered 9 April 2008)

The respondent sued the appellants for a sum of money, based on an acknowledgment of debt. The respondent had lent the appellants a sum of money which had not been repaid. The amount owing had increased due to interest. After negotiations, the appellants signed the acknowledgment of debt, but when the respondent sued, the appellants paid the original sum owed, plus interest up to the double, claimed that the balance due under the acknowledgment of debt was illegal interest, as it offended against the in duplum rule. In its replication, the respondent claimed that the principal debt had been novated. At the trial, counsel for the respondent advised the court that he would be relying not on the principle of novation but on that of compromise, it being the respondent's stance that the principal debt had been compromised and was therefore recoverable. The trial judge found on the facts that indeed a compromise had been arrived at and accordingly gave judgment in favour of the respondent. The appellants argued on appeal that the trial court should not have found that the respondent's claim against the appellants was based on a compromise, because in the summons and particulars of claim, the respondent had based its claim on the basis of an alleged novation.

Held: (1) the rules relating to pleadings require that a party pleads the facts on which his case is based and not the law applicable or the evidence by which he intends to establish those facts. Parties will be bound by their pleadings where any departure would be prejudicial to the other party or prevent a full enquiry. However, the courts have a wide discretion, and where there has been full investigation of a matter and there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. Here the court a quo had before it all the facts which were necessary to determine the real issue which arose before it, which was whether the agreement amounted to a compromise or a novation.

(2) Compromise is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something either diminishing his claim or increasing his liability. A party sued on a compromise is not entitled to raise defences to the original cause of action. On the facts, the trial court's conclusion – that there had been a compromise – was correct.

Contract – mistake – unilateral mistake by offeror – when will entitle offeror to escape liability

Contract – waiver – delay in enforcing rights – when may be construed as waiver of right

Agribank v Nachingaifa & Anor S-61-08 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment

delivered 17 March 2008)

The respondents were employed in managerial positions by the respondent bank. In 2000 they signed revised contracts of employment. Among the provisions of the contract was one relating to the use of motor vehicles. This provided that the employees could purchase a car under the bank's scheme and claim for the use of it when on duty. They were also entitled to a fixed monthly allowance based on 4000 km a month. The following year the bank wrote to the affected employees and told them that the car scheme had been changed. The benefits were substantially less. The respondents almost immediately raised the question of the monthly allowance and were told that the bank could not afford it. After more correspondence, the bank told the respondents that the allowance had been included by mistake. Following this statement, the respondents sought a declaratur that they were entitled to the allowance. The High Court granted the application. On appeal, the bank raised 4 issues: (1) that the inclusion of the allowance in question was the result of a mistake; (2) that the respondents had waived their rights by not bringing up the matter to court timeously; (3) that in terms of the contract of employment agreed to by the respondents, the appellant could change its policies and procedures; and (4) that the court a quo had no jurisdiction to determine what was essentially a labour dispute contrary to the provisions of s 89(6) of the Labour Act [Chapter 29:01].

Held: (1) the High Court's inherent jurisdiction to grant declaratory orders in labour matters had not been ousted. The only issue for determination was whether the case was a proper one for the exercise of discretion under s 14 of the High Court Act. The fact that the dispute could well have been determined in the Labour Court was not the determining factor.

(2) There is a presumption, even in some cases a strong one, against waiver. This means not only that the onus is upon the party asserting waiver to prove it, but that although, as in all civil cases, the onus may be discharged on a balance of probability, it is not easily discharged. In casu, the correspondence showed that the respondents immediately complained and even threatened to take legal action. In any event, delay in enforcing a contractual right is not necessarily a waiver of the right. Delay, of itself and without more, can never deprive a party of a contractual right except by prescription.

(3) A party to a contract relying on an error of judgment, who can go further and show that at the time of the contract he was labouring under some misapprehension, may escape liability under a contract. The onus however is not easy to discharge. Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge. However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract and in fact in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is iustus. In this case, when the appellant made provision for this allowance in the contract of employment, there was no question of mistake at that stage. That allowance was what the appellant was prepared to offer the respondents. Later, however, the appellant had a change of heart because it considered the allowances as too high and unsustainable. An offeror cannot escape liability by

establishing that he has made a wrong offer which was accepted.

(4) Although the respondents undertook to subscribe to the bank's policies and procedures currently in use and as revised and amended from time to time, this did not mean that the bank was empowered to remove, without reference to the respondents, such a fundamental right as the entitlement to payment of a monthly mileage allowance. If the appellant's argument were to be taken to its logical conclusion, even the respondents' salaries could have been reduced. The bank, in amending its policies and procedures, was not empowered to alter clearly defined contractual rights to payment of a salary and allowances.

Contract – performance – impossibility – when extinguishes obligations under contract – parties contemplating situation giving rise to impossibility – defendant not able to rely on impossibility to avoid obligations

Contract – performance – reciprocity – when party sued on contract entitled to rely on reciprocity by other party – principle of reciprocity may be excluded by contract itself

Beitbridge-Bulawayo Railway (Pvt) Ltd v Commercial Union Ins Co of Zimbabwe Ltd S-57-07 (Garwe JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 11 March 2008)

The appellant acquired the sole right to the use of the Beitbridge-Bulawayo railway line for, inter alia, the carriage of goods, including petrol, for the National Oil Company of Zimbabwe (NOCZIM). The respondent insured the appellant against any loss of gross profit resulting from any interruption of or interference with its business during a 12-month period. For part of this period, the appellant's business was interrupted by a cyclone which rendered the railway line from South Africa to Beitbridge impassable and as a consequence goods could not be carried on the line. As a result the appellant suffered certain losses. All the losses were made good by the respondent save for loss of gross profit in respect of NOCZIM traffic. It was agreed by the parties that the respondent would be liable to pay this amount unless, despite the appellant's inability to convey petrol belonging to NOCZIM, NOCZIM was obliged to make payment for the minimum volume of traffic it was obliged to procure on the railway line in terms of an agreement between the appellant and NOCZIM.

The High Court found that, despite the cyclone, NOCZIM was liable, in terms of the agreement between itself and the appellant, to pay the minimum amount due in terms of the agreement and consequently the appellant should have looked to NOCZIM for payment of the amount in question.

The appellant argued that that NOCZIM's obligation to make the payment for the minimum volume of petrol had been suspended by reason of the supervening impossibility and frustration that arose as a result of the closure of the railway line due to the cyclone. It was further argued that this was a case where the principle of reciprocity applies: where the one party has not performed for whatever reason, the other cannot demand performance.

Held: The general rule is that if, as a result of vis major or other supervening physical or legal act, performance of a contract has become impossible through no fault of the debtor, the obligations under the contract are extinguished. There are, however, exceptions. If it is clear that the parties contemplated the situation which gave rise to the impossibility, then the general rule would not apply. Regard must therefore be had to the agreement between the parties, as it is from the provisions of the agreement that the court can determine whether or not supervening impossibility or frustration has the effect of extinguishing obligations under that agreement. It was clear from the relevant provisions of the agreement that the parties were aware that intervening impossibility could prevent a party either wholly or in part from fulfilling its obligations under the contract. In the knowledge of the possibility of such an event, they had agreed that all obligations would be suspended for the duration of such an event except the obligation to make payment due under the agreement.

The principle of reciprocity recognizes the fact that in many contracts the common intention of the parties is that there should be an exchange of performances, and the exception gives effect to the recognition of this fact by serving as a defence for the defendant who is sued on the contract by a plaintiff who has not yet performed or tendered to perform. Whether the contract is one to which the principle of reciprocity would apply is a question of interpretation. The presumption is that in any bilateral contract the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations. However, general principles may be excluded by the contract itself. In casu, the parties had agreed that in the event that either party was prevented from fulfilling its obligations, the agreement would be suspended for the duration of the event causing such impossibility, except the obligation to make payment due under the agreement. The defence that would otherwise have been available to the appellant was by agreement expressly excluded.

Court – High Court – jurisdiction – labour matters – application for declaration – only labour matter over which High Court has jurisdiction – need for court to examine precise nature of relief sought

Mushoriwa v Zimbank HH-23-08 (Gowora J) (Judgment delivered 23 January 2008)

In terms of 89(6) of the Labour Act [Chapter 28:02], no court, other than the Labour Court, has jurisdiction in the first instance to hear and determine any application, appeal or matter regarding labour matters. This includes seeking a review in regard to a labour matter. However, the power to issue a declaratory order is specific to the High Court. The Labour Court, unlike the High Court, has not been specifically empowered to issue declaratory orders and cannot create such a relief or the procedure for granting such relief as it is not a court of inherent jurisdiction. Consequently, if the relief that an applicant seeks is in the nature of a declaratory order, the High Court would have original jurisdiction as that power has not been specifically ousted by statute.

An exercise undertaken by the court to examine the manner in which the respondent effected the

dismissal of the applicant would be no more than a review of that process. Any argument by the applicant that what he seeks is a declaration of nullity does not detract from the nature of the relief sought by the applicant. In determining the nature of the relief that is sought by a litigant a court is bound to examine the process by which the relief being sought can be achieved. A draft order cannot per se be the determining factor of the nature of such relief, as the draft order is achieved or arrived at through a process. Where one cannot determine the matter without subjecting the conduct of the respondent to scrutiny in light of the provisions of s 12 of the Act, such process, no matter what the applicant may choose to name it, is a process of review. Where a declaration of nullity can only come about after a process of review, the court would not have jurisdiction.

Court – High Court – jurisdiction – labour matters – declaratory order – High Court retaining jurisdiction to grant such order

Agribank v Nachingaifa & Anor S-61-08 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 17 March 2008)

See above, under CONTRACT (Mistake).

Court – jurisdiction – children's court – custody order granted by High Court – juvenile court having no jurisdiction to vary such order

Court – jurisdiction – two courts having jurisdiction over same matter – one court seized with the matter – other court, even a senior one, having no jurisdiction to deal with the matter

Surtee v Surtee HH-7-08 (Makarau JP, Mavingira J concurring) (Judgment delivered 13 February 2008)

It sometimes happens that two courts both have jurisdiction over the same matter, a situation that obtains between the High Court and the children's court and other lower courts. The question is not which court is the senior, but which course is more conducive to stability of administration. The High Court has over the years adopted the approach that where there is an existing order by a court of competent jurisdiction, another court (including the High Court) cannot, except by way of review or appeal, make an order competing with or overriding it even if the court making the original order is inferior to the High Court. By the same token, and in reverse order, where there is an order of the High Court regulating the custody of minor children, a lower court cannot make an order seeking to compete with or vary such order. The issue is not that the children's court is an inferior court, but that the courts have to adopt a sensible and practical approach to the matter and avoid dealing with orders that are properly before another court of competent jurisdiction, save as is provided for under the procedure of review. In casu, having made an order relating to custody (with the unstated but undisputable condition that the order is subject to

variation if circumstances change), the High Court was seized with the custody issue. The children's court could not exercise its parallel jurisdiction in the matter at first instance nor could it purport to vary the order of the High Court.

Court – magistrates court – proceedings before – requirement to follow correct rules of procedure – not permissible for court to proceed on informal basis even with unrepresented parties

Mandava v Chasweka HH-42-08 (Makarau JP, Hlatshwayo J concurring) (Judgment delivered 8 May 2008)

All magistrates courts are formal courts whose proceedings are governed by a set of rules and established procedures. The setting of rules of procedure is the widely acceptable manner of avoiding arbitrariness and ensuring fairness in the airing of disputes by litigants. Rules of court are framed for a purpose and any procedure done outside the rules is susceptible of being set aside. Such informality as hearing the parties in the absence of pleadings filed of record and before a pre-trial conference has been held is unacceptable. It destroys the integrity of magistrates' courts as courts of law and reduces proceedings before the court to the same level as that before the traditional leaders and at village level.

Court – magistrates court – jurisdiction – eviction – interdict amounting to constructive eviction – such order subject to normal monetary jurisdiction of court

Court – review – magistrates court – grounds for review – gross irregularity – includes conduct which though well-intentioned and bona fide, prevented a fair trial

Pondoro (Pvt) Ltd & Anor v Nemakonde & Anor HH-18-08 (Hungwe J) (Judgment delivered 20 January 2008)

The applicants were the owners of a farm which had been expropriated by the State. The first respondent was the person to whom the farm had been offered. The first respondent had obtained an eviction order against the applicants from the second respondent, a local magistrate. The magistrate had granted the order in default after the applicants' legal practitioners were late in appearing to answer the application for eviction. This order was made despite the magistrate having earlier recused himself from dealing with another, related, matter between the same parties. The applicants complained that the eviction order had the effect of preventing them applicants from continuing with their farming operations without having been afforded an opportunity to be heard on such a drastic issue. In addition, they averred that the value they stood to lose was far in excess of the court's monetary jurisdiction.

Held: (1) under s 27 of the High Court Act [Chapter 7:06] the decision of an inferior court may be

brought on review on the grounds of, inter alia, gross irregularity. Not all procedural irregularities will qualify a superior court setting aside the proceedings leading to the result complained of. The irregularity must be so gross as to have prevented the presiding officer from deciding the issues which he had to decide. Put differently, the irregularity must have resulted in a miscarriage of justice to be sufficient ground for review. It is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues, then it will amount to a gross irregularity.

(2) In casu, the magistrate committed two gross procedural errors warranting the court to infer prejudicial bias on his part: (a) having correctly decide that it was appropriate for him to recuse himself, he then went ahead and presided over the same or similar matter. It did not matter that the matter was one proceeding by default. (b) The applicants raised the question of jurisdiction but because of the procedure the magistrate adopted he prevented them from placing their case before him when he knew they had a case to present.

(3) A magistrates court can only do those things the Magistrates Court Act expressly prescribes to it. In respect of interdicts, s 12(1) provides that, subject to the limits of jurisdiction prescribed by the Act, the court may grant interdicts. The effect of the wording of the interim interdict was to shut the applicant out of his home and farm. This in essence was constructive eviction of the applicant and thus was in violation of the monetary jurisdictional limit of the magistrates court.

(4) There is a specific procedure for eviction in respect of land acquired in terms of the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]. The right to claim eviction is only exercisable by the acquiring authority. That process is not initiated by a beneficiary under that land reform programme, or by an officer of the acquiring ministry.

Criminal law – common law offences – culpable homicide – foreseeability – accused creating dangerous situation by driving away from police road block – police officer firing at accused's vehicle and killing passenger – death not foreseeable consequence of accused's acts

S v Machembo HH-2-08 (Kudya J) (Judgment delivered 16 January 2008)

The accused was driving a lorry on a main road at night. The lorry carried several passengers. The accused was stopped at a police road block; he was told by the police to go to the nearest police station because the vehicle was not properly lit. He instead drove off, resulting in the police giving chase and erecting another road block to stop him. He did not stop there either. The police opened fire, killing one of the passengers. The accused was charged with and convicted of culpable homicide. It was alleged that by failing to obey the order to stop, he acted negligently and that this negligence caused the death of one of his passengers.

Held: a conviction for culpable homicide is founded, firstly, on proof of negligent conduct and, secondly, on the foreseeability of death arising from that conduct. The concept of foreseeability is sometimes expressed as the natural and probable consequence or as the direct result of the act or omission that the accused fails to guard against which results in death. In casu, the accused took a deliberate and conscious act to disobey the police. His actions in failing to stop were grossly negligent. He was therefore negligent in that he created a dangerous situation by driving off from the road block instead of stopping as directed by the police. However, the State case fell on the aspect of the foreseeability of death arising from the accused's failure to obey the instruction to stop. Whether or not he was aware that the police who stopped him before the shooting were armed, a reasonable man would not expect an armed policeman to shoot at a moving lorry with passengers at the back in a bid to stop the driver. The death of the deceased was thus caused by the policeman and not by the accused's manner of driving. It was neither the direct result nor the natural and probable consequence of his failure to obey the police instruction to stop.

Criminal procedure – extradition – appeal – nature of -- appeal in the wide sense – not necessary to rely on misdirections by court a quo

Criminal procedure – extradition – prima facie case – meaning of – what evidence is required before extradition may be ordered

Criminal procedure – extradition – when prohibited – prohibition where extradition would conflict with international obligations – UN Convention on Torture – applicability of

Mann v Republic of Equatorial Guinea HH-1-08 (Makarau JP & Patel J) (Judgment delivered 23 January 2008)

An appeal in terms of s 18 of the Extradition Act [Chapter 9:08] is an appeal in the wide sense, that is, the appeal court need not first establish any misdirection on the part of the lower court. It re-hears the request as argued before, together with any additional considerations of a humanitarian nature that may be placed before it during the appeal hearing. The correctness or otherwise of the approach adopted by the lower court in coming to the conclusion that it did are therefore not issues before the appeal court.

Before a court can make a finding that there are substantial grounds for believing that the appellant will be subjected to torture, cruel, inhuman or degrading treatment if extradited, there must be expert evidence concerning the efficacy and fairness of the justice delivery systems in the country seeking extradition. A report, even from a body of international standing such as Amnesty International or the International Bar Association, cannot be accepted without some further basis having been laid as to the authors of the report and their expertise in issues relating to torture and the legal system of the country in question.

Torture is universally proscribed at the international level, in instruments of global as well as regional application. This has two consequences: (a) it imposes upon every State obligations which are applicable towards all other States, which are then endowed with correlative rights; and (b) the principle against torture has evolved into a peremptory norm or jus cogens, that is, a principle endowed with primacy in the hierarchy of rules that constitute the international normative order. As such, it cannot be derogated or deviated from by any State or group of States. The overarching nature of the principle against torture imposes certain additional duties on States. It requires States to do more than simply eschew the practice of torture and to give more positive and wider effect to the principle in the fulfilment of their international obligations. Consequently, Zimbabwe is not yet a party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it nonetheless has an obligation not to extradite any person to a country where there are substantial grounds for believing that the person so expelled, returned or extradited would be in danger of being subjected to torture.

A prima facie case for the purposes of s 17 of the Act is established by evidence tending to prove the offence and linking the person whose extradition is sought to the offence. It does not require evidence proving the guilt of the person concerned of the charged offence. A magistrate can only order the extradition of a person if such evidence is produced as would have, under the defunct procedure of preparatory examinations, justify the committal for trial of the person if the crime had been committed in Zimbabwe. The standard of proof required at this stage is not such as to put the appellant to his defence during a trial or evidence upon which a court may convict, but evidence tending to link the appellant to the alleged offence and to which he has to proffer an answer when charged.

Criminal procedure – sentence – passing of – by whom must be passed – trial in High Court – murder trial – original judge not having decided issue of extenuation – original judge then becoming unavailable to complete the case – permissible for another judge to pass sentence

Attorney-General v Sibanda S-4-08 (Chidyausiku CJ, Sandura & Gwaunza JJA concurring) (Judgment delivered 10 March 2008)

The respondent was convicted in the High Court of murder. The proceedings were postponed at the respondent's request to allow him to lead evidence on extenuation. Before the case resumed, the presiding judge retired. Shortly after his retirement, he was arrested on allegations of attempting to defeat the course of justice and placed on remand. He advised the Registrar that he would not be available to complete his part-heard matters until he was cleared of the allegations against him. Some 9 months later, the charges against the judge were withdrawn before plea. The judge then left the country and declined to return unless the charges were withdrawn after plea. Further communication with him proved fruitless. It was common cause that the judge became unavailable to continue after verdict but before extenuation and sentence. The question was whether another judge could take over the proceedings at this stage and thereafter determine the matter. The Judge President ruled (see S v Sibanda HH-59-05) that the proceedings had become a nullity and that another judge could not take over the

proceedings and conclude them. He held that a murder trial only ends with the judge and assessors making findings on the existence or otherwise of extenuating circumstances following a conviction for murder. On appeal by the Attorney-General:

Held: while it was correct to say that a trial in a murder case concludes when the court determines the issue of extenuation, that was not the issue. The issue was when it becomes permissible for a judge to take over a trial started by another judge. There was nothing in the language of ss 333 and 337 of the Criminal Procedure and Evidence Act [Chapter 9:07] to suggest that a judge can only take over a murder case commenced before another judge at the conclusion of the trial or after the determination of extenuation. If the words of ss 333 and 337 are given their primary meaning, the inescapable conclusion is that the legislature authorises the take-over of a murder trial after the verdict of guilty has been reached. Section 333(2) provides that if sentence is not passed "forthwith", that is, immediately after conviction, any judge may pass sentence upon the convicted person. There is no reference therein to completion of the trial, which in turn would mean, in a murder trial, at the conclusion of extenuation. Determining the issue of extenuation is a process in relation to sentencing and not conviction.

Customary law – marriage – unregistered customary law union – division of property following break-up of union – matter heard before magistrates court – need for parties to choose between customary and general law – effect of choosing general law

Mandava v Chasweka HH-42-08 (Makarau JP, Hlatshwayo J concurring) (Judgment delivered 8 May 2008)

Unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act [Chapter 5.13]. Parties to such unions cannot be divorced by the courts and their joint estate cannot be distributed in terms of the divorce law of this country. This does not mean that parties in such a union cannot approach the court for relief. They can. However, when they do so, the law requires that they must choose which law – customary or general – they want to apply to the resolution of their dispute. If they choose general law, they must plead a cause of action recognizable at law as their "marriage" is not recognized as such. The matter must also fall within the monetary jurisdiction of the trial magistrate.

Elections – appeal – against rejection of appellant's nomination as parliamentary candidate – when appeal must be lodged – period of four days within which to lodge appeal – includes weekends and public holidays

Nyamapfeni v Constituency Registrar, Mberengwa East & Ors HH-27-08 (Uchena J) (Judgment delivered 22 February 2008)

In terms of s 46(19)(b) of the Electoral Act [Chapter 2:13], an appeal to the Electoral Court against a decision of a nomination officer to reject the nomination papers of an aspiring parliamentary candidate must be lodged within 4 days of receipt of notice of the nomination officer's decision. Until rules of court for the Electoral Court are made in terms of s 165 of the Act, the rules of the High Court apply to the Electoral Court. Under r 4A of the High Court Rules, where anything is required to be done within a particular number of days or hours, a Saturday, Sunday or public holiday is not reckoned as part of such period. However, the Rules do not apply to the meaning of "days" in the Electoral Act, which must be interpreted in the light of s 33 of the Interpretation Act [Chapter 1:01]. In terms of that section, the reckoning of the four day period starts on the following day (that is, the day after receiving notice of the nomination officer's decision) and ends on the fourth day, if the fourth day falls on a day other than a Saturday, a Sunday or a public holiday. If the fourth day falls on a Saturday, a Sunday or a public holiday the period then expires on the following day which is not a Saturday, a Sunday or a public holiday.

Elections – candidate – death of before election – requirement to hold fresh election – declaration by Chief Elections Officer that proceedings are void – nature of such declaration – no obligation on Chief Elections Officer to notify President of his declaration – President required within 14 days to order new election

Sibanda v The President of Zimbabwe HB-46-08 (Ndou J) (Judgment delivered 9 May 2008)

Where a candidate for a parliamentary election dies before the poll, the chief elections officer must, in terms of s 50 of the Electoral Act [Chapter 2:13], declare all the proceedings void and all proceedings relating to that election must be commenced afresh in the same manner as if a vacancy had occurred. No formal declaration is prescribed. The stopping of the election by the Chief Elections Officer, whether by word of mouth or in writing, constitutes such a declaration. There is no requirement under s 39 of the Act for the Chief Elections Officer to notify the President of his declaration made in terms of s 50. However, within 14 days of such a declaration, the President is obliged to publish a notice in the Gazette ordering a new election to fill the vacancy.

Elections – constituencies and wards – boundaries of – publication of – proclamation itself not defining boundaries but incorporating them by reference to report of Delimitation Commission – such report thereby becoming part of proclamation

Moyo & Anor v Mugabe NO & Ors HH-33-08 (Guvava J) (Judgment delivered 12 February 2008)

The applicants, candidates in the forthcoming Parliamentary elections, complained that the proclamation in terms of which the President was supposed to publish the boundaries of constituencies and wards did

not comply with the requirements of s 61A(11) of the Constitution. This provides that within fourteen days after receiving the Electoral Commission's final delimitation report, the President shall publish a proclamation in the Gazette declaring the names and boundaries of the wards and the House of Assembly and senatorial constituencies of Zimbabwe. The proclamation published by the President did not describe the wards as set out in the delimitation report; instead, it stated that the descriptions of the boundaries of these wards were contained in the Zimbabwe Electoral Commission's final delimitation report, which descriptions were incorporated by reference and that the report could be inspected free of charge during normal working hours at the various provincial offices of the Electoral Commission.

Held: The proclamation did describe the boundaries of the wards as it specifically incorporated the delimitation report by reference. "Incorporate" means to "include as a part or ingredient, unite (in one body)". Once the Proclamation incorporated the report, the report became part of the Proclamation. The intention of the legislature in enacting s 61A(11) was to make available to the public the description and boundaries as set out in the report. Incorporating the report as part of the Proclamation complied with the requirements of the legislature. There could be no prejudice to persons in the position of the applicants who wanted to make use of it for election purposes.

Elections – election petition – when must be presented – should be presented within 14 days of the declaration of the result for the last constituency – security for costs – when must be furnished – effect of failure to do so timeously – Zimbabwe Electoral Commission – joinder of – not proper to join Commission as respondent in an election petition

Simbarashe v Zimbabwe Electoral Commission & Anor HH-45-08 (Kudya J) (Judgment delivered 9 June 2008)

In terms of s 168(2) of the Electoral Act [Chapter 2:13], an election petition must be presented within fourteen days after the end of the period of the election to which it relates, the "period of the election" being in the case of a general election for the purpose of electing members of Parliament, the period between the calling of the election and the declaration of the result of the poll for the last constituency in terms of s 66(1). It is not the date on which the result for the particular constituency was announced.

In terms of s 168(3) of the Act, a petitioner must furnish security for costs (or enter into recognizances) within 7 days after the presentation of the petition. The aim of providing for security of costs is to guarantee the expenses that the respondent will incur in defending the petition. The petitioner is requested to guarantee payment of these costs in advance to demonstrate his seriousness in challenging the election result. The security also serves to discourage the petitioner from launching a vexatious and reckless petition. Failure to comply with the 7 day period is fatal to the petition. The Electoral Court is not clothed with the powers of condonation for a breach of any of the time frames that are set out in the Act.

The Zimbabwe Electoral Commission should not be joined as a respondent in an election petition. For a start, s 166 of the Act states that "respondent" means the President, a member of Parliament or councillor whose election or qualification for holding the office is complained of in an election petition. By application of the maxim expression unius est exclusion alterius, "respondent" cannot include the Commission. Apart from this, there were numerous other indications in the Act that the legislature did not intend that the Commission should be a party to an election petition. Once an electoral malpractice is found to have been committed with the knowledge and consent or approval of the winner or of his agents and that malpractice materially affected the election it renders that election void and triggers the holding of a new election. The effect is that the Commission is obliged by operation of law to hold a new election. It does not necessarily require a citation in an election petition to carry out this statutory mandate. No prejudice will arise to either candidate or to the Commission if it is not cited. There is therefore no logical reason for citing it.

Elections – election petition – notice to respondent – when must be presented – effect of failure to present within stipulated time – whether substantial compliance with provisions of Act sufficient – Electoral Court – has no power to condone non-compliance with Act – service at respondent's party offices – not service as required by the Act

Chabvamuperu & Ors v Jacob & Ors HH-46-08 (Makarau JP) (Judgment delivered 10 June 2008)

In terms of s 169 of the Electoral Act [Chapter2:13], notice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, must, within ten days after the presentation of the petition to court, be served by the petitioner on the respondent personally or by leaving the same at his or her usual or last known dwelling or place of business.

The petitioners, all losing candidates in the March 2008 general election, presented election petitions. Having timeously presented the petitions to court, they gave purportedly notice to the respondents by handing a copy thereof to an official at the respondents' party's headquarters in Harare nearly a month later. The petition was served together with a notice setting the matter down before a judge for a pre-trial conference and a letter offering security of costs. The respondents contended that in view of the non-compliance with the provisions of the electoral law in respect of the time and place of service of the petition, the petitioners were non-suited and the petition should accordingly be dismissed. The petitioners argued that service outside the time limit and at the headquarters of respondent's party was proper and in substantial compliance with the provision of the law. In particular, they argued that they delayed in serving the petition as they were waiting for the amount of security to be fixed by the Registrar, since the law requires them to serve the petition together with a list of their proposed sureties.

Held: the language used in s 169 is peremptory. The question was whether what had been done by the petitioners could constitute substantial compliance with the peremptory provisions of the section. This

required the court to first establish what had to be done in terms of s 169 and secondly, the object of the section. In the third step, it had to be established what was actually done; and finally, the court had to assess whether what was actually done could stand alone and be objectively viewed as amounting to substantial compliance with the requirements of the section. In the event that there was substantial compliance, the next question was whether there was any prejudice as a result of the non-compliance.

The section itself was plain in meaning and admitted of no ambiguity. The object was to contain the time frame within which election petitions presented to court may be determined. Election petitions require urgent resolution. The section should not be interpreted so as to intrinsically link the furnishing of security with the presentation of the petition, such that one cannot exist without the other. The presentation of the petition, a thing in the exclusive domain of the petitioner, has no direct link to the furnishing of security for the costs of the respondent, the fixing of which is under the control of persons other than the petitioner, save that the law requires the two to be served together. The fact that the two are to be served at the same time does not make them so intrinsically linked one to the other that service of one could not be effected in the absence of the other. In any event, the Registrar had fixed security nearly 3 weeks before the petitions were served, so there was no factual ground for arguing substantial compliance. In view of the failure by the petitioners to comply exactly or substantially with the provision, their petition was a nullity and the proceedings before the court were also rendered a nullity.

The Electoral Court, being a creature of statute, can only exercise those powers that are expressly granted to it by the enabling statute. Section 169 does not grant the court power on good cause, to extend the time within which petitions can be served. Rule 4C of the High Court Rules is of no application as the court was not dealing with a time limit that has been set in terms of the rules of court. This was a time limit set by parliament.

With regard to service at the party's offices, the section requires that service has to be personal or at the residence or place of business of the respondent. A "political business" place is not one of the places where proper service of an election petition may be effected.

Elections – election petition – notice to respondent – where must be presented – service at respondent's party offices – not compliance with requirement – security for costs – when must be provided – service late due to failure of public official – substantial compliance with requirement sufficient – Zimbabwe Electoral Commission – joiner of – whether proper

Muzenda v Kombayi & Anor HH-47-08 (Kudya J) (Judgment delivered 10 June 2008)

Section 169 of the Electoral Act [Chapter 2:13] requires that notice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, must, within ten days after the presentation of the petition, be served by the petitioner on the respondent either personally or by leaving the notice at his or her usual or last known dwelling or place of business.

The respondent's party offices are neither his usual dwelling nor the place at which he is employed and service there is a nullity.

The petitioner provided security for costs, but did so a day late because no sum had been fixed by the Registrar until then. Where a public functionary is to blame for failure to comply, a case for substantial compliance is made. There would be no prejudice to the respondent who could on service of the petition object to the amount set.

It is not proper, for the reasons set out in Simbarashe v Zimbabwe Electoral Commission & Anor HH-45-08 (supra) to join the Zimbabwe Electoral Commission as a respondent. Even if the Commission could be joined, it would not be proper to cited the Commission itself; the chairman should be cited.

Elections – Electoral Court – jurisdiction – subject matter of petition or application not specifically allocated to Electoral Court – court having no jurisdiction to hear matters not specifically provided for in Electoral Act

Makone & Anor v Chairman, ZEC & Anor HH-38-08 (Uchena J) (Judgment delivered 13 March 2008)

The applicants, a parliamentary candidate and his party, applied in s 21(4) of the Electoral Act [Chapter 2:13] to the respondents, the electoral authorities, for electronic copies of the voters roll. The applicants were given compact disks with voters rolls copied onto them, but these were in a format not acceptable to the applicants. They were told that other disks could not presently be copied because of the break down of the respondents' computers. The applicants applied urgently to the Electoral Court for an order compelling the respondents to give them electronic copies of the voters roll in a format they have specified.

The respondents in limine argued that the Electoral Court, being a creature of statute, did not have jurisdiction to determine issues arising from the provisions of s 21 of the Act as that section did not confer jurisdiction on the Electoral Court. The court could only exercise jurisdiction in cases where the Act specifically conferred jurisdiction on it. The Act specified instances when the court had jurisdiction, which meant that in instances where jurisdiction is not specifically conferred the legislature did not intend to confer jurisdiction. They relied on the expressio unius est exclusio alterius rule of interpretation.

The court was established by s 161(1) of the Act, which provides that the purpose of the court is to hear and determine election petitions "and other matters in terms of this Act". The applicants argued that the words of the section were wide enough to give the court jurisdiction to hear and determine matters arising from failure to comply with any provisions of the Act.

Held: (1) As a creature of statute, the court could only exercise the jurisdiction conferred on it by the

statute which created it. Jurisdiction can be conferred expressly or by necessary implication.

(2) The meaning of "and other matters in terms of this Act" can be discovered by assigning an ordinary, literal or grammatical meaning to every word in the phrase. In this case the key word was "terms", the dominant meaning of which clearly has something to do with limiting, conditioning, bounding and directing whatever is to be done. In this context, it meant that the jurisdiction of the court was as is limited, conditioned, bound and directed by the Act.

(3) Whether the court had jurisdiction could be determined by ascertaining the expressed or implied intention of the legislature from the construction of the sections which confer jurisdiction on the court and a careful study and construction of the scheme of the Act. This called for an analysis of the sections conferring jurisdiction on the Electoral Court and other courts. An examination of the sections conferring jurisdiction showed that in some instances, the magistrates court had jurisdiction; in others, the Electoral Court; and in others, the High Court. This clearly demonstrated the legislature's deliberate intention as to which court it intended to deal with which situation. Consequently, where the legislature intended to confer jurisdiction on the Electoral Court it did so by conferring it through a specific provision in the Act. There was clearly no room for the conferring of jurisdiction by implication. The express mention of the instances where the court had jurisdiction was a clear indication that where no jurisdiction was specifically conferred the legislature did not intent to confer jurisdiction on the court. Although the maxim expressio unius est exclusion alterius was one of limited application to be applied with great caution, this was a case where it did apply.

(4) The clear meaning of s 157 of the Act is that the court may during the hearing of a petition, or when an application is made to it in terms of s 157(2), make an order allowing an otherwise illegal practice an exception to the provisions of the Act. The interpretation of the words "and other matters in terms of this Act" remains unaffected by the provisions of s 157.

Elections – presidential election – results – announcement of – need for results to be processed with urgency – when delay permissible – recount ordered on initiative of Election Commission – when may be ordered – may justify delay in announcing results

Elections – Zimbabwe Election Commission – proceedings against – need to cite Chairman – jurisdiction of court to hear matter against Commission – court having jurisdiction to ensure Commission operating within law

MDC & Anor v Chairman, ZEC & Anor HH-37-08 (Uchena J) (Judgment delivered 14 April 2008)

Following the harmonised elections held on 29 Match 2008, the results of the polls for elections to parliament and local authorities were announced within a few days of the elections. The results were announced at constituency levels by the respective constituency elections officers. They were also

announced by the National Collation Centre presided over by the second respondent, the chief elections officer of the Zimbabwe Election Commission (ZEC). This second announcement was merely for the benefit of the general public as the legal requirements had been satisfied at constituency level. The applicants, the main opposition party and its president, sought an urgent order compelling the respondents to announce the results of the poll for the office of President.

The respondents argued that the court did not, in view of the wording of s 61(5) of the Constitution, have jurisdiction to hear the application.

On the question of urgency, the applicants argued that s 110 (3) of the Electoral Act [Chapter 2:13] provides for a re-run within 21 days after the previous election in the event of no candidate obtaining a clear majority in the election. This meant that a delay in announcing the election results would deprive candidates of sufficient time to prepare for the re-run. The respondents argued there was no urgency in the application because the cause of action was based on the announcement of the results of the presidential poll. Those results were not due, as the provisions of the Second Schedule to the Act had not yet been complied with; and any cause of action would arise only when the provisions of that schedule had been complied with.

The respondents argued that the first respondent, the Chairman of the ZEC, should not have been joined as he plays no roll in the processing and announcement of presidential results.

On the merits, the applicants contended that there had been an unreasonable delay in the processing and announcement of presidential results. The results for the presidential poll should have been announced already. The respondents were employing delaying tactics by announcing the already declared results for the House of Assembly and the Senate, thereby avoiding their primary responsibility. The procedures laid down in ss 64 and 65 and the Second Schedule of the Act should have been followed. It should not have taken long to collate, verify and announce the results. These procedures signified the legislature's intention that the results of the poll must be processed and be announced without any undue delays. The respondents argued the Act did not require them to collate, verify and announce the results in a specified period. They were entitled to act at their own discretion.

The first respondent claimed that the delay in producing the results of the presidential election was that it had received several complaints and was considering whether to order a recount, a matter that was entirely within the ZEC's discretion.

Held: (1) The clear intention of the legislature in s 61(5) of the Constitution was to ensure ZEC's independence, provided it was operating within the law. It has to exercise its functions as provided by s 61(4) for it to enjoy that immunity. It cannot, for example, conduct elections unfairly or outside the law or which are not free and fair, but on being sued insist that the courts have no jurisdiction over it. The court would in such circumstances have jurisdiction to hear and determine complaints against ZEC.

(2) The applicants had shown that the delay was caused by the respondents wasting time on already

declared election results instead of doing what they are mandated to do, that is, the collation and verification of presidential results and their announcement.

(3) The first respondent was correctly cited in his nominal capacity as the Chairman of ZEC. Section 18 of the Zimbabwe Electoral Commission Act [Chapter 2:12] provides for his being a nominal cite in the event of legal proceedings against the ZEC.

(4) In terms of s 64(2) of the Electoral Act polling station-returns and other election results material must be urgently, and under the personal care of the presiding officer, be sent to the constituency elections officer. Even the death, injury or illness of the presiding officer is not allowed to delay the transmission of these materials; in that event a polling officer must take over and deliver them with the same urgency the presiding officer should have done. The presidential polling station-return is part of the material to be urgently transmitted. In terms of para 1 of the Second Schedule, these returns must be urgently transmitted from polling stations and constituency centres to the second respondent for collation.

(5) In terms of para 2(1), the Chief Elections Officer must give reasonable notice in writing to each candidate or his chief election agent of the time and place where the Chief Elections Officer will verify and collate all the constituency returns. No time limit is specified for him to give such notice. However, para 3 of the Schedule required that once the verification and collation starts it continues until the winning candidate is forthwith declared the president if the result produces a winner with a majority of the votes cast. This clearly proves urgency is resumed from the time the invitees come till the declaration of the winner. The limited period between the first and second election suggests that the first election's results must be processed with urgency to avoid prejudicing candidates who will be contesting the second election. The processing of presidential results must be given priority when compared to the announcement by the National Collation Centre of other elections which have no possibility of a re-run. The legislature must have intended that presidential election results should be processed without any undue delay.

(6) It was not necessary to decide whether the ZEC was an "administrative authority" in terms of the Administrative Justice Act [Chapter 10:28]. Its conduct should be determined by whether it had complied with s 61(4)(a) of the Constitution, which required it to conduct elections "efficiently, freely, fairly, transparently and in accordance with the law". The use of the word "efficiently" when construed in conformity with the urgency provided for in the Electoral Act means the ZEC must act accurately and timeously. In the absence of an explanation the delay in announcing the results seemed to be unjustified and pointed to a lack of efficiency. The period between the holding of the elections and the date of application is six days; three other elections involving greater numbers of candidates were processed and finalized at their levels within two days of the date of the elections.

(7) In terms of s 67A(1) of the Act (which by virtue of s 112 applies mutatis mutandis to presidential elections), a recount can only be requested by a party or candidate within forty-eight hours after the declaration of the results of the presidential election. A recount before the announcement of the results is

not provided for. However, s 67A(4) allows the ZEC of its own initiative to order a recount of the votes at any station if it has reasonable grounds for believing that votes were miscounted. The section does not state when it can do so. The matter is within the ZEC's discretion and not subject to appeal. Consequently, the reason proffered by the respondents for their failure to timeously announce the presidential results was legally valid and could justify the delay. The respondents had not strayed from the law and the court was therefore not entitled to intervene.

Employment – code of conduct – disciplinary proceedings under – penalty which may be imposed – code providing different penalties for a first offence and for subsequent offences – serious offence committed – employer no limited to penalties for first offence

Toyota Zimbabwe v Posi S-55-07 (Malaba JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 4 March 2008)

The respondent was dismissed from his employment following disciplinary proceedings for an act of gross negligence regarding the handling of funds. This act had caused considerable financial loss to the employer. The code of conduct under which he was charged provided that, "depending on the severity of the offence committed", the following penalties were provided for an offence which fell into the category of serious breaches of the code: for a first offence, a final written warning valid for 12 months and/or demotion and suspension without pay for up to 30 days; and for a second offence, dismissal. The respondent argued that since this was a first offence the disciplinary committee was bound to impose the lighter penalty and that dismissal was not a competent penalty.

Held: If the construction of the words proposed by the respondent was adopted, the result would be that an employee who committed an act of misconduct which went to the root of the relationship between employer and employee could not be dismissed as long as it was his first breach of the rule against that conduct. This construction would drastically alter the common law. The position at common law is that a high degree of negligence, such as gross negligence in the performance of work, justifies an employer dismissing the employee. It is also the position at common law that the commission by an employee of conduct inconsistent with the fulfilment of express or implied conditions of the contract of employment entitles the employer to dismiss him if the circumstances of the commission of the offence show that the continuance of a normal employer and employee relationship has in effect been terminated. The Labour Act contains no provision which either expressly or impliedly purports to alter the common law principle that an employer has a right to dismiss an employee following conviction for a misconduct of a material nature going to the root of the employer and employee relationship. A code of conduct cannot alter or abrogate a principle of the common law. It does not matter that the code of conduct is a product of an agreement. What the code meant in casu was that the intention of the parties was to have the penalties provided imposed by employers unless there was evidence in the circumstances of the commission of the offence which so aggravated the conduct of the employee as to take it out of the ordinary degree of seriousness of the breach. In that case the employer was entitled to impose the penalty of dismissal on a first offender, which accords with the common law principle mentioned.

Employment – contract – variation of terms – conditions of service – what constitute – provision of medical aid – employers' obligation to pay contributions to medical aid society – medical aid society altering levels of benefits in accordance with contributions – not a change in employees' conditions of service

Railway Artisans Union & Ors v Railmed & Ors HH-111-08 (Gowora J) (Judgment delivered 29 January 2008)

The first respondent was a registered medical aid society, the object of which was to provide medical aid to persons associated with the railway industry. In terms of its constitution, the respondent could include the schedule of rates payable by different categories of members, and could determine the range and scope of benefits to be afforded by it to its members. Benefits which the employees received were originally not related to the level of payment by the beneficiary. The first respondent put into effect a three tier system where benefits were structured according to the level of contributions paid by respective members. The applicant trade unions sought an order to set aside the new system. It was argued that the first respondent's actions in altering the benefit structure being offered to their members were an alteration of the conditions of service of the unions' members. Most of the unions' members were not actually employed by the first respondent, but by the railways and associated entities. The applicants argued that they had a legitimate expectation to be heard before the implementation of the new system. They contended that the first respondent was a public body and as such it had the obligation, before making any decisions which would adversely affect the rights of the members of medical aid society, to give them a right to be heard.

Held: (1) conditions of service can only exist where services of a personal nature are rendered, with one party being the employer and the other the employee. In casu there were no services of a personal nature being rendered by the applicants' members to and on behalf of the first respondent. While presumably the contracts of employment between the applicants' members and their employers provided for contributions by the employers for subscriptions to a medical aid society, the level and extent of benefits afforded to members was within the discretion of the first respondent and the employers had no input in such assessment. The condition of service was the entitlement to membership in terms of the contract of employment, coupled with the employer's obligation to contribute an equal measure as the employee. Since the employer did not determine the level of benefits afforded by the first respondent, the fact the benefits were reduced did not alter the conditions of service, which remain unchanged.

(2) The first respondent had the power to regulate the range and scope of the benefits to be afforded by the medical aid scheme. There would be no practical benefit for a medical aid society to have the power to set the schedule of rates of contributions to be paid by the different categories of members but not the power to set the range and scope of the benefits to be afforded to the membership. It would be only logical that the range and scope of benefits be set and then the contributions be calculated.

(3) As the first respondent was a restricted medical aid society on the basis of employment or association therewith, it could not be termed to be a public body. There was thus no basis of public law on which the first respondent's actions could be challenged. The court was concerned only with the rights and obligations which flowed from the contract.

(4) There is a presumption in favour of applying the audi alteram partem rule when the decision is made in the exercise of a statutory power (unless the rule is expressly excluded). There is no such presumption when a decision is taken in the exercise of a contractual right, because the question then is whether or not the failure to hear the other party constituted a breach of contract. A party cannot be in breach of an obligation which has not been made an express or implied term of the contract.

Employment – contract – variation of terms – when employer entitled unilaterally to alter defined rights to salary and allowances

Employment – Labour Court – jurisdiction – labour matters – declaratory order – no exclusive jurisdiction to grant declaratory order – High Court retaining jurisdiction

Agribank v Nachingaifa & Anor S-61-08 (Garwe JA, Sandura & Ziyambi JJA concurring) (Judgment delivered 17 March 2008)

See above, under CONTRACT (Mistake).

Employment – employment councils – voluntary employment councils – membership – entitlement to – admission to membership in discretion of council – no trade union entitled to membership as of right

NEC for the Catering Industry v Catering & Hospitality Workers' Union of Zimbabwe S-8-08 (Ziyambi JA, Cheda & Malaba JJA concurring) (Judgment delivered 13 May 2008)

The appellant was a voluntary employment council formed in terms of s 56 of the Labour Act [Chapter 28:01]. The Act provides for two types of employment councils, voluntary and statutory. Voluntary employment councils differ from their statutory counterpart in the manner of formation. With regard to the former, the parties may come together by choice to form a council, whereas in respect of the latter, the parties to the council are chosen by the Minister in the manner prescribed in s 57 of the Act.

As required by s 58(g) of the Act, the appellant's constitution made for the provision of new members to the council. The constitution stated that "...any ...trade union registered in terms of s 36 of the Act, in

respect of persons engaged or employed in the industry, may be admitted to membership of the Council". The respondent trade union sought membership of the council but its application was refused. It then approached the Registrar of Labour, who ordered that the respondent be admitted to membership and allocated two seats on the council. An appeal by the appellant to the Labour Court failed.

On appeal to the Supreme Court, the appellant argued is that by virtue of its being a voluntary employment council, admission to its membership was not as of right but dependent on the discretion of the council. The use of the words "may be admitted" in clause 5:3 of the constitution clearly showed that admission was not as of right. Since the issue of membership was within the discretion of the council, a court can only interfere with the exercise of that discretion if it was exercised irrationally. The second contention was that s 21 of the Constitution guarantees the right of the appellant to freedom of association and there was nothing in the Act which entitles the respondent to membership of the appellant as of right or obliges the appellant to admit the respondent to its membership. The respondent argued that the word "may" was to be construed as being mandatory in this case, since it was mandatory in terms of s 58 of the Act that any constitution of an employment council should contain provisions for admission to that council. This meant, it argued, that the legislature was making it mandatory for the appellant to admit whoever applied, subject only to the applicant possessing the qualifications set out in clause 5(3) of its constitution.

Held: (1) under the common law, an association has an absolute discretion as to whether or not it admits a person to membership. In the matter of admission to membership no question of mala fides or non-compliance with principles of natural justice can arise. The legislature is presumed to be aware of the common law and any intention to depart therefrom must be clearly and unambiguously stated in the statute concerned. The use of the word "may" in s 58 did not disclose an intention by Parliament to alter the common law relating to voluntary associations. Not only that, but the provision in s 56 for voluntary councils, in the absence of an express statement to the contrary, lends weight to the conclusion that Parliament intended these to be voluntary associations to which the common law is applicable.

(2) In its ordinary meaning the word "may" is discretionary. When given its ordinary meaning the word, as used in clause 5:3 of the appellant's constitution, does not conflict with the intention of Parliament as expressed in the Act. The provision in s 29 (4) (f) of the Act that "a registered trade union ... shall be entitled to form or be represented on any employment council" does not detract from that view. It was therefore unlawful for the Registrar to impose the respondent as a member of the appellant.

Family law – child – custody – issues relating to – include access by non-custodian parent

Pissas v Pissas HH-35-08 (Gowora J) (Judgment delivered 9 April 2008)

See above, under APPEAL (Noting of – effect – interlocutory order issued by High Court).

Family law – child – custody – to whom should be granted – child born of unregistered customary union – natural parent available and willing to take custody – custody should be granted to such parent in absence of compelling reasons not to

Tawonanhasi v Tshuma & Ors HB-63-08 (Kamocha J) (Judgment delivered 26 June 2008)

The applicant was the father of a boy born during the brief subsistence of an unregistered customary union. He was granted access to the boy and paid various sums to support the child, who was living with his mother. The mother left the country and left the boy with his grandmother, who in turn left him with his great-grandmother. The applicant sought custody of the child.

Held: What had happened was clearly undesirable. When the mother left to go and settle in South Africa the custody of the child should have been given to the natural parent – the father. He had paid lobola for the customary union. There was no need for the custody of the child to be given to a third party when one of the parents was available. A natural parent should not be deprived of his rights of custody unless he is found to be unworthy to have custody. There should be very compelling reasons for doing so. In casu the evidence was that the father was a responsible person who had the means to support the child. There was no need to abandon the child to a fourth party when a willing and able father was available.

Family – husband and wife – divorce – division of property following divorce – principles to be applied – "clean break" principle – not part of our law

Dzvova v Dzvova HH-39-08 (Makarau JP) (Judgment delivered 7 May 2008)

The "clean break" principle, as its name implies, envisages a situation where, after divorce, there are no strings, financial or social, tying the parties one to the other. The parties are given their due from the failed marriage and left to pick up their lives and move on. This, on the face of it, appears to be the desire of most plaintiffs and some defendants in divorce actions. On the other hand, s 7(3) of the Matrimonial Causes Act [Chapter 5:13] introduces a duty on the court divorcing the parties to maintain, as far as is reasonable and practicable, the status quo of the lifestyle that the spouses had during the subsistence of the marriage. Upholding one obviously frustrates the other. The Act does not specifically embrace and provide for the clean break principle. On the contrary, it provides for the continuance of the marriage as far as is reasonable and practicable after divorce. It is on this basis that the High Court has made orders for custodian parents to remain in occupation of the matrimonial residence after divorce and until the youngest child attains majority. It is on this basis that the court has ordered the procurement of new residences or motor vehicles for divorced spouses to achieve the objectives of the Act. It could thus be appropriate, where division of the matrimonial home is ordered, to take into account one party's need to remain in the property, if that outweighs the other's need to realize her one half share of the property immediately and achieve a clean break from the first party, and allow the first party to remain in

possession of the home.

Family law – husband and wife – divorce – irretrievable breakdown of marriage – when can be said to have occurred – one party having expressed intention to end marriage and not having changed his mind – need for other party to show that there are prospects of reconciliation

G v G HH-31-08 (Makarau JP (Judgment delivered 2 April 2008)

The plaintiff husband sought a decree of divorce to issue on the grounds that his relationship with the defendant had broken down to such an extent that there was no possibility of reconciliation. In the main, he lamented the fact that he had been denied conjugal rights by the defendant for a period in excess of three years. The defendant however did not agree that the marriage had broken down to such an extent that reconciliation was impossible. She averred that with proper counselling, the parties could resume a normal married life.

Held: s 5 of the Matrimonial Causes Act [Chapter 5.13] vests wide discretion in the court seized with a divorce matter either to grant the divorce or to postpone the hearing of the matter to give the marriage another chance where the court is of the view that this is the appropriate approach to take. Courts will not grant divorces lightly. Divorces change one's status at law and socially. Where the parties have children, a divorce has the effect of separating the children from one of their parents save for regulated periods of access by the non-custodian parent. Generally, a divorce has the effect of impoverishing the couple, as it parcels out jointly held assets into two separate estates, each estate obviously becoming less in worth than the jointly held estate. Thus, where there is evidence that a marriage can be salvaged, or where the justice of the case demands, the court will exercise its discretion against granting a decree of divorce. However, once one party to the marriage has expressed an intention to end the marriage and remains of that view at the time of the hearing, in the absence of any evidence to show that he or she may have changed his or her mind between the issuance of summons and the hearing of the matter, the court will be hard pressed to order the parties to reconsider their positions. It takes two to tango. A defendant who argues that the marriage has not broken down irretrievably has the duty to place before the court evidence tending to show that there are prospects of reconciliation and that the plaintiff has been responding well to overtures of reconciliation. The court cannot act on the mere belief of one of the parties that the marriage will someday blossom into its former vibrancy and passion. In casu, in the light of the evidence, it was idle for the court to believe that what the parties required was more time to reconsider their respective positions. A decree of divorce would be granted.

Insolvency – undue preference – disposition made in ordinary course of business – what is – bank belatedly insisting on security for overdraft and then securing only a fraction of amount lent – bank not entitled to liquidate security

Madondo NO v Zimbank HH-4-08 (Garwe JA) (Judgment delivered 30 January 2008)

See above, under BANK (Overdraft).

Insurance – insurance brokers – registration – requirements for – Regulations imposing requirements additional to those in Act and compelling brokers to re-register even if already registered – Regulations ultra vires

Trust Insurance Brokers v Min of Finance & Anor S-6-08 (Ziyambi JA, Malaba & Garwe JJA concurring) (Judgment delivered 13 May 2008)

The Minister of Finance enacted regulations in terms of s 89 of the Insurance Act [Chapter 24:07]. The enabling section of the Act allowed the Minister to make regulations "prescribing anything which under this Act is to be prescribed or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to this Act". The effect of two sections of the Regulations was (a) to impose additional requirements for registration on insurance brokers already registered; and (b) to oblige every registered insurance broker to apply for re-registration in terms of the Regulations. The penalty for failure to re-register was automatic de-registration. The appellant argued that the enabling section of the Act did not give the Minister the power to prescribe alterations to the qualifications and requirements laid down by Parliament in the Act for the registration of insurance brokers, nor did it confer on the Minister the power to de-register insurance brokers who were duly registered in compliance with the provisions of the Act. Despite the general nature of its terms the power given to the Minister in the section was not unlimited in its application; it was limited to "anything which under this Act is to be prescribed" and to regulating only those things which in the Minister's opinion are "necessary or convenient to be prescribed for carrying out or giving effect to" the Act. Re-registration was not in any way "necessary or convenient ... for carrying out or giving effect to" the Act. The Minister's argument was that he had, in effect, been given unfettered powers to prescribe anything "which in his opinion is necessary to be prescribed".

Held: the approach of the courts in such matters is that power will only be given to a subordinate law-making body to alter an enactment of Parliament in extraordinary circumstances. The courts lean against implying an alteration or repeal of one statute by another and for obvious reasons lean even more heavily against implying that Parliament has conferred power on a subordinate law-making body to alter or repeal an Act of Parliament. No express power was conferred on the Minister to alter the provisions of the Act relating to the qualifications for registration of insurance brokers or for their de-registration. In s 35 of the Act Parliament set the requirements for the registration of insurance brokers. Once an applicant meets those requirements then, unless the Commissioner is of the opinion that it would not be in the public interest to approve his application, the Commissioner is obliged to register him. Similarly, in s 38, Parliament prescribed the procedure for cancellation of the registration of insurance brokers. Not only was there no express grant of power to alter those requirements but, from a reading of s 89 together

with ss 35 and 38, there was no indication of an intention on the part of Parliament to grant to the Minister the power to amend the Act, in particular, the power to alter the requirements for registration or the procedure for de-registration of insurance brokers.

Judgment of Kamocha J in Trust Insurance Brokers (Pvt) Ltd v Min of Finance & Anor HB-13-07 overruled.

Interest – in duplum rule – applicability – limited to commercial transactions – not applicable to debts owed by taxpayer to the fiscus

Bindura Nickel Corp Ltd v ZRA HH-30-08 (Chatukuta J) (Judgment delivered 20 February 2008)

In terms of s 71(2) of the Income Tax Act [Chapter 23:06], as amended in 2003, interest on a tax debt is not payable from the date of notification by the revenue authority but from the date when the tax was due in terms of the Act. Interest only ceases to run on the date the tax or any instalment thereof is paid in full. Whether or not interest exceeds the capital, the Commissioner of Taxes is entitled to charge interest on any tax that remains unpaid.

The purpose of the in duplum rule, which limits interest to the amount of the capital sum owed, is to protect the borrower from the lender and forms part of our law. The rule is not limited to money lending transactions but applies to all contracts or transactions under which a debt is subject to interest at a fixed rate. In terms of s 11A of the General Laws Amendment Act [Chapter 8:07], the in duplum rule does not apply to fiscal debts. Even without that provision, the position under the common law is clear: the rule does not apply to any other relationship which is not that of a borrower or lender, or which is not one of a commercial nature. Such a relationship may occur where the State is a party; but the rule does not apply to debts owed by the taxpayer to the fiscus. The relationship between a taxpayer and the fiscus is a statutory one and does not fall under the contracts or transactions as perceived in the decided cases. The whole purpose of the relationship between the taxpayer and the fiscus is to enable the State to raise, by way of tax, public revenue. The non-remittance of tax and the application of the rule to tax debts would interrupt the flow of revenue to the fiscus with adverse impact on good governance. The purpose of the common law is the preservation of the fiscus for the good of the nation.

International law – international instruments – Convention against Torture – obligatory nature of Convention even though Zimbabwe not a signatory – effect on decision whether or not to extradite alleged offender

Mann v Republic of Equatorial Guinea HH-1-08 (Makarau JP & Patel J) (Judgment delivered 23 January 2008)

See above, under CRIMINAL PROCEDURE (Extradition).

Interpretation of statutes – regulations – validity – regulations effectively altering provisions of parent Act – approach of courts to alteration of statutes by subordinate bodies

Trust Insurance Brokers v Min of Finance & Anor S-6-08 (Ziyambi JA, Malaba & Garwe JJA concurring) (Judgment delivered 13 May 2008)

See above, under INSURANCE.

Land – acquisition – eviction of former owner – who may seek eviction – beneficiary under land reform programme not entitled to seek eviction order

Pondoro (Pvt) Ltd & Anor v Nemakonde & Anor HH-18-08 (Hungwe J) (Judgment delivered 20 January 2008)

See above, under COURTS (Magistrates court – jurisdiction)

Landlord and tenant – lessee – ejectment – certificate of ejectment issued by rent board – status of such certificate – not an order for ejectment – need to obtain certificate before getting order from court for ejectment

Kudinga v Dhliwayo & Anor HH-22-07 (Makarau JP) (Judgment issued 12 March 2008)

The applicant had obtained a certificate from the second respondent, the chairman of the rent board, for the ejectment of the first respondent from the premises he was renting from the applicant. The first respondent noted an appeal with the administrative court against the ejectment certificate. The applicant, believing that the noting of the appeal suspended the operation of the ejectment certificate, applied to the High Court for an order for the execution of the certificate pending the appeal.

Held: (1) There is a ruling of the Supreme Court to the effect that the operation of any judgment is suspended by the noting of an appeal.

(2) However, the issuance of a certificate of ejectment by a rent board is not a judgment as envisaged by the rule of practice in the superior courts. Such a certificate is issued in terms of s 32 of the Rent

Regulations 2007 (SI 32 of 2007). In granting the certificate, the board is enjoined to specify in the certificate the date on or before which the tenant is to vacate the dwelling. The regulations do not proceed to specify that in the event that the tenant does not vacate the dwelling on the specified date, a writ for his ejectment may be issued by the board or any other competent authority. The issuance of a certificate by the rent board is merely a preliminary step before the obtaining of a court order for the ejectment of the tenant. It is not the ejectment order itself. It is not a judgment, nor can it be used for the purposes of issuing a writ of ejectment from any court.

(3) The noting of an appeal against the decision of the rent board to issue a certificate is thus not an instance where the High Court can use its inherent jurisdiction to order that the tenant be evicted from the dwelling pending the determination of the appeal. The landlord still has to obtain an eviction order on the back of the certificate from a court of competent jurisdiction.

(4) The fact that the chairman of the rent board was a magistrate did not make the decision one of the magistrates court. It was inappropriate to use the terms "judgment", "order" or "ruling" when describing the decision of a rent board. The correct nomenclature is "a certificate of ejectment".

Practice and procedure – absolution from the instance – when may be granted – principles – application made in respect of ancillary matter – not permissible to grant piece-meal applications

Dube v Dube HB-39-08 (Ndou J) (Judgment delivered 22 May 2008)

An application for absolution from the instance stands much on the same footing as an application for discharge of an accused at the close of the evidence for the prosecution, but it would indeed be curious if in civil cases the courts were to apply a more stringent rule of practice than in criminal cases. As in a criminal case the onus of proof is always higher than in a civil case, evidence which, in a criminal case, would be insufficient to justify refusing an application for the discharge of an accused might well in a civil case be sufficient to justify refusing an application for absolution from the instance. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance. The rules of procedure are made to ensure that justice is done between the parties and, so far as possible, the courts should not allow rules of procedure to be used to cause an injustice.

Piecemeal applications for absolution are not permissible: an application, if successful, must have the effect of terminating the case completely. The procedure is not intended for the court to determine issues piecemeal in one trial.

Practice and procedure – application – dismissal of – summary dismissal – when order for

summary dismissal may be granted – action "frivolous" – when action may be regarded as frivolous

Rogers v Rogers & Anor S-64-07 (Malaba JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 27 May 2008)

The appellant's application to have her mother's will (from which she had been excluded) declared invalid on the grounds of undue influence had been summarily dismissed in the High Court on the grounds that it was frivolous. Alternatively, she had sought an order that the will was applicable only to her mother's estate situated in Zimbabwe. Her mother had made two previous wills, one which dealt with her property in Britain and a later one dealing with her property in Zimbabwe.

Although the appellant was asked for particulars of the alleged undue influence, such particulars were not provided. The first respondent, the appellant's brother, averred that refusal by the appellant to plead the particulars of undue influence meant that there were no facts in the declaration which, if proved at the trial, would entitle the appellant to the relief sought. On the alternative relief, he averred that the language of the will was so clear and unambiguous in expressing the intention of the testatrix to revoke all prior wills that the contention that the testatrix had no intention to revoke her previous will relating to the disposal of her estate in Britain was obviously unsustainable. He accordingly applied for, and was granted, absolution from the instance in terms of r 79 of the High Court Rules, the judge finding that for the reasons advanced by the first respondent the application was frivolous.

Held: (1) Summary dismissal of an action in terms of r 79(2) is an extraordinary remedy to be granted in clear and exceptional cases, as granting the remedy interferes with the elementary right of free access to the court. The object of the rule is to enable the court to stop an action which should not have been launched. The word "frivolous" in its ordinary sense connotes an action characterized by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense "frivolous or vexatious" when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation. A plaintiff who commences action in a court of law when he has no reasonable grounds to do so has no cause of action. An action without a good cause is baseless and obviously unsustainable. It was thus necessary to determine whether the appellant had reasonable grounds for charging the first respondent with undue influence on the testatrix's will.

(2) The appellant particularly alleged undue influence as the ground on which she intended to rely for invalidating the will. She was thus required to give the necessary particulars which would constitute the wrong she accused the first respondent of having committed. She, however, seems to have had no knowledge of the material facts she was required to allege in the declaration, proof of which would constitute the essential elements of undue influence and entitle her to judgment. The onus was on her to prove that the first respondent through undue influence on the testatrix's mind caused her to execute the will she was unwilling at the time to make.

(3) Undue influence is a compendious description of the facts which if alleged in the declaration and

proved at the trial would constitute the wrong for the redress of which the action was commenced. Undue influence may take many different forms. It may be in the form of coercion of the testator's will so that he does what is against his or her own volition. When undue influence amounts to coercion of the mind of the person who becomes the testator it may also take an infinite number of forms depending on the facts and circumstances of each case. It does not follow that because undue influence was applied on the testator it necessarily caused the execution of the will. That the undue influence caused the execution of the will must be established by the facts alleged. The undue influence must be shown to have been operative at the time of the execution of the will. A testator may still make a will expressing his wishes notwithstanding the application of undue influence to his mind. In order to invalidate a will, the plaintiff must have reasonable grounds for alleging undue influence. That requires him to allege in the declaration all the material facts he has to prove to succeed. Here, there were no allegations of facts on what the first respondent could have done or said to the testatrix causing her to execute the will under which he benefited. The cause of action remained shadowy. The action was thus baseless and unsustainable. It was frivolous.

(4) The will began with a general revocatory clause, in terms which showed that it was the intention of the testatrix to revoke all former wills made by her. The language used was clear and unambiguous. The testatrix was of a sound mind, memory and understanding at the time she executed the latest will. She knew that she had made prior wills disposing of part of her whole estate in a manner inconsistent with the disposition she was about to make. An action based on the contention that she did not intend to revoke the earlier will was therefore untenable and frivolous.

Judgment of Kamocha J in Rogers v Rogers & Anor HH-116-06 upheld.

Practice and procedure – bar – upliftment of – application – desirability of application being made in writing – court's duty when application made – not entitled to decide matter on merits without dealing with application for upliftment

GMB v Muchero S-59-07 (Garwe JA, Cheda & Gwaunza JJA concurring((Judgment delivered 11 March 2008)

The respondent, the appellant's chief executive officer, was suspended from his employment on disciplinary grounds. The respondent thereafter filed an application in the High Court challenging his suspension. That application was dismissed on the basis that the same matter was pending before the Labour Court. The respondent then appealed to the Supreme Court, which remitted the matter to the High Court, giving the appellant leave to file its opposing papers within fourteen days of the date of the order. The appellant failed to file its opposing papers within the stipulated time. The matter was then set down again before the High Court. Both parties were legally represented. Having failed to file its opposing papers within fourteen days stipulated, the appellant was automatically barred. An oral application to uplift the bar was made. The High Court, however, proceeded to deal with the matter on

the merits and concluded that the suspension was a nullity. It also found that no application to uplift the bar had been made. The appellant appealed against this decision, submitting that an oral application had been made, on which the court should have adjudicated first. It argued that it was improper for the High Court to deal with the case on the merits without adjudicating on the application to uplift the bar. In any event, it argued, the court erred in dealing with the merits of the application in a situation where a default judgment was to be granted. The appellant prayed for the matter to be remitted so that the court could make a decision on the application for the upliftment of the bar.

Held: (1) It is clear from rr 83, 84, 233 and 239 of the High Court Rules 1971 that once a party is barred the matter is treated as unopposed unless the party so barred makes an application before that court for the upliftment of the bar. It is also clear that in making the application to uplift the bar the party that has been barred can either file a chamber (not court) application to uplift the bar or, where this has not been done, the party can make an oral application at the hearing.

(2) The practice in the High Court is that only in very few instances have oral applications to uplift the bar been entertained. This is because in such a case the applicant must explain the reason for the delay, and thereafter convince the court that he has a bona fide defence on the merits. The general view is that this cannot properly be done by oral application as the other party would not have been afforded the proper opportunity to prepare and possibly contest the application. In practice, where such an application is made, the court will direct that a written application be filed. In that event the court will postpone any decision on the merits pending the determination of the application to uplift the bar. The court may also give a time limit within which any such application is to be made as well as order the payment of the wasted costs by the party seeking the postponement.

(3) Once the application to uplift the bar had been made, the court became seized with the matter and was required to make a determination on that application. It did not do so; instead it proceeded on the basis that there was no such application before the court. If the court was of the view that the appellant should have filed a written application then it should have said so and proceeded to grant a postponement for such application to be filed. Once there was a failure to determine the application to uplift the bar, then the decision on the merits was incompetent and cannot stand.

Practice and procedure – parties – citation – Zimbabwe Electoral Commission – chairman should be cited as party, not Commission itself

Muzenda v Kombayi & Anor HH-47-08 (Kudya J) (Judgment delivered 10 June 2008)

See above, under ELECTIONS (Election petition – notice to respondent – where must be presented).

Practice and procedure – parties – joinder of – claim in reconvention by defendant in main action – not permissible to join another party as co-defendant in the claim in reconvention

Mungofa v Sande & Anor HH-29-08 (Chatukuta J) (Judgment delivered 23 January 2008)

The applicant was the defendant in an action being brought by his wife (the second respondent in this application) for divorce. He filed a counter-claim against her and cited the first respondent as co-defendant, claiming damages from the first respondent for his alleged adultery with his (the applicant's) wife.

Held: A claim in reconvention is dependent upon allegations which would defeat the plaintiff's claim in convention. In order for the applicant to be able to join the first respondent as a co-defendant in the claim in reconvention, the first respondent must have had a basis for defending the claim for divorce that was brought by the second respondent. Rule 120 of the High Court Rules does not provide for a claim in reconvention against any person other than the plaintiff in convention. In any event, the applicant's counter-claim for divorce on the basis of adultery could not strictly be termed a counter-claim in light of the Matrimonial Causes Act [Chapter 5:13], since fault is no longer a pre-requisite for divorce (before the amendment of the Act in 1985, fault and misconduct were relevant to the existence of grounds for divorce and it was possible to counter-claim for divorce on the basis of a different fault cited by the plaintiff in her or his claim for divorce). Joinder of the first respondent was thus not competent.

Practice and procedure – parties – locus standi – company – holding company – action in respect of wholly owned subsidiaries – holding company having locus standi

Bindura Nickel Corp Ltd v ZRA HH-30-08 (Chatukuta J) (Judgment delivered 20 February 2008)

For a party to be able to sue it must have an interest in the subject-matter of the suit and such interest must be a direct one. Where a company is wholly owned by another and the holding company has a direct pecuniary interest in the affairs of its subsidiary, the holding company would be entitled to bring an action relating to its subsidiary.

Practice and procedure – parties – locus standi – principles – need to have legal interest in subject-matter of action – Zimbabwe Stock Exchange – bringing action on behalf of stockbrokers – Stock Exchange having no legal interest at stake – Stock Exchange having no locus standi

Zimbabwe Stock Exchange v Zimbabwe Revenue Authority S-56-07 (Malaba JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 4 March 2008)

The appellant, the Zimbabwe Stock Exchange, was established as a corporate body in terms of s 3 of the Zimbabwe Stock Exchange Act [Chapter 24:14]. Its affairs are managed and controlled by a Committee, the duties of which are set out in s 15 of the Act. Stockbrokers are members of the Exchange. A stockbroker is defined in the Act as a person who "carries on the business of purchasing and selling, or purchasing or selling listed securities on behalf of other persons". In the discharge of the duties of managing and controlling the affairs of the appellant the Committee is enjoined to ensure that there is fair and efficient dealing in the securities listed and that the competence and conduct of stockbrokers is sufficiently high for the protection of the public.

A dispute arose as to the liability of registered stockbrokers to pay VAT on the services provided by them, the respondent claiming that they were liable. The appellant sought a declaration that stockbrokers were exempt from paying VAT on the grounds that the service of purchasing and selling of listed securities they rendered to their clients was a financial service. The court a quo considered in limine whether the appellant had locus standi to bring the application. The appellant argued that since it was set up to manage a fair and efficient manner of dealing in listed securities, it had an interest in the impasse between the respondent and the stockbrokers and thus had a standing in terms of the common law on the basis that it had a direct and substantial interest in the impasse. The court held that the appellant had no locus standi. On appeal:

Held: The common law on locus standi of a party instituting legal proceedings is that to justify participation in the action the party must show that he has a direct and substantial interest in the right which is the subject matter of the proceedings and the relief sought and not merely a financial interest which is only an indirect interest in the litigation. The exception to this rule where the question for determination involves the liberty of an individual who because of mental illness or detention is unable to institute the proceedings himself. The appellant was not involved in the purchasing and selling of listed securities. As such it would not have a direct interest in the result of the determination of the question whether or not such a service by a stockbroker was a "financial service" entitling its provider to an exemption from the liability for payment of VAT.

Judgment of Makarau JP in Zimbabwe Stock Exchange v Zimbabwe Revenue Authority HH-120-06 (judgment delivered 8 November 2006) upheld.

Practice and procedure – parties – locus standi – spoliation order – need for applicant to show he has locus standi

Diocese of Harare v Church of Province of Central Africa & Anor HH-6-08 (Hungwe J) (Judgment delivered 30 January 2008)

See above, under CHURCH (Government of).

Practice and procedure – pleadings – what must be pleaded – parties entitled to plead only the facts and not the law or evidence – suit based on one ground but another one raised at trial – facts necessary to support other ground established – court entitled to base decision on that ground

Moyo & Anor v Intermarket Discount House Ltd S-60-07 (Ziyambi JA, Cheda & Garwe JJA concurring) (Judgment delivered 9 April 2008)

See above, under CONTRACT (Compromise).

Property and real rights – spoliation order – requirements for – need for applicant to show he was in exclusive possession of property – member of a church – cannot possess church premises to exclusion of other church organs or members – spoliation of incorporeal right – meaning – bishop being invited by faithful to minister to them – not an unlawful dispossession of any rights held by ordained bishop – locus standi to bring application for spoliation – applicant must show he has locus standi

Diocese of Harare v Church of Province of Central Africa & Anor HH-6-08 (Hungwe J) (Judgment delivered 30 January 2008)

See above, under CHURCH (Government of).

Revenue and public finance – interest – interest owed by taxpayer for unpaid or overdue taxes – accrual of interest – when accrual ceases – not limited by in duplum rule

Bindura Nickel Corp Ltd v ZRA HH-30-08 (Chatukuta J) (Judgment delivered 20 February 2008)

See above, under INTEREST (In duplum rule).

Statutes – Insurance Act [Chapter 24:07] – regulations made under s 89 – regulations imposing requirements for registration of brokers additional to those in Act and compelling brokers to re-register even if already registered – regulations ultra vires

Trust Insurance Brokers v Min of Finance & Anor S-6-08 (Ziyambi JA, Malaba & Garwe JJA concurring) (Judgment delivered 13 May 2008)

See above, under INSURANCE.

Succession – will

See below, under WILL.

Town and country planning – subdivision of property – prohibition on agreement for change of ownership of portion of property without permit allowing for subdivision – effect – permit issued after agreement had been concluded – no effect on validity of agreement

Tsamwa v Hondo & Ors HH-53-08 (Mavangira J) (Judgment delivered 25 June 2008)

The preamble to an agreement for sale of an immovable property reflected that as at the time of the sale a subdivision permit was not yet in place. The seller had applied to the City of Harare for the approval of the subdivision. He undertook that the subdivision permit would be ready in not more than six months from the date of agreement.

Held: at the time the parties entered into the agreement, there was no subdivision permit in existence. An agreement made in such circumstances is forbidden by s 39(1)(b)(i) of the Regional, Town and Country Planning Act [Chapter 29:12]. Any purported agreement for the change of ownership of a portion of a property is therefore null and void ab initio. The submission of an application for a subdivision permit is no guarantee as to its success. The planning authority should not have its hands forced. The issuance of the permit after the agreement had already been entered into cannot have any legal effect on the validity of the agreement insofar as compliance with the Act in question is concerned. It is the state of affairs prevailing at the time that the parties entered into the agreement, in relation to the existence or otherwise of a subdivision permit, that is relevant.

Will – validity – marriage subsequent to execution of will – whether will thereby invalidated – will made in contemplation of marriage – such will valid

Mapenzauswa v Muskwe & Ors HH-48-08 (Kudya J) (Judgment delivered 18 June 2008)

The deceased had executed a will in late 2000. In the will he referred to the applicant as his "wife" and in it he made several bequests to her. In fact he was not married to her at the time, though they were living together. His previous wife had died some time beforehand. There was no evidence as to whether

the applicant and deceased had contracted a customary law marriage, but in April 2001 they were married by civil rites. After the deceased's death, the first respondent, the executor, started to dispose of the estate in terms of the will. This included the property where the applicant was living. The applicant sought an order declaring the will invalid.

Held: it was not necessary to decide whether the civil marriage was a subsequent marriage for the purposes of s 16(1) of the Wills Act [Chapter 6:06]. This situation was governed by s 16(4) of the Act, which saves a will made in contemplation of an impending marriage. The facts showed that this was such a will and, accordingly, its validity would be upheld.

Will – validity – undue influence on testator – what amounts to undue influence – need to show that undue influence actually influenced making of will

Rogers v Rogers & Anor S-64-07 (Malaba JA, Cheda & Gwaunza JJA concurring) (Judgment delivered 27 May 2008)

See above, under PRACTICE AND PROCEDURE (Application – dismissal – summary dismissal).

Words and phrases – "days" – whether weekends and holidays included – Electoral Act [Chapter 2:13] – s 46(19)(b)

Nyamapfeni v Constituency Registrar, Mberengwa East & Ors HH-27-08 (Uchena J) (Judgment delivered 22 February 2008)

See above, under ELECTION (Appeal).

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CASES DECIDED JULY – DECEMBER 2008

Administration of estates – deceased estate – litigation – must be represented by executor

Nyandoro & Anor v Nyandoro & Ors HH-89-08 (Kudya J) (Judgment delivered 16 October 2008)

The first plaintiff, a widow, sought the transfer of a property to her. The property was registered in the name of her late husband's brother, who was also deceased. The plaintiff's brother in law had never lived in the house, but her husband had. The action was also brought in the name of the estate of the first plaintiff's husband. The first defendant was the son of the first plaintiff's late brother in law.

Apart from disputing the claim on the facts, the defendants argued (1) that the second plaintiff was not properly before the court, no executor having been appointed for the estate; (2) that the first plaintiff in any event had no locus standi; and (3) that the claim had prescribed. The plaintiff conceded the first point, but argued that the plaintiff had locus standi; that a plea of prescription must be pleaded; that it should be raised by way of a special plea and lastly that the first plaintiff's claim was not a debt but a claim for land for which prescription runs for 30 years. The defendants initially counter-claimed for eviction and rentals but abandoned this claim during the trial.

Held: (1) the plaintiff's concession was correct. A deceased estate must be represented by an executor or executrix duly appointed and issued with letters of administration by the Master. The executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position. Because a deceased's estate is vested in the executor, he is the only person who has locus standi to bring a vindicatory action relative to property alleged to form part of the estate. Arising from the nature of a deceased estate, the citation of a deceased estate as a party to litigation is wrong. The correct party to cite is the executor, by name. The citation of the second plaintiff and second defendant in casu was therefore improper and incurable and their presence was a nullity.

(2) On the issue of whether the plaintiff, as the widow, has the legal interest to sue for the immovable property in question on the basis that she was a part owner of the property, property that is registered solely in the husband's name belongs only to him. This case dealt with estate property, not the distribution of matrimonial property arising from divorce which would be governed by s 7 of the Matrimonial Causes Act [Chapter 5:13]. The plaintiff would not have had locus standi to sue for such property in her own right.

(3) The defendants raised the matter of prescription in their plea, but did not raise a special plea. The failure to raise a special plea does not debar a litigant who has pleaded prescription from having its case resolved. Having pleaded it in casu, the defendant was within his rights to seek to curtail the trial on the basis of prescription.

(4) The plaintiff's claim fell within the definition of "debt" in the Prescription Act [Chapter 8:11]. Her claim for transfer of the immovable property whether based on a purported trust for her children or her contributions began to run at the latest when the distribution plan of Nelson's Estate was approved by the Master.

Administration of estates – maintenance – dependant – who is – person unrelated to deceased who received support during lifetime of deceased – not entitled to maintenance

Maloya v Nyamupfukudza NO & Anor HH-115-08 (Makoni J) (Judgment delivered 26 November 2009)

The applicant was employed by the deceased. The applicant had a minor child, who stayed with him after he divorced the child's mother. From the time of the divorce until his death, the deceased provided the child with the basic necessities of life. The deceased, in his will, left his entire estate to his sister. The will was accepted by the Master of the High Court as the deceased's final testamentary disposition. The applicant sought, in terms of s 3 as read with s 8(2)(d) of the Deceased Persons Family Maintenance Act [Chapter 6:03], an order that a specified immovable property be transferred to the child. It was argued that the child was a "dependant" of the deceased in terms of para (f) of the definition of "dependant". This classifies as a dependant any person who (i) was being maintained by the deceased at the time of his death or (ii) was entitled to the payment of maintenance by the deceased at the time of his death.

Held: a "dependant", in the context of the Act, must be someone whom the deceased had a legal duty to maintain. The word "maintain", in the context of the Act, connotes a legal duty on the part of the deceased to maintain the claimant. In casu, the deceased had no legal obligation to maintain the minor child. It was an act of benevolence on the part of the deceased, constituting gratuitous support. He was assisting the child's father who had a legal obligation to maintain the child. Adopting the approach suggested by the applicant would lead to an absurdity, more particularly in the context of the African extended family. If the deceased, during his life time, had ceased to assist the minor child, the applicant could not have successfully sued the deceased for maintenance.

Administration of estates – Master of the High Court – acceptance of will by – Master's discretion – process that should be followed in deciding whether or not to accept will

Mujuru NO & Ors v The Master & Ors HH-112-08 (Guvava J) (Judgment delivered 20 November 2008)

The Master of the High Court rejected the will of the deceased on the grounds that it did not comply with the formalities prescribed in s 8(1) of the Wills Act [Chapter 6:06]. The will had been signed by the deceased and the two witnesses on the last page only, the other pages being unsigned. The executor nominated in the will brought the Master's decision on review, seeking an order, inter alia, to have the will accepted. Section 8 (5) of the Act allows the Master, if he is satisfied that the document was intended to be the will of the deceased, to accept it for the purpose of administering the estate. It was argued that the failure by the Master to apply this provision when arriving at a decision was grossly irregular.

Held: (1) a proper application of the section would require the Master to adopt a two stage approach in coming to a decision. Firstly, he must satisfy himself that the document before him does not comply with the formalities in the Act. Secondly, he must satisfy himself that the document was indeed intended to be the last will and testament of the testator. If he is so satisfied, then he has a discretion whether or not to accept it for the purpose of the administering the estate. His failure to take the second step in the enquiry was a gross irregularity which would warrant the setting aside of his decision.

(2) It would not be correct for the court to make the decision whether or not to accept the will. The provision envisaged the exercise of this discretion by the Master, with the court determining the matter on appeal in the event that one of the parties is dissatisfied with his decision.

Appeal – extension of time within which to note appeal – application – delay due to legal practitioner not making enquiries about when pending judgment was to be handed down – not an acceptable explanation for non-compliance with rules

Metro Intl (Pvt) Ltd v Old Mutual Property Invst Corp (Pvt) Ltd S-31-08 (Malaba DCJ, in chambers) (Judgment delivered 29 October 2008)

On 18 June 2008 an order for the ejectment of the applicant from the premises it occupied was made by the High Court. Judgment in the matter had been reserved on 31 January. The applicant it had no knowledge that judgment had been given on 18 June 2008 until the Deputy Sheriff served a copy of it at its head office on 4 October 2008 in execution of the writ of ejectment. On 7 October it applied for extension of time within which to note an appeal. The applicant's legal practitioner admitted that he did not at any time during the period between 31 January 2008 and 4 October 2008 contact the Judge's clerk or the Registrar's office to inquire as to when judgment would be handed down. The only inquiry made was by a legal assistant on 26 August 2008 when she asked the judge's clerk whether the judgment was still pending. She said she was told that the judgment had not yet been given. It was her view that she did not find it necessary to confirm the inquiries by a letter because the status quo ante was in favour of

the applicant. As events turned out the statement that judgment had not yet been given was not true and the belief that the status quo ante continued to favour the applicant was misplaced.

Held: (1) In considering an application for condonation of non-compliance with its Rules or for an extension of time within which to note an appeal, the court has a discretion, which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefore; 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. The applicant's legal practitioners were under a duty, having taken instructions to represent it in the application at the High Court, to make regular inquiries at the Registry, confirmed by letters, as to whether the judgment had been given and, if not when, it was to be handed down. A vigilant litigant interested in the speedy outcome of the application would have satisfied himself that the legal practitioners made regular inquiries for the judgment. Lack of knowledge of a judgment due to failure to make necessary inquiries in circumstances where one is under a duty to do so cannot be an acceptable explanation for non-compliance with Rules of the court. The applicant could not remain inactive until notification of the judgment was given by the Registrar.

(2) In any event, there were no prospects of success on appeal: inter alia, the applicant was not entitled to the protection of a statutory tenant as it had not complied with the terms of the lease.

Appeal – interlocutory order – includes provisional order for winding up of company

Dorbrock Hldgs (Pvt) Ltd v Turner & Sons Pvt) Ltd & Anor S-69-07 (Cheda JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 11 September 2008)

A provisional order for the winding up of a company is not appealable, as it is an interlocutory order, the correctness of which is still open to be tested on the return date. Similarly, the property of a company under provisional liquidation may not be sold before the provisional order is confirmed.

Arbitration – arbitration clause – clause in rules of pension fund – construction of clause – clause providing that dispute under rules may be referred to arbitration – proper construction of rules showing that dispute was not about matter not arising out of rules – matter not a dispute falling within terms of arbitration clause

Communication & Allied Industries Pensioners' Assn v Communication & Allied Industries Pension Fund S-29-08 (Malaba JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 17 November 2008)

The respondent was a self-administered fund governed by a set of rules. The affairs of the fund were administered and controlled by nine trustees. The object of the fund was to provide benefits for officers and employees and former officers and employees of the Post and Telecommunications Corporation and its successor companies on their retirement through age, ill-health or other reasons specified under the rules.

One of the categories of beneficiaries under the fund was that of employees who were discharged owing to the abolition of office or to any retrenchment. They were entitled to benefits calculated in accordance with a formula which took into account the accumulated contributions made by the member every year from the fifth year of service, together with an additional benefit equal to a prescribed percentage of his accumulated contributions excluding any voluntary contributions paid. The rules give the trustees the discretionary power to make additions to the benefits payable to the member as they see fit. The additions referred to could be made to a benefit payable to a member of any category of pensioners. Where the benefit was being paid to a pensioner who received an additional pension from another source, the exercise of the power must take into account amounts of increases made to those pensions.

The appellant, as an association of pensioners, claimed on behalf of retrenched pensioners that such pensioners were entitled to additions to benefits calculated in accordance with a formula which took into account the amounts of increases made to salaries of employees in the services of the successor companies. The trustees denied that the rules imposed any obligation on them to do this. The appellant asked that the matter be referred to arbitration in terms of r 7 of the rules, which allows a dispute about a claim from a member about any matter under the rules to be referred to arbitration. In the High Court, the judge held that the claim did not arise from the rules but rather sought an amendment of the rules.

Held: The matter about which the dispute which the parties must refer to arbitration, should the other party in the dispute be dissatisfied with the decision of the trustees, should not be a matter outside the rules; it must be a matter for which the parties made provision under the rules.

The first thing to be ascertained is the precise nature of the dispute which has arisen. The dispute in this case was about the existence or otherwise, as a matter of law under the rules, of an obligation on the trustees to take into account amounts of increases made to salaries of serving employees by the successor companies when calculating additions to benefits payable to retrenched pensioners. The appellants were demanding as a matter of law that the trustees must act in the manner suggested whilst the trustees argued that the decision as to what factors were to be taken into account in calculating additions to benefits payable to pensioners or beneficiaries was a matter of discretion.

The next question is whether the dispute is one which falls within the terms of the arbitration clause, that is, whether the matter about which the dispute arose was a matter under the rules. The appellant conceded that the rule did not impose an obligation on the trustees but argued that the court could nonetheless proceed on the basis that the trustees were under the obligation. This would impose on the trustees a burden they did not undertake under the rules. The principle of impartiality which trustees must observe in dealing with beneficiaries under the rules requires that the court should intervene in

matters of administration of the fund for purposes of enforcing the rules. The matter sought to be imposed on the trustees was one outside the rules. Accordingly, the dispute did not fall within the terms of the arbitration clause.

Company – general meeting – when can be called by shareholders – articles of association – provisions dealing with calling of meetings – override general provisions of s 128(1)(b) of Companies Act [Chapter 24:03] – shareholders must require directors to call meeting – shareholders only entitled to call meeting if directors fail to comply with requisition

Africa First Renaissance Corp Ltd v ACM Invstms (Pvt) Ltd & Ors HH-95-08 (Uchena J) (Judgment delivered 16 October 2008)

The first five respondent companies, all shareholders in the sixth respondent, gave public notice convening an extraordinary meeting of the sixth respondent. The object of the meeting was to remove and replace certain of the directors of the sixth respondent. The applicant, also a shareholder, contended that the convening of the meeting was a nullity. It was argued on behalf of the first five respondents that they were entitled to call a meeting in terms of s 128(1)9b) of the Companies Act [Chapter 24:03]. This section provides that, in so far as the articles of a company do not make other provision in that behalf, two or more members holding not less than one tenth of the issued share capital of a company may call a meeting. The articles of association of the sixth respondent provided that meetings had to be called by the directors, whether on their own initiative or when requisitioned by shareholders "in accordance with the statutes". "The statutes" was defined as meaning the Companies Act.

Held: The provisions of s 128(1)(b) only have effect if the company's articles of association do not provide otherwise. The provisions of the articles were different from the provisions of s 128(1)(b). They therefore provided otherwise, and should in terms of s 128(1) be followed. Since the requisitioning of a general meeting had to be in accordance with the Act, it was necessary to look into the Act for provisions on how shareholders can call for an extraordinary meeting or any meeting other than in the manner prescribed in s 128(1)(b), which defers to the provisions of the articles of association. Section 126 provided the procedure whereby shareholders could requisition a meeting and for the circumstances where they could convene a meeting if the directors failed to call a meeting when required. The first five respondents therefore used the wrong procedure. While they had a right to initiate an extraordinary meeting by requisitioning the directors, they had no right to convene the meeting themselves. They could only have convened the meeting themselves if, after complying with s 126(1), the directors had failed to comply with their requisition. It is not lawful for shareholders to convene an extraordinary meeting before requisitioning the directors to do so, and then only if the directors have failed to comply. The notice was therefore null and void.

Company – winding-up – provisional order for winding up of company – such order interlocutory and not subject to appeal

Dorbrock Hldgs (Pvt) Ltd v Turner & Sons Pvt) Ltd & Anor S-69-07 (Cheda JA, Malaba & Gwaunza JJA concurring) (Judgment delivered 11 September 2008)

See above, under APPEAL (Interlocutory order).

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1) – application to Supreme Court – when may be brought – proceedings commenced in lower court – lower court declining jurisdiction – no proceedings before that court – applicant entitled to bring application under s 24(1)

Shumba & Anor v ZEC & Anor S-11-08 (Chidyausiku CJ; Sandura, Ziyambi, Malaba & Garwe JJA concurring) (Judgment delivered 1 August 2008)

The applicants both wished to stand as candidates in the presidential election in March 2008. At 1545 on nomination day they were both in the nomination court to present their papers. Their papers were rejected by the second respondent, the nomination officer, on the grounds that the nomination court had closed. They brought an application in the High Court to compel the respondent to accept their nominations and declare them to be candidates for the election. The High Court declined jurisdiction, holding that only the Electoral Court had jurisdiction, by virtue of s 46(19) of the Electoral Act [Chapter 2:13]. An application was then brought before the Electoral Court, which held that the matter had prescribed in terms of s 46(19)(c). After the election had been held, the applicants brought an application under s 24(1) of the Constitution, alleging that their right to freedom of association, guaranteed by ss 21 (1) and 21(2) of the Constitution and their right to protection of the law, guaranteed by s 18(1) of the Constitution, were violated by the second respondent, an employee of the first respondent.

It was argued by the respondents that the remedy available to the applicants upon the rejection of their nomination papers was an appeal to a Judge of the Electoral Court in terms of s 46(19) of the Act. When the applicants failed to do so timeously the decision of the nomination officer became final, in terms of s 46(19)(c). The application to the Supreme Court was, they argued, a disguised appeal against the nomination officer's decision and not permissible. The second point raised was that the application should be dismissed on the basis that the matter arose from proceedings in both the High Court and the Electoral Court and therefore could only find its way to the Supreme Court by referral in terms of s 24 (2) of the Constitution. The applicants had no right to approach the court directly in terms of s 24(1). The third point raised was that the first respondent, the Electoral Commission, was wrongly cited having regard to the provisions of s 18 of the Zimbabwe Electoral Commission Act [Chapter 2:12]. The chairman of the Commission should have been cited.

Held: (1) the applicants' contention that the nomination papers of the applicants were not rejected in terms of s 46(10) of the Act was correct. The application of subs (10) is conditional upon the fulfilment of the requirements of subss (8) and (9), which envisage that nomination papers are submitted to the nomination officer who in turn accepts and examines the nomination papers. It is only after a nomination officer has accepted and examined the nomination papers that he can act or do any of the things provided for in terms of subs (10). In casu the respondents' nomination papers were rejected by the nomination officer for failure to comply with s 46(7) of the Act, which provides that nomination papers have to be submitted by four o'clock in the afternoon of the nomination day. The rejection of the papers was contrary to the explicit provisions of s 46(7) of the Act, the applicants being within the court by four o'clock. The Act does not provide a remedy for such a candidate – an apparent oversight by the draftsman. Where no specific remedy is provided for in the Act the High Court can exercise its inherent jurisdiction of review. The approach to the High Court in the first instance was therefore correct.

(2) Once proceedings are commenced in the High Court or any subordinate court and a constitutional point arises from the pleadings or circumstances of the case, the constitutional point has arisen from proceedings in that court. In casu, the High Court and the Electoral Court both declined jurisdiction. Where a court has declined jurisdiction there cannot be proceedings before it thereafter. While it was open to the applicants to apply to the High Court or the Electoral Court to refer the case to the Supreme Court, the mere existence of an opportunity to apply for a referral did not create an obligation on the applicants to comply with s 24(2) of the Constitution or bar them from approaching the Supreme Court in terms of s 24(1). One of the objects of s 24(2) and s 24(3) is to prevent parallel proceedings in two courts and the possibility of two conflicting outcomes. Where the one court has concluded that it has no jurisdiction that possibility is eliminated. It is also incongruous to hold that a matter arises from proceedings in another court when that other court has declined jurisdiction.

(3) It is clear from s 18 of the Zimbabwe Electoral Commission Act that the chairperson of the Electoral Commission is to be cited whenever the Commission is being sued. Failure to cite the chairperson of the Commission or the citing of the Commission itself instead of the chairperson constitutes a failure to comply with s 18 of the Zimbabwe Electoral Commission Act. Sections 2 and 3 of the State Liabilities Act [Chapter 8:14], which are incorporated by s 18 of the Zimbabwe Electoral Commission Act, have to be interpreted as directing a plaintiff or applicant to cite the Minister as the defendant or the respondent. To interpret the sections as conferring on a plaintiff or applicant unfettered discretion to cite the Minister or any other person of their choice would lead to an obvious absurdity that could not have been intended by the legislature. The correct interpretation to be ascribed to s 18 of the Electoral Commission Act, as read with the State Liabilities Act, is that whenever an employee of the Commission is being sued and a plaintiff or applicant wishes to join the Commission, the Chairperson of the Commission, not the Commission itself, has to be cited. However, the use in s 3 of the State Liabilities Act of the word "may" rather than "shall" meant that the provision was directory rather than peremptory. The consequences of failure to comply with the provisions of s 18 of the Zimbabwe Electoral Commission Act are not explicitly spelt out. In those statutory provisions where the legislature has not specifically provided for the consequences of failure to comply, it has to be assumed that the legislature has left it to the courts to determine what the consequences of failure to comply should be. One of guiding principles for the determination of whether failure to comply with a statutory provision is fatal or a mere irregularity is the

possible consequences of a particular interpretation. If interpreting non-compliance with a statutory provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did not intend such a consequence and therefore the provision is directory. The purpose of s 18 of the Zimbabwe Electoral Commission Act is to ensure that the chairperson of the Commission, as an interested party, is not sidelined in litigation against the Commission. In casu, he had not been sidelined. He was aware of the proceedings and had filed an affidavit. To hold that the proceedings were a nullity for failure to comply with s 18 of the Zimbabwe Electoral Commission Act would result in a consequence totally disproportionate to the mischief intended to be remedied. No prejudice was caused in this case.

Contract – depositum – applicability thereto of Praetorian edict relating to liability of sailors, innkeepers and stable-keepers — loss of goods deposited due to theft by employee of bailee — where onus of proving damage lies — "owner's risk" clause in contract — effect of – need for plaintiff to allege and prove gross negligence

Rix Upholstery (Pvt) Ltd v Biddulphs (Pvt) Ltd HH-91-08 (Makarau JP) (Judgment delivered 15 October 2008)

The plaintiff left certain of his goods in storage at the defendant's premises. He signed, but did not read, a document which stated that the defendant "shall not be responsible for any loss or damage of any nature whatsoever sustained or suffered by the customer and however and from whatever cause arising even if the customer (sic) and/ or their servants and /or agents are negligent, the basis of this quotation being that work and storage will be effected entirely and solely at the customer's risk." An employee of the defendant broke into the warehouse where the plaintiff's goods were stored and stole some of the plaintiff's goods. The plaintiff issued summons against the defendant claiming a sum representing the value of the stolen goods. The claim was based on breach of contract, on the basis that the defendant failed to return to the plaintiff certain items that had left with it for storage. No fault was pleaded in the papers and no cause of action of which fault is an element was raised.

Held: (1) a plaintiff who has suffered loss as a result of the alleged negligent performance of a contract by the defendant has the option to embed his claim in either delict or in contract. The legal principles applied in establishing liability under each cause of action are different and necessary averments to sustain each cause of action have to be made and supporting evidence adduced.

(2) This was a depositum contract, a specific form of contract whose terms are implied by law. An essential element of the contract is the fact of the delivery of the item to the bailee and its return to the owner upon demand. Were the contract for storage only, the plaintiff would have been merely shown a designated place on the defendant's premises where he could place his goods and from which he could retrieve them when he chose. Under a contract of depositum, the bailee has the obligation, imposed by law, to return the goods to the owner upon demand. The liability of the bailee under the depositum

contract is similar to the obligations imposed on sailors, innkeepers and stable keepers by the Praetor's Edict de nautis, cauponibus et stabulariis which is a part of our law. The parties to a depositum contract can agree to exempt one of the parties from liability for breach of the contract that ordinarily would have attracted liability, just as carriers by land invariably insert clauses in their contracts limiting their liabilitiy to instances of gross negligence only. Although the "owner's risk" clause expressly referred to negligence, it would not exempt the defendant from liability arising from gross negligence. In casu, there was no averment, evidence or argument that the defendant or its servants were negligent in any way, let alone grossly negligent. Employing a dishonest employee on its own is not per se proof of negligence.

Contract – donation – inter vivos – donation between spouses – may be revoked at any time

Taylor v Taylor S-70-07 (Garwe JA, Cheda & Ziyambi JJA concurring) (Judgment delivered 15 September 2008)

The parties met in 1982 and during the same year started co-habiting. They eventually got married the next year. The marriage subsists to this day. After living together for a period of over ten years, the respondent decided to donate the vacant piece of land to the appellant. The appellant accepted the donation and the property was formally transferred to him in 1998. After the respondent discovered that the appellant had engaged in an adulterous relationship during the subsistence of the marriage, she brought an action for an order revoking the donation. The High Court granted the order. The appellant appealed, arguing inter alia that the court a quo erred in ordering a revocation of the donation without mero motu considering the question of compensation for the dwelling built on the land by the appellant. The judgment of the court a quo thus, he argued, had the effect of unjustly enriching the respondent.

Held: (1) In general a donation inter vivos, once made, is irrevocable, except in a few instances, notably ingratitude. In the case of a remuneratory donation, there can be no revocation, even for ingratitude. In the case of donations between spouses the common law position was that a donation inter vivos between spouses was prohibited subject to certain exceptions, but that rule no longer applies in this country: see s 11 of the General Law Amendment Act [Chapter 8:07]. Consequently donations between spouses are now permissible, though the common law position remains that the donor may at any time revoke such a donation. Reciprocal and remuneratory gifts between spouses, however, are not revocable.

(2) Unjust enrichment now forms a cause of action in terms of our common law, but the issue of unjust enrichment was not before the court a quo and indeed no submissions in that regard were made there by either party. The issue before the court was whether the respondent could revoke the donation and, if so, whether it was necessary to prove ingratitude on the part of the respondent. The court not having been asked to direct its mind to the question of compensation for improvements effected on the land, there was no basis upon which the court could be said to have misdirected itself in not mero motu dealing with an issue that was never before it. The appellant was still entitled to take any action he considered

appropriate in order to recover any monies he may have expended in effecting improvements to the donated land.

Contract – enforceability – illegal contract – maxim ex turpi causa non oritur action – inflexibility of maxim – no exceptions will be entertained by the courts

Mega Pak Zimbabwe (Pvt) Ltd v Global Technologies Central Africa (Pvt) Ltd HH-84-08 (Makarau JP (Judgment delivered 24 September 2008)

The plaintiff company, which wanted to purchase two luxury cars from outside the country, entered into an arrangement with the defendant in terms of which the plaintiff would pay the defendant local currency (plus a commission) and the defendant would source funds from another party. The third party did not transmit all the funds expected and payment for one of the cars was not made. The plaintiff sought specific performance of the contract and the delivery from the defendant of the car that was not paid for. Alternatively, it sought damages to place it in the position where it could procure a similar vehicle to the one the defendant allegedly failed to deliver.

Held: the plaintiff could not succeed: the maxim ex turpi causa non oritur actio applied. An illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute, admitting of no exceptions. Were the plaintiff simply seeking to extricate itself from the contract by seeking a refund of the local currency payment it made in respect of the motor vehicle yet to be delivered, there may have existed scope for the court to apply the in pari delicto rule and attempt to do justice between the parties. Here, however, the court was dealing with the attempted enforcement of a contract which arose ex turpi causa and not an attempt to undo performance pursuant to an illegal contract. It followed that the plaintiff must be entirely non-suited.

Contract – illegality – agreement to pay foreign currency for item purchased in Zimbabwe – breach of exchange control laws – par delictum rule – relaxation of – when appropriate

Gambiza v Taziva HH-109-08 (Gowora J) (Judgment delivered 27 August 2008)

The parties entered into an agreement whereby the plaintiff would supply a motor car to the defendant. The purchase price was stated in South African currency. An initial deposit was paid of around one-third of the full price, with the balance to be paid within a month. The plaintiff in the mean time kept possession of the car's registration book. The defendant failed to pay the balance in rand and tendered payment in local currency at the official exchange rate. The plaintiff refused the tender and sued for the return of the vehicle or payment of the balance, in rands. It was argued by the plaintiff that the agreement was not unlawful, as s 4(1) of the Exchange Control Regulations (SI 109 of 1996), which

proscribes the buying, selling, borrowing, lending or exchange of any foreign currency without permission from the exchange control authority, did not make it an offence to receive foreign currency. The defendant argued that the agreement was illegal and that the in pari dellicto rule should apply. Accordingly, the loss should lie where it fell. The defendant counterclaimed for the delivery of the registration book against payment of the balance owed, paid in local currency.

Held: (1) Although the regulations did not forbid parties from transacting in foreign currency in general terms but they proscribed specific conduct involving foreign currency. In this situation, the question was whether what the parties did could be said to be "exchanging" foreign currency. In the context in which the word "exchange" is used in the regulations, the meaning that can be ascribed to it is "to pay" and "to receive". Thus the agreement was tainted with illegality and could not be enforced.

(2) The agreement had only been partially performed by either of the parties. Whilst the defendant had paid less than half of the purchase price the plaintiff had not really effected delivery, in that the registration book had not been given to the defendant and thus he could not assume ownership of the vehicle. Although the agreement itself was not illegal, the manner in which the parties performed part of the agreement had rendered it illegal and any order by the court that would lead to the performance of the remaining part of the agreement would have the effect of giving sanction to the actions of the parties in violating the regulations. This meant that the defendant's counterclaim could not be entertained. The usual way of treating illegal agreements, where the parties are equally to blame, is to let the loss lie where it fell. However, the courts have a discretion, in suitable cases, to relax the par delictum rule in order to do justice between man and man and to prevent the injustice of one party being enriched at the expense of another. The plaintiff having parted with a valuable item against payment of an amount which was less than half the purchase price, it would be just to order that the vehicle be returned to the plaintiff.

Contract – option – right of first refusal – meaning – what rights given to grantee – no obligation on part of grantor to sell subject of the contract – right only exercisable if grantor decides to sell item

Makamure v Devon Engineering (Pvt) Ltd HH-106-08 (Gowora J) (Judgment delivered 26 November 2008)

The applicant was employed by the respondent company. When he left its service, having worked there for nearly 4 years, he retained the car that had been allocated to him. He sought an order compelling the respondent to sell the car to him at the current market value. The relevant clause in the contract of employment provided that assigned vehicles shall be disposed of after three years of continuous use by the employee concerned and, where applicable, subject to the lease hire company's laid down conditions. The user would be given a right of first refusal to purchase the vehicle at a price to be determined by reference to the lease hire company's laid down value or any other value as determined by the executive

directors.

Held: (1) There was an agreement offering the applicant a right of pre-emption. A right of pre-emption or first refusal entitles the holder to the first opportunity of buying if the seller decides to sell. It is a right that is exercised upon the fulfilment of a condition: there must be an offer made for the property which is subject to the right. At that stage, the obligation of the grantor, before accepting the offer made with a specific price, is to offer the property for sale to the grantee to purchase at the price being offered by the third party. The grantee is then at liberty to accept or refuse the offer made to him. Thus are the conditions of first refusal satisfied. In casu there was no offer on the table for the applicant to accept. There was no third party vying to purchase the car from the respondent. There was no price specified on the vehicle. The applicant could not exercise a right of pre-emption in a vacuum.

(2) The grantor of a right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right.

Contract – sale – instalment sale – of land – when such sale exists – agreement under which lessee to buy sells rights in property to another – not a sale of land – contract one of cession of rights and interests in land – contract not governed by s 8 of Contractual Penalties Act [Chapter 8:04]

Khumalo v Mandeya & Anor S-23-08 (Malaba JA, in chambers) (Judgment delivered 30 September 2008)

The applicant entered into a lease–to–buy agreement with the Bulawayo City Council in respect of a stand in a high-density suburb. The agreement included a clause in terms of which the applicant was prohibited, prior to transfer of the property to himself, from ceding or assigning the agreement or any rights acquired by him thereunder, or parting with the possession of the property or any part thereof or alienating, donating or otherwise disposing of the same without the prior consent in writing of the Council. The applicant subsequently entered into a written agreement with the first respondent in respect of the property before transfer of ownership of the property to him by the Council. The transaction was described by the parties as an "agreement of sale", the subject matter of which was referred to as "a piece of land". The agreement provided for payment by means of a deposit, followed by two instalments (which were not equal amounts). The applicant had sought and obtained the written consent of the Council. With that consent the applicant ceded all his rights and interests in the property under the lease-to-buy to the first respondent.

The first respondent did not pay the deposit in full, nor did she pay the instalments either timeously or in full. The applicant, acting in terms of the agreement, gave the first respondent, who admittedly was in breach of the contract, 14 days' notice to remedy her breach. When she failed to do so within the time limit prescribed in the notice, he cancelled the agreement.

The first respondent applied to the High Court for an order declaring the cancellation of the agreement of "sale" by the applicant null and void on the ground that the written notice fell foul of s 8(2)(c)(i) of the Contractual Penalties Act [Chapter 8:04]. Section 8(1) of the Act prohibits a seller under an instalment sale of land from terminating the contract on account of any breach of by the purchaser unless he has given notice in terms of subs (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued. The period given to the first respondent within which she was called upon to remedy the breach was less than the thirty days specified in s 8(2)(c) in respect of an "instalment sale of land". An "instalment sale of land" is defined in s 2 of the Act as a contract for the sale of land whereby payment is required to be made by way of a deposit and two or more instalments; and ownership of the land is not transferred until payment is completed. The court a quo held that the agreement was an "instalment sale of land" as the subject matter of the sale was "land", the purchase price for which was payable by way of a deposit and two or more instalments. He declared the cancellation of the agreement by the applicant null and void ab initio.

Held: Whilst the concept used by the parties to describe the merx was an important factor to consider in the determination of the question whether the subject-matter of the agreement of sale was "land", it was not an overriding one. At the time the parties entered into the agreement, the applicant was not the owner of the land and improvements thereon. He could not pass title to the land to the first respondent at the payment of the purchase price in terms of the agreement. At the time the parties entered into the agreement, the applicant held rights and interests in the land and improvements thereon under the lease-to-buy. With the written consent of the Council he ceded those rights and interests to the first respondent, who stepped into his shoes as the cessionary and acquired them under the lease-to-buy. In spite of the language used by the parties in the agreement, what was in effect sold and purchased were rights and interests in the land, not the dominium in the land.

Contract – termination – effect – rights accrued before the date of termination – enforceability of such rights

HEM Granite Industries (Pvt) Ltd v Keeley Granite (Pvt) Ltd S-18-09 (Malaba DCJ, Ziyambi & Garwe JJA concurring) (Judgment delivered 9 September 2008)

The respondent entered into a tribute agreement with the appellant, which owned a mining location. Whilst the appellant was holder of the title to the minerals within its location it did not have the necessary capital for digging up, extracting, processing and disposing of the actual minerals for its own benefit and account. The agreement gave the respondent the rights, for a period of three years, to mine, extract, process, remove from site granite and dolorite blocks and dispose of them for its own benefit and account, subject to payment of an amount of a royalty of 10% of the "at quarry" value of the minerals won. The value was defined as being the price set by the Minerals Marketing Corporation. The agreement had a termination clause, in terms of which the respondent had a right to terminate the tribute agreement if it was unable to continue mining operations due to causes beyond its control, subject to it

giving the appellant three months' written notice of its intent.

The granite blocks extracted from the mining location were of poor quality and the respondent found it difficult to sell them at the price set for the lowest category of grades of the quality of granite blocks. This resulted in the operations of the respondent becoming increasingly uneconomic, and the respondent gave notice of termination. It duly removed its equipment from the site but left behind 188 granite blocks. Attempts were made to sell the blocks but without success. After some years the prices in the international market had generally improved and the respondent went to remove the blocks from the site. The appellant prevented it from doing so, claiming that the respondent had lost its ownership in them until a new royalty agreement had been concluded. The respondent obtained an order from the High Court, authorising the removal of the blocks, subject to payment of a royalty as provided for in the tribute agreement. The appellant argued that the rights which the respondent had acquired in the granite blocks ought to have been exercised during the period of tribute.

Held: the general rule of the law of contract is that termination of a contract operates ex nunc, de futuro only and does not affect rights which have accrued to the parties. Termination or extinction of the obligation to perform is restricted to the executory portion of the contract, leaving intact rights which were accrued due and enforceable before termination. Up to the date of termination, the rights have come into existence and can be enforced. In casu the granite blocks had already been won by the respondent in the exercise of the rights given to it under the tribute agreement. They were in its possession, ready to be removed from the mining location at the time of termination of the contract. They had become the property of the respondent by reason of its having performed its side of the bargain subject, of course, to payment of the amount of royalty which had to be calculated in the manner expressly provided for under the tribute agreement. The right to remove the blocks had accrued to the respondent at the time of termination of the tribute agreement and was enforceable against the appellant in the event of interference with its exercise. The only limitation to the exercise of the right of ownership by the respondent was the obligation to pay the amount of royalty determined in the manner specified of the agreement.

Court – contempt – committal for – when committal justified – need for wilfulness and mala fides to be shown – disobedience to order brought to person's notice – wilfulness and mala fides inferred

Batezat v Permassan (Pvt) Ltd S-49-09 (Sandura JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 6 October 2008)

Not every breach of an order of court justifies committal for contempt. A person's disobedience must be not only wilful but also mala fide. However, only in the limited class of case referred to as "constructive" contempt does the applicant have to allege and prove mala fides; in the more usual case of a "direct" contempt, where there is a deliberate disobedience of an existing order of court, he need prove wilfulness only, mala fides being inferred. Thus, whenever an applicant proves that the respondent

has disobeyed an order of court which was brought to his notice, then both wilfulness and mala fides will be inferred. The onus is then on the respondent to rebut the inference of mala fides or wilfulness on a balance of probabilities.

Court – magistrate – duties – unrepresented accused – magistrate's responsibilities towards

S v Gwande & Anor HH-101-08 (Omerjee J) (Judgment delivered 15 November 2008)

See below, under CRIMINAL PROCEDURE (Plea – guilty plea).

Criminal law – being found in possession of goods in regard to which there is a reasonable suspicion that they were stolen – whether accused person can be convicted on plea alone, without evidence being led

S v Gaviyaya HH-85-08 (Chitakunye J) (Judgment delivered 11 September 2008)

The accused pleaded guilty in the magistrates court to a charge of contravening s 125(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], that is, being found in possession of goods in circumstances giving rise to a reasonable suspicion that they were stolen and being unable at any time to give a satisfactory account of his possession. The magistrate found him guilty on his plea. The facts in the outline of the State case did not contain any explanation of how accused acquired the goods and the questions posed by the magistrate did not elicit any explanation from the accused as to how he came to possess the goods or even what explanation he gave to the police.

Held: it would be absurd to ask an offender in plea proceedings if he admits that there was a reasonable suspicion that the goods found in his possession had been stolen. It is not the accused who suspects himself. The suspicion is formed by a third person, usually a police officer. The circumstances which give rise to the suspicion that the property was stolen must be as perceived by and considered by that police officer. There must be something that the police officer saw and considered in the accused's possession or manner of possession for him reasonably to suspect that the property was stolen. Such a matter is not within the accused's knowledge and so any admission of that element of the offence by the accused would not be of much value. Consequently, where the accused enters a plea of guilty the presiding magistrate should still receive evidence on the circumstances giving rise to a reasonable suspicion that the goods were stolen. Where no evidence has been given, the court is never in a position to satisfy itself that the explanation is not satisfactory. It is the court that has to be satisfied that the accused has failed to give a satisfactory account of his possession and that the suspicion alleged is therefore reasonable in the circumstances.

Criminal procedure – admissions – what may be admitted – by accused person – accused may not admit facts which are within the peculiar knowledge of another person

S v Gaviyaya HH-85-08 (Chitakunye J) (Judgment delivered 11 September 2008)

See above, under CRIMINAL LAW (Being found in possession of goods in regard to which there is a reasonable suspicion that they were stolen).

Criminal procedure – arrest – child of arrested person – police having no right to detain child along with parent

Criminal procedure – arrest – time for which an arrested person may be detained by police

Chiramba & Ors v Min of Home Affairs & Ors HH-29-09 (Hungwe J) (Judgment delivered 11 November 2008)

The applicants, all activists in the main opposition party, were detained by the police. One of the applicants had a two year old child and the child was also taken away with its mother. For some two weeks the applicants were kept incommunicado. They had no access to their lawyers for nearly two weeks. They were not informed of the reason for their arrest, and enquiries by their lawyers were met with denials that the applicants were in police custody at all. The applicants sought orders (a) declaring their arrest and continued detention unlawful; (b) requiring the respondents and all those acting through them or on their behalf to permit applicants access to medical treatment at medical centres of their choices; and (c) directing the respondents produce the applicants before a High Court judge in chambers within two hours of the order being made or, alternatively, to take the applicants for a remand hearing at the magistrates court by a stated time, failing which the respondents should forthwith release all the applicants from custody.

Held: (1) Zimbabwe is a signatory to the International Covenant on Civil and Political Rights. As a state party to this treaty, Zimbabwe is bound by the obligations flowing from the treaty, which deals, inter alia, with the rights of persons who have been arrested and detained on criminal charges. The treaty places two types of obligations on states: firstly, the duty to respect and ensure human rights and, secondly, the duty to guarantee that those same rights are respected. The first set of obligations is both positive and negative in nature; on the one hand the state must refrain (whether by act or omission) from violating human rights; and on the other the state must ensure that, through the adoption of whatever means necessary, such rights can be actively enjoyed. Section 13(3) of the Constitution guarantees the rights of persons who have been detained, and s 32(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] requires that a person who has been arrested must be brought before a judge or magistrate

within 48 hours. The respondents had denied the applicants the protection of the law. Their conduct in doing so should be deprecated.

(2) Zimbabwe was also a signatory to the Convention on the Rights of the Child and accordingly it must be seen, through the acts of its public officials, to be protective of the rights of the child. Article 16 of the Convention provided that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. Neither the Criminal Procedure and Evidence Act nor the Childrens Act [Chapter 5:06] provided for a child in a situation like this; they dealt with young persons suspected of having committed criminal offences. The Prisons Act [Chapter 7:11] made provision in s 58 for dealing the unweaned child of a female prisoner. Section 84(1) of the Children's Act did not expressly address the plight of a baby taken by police who have arrested its mother but the prohibition against detention of minors is implied in this section. The conduct of the respondents in this case did not in any way uphold this international obligation to protect and promote the rights of the child. To subject a two year old to the rigours of detention simply on the grounds that its mother may have committed some criminal offence is totally unconscionable and immoral, made worse by the denial of basic rights to the mother.

(3) The orders sought would accordingly be granted.

Criminal procedure – plea – guilty plea – questioning of accused by magistrate – need to phrase questions carefully to ensure accused understands what he is pleading guilty to – disclosure of facts by prosecutor – need for court to ensure that prosecution discloses sufficient facts – use of State's outline of facts – need to ensure that accused has actually agreed with such outline

S v Gwande & Anor HH-101-08 (Omerjee J) (Judgment delivered 15 November 2008)

Magistrates owe enormous duties toward unrepresented accused persons. The magistrate is the primary bulwark defending the ignorant or impoverished against the potential injustices wrought through an excess of zeal; pressure of work; administrative inefficiency or plain ineptitude in the investigation and prosecution of offences.

Where the accused person pleads guilty, and the court proceeds in terms of s 271(2)(b)(i) of the Criminal Procedure and Evidence Act [Chapter 9:07], the magistrate is duty bound to ensure that the prosecutor has disclosed sufficient and adequate facts, which are capable of informing, not only the court, but also the accused, precisely what the allegations against him are. Where the prosecution fails to provide or disclose adequate facts in support of the charge, it must be directed to do so: the magistrate must mero motu invoke the provisions of s 177(1) of the Act and direct the prosecution to provide further particulars. Failure by the magistrate to ensure prior disclosure of adequate and sufficient facts amounts to a misdirection and offends against the accused person's constitutional right to be afforded a fair trial, in particular, the right to be informed, in detail, of the nature of the offence charged as guaranteed by s 18

(3)(b) of the Constitution.

The purpose of the enquiry in terms of s 271(2)(b)(i) of the Act is to ensure that the accused's plea of guilty is an unqualified or unequivocal and genuine plea. The magistrate can only satisfy himself of this if he asks questions which are carefully formulated by marrying the charge, the essential elements and the particular facts of the case. Merely paraphrasing the definition of an offence will not assist the accused to understand the import of the elements, more so if they are of a technical legal nature.

Magistrates and prosecutors should desist from the practice, which appears to be common, of simply using the State's outline of its case when the accused tenders a guilty plea. The State outline is not based on facts which the accused has given prior agreement to. The use of the State outline exposes the accused to the danger of being convicted on facts that he has not been given an opportunity to carefully reflect on and has the real potential of the accused being severely prejudiced, in the sense that he may be convicted on the basis of facts which he may not agree with but which facts aggravate the offence and lead to a more severe punishment than warranted. The correct procedure should be that if, in a contested trial, the accused pleads guilty to the charge, the magistrate should take a short recess to allow the prosecutor to interview the accused and draw up a statement of agreed facts based on the information gathered.

Criminal procedure — plea — guilty plea — conviction on basis of plea — charge under s 125(a) of Criminal Code [Chapter 9:23] — conviction may not be recorded without leading evidence

S v Gaviyaya HH-85-08 (Chitakunye J) (Judgment delivered 11 September 2008)

See above, under CRIMINAL LAW (Being found in possession of goods in regard to which there is a reasonable suspicion that they were stolen).

Criminal procedure – specification in terms of Prevention of Corruption Act [Chapter 9:16] – whether Minister is obliged to notify person affected of his intention to declare him to be a specified person – extra-territoriality of specification – whether Minister entitled to declare non-resident of Zimbabwe to be a specified person – such person having assets and controlling companies within Zimbabwe – Minister entitled to declare him to be a specified person

Mawere v Min of Justice S-67-07 (Cheda JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 11 September 2008)

In terms of s 6 of the Prevention of Corruption Act [Chapter 9:16], the Minister of Justice may declare any person whom he has reasonable grounds to believe to be guilty of offences set out in the section to

be a "specified person". The offences broadly relate to activities that have resulted in any loss to the State or other persons or institutions in which the State has a direct interest and other forms of corruption. The consequences of specification are that an investigator is appointed. The specified person is prohibited by s 10 of the Act from expending any of his assets in Zimbabwe without the consent of the investigator.

The appellant was a citizen and resident of South Africa although he has previously been a resident and citizen of Zimbabwe. He was specified by the respondent Minister. He applied to have the specification set aside on various grounds, inter alia: (1) he only became aware of the specification some three months after the fact as he was not normally resident in Zimbabwe and no order was served on him personally; (2) the respondent had breached the rules of natural justice in failing to afford the appellant a hearing prior to declaring him to be a specified person; (3) the respondent did not have the jurisdictional facts to entitle him to exercise his discretionary power to declare the applicant to be a specified person; and (4) the Act did not have extra-territorial application, and created no crime or conduct with such effect.

The respondent argued that the appellant had no locus standi because he was a fugitive from justice and had had no authority from the investigator to expend his assets.

Held: (1) Any assets which the appellant had in South Africa were not affected by s 10. The investigator had no jurisdiction over the appellant's assets which were not in Zimbabwe. In the absence of evidence suggesting that he was expending or disposing of assets in Zimbabwe, the court could not hold that he had no locus standi.

Quaere: (2) whether the appellant could be deprived of his constitutional right to challenge such an administrative decision to test its correctness. If such authority were refused by the investigator the appellant would have a right to appeal if it was unreasonably refused.

(3) For the court to hold that the appellant was a fugitive from justice it would have to be shown that he left Zimbabwe with the intention to flee and deliberately put himself beyond the jurisdiction of the court to avoid any legal action that might be brought up against him, or that he was in hiding within the jurisdiction of Zimbabwe. The fact that an attempt was made to arrest and bring him to Zimbabwe and that he was now avoiding coming to Zimbabwe did not make him a fugitive from justice. No person can be compelled to leave his country of residence and citizenship in order to go and subject himself to the jurisdiction of another country to face any legal action in that country.

(4) The appellant could not avoid being investigated simply because he was not a citizen or resident of Zimbabwe. There is nothing to prohibit investigating the activities of a person simply because he resides outside Zimbabwe.

(5) Specification of a person under the Act is simply a declaration. It is neither an arrest nor detention. It is a declaration that is made in order to facilitate an investigation. Even though the specification of a person may have serious implications, it would defeat the whole purpose of specification if a person

were to be informed that it was intended to investigate him as this would give him an opportunity to take whatever action he could to frustrate the intended investigations. The person specified is given an opportunity under s 8(c) of the Act to give any explanation on the matters concerned when he is questioned by the investigator. Section 9 also gives him the opportunity to present his position on being examined by the investigator. He is given the opportunity of a full hearing. Specification is not a final action against him.

(6) There is no provision in the Act for the Minister to warn or give notice to the person concerned before investigating him. Accordingly, the Minister cannot be ordered to issue such a warning first. The argument that specification offends against the rules of natural justice could not be sustained, since if the Minister sees fit to cancel the specification, he can do so after a report is made to him. Specification is not different from any other provisional orders made in the courts where it is feared that investigations may be jeopardised if prior warning is given to the person involved.

(7) The right to exercise a discretionary power is dependent upon the existence of a jurisdictional fact and that jurisdictional fact consists of the holder of the power satisfying himself, subjectively speaking, upon certain matters. In casu, the appellant had assets in Zimbabwe in the form of a house, bank accounts and companies he owned through some holding companies. There were allegations of fraud and externalization of funds involving those companies. Consequently, the Minister did not exceed his powers.

Note: the judgment appeal against was that of Uchena J in Mawere v Min of Justice HH-1-05, delivered on 11 May 2005.

Criminal procedure (sentence) – general principles – factors to consider – need to balance needs of society against interests of accused – desirability of sentencing court identifying and articulating such competing interests

S v Mukome HH-68-08 (Makarau JP, Hungwe J concurring) (Judgment delivered 6 August 2008)

Assessing sentence is one of the most difficult tasks that faces a judicial officer. Except where the law has laid out a minimum mandatory sentence, the judicial officer is called upon to exercise his discretion and punish the accused on behalf of society. As with most judicial functions, a number of competing interests come into play and have to be delicately balanced. On the one hand is the need to punish and on the other are the interests of the accused. Reaching the correct balance is always a taxing exercise and one that must be approached humanely and rationally. The same punishment does not weigh the same with all people. A sentence that is heavily weighed in favour of the needs of society without paying adequate attention to the interests of the offender is invariably harsh and appears draconian, while a sentence that underplays the interests of society while overemphasizing the interests of the offender is invariably lenient and ineffectual in curbing crime. While it is not practical that in each case the court

should identify and articulate the two competing interests that it seeks to balance, this is a prudent way of approaching the exercise. If this is done, it will assist the court to view whether it has overplayed any of the interests at the expense of the other. It will also assist any superior court that will be reviewing the sentence to see whether the competing interests have each been fairly considered. Trial magistrates must not pay lip service to any plea of guilty and to the mitigatory factors that have been advanced by the accused. The sentences they impose after receiving submissions in mitigation must reflect that the mitigatory features of the case have been taken into account.

Criminal procedure (sentence) – general principles – theories of purpose of punishment – reformation, rather than retribution, the preferable approach – multiple counts – approach to be taken – need to ensure individual sentences as well as overall sentence are appropriate

Criminal procedure (sentence) – common law offences – theft – multiple counts – maximum overall sentence acceptable to courts

S v Chera & Anor HB-84-08 (Ndou J) (Judgment delivered 31 July 2008)

The most popular theory today is that the proper aim of criminal procedure is to reform the criminal so that he may become adjusted to the social order. A mixture of sentimental and utilitarian motives gives this view its great vogue. With the spread of humane feelings and the waning of faith in the old concept of the necessity for inflicting pain in the treatment of children and those suffering from mental disease, there has come revulsion at the hard-heartedness of the old retributive theory. The growing belief in education and in the healing powers of medicine encourages people to suppose that the delinquent may be re-educated to become a useful member of society. Is it not better to save such youthful offenders for a life of usefulness rather than punish them by lengthy imprisonment, which generally makes them worse after they leave than before they entered? An enlightened judicial officer will recognise the futility of severely punishing unavoidable retrogression in human dignity. It is accepted that it is one of the functions of the criminal law to give expression to the collective feeling of revulsion towards offences committed by the accused persons, but such disapproval need not be cruel or take extreme forms. Magistrates need to be guided by principle of consistency in sentencing, so regard must be had to sentences imposed or recommended in similar cases by the superior courts.

Where multiple counts are involved, it is necessary, where such counts are not treated as one for sentence, to ensure that the sentence on each count, as well as the overall sentence, is not excessive. The correct approach is either to take all counts as one for the purposes of sentence and then impose a globular sentence which court considers appropriate in the circumstances, or, alternatively, to determine an appropriate sentence for each count taken singly so that the seriousness of offence is properly reflected. The court would then determine a realistic total which is considers appropriate in the circumstances and where necessary the severity of the aggregate sentence on all the counts taken together may be palliated by ordering some counts to run concurrently with others. For multiple counts

of theft, the maximum effective sentence should rarely even be as much as 20 years.

Criminal procedure (sentence) – stock theft – penalties applicable – theft of equine animal – whether includes theft of a donkey

S v Moyo & Ors HB-124-08 (Ndou J) (Judgment delivered 27 November 2008)

The three accused were convicted before different magistrates of the theft of donkeys. In terms of s 114 (2)(e) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], where stock theft involves any bovine or equine animal, a mandatory minimum sentence is applicable. The magistrates all took the view that a donkey is an "equine animal" and imposed the mandatory minimum sentence.

On automatic review, held: there are conflicting rulings of the High Court as to whether a donkey is or is not an "equine animal". This has resulted in widely different sentences for the crime, depending on which line the magistrate or judge follows. This is not justice. The accused should benefit from this uncertainty and not be disadvantaged. Irrespective of what interpretation is followed, the lesser of the punishments should be visited upon the donkey thieves. The imposition of the minimum mandatory sentence on the accused person in the present cases is discriminatory and unfair when other thieves of donkeys do not attract such mandatory punishment. There is a need, in casu, to use international law for the purpose of removing this uncertainty or ambiguity. It is within the proper nature of judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. Article 7 of the Universal Declaration of Human Rights states that all are equal before the law and are entitled without any discrimination to equal protection of the law. To remove that discrimination, the mandatory minimum sentence should not be applied.

Customs and excise – seizure of goods – goods in possession of traveller leaving the country – traveller not asked to declare goods – not a violation of Customs and Excise Act and goods not liable to seizure

Mudima v Commr-General, ZRA HH-83-08 (Makarau JP) (Judgment delivered 24 September 2008)

In terms of s 55(2)(b) of the Customs and Excise Act [Chapter 23:02], any person leaving Zimbabwe shall, whether or not he has goods in is possession, report to an officer, in the case of a person leaving by aircraft, at the customs post or to an officer at the aerodrome of departure and shall, if called upon to do so, unreservedly declare all the goods in his possession which he proposes to take with him beyond the borders of Zimbabwe in such manner as the officer may require, and shall fully and truthfully answer

any questions put to him by the officer and, if so required, produce such goods for inspection by an officer. Goods found that have not been declared are subject to seizure and possible in terms of s 193 of the Act. The discovery of goods in possession of a traveller where he has not been asked to declare it is not a violation of the Act and thus there would be no basis upon which the seizure of the money could be lawfully made. The law does not oblige every traveller to mero motu declare the goods on his person. A traveller is only obliged to disclose and disclose fully and truthfully the goods in his possession if called upon to do so by a customs officer.

Elections – election petition – service of notice of petition on respondent – where such notice must be served – must be at respondent's "usual or last known" dwelling or place of business – meaning

Chivore v Mudavanhu & Anor HH-61-08 (Chitakunye J) (Judgment delivered 17 July 2008)

Section 169 of the Electoral Act [Chapter 2:13] provides that notice of the presentation of an election petition shall "be served by the petitioner on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business." This means that service must be either personally or by leaving the papers at the respondent's usual or last known dwelling or place of business. It is not enough to serve the notice at the respondent's party's offices. The legislature intended that the respondent should get to know about the petition personally as soon as possible. The addresses for service are such that respondent frequents them as his usual dwelling or place of business. The term "usual" in this instance means "ordinarily used", "frequently used" or "that is in ordinary use". The dwelling place or place of business thus has to be where respondent is ordinarily found or frequents or is expected to be available on a day to a day basis; it is not just any dwelling place or place of business for the respondent. It is for the petitioner to show that the respondent frequents or is ordinarily found at the place at which service was effected. To merely say that a party headquarters is the respondent's place of business is not good enough. Even if, for instance, the respondent was employed by the party, the party's headquarters would still not suffice if that is not where the respondent is based. Election petitions are for the personal attention of the particular respondent. It is the respondent's, not the party's, election which is being challenged. It is the respondent, not his party, on whom the responsibility to act promptly is imposed and on whom the dire consequences of failure to act promptly fall.

Elections – election petition – service of notice of petition on respondent – service of notice on respondent's legal practitioner – whether such constitutes substantial compliance with Act

Kadzima v Chimbetete HH-75-08 (Mtshiya J) (Judgment delivered 20 August 2008)

All the places of service indicated in the Electoral Act [Chapter 2:13] clearly demonstrate the need for personal service on the respondent. For the purposes of service of a petition and other documents, the

legislature has spelled out the manner and places of service only through ss 169 and 188(2). A legal practitioner's office is not one of the places provided for. If there is failure to effect service at places mentioned in s 169, then in terms of s 188(2) service can be effected at the respondents' address appearing in the voter's roll. But even in a last resort situation, the office of a legal practitioner is not availed to the petitioner as a proper place of service. The doctrine of substantial compliance has found way in our jurisdiction. If there was evidence to show that the respondent had in fact instructed or advised the petitioner to serve the petition on his legal practitioners, that might constitute substantial compliance.

Elections – election petition – time limits – failure to comply with – court has no power to dispense with time limits

Kaungwa v Nguni HH-72-08 (Uchena J) (Judgment delivered 31 July 2008)

Irrespective of the attitude of the parties, jurisdiction is conferred by statute and not by the parties. The authority to dispense with statutory time limits is not a wide discretion based on expediency, but a circumscribed discretion which is fully subject to judicial review. A reading of s 169 of the Electoral Act [Chapter 2:13] clearly establishes that it gives the petitioner a right and privilege to challenge the election of the respondent, subject to compliance with the time limit stipulated therein. If the legislature's intention was to authorise the courts to grant extension of time limits, it would have made provision for such extension in the section. The fact that no authority was granted to extend the time limits means the legislature's intention was that failure to comply should lead to nullity. If it can be shown that non-compliance with the rule has led to real or potential prejudice, there is no dispensing power and the rule must be observed. To determine whether non-compliance with formal or procedural requirements has resulted or may result in prejudice, the content and objectives of the rule must be analysed. If the administrative organ is mistaken about the possibility of prejudice and grants dispensation when such danger in fact exists, the court may review the defective exercise of the organ's discretionary power and declare the granting of the dispensation invalid. In this regard it is of importance to mention that the obligatory nature of formal and procedural requirements often arises in electoral issues. Although the courts are inclined to overlook minor formal defects, the general approach is nevertheless to regard the rules relating to the registration of voters, nomination, the drawing up of voters rolls and so on as peremptory. Such an approach is perfectly correct, elections are the foundation upon which a democratic system is built and although irregularities in elections cannot always be judged by the criterion of individual prejudice, the prejudice consists in the fact that the legitimacy of the system of government is undermined. The weight of authority in this country and elsewhere is to the effect that the time requirements are peremptory and cannot be dispensed with.

Elections – election petitions – time limits – failure to comply with – fatal to the petition

Sikanyika v Garadi HH-65-08 (Uchena J) (Judgment delivered 28 July 2008)

The statutory periods laid down for election petitions should be strictly complied with, and any failure to comply is fatal to the petition. If the legislature's intention was to authorise the courts to grant extension of time limits, it would have made provision for such extension. The fact that no authority was granted to extend the time limits means that the legislature's intention was that failure to comply should lead to nullity. The legislature had in mind the timeous resolution of election petitions. A petition must be determined within 6 months of its presentation. It must also be born in mind that a pending election petition undermines the authority of the legislature and the executive, as holders of office in the challenged constituencies will be participating in governing the nation while their election will be under challenge. The legitimacy of the system of government is undermined.

Elections – election petition – time limits – failure to comply with – High Court has no power to condone such failure

Shumba v Chrmn, ZEC & Anor HH-116-08 (Makoni J) (Judgment delivered 10 December 2008)

The applicant had wanted to contest the presidential election in March 2008. His nomination papers were rejected. He made an urgent application to the High Court, which was rejected on the grounds of lack of jurisdiction. The Electoral Court, to which the applicant then turned, declined to hear the case on the grounds that the time for presenting a petition had expired. The applicant appealed to the Supreme Court, sitting as a constitutional court. After the run-off election in June 2008, the Supreme Court handed down its decision (see Shumba & Anor v ZEC & Anor S-11-08). The applicant then presented an election petition to the Electoral Court and simultaneously applied to the High Court for condonation of the late presentation of the petition. The respondents opposed the application, arguing that the High Court had no jurisdiction to grant condonation.

Held: the Electoral Court can only hear election petitions and other matters in terms of the Electoral Act [Chapter 2:13]. The Electoral Court is a creature of statute whose powers and functions are to be found in the statute. It has no inherent powers such as is possessed by the High Court and can therefore not claim authority which cannot be found within the four corners of the Electoral Act. No provision is made in that Act for condonation, so the High Court cannot grant condonation. To ask the court to condone a departure from a period provided for in an enactment, as urged by the applicant, would be to usurp the functions of the legislature.

Election – nomination – rejection of nomination papers – papers rejected on the grounds that they were submitted after nominations had closed – remedies open to candidate disputing nomination officer's decision

Shumba & Anor v ZEC & Anor S-11-08 (Chidyausiku CJ; Sandura, Ziyambi, Malaba & Garwe JJA concurring) (Judgment delivered 1 August 2008)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1)).

Employment – appeal – under Labour Act – appeal from Labour Court – leave to appeal refused by Labour Court – time within which application for leave must be made to judge of Supreme Court

Zimnat Life Assurance Ltd v Dikunye S-21-08 (Cheda JA, in chambers) (Judgment delivered 30 September 2008)

The appellant had applied to the President of the Labour Court for leave to appeal against a ruling of that court. Leave was refused and application was made to a judge of the Supreme Court in terms of s 92F(3) of the Labour Act [Chapter 28:01]. The respondent contended that the application was out of time, but the applicant argued that it was made within the 30 day period allowed by r 36 the Labour Court Rules 2006 (SI 59 of 2006).

Held: the period of 30 days is for an application to the President of the Labour Court. For an application to a judge of the Supreme Court, the applicable rule is r 30(c) of the Supreme Court Rules 1964 (RGN 380 of 1964), which provides that if leave to appeal is necessary and has been refused by the High Court, by making application for leave to appeal within ten days of the refusal of leave to appeal. The application was therefore out of time, but in view of the importance of the point raised, leave to appeal would nonetheless be granted.

Evidence – credibility – demeanour – extent to which it may be relied on – all circumstances of case must be considered

Evidence – document – date of execution – presumption that document executed on date stated in document

Evidence – receipt of document – parties having agreed on method of delivery – all requirements complied with – presumption that letter delivered

M B Ziko (Pvt) Ltd & Anor v Cestaron Invstms (Pvt) Ltd & Anor S-68-07 (Malaba JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 9 July 2008)

An appellate court may still disagree with the finding of the trial court if on examination of the evidence and considering all the circumstances (such as inferences from unquestioned facts and probabilities) of the case, it comes to the conclusion that the trial court's findings on the credibility of witnesses cannot be supported. Whilst demeanour is an important factor to be taken into account in the assessment of a witness's credibility the weight to be placed on it in determining the question whether the evidence given is reliable and probative of the facts in issue must depend on all the circumstances of the case.

Where a specific method of communication has been chosen by the parties and all the necessary requirements for its use such as proper addressing and posting have been complied with as directed, a presumption arises of the fact that the letter was delivered or received unless there is proof to the contrary. The bare denial of receipt of the letters was not sufficient to discharge the onus on the first respondent to rebut the presumption that the letters were delivered at the address to which they were posted.

There is also a presumption that a document was executed on the day of the date it bears. In other words, unless the contrary is proved the date on a document must be taken as its true date.

Evidence – hearsay – civil case – when hearsay evidence is admissible

Hiltunen v Hiltunen HH-99-08 (Makarau JP) (Judgment delivered 19 November 2008)

See below, under PRACTICE AND PROCEDURE (Affidavit – founding affidavit – hearsay evidence in).

Exchange control – offences – exchanging foreign currency without approval – meaning – includes paying foreign currency to purchase item in Zimbabwe

Gambiza v Taziva HH-109-08 (Gowora J) (Judgment delivered 27 August 2008)

See above, under CONTRACT (Illegality – agreement to pay foreign currency).

Family law – child – arrest – parent of child arrested by police – police having no right to detain child along with parent

Chiramba & Ors v Min of Home Affairs & Ors HH-29-09 (Hungwe J) (Judgment delivered 11

November 2008)

See above, under CRIMINAL LAW (Arrest – child of arrested person).

Family law – child – birth – registration of – correction of "error" in register – meaning of "error" – when Registrar may correct entry – courses open to Registrar when entry based on false information – not open to Registrar to cancel entry without court order

Timbe v Registrar-General S-25-08 (Malaba JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 21 October 2008)

The appellant was the mother of two children. Before their birth she had married a man under customary law, unaware that he had been previously married under the civil law some 20 years earlier. After the birth of each child, the appellant and the man gave notice of the birth and its particulars to the Registrar for purposes of registration. As a result of the information they supplied, the man's name was entered in the register as the father of each child. He loved and cared for the children as their father. It subsequently emerged that he could not, due to physical deformities, have been the father of the children, although he always acknowledged them as his. He was later killed in a car accident, and in a bid to prevent the children from sharing in the inheritance of his estate, the deceased's relatives approached the respondent and asked him to direct that the birth certificates of the two children be cancelled. Purporting to act in terms of s 8(1) of the Births and Deaths Registration Act [Chapter 5:02], he cancelled the registration of the children's births, on the ground that false information had been given that the deceased was their father. The appellant unsuccessfully sought an order in the High Court setting aside the respondent's purported cancellation of the births.

Held: The Registrar has the power under s 8(1) of the Act to direct the correction of any error in any register, whether it is a clerical error or an error of fact or substance if he discovers the error himself or upon an application by any person. Under s 8(3), corrections shall be made without erasing the original entry. "Entry", in relation to any register kept in terms of the Act, is defined in s 2(1) as including any information contained in a birth certificate which forms part of that register. Section 8(1) is the only section which gives the Registrar the power to correct an entry in a register without erasing the whole entry altogether. The subsection vests him with a discretionary power, exercisable only when he has satisfied himself that what he is being called upon to correct is an error in the register. An error of fact or substance implies the existence of a state of mind in regard to the fact or state of facts but one which does not accord with the facts or state of facts in question. For purposes of exercising the powers of correction under s 8(1) of the Act, it would have had to be shown that the man had genuinely believed that he was the father of the children and had caused that belief to be entered in the register when in fact another man was the father of the children. That would have been an error of fact found to have been entered in the register. It would not have been enough for the respondent to find that the man was not the father of the children without relating that fact to his state of mind for the existence of an error of fact to

be established.

Cancellation of a birth certificate, on the other hand, has the effect of erasing the entry in the register. There is no section in the Act which gives the respondent power to cancel an entry in a register without an order of a court. The respondent did not find that there was an error of fact in the register relating to the entry of the name of the man as the father of the two children; he found that there was a false entry in the register relating to the paternity of the children. If there was a false entry, it could be cancelled but only on the order of a court.

Family law – child – custody – custodian parent's powers and obligations – variation of custody order – what applicant for variation must show

Samudzimu v Ngwenya HH-92-08 (Kudya J) (Judgment delivered 16 October 2008)]

The applicant sought an order granting him the custody of his two children. Custody had been granted to their mother, the respondent, when she and the applicant were divorced, with provision for access. The custody order also provided that if the respondent wanted to remove the children from Zimbabwe, she should seek the consent of the applicant, "which consent shall not be unreasonably withheld". The respondent proposed to relocate to South Africa, and sought the applicant's consent. His response was to initiate the present action. He averred that the relocation was not in his best interests. The respondent counter-claimed for the removal of the children and consequential relief to facilitate the removal.

Held: (1) a custodian parent is in absolute charge of the day to day needs of the children. She determines where they go to school; which church they go to; which houses they visit; which friends they play with. She does not exercise these powers in consultation with anyone. As long as these are in the best interest of the children; they cannot be impugned. She is vested with the power of nurturing, shaping and bringing up the minor children. The onus was on the applicant to show on a balance of probabilities that the respondent's relocation was not in the best interest of the children. It was not enough to aver that she had relocated to another country or that the non-custodian parent was economically better able to support the children and offer them the creature comforts of life. In casu, he could not use the fact of her employment in South Africa as a changed circumstance which necessitated the variation of custody. The children were still very young and their mother was best suited to look after them. The view that that the maternal link, which is necessary for the psychological well being of children, is formed earlier than the paternal link, was still true.

(2) With regard to the counter-claim, the consent order contemplated the removal of the children from Zimbabwe. The applicant's consent was required for the purpose of ensuring that the parties come to some reasonable accommodation on the applicant's access rights. If he was able to exercise them in South Africa, then well and good; if not, then the order would need to be varied to allow him to have them in Zimbabwe at his cost on agreed terms. If both parties, as the parents, truly had the interests of

the children at heart, then they should come to a workable compromise.

Family law – husband and wife – divorce – grounds – irretrievable breakdown of marriage – factors showing that marriage has irretrievably broken down

Murada v Murada HB-119-08 (Ndou J) (Judgment delivered 27 November 2008)

There are two characteristics of irretrievable breakdown of marriage: (a) the marriage relationship is not normal any more; and (b) there is no reasonable prospect of the restoration of a normal marriage relationship. A subjective decision by one of the parties that he no longer desires to maintain a marriage relationship with the other is an indication of the breakdown of the parties' marriage but not necessarily of an irretrievable breakdown. The next step is to examine, in an objective manner, the reasons advanced by the party and to determine the irretrievability of the breakdown. Where it is the party's stated desire to terminate the marriage, it is in reality hardly possible for a court to find that there is a reasonable prospect of reconciliation between the parties. A further factor could be that the parties have separated: this would evince a serious violation of consortium i.e., inter alia, loyalty, love, affection, comfort, mutual services and sexual relations which characterise a normal marriage relationship.

Family law – husband and wife – divorce – jurisdiction – domicile – acquisition – proof – proof on balance of probabilities required – intention to acquire new domicile – how can be inferred, notwithstanding stated intentions to contrary

Kung v Kung S-16-08 (Gwaunza JA, Malaba & Garwe JJA concurring) (Judgment delivered 16 September 2008)

The appellant was born and educated in Zimbabwe. His mother being a citizen of South Africa, the appellant was able to obtain a South African passport and the right of residence in that country. After their marriage in 1999, the parties initially lived in Harare. They had certain business interests in Zimbabwe. Apart from their concern over the economic situation in Zimbabwe, they also wished to have the respondent's daughter from a previous marriage educated in South Africa. To this end they purchased a residence in South Africa and placed the daughter in a South African school. Before that, the appellant had disposed of all his assets in Zimbabwe and externalised the proceeds. He acquired other assets in South Africa and secured employment there. The respondent did not relocate to South Africa. No family of the appellant remained in Zimbabwe and he himself did not maintain his permanent residence status in Zimbabwe. At the time the divorce proceedings were instituted, the appellant was already living in South Africa. He said that at that time he was going "backwards and forwards" between Zimbabwe and South Africa. This was the only way he remained connected to Zimbabwe.

At the divorce trial, the court a quo raised the issue of the appellant's domicile. The appellant expressly denied that he had adopted South Africa as a domicile of choice. He said that he intended to come back to Zimbabwe should the economic situation improve.

Held: the requirements for the acquisition of a domicile of choice are (a) the factum of residence; (b) the animus manendi, or intention of remaining permanently; and (c) freedom of volition.

Even if expressions of intention are clear and consistent, they cannot prevail against a course of conduct inconsistent with them or lending to an opposite inference. An intention to reside in a country for a fixed period of time, or until the happening of some clearly foreseen and reasonably anticipated event, will not be sufficient to acquire domicile, but if the proper conclusion from all the circumstances is that the person intends to make his home in a country for an indefinite time, he will acquire a domicile of choice there, notwithstanding a continuing emotional attachment to some other country, or an intention to change his residence upon some vague or improbable contingency.

The acquisition of domicile of choice is proved on a balance of probabilities. There was no authority that classified the requisite animus manendi as either "strong" or "weak". To suggest this qualification would be akin to requiring the court to apply a test higher than that of "a balance of probabilities" in its determination of the state of mind of the de cujus. The courts also tend to use the words "permanently" and "indefinitely" interchangeably; there was no real distinction between the two.

In casu, the appellant no longer had any business interests in Zimbabwe at the time the proceedings were instituted, nor did he have any family interests left. What interest or attachment he did have might have been no more than emotional or sentimental. Viewed against the other factors referred to, this interest was not sufficient to disprove an intention on his part to make a permanent home in another country. His stated intention to come back to Zimbabwe should the economic situation improve was clearly based on some "vague or improbable contingency".

Human rights – discrimination – discrimination based on race – statute making no mention of race – implementation of law in fact discriminatory

Human rights – rule of law – right of access to courts – deprivation of right of access to courts – a breach of human rights

Mike Campbell (Pvt) Ltd & Ors v Republic of Zimbabwe SADC 2/07 (Mondlane J; Pillay P, Mtambo J. Kambovo J & Tshosa J concurring, except as indicated)

See below, under INTERNATIONAL LAW.

International law – international tribunals – access to – requirement that domestic remedies must have been exhausted – applicants entitled to approach such tribunals where domestic remedies are denied or are ineffective

International law – treaties – binding nature of – effect of domestic legislation – party to treaty may not invoke domestic law to evade treaty obligations

International law – treaties – SADC Treaty – art 4(1) – interpretation – principles – requirement to act in accordance with human rights, democracy and the rule of law – art 21(b) – Tribunal required to develop its own jurisprudence, having regard to applicable treaties, general principles and rules of public international law

Mike Campbell (Pvt) Ltd & Ors v Republic of Zimbabwe SADC 2/07 (Mondlane J; Pillay P, Mtambo J. Kambovo J & Tshosa J concurring, except as indicated)

Note: this judgment is included for interest only, being the first case in which the Government of Zimbabwe has been a party to an application in an international tribunal. There has not yet been a decision of the courts of Zimbabwe on the subject of the enforceability in Zimbabwe of a Tribunal decision.

The applicants brought an application before the SADC Tribunal, arguing that the respondent (the Government of Zimbabwe) had acted in breach of its obligations under the SADC Treaty by enacting and implementing Amendment No 17 to the Zimbabwean Constitution. They argued that all the lands belonging to them which had been compulsory acquired by the respondent under that Amendment were unlawfully acquired since the Minister responsible had failed to establish that he applied reasonable and objective criteria in order to satisfy himself that the lands to be acquired were reasonably necessary for resettlement purposes in conformity with the land reform programme. They claimed that they had been denied access to the courts to challenge the legality of the compulsory acquisition of their lands, that the respondent was in breach of art 6(2) of the Treaty, which prohibits discrimination, by enacting and implementing Amendment No 17 to the Constitution, and that they had been denied compensation (on the subject of compensation, s 16B(2)(b) of the Constitution, as amended, provides that compensation shall be paid for improvements only). Apart from arguing to the contrary, the respondent argued that the Tribunal had no jurisdiction to entertain the application, on the grounds that the applicants had not shown that they had exhausted all available remedies or were unable to proceed under the domestic jurisdiction.

Held: (1) individuals are required to exhaust local remedies in the municipal law of the state before they can bring a case to the Tribunal. This means that individuals should go through the courts system starting with the court of first instance to the highest court of appeal to get a remedy. The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the tribunal

does not deal with cases which could easily have been disposed of by national courts. However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. Amendment No 17 ousted the jurisdiction of the courts of law in Zimbabwe from any case related to acquisition of agricultural land and therefore the applicants were unable to institute proceedings under the domestic jurisdiction.

(2) Member states cannot rely on their national law to avoid their legal obligations under the Treaty. To allow this would permit international law to be evaded by the simple method of domestic legislation. The Vienna Convention on the Law of Treaties provides in art 27 that a party to a treaty may not invoke provisions of its own internal law as justification for failure to carry out an international agreement.

(3) The concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. In terms of arts 4(c) and 6(1) of the SADC Treaty, member states are obliged to respect principles of "human rights, democracy and the rule of law and to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty. Legislation which deprives the courts of the powers to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen is inimical to the principle of the rule of law, which requires citizens to have access to justice. Indeed, one can scarcely conceive of the rule of law without there being a possibility of having access to the courts. The right of access to the courts is not only set out in court decisions, but also enshrined in international human rights treaties, such as the African Charter on Human and Peoples' Rights. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to a court or, where appropriate, another independent and impartial tribunal or forum. It is quite clear that the provisions of s 18(1) and (9) of the Constitution, dealing with the right to the protection of law and to a fair hearing, have been taken away in relation to land acquired under s 16B (2)(a). There is not even the remedy of judicial review in respect of land acquired under s 16B(2)(a)(i) and (ii). The applicants had thus been expressly denied the opportunity of going to court and seeking redress for the deprivation of their property, giving their version of events and making representations. The applicants had established that they had been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and consequently the respondent has acted in breach of art 4(c) of the Treaty.

(4) (Tshosa J dissenting) Discrimination of whatever nature is outlawed or prohibited in international law. There are several international instruments and treaties which prohibit discrimination based on race, the most important one being the United Nations Charter, as well as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples' Rights and the Convention On the Elimination of All Forms of Racial Discrimination, all of which prohibit racial discrimination. The respondent acceded to both Covenants, the African Charter and the Convention and,

by doing so, was under an obligation to respect, protect and promote the principle of non-discrimination and must, therefore, prohibit and outlaw any discrimination based on the ground of race in its laws, policies and practices. In addition to those international agreements, the SADC Treaty itself, in art 6(2) prohibits discrimination. Although the Treaty does not define racial discrimination or offer any guidelines to that effect, the Convention On the Elimination of All Forms of Racial Discrimination, for example, prohibits any distinction, exclusion, restriction or preference based on race, colour, descent, or natural or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The 17th Amendment affected all agricultural lands or farms occupied and owned by the applicants and all the applicants were white farmers. While there was no explicit mention of race, ethnicity or people of a particular origin in the Amendment as to make it racially discriminatory, its implementation affected white farmers only and consequently constituted indirect discrimination or de facto or substantive inequality. The differentiation of treatment meted out to the applicants also constituted discrimination, as the criteria for such differentiation were not reasonable and objective but arbitrary and based primarily on considerations of race. The aim of the respondent in adopting and implementing a land reform programme might have been legitimate if and when all lands under the programme were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups.

(5) Ordinarily in international law it is the expropriating state that should pay compensation. This would mean that in casu the respondent should shoulder the responsibility of paying compensation to the applicants for their expropriated lands. It is the right of the applicants under international law to be paid, and the correlative duty of the respondent to pay, fair compensation. The respondent cannot rely on its domestic legislation to avoid payment of compensation to the applicants for their expropriated farms, regardless of how the farms were acquired in the first place, provided that the applicants had a clear legal title to them.

(6) (Pillay P dissenting) No order of costs would be made.

International law – treaties – human rights treaty – obligations of state parties – duty of state parties to refrain from acts which violate treaty and to guarantee enjoyment of rights contained in treaty

Chiramba & Ors v Min of Home Affairs & Ors HH-29-09 (Hungwe J) (Judgment delivered 11 November 2008)

See above, under CRIMINAL LAW (Arrest – child of arrested person).

Interpretation of statutes – directory and peremptory provisions – distinction between – failure to comply with directory provision – effect – principles – whether effect of holding that failure to comply was fatal would be disproportionate

Shumba & Anor v ZEC & Anor S-11-08 (Chidyausiku CJ; Sandura, Ziyambi, Malaba & Garwe JJA concurring) (Judgment delivered 1 August 2008)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1)).

Interpretation of statutes – meaning of words – ambiguity – ambiguity in criminal statute resulting in unequal treatment of persons being sentenced – use of international instruments to ensure equality of treatment

Interpretation of statutes – meaning of words – international instruments – may be used to resolve ambiguity and ensure equal treatment

S v Moyo & Ors HB-124-08 (Ndou J) (Judgment delivered 27 November 2008)

See above, under CRIMINAL PROCEDURE (SENTENCE) (Stock theft).

Landlord and tenant – lease – termination – fixed term lease – grounds on which landlord may seek eviction of tenant

Landlord and tenant – statutory tenant – when statutory tenancy created – referral of issue of quantum of rental to rent board – determination of rental by board – tenant not thereby made a statutory tenant

P Rosati & Sons (Pvt) Ltd v P & C Panel Beaters & Spray Painters HH-102-08 (Uchena J) (Judgment delivered 19 November 2008)

The plaintiff leased commercial premises to the defendant in terms of a ten-year lease. The lease provided that the rentals were to be reviewed from time to time. In pursuance of such a review, when the parties could not agree on a rental, the plaintiff referred the matter to the rent board, which set a rental figure. The plaintiff was dissatisfied with the figure set and sought the eviction of the defendant, claiming that the defendant had, because of the referral to the Rent Board, become a statutory tenant, and that as the plaintiff wanted the premises for its own use, it entitled to have the defendant evicted.

Held: (1) in terms of s 10(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), the rent board may, in fixing a fair rent for the premises, specify different rents for different periods during the currency of the lease concerned. The wording of s 10(2) clearly indicated that the intention of the legislature in providing for the determination of fair rental by a rent board was not to terminate the lease agreement, but to determine fair rentals to be paid during the currency of the lease agreement. It was clear from the wording of the lease agreement that the intention of the parties was to review the rentals while the lease remained in existence for the stated period. The defendant was not, therefore, a statutory tenant.

(2) A landlord and his tenant are bound by the terms of their contract. If a fixed period is agreed, earlier termination is not possible unless there has been a breach by the tenant. Notice to quit cannot be given before the expiry of the lease, save where the premises have become dangerous or urgently in need of repair and vacation becomes necessary for that purpose. Even in that situation, the lessee would ordinarily be permitted to resume occupation upon completion of repairs. There being no breach alleged, the defendant was entitled to lease the premises until the period agreed to in the lease had lapsed.

Legal practitioner – conduct and ethics – duties – duty to ascertain whether pending judgment has been handed down or when it is to be handed down

Metro Intl (Pvt) Ltd v Old Mutual Property Invst Corp (Pvt) Ltd S-31-08 (Malaba DCJ, in chambers) (Judgment delivered 29 October 2008)

See above, under APPEAL (Extension of time within which to note appeal – application).

Legal practitioner – conduct and ethics – refusal to accept court process – practitioner having obtained order in ex parte application – order granted erroneously – practitioner refusing to accept notice of set-down for fresh hearing – such conduct unethical and unacceptable

Mufundisi v Rusere HH-22-09 (Bere J) (Judgment delivered 6 November 2008)

The applicant sought and obtained an ex parte order which restrained the respondent from disposing of a certain motor vehicle. Upon having had his attention drawn to the respondent's notice of opposition to the applicant's application, the judge considered that the order should not have been granted before affording the respondent an opportunity to be heard. Accordingly, he mero moto invoked the provisions r 449 of the High Court Rules 1971, which allows a court to correct, rescind or vary any judgment or order erroneously granted in the absence of any party affected thereby. He arranged for the matter to be set down for further hearing, intending to advise the parties that he proposed to have the order granted ex parte rescinded and to hear both parties afresh and on equal footing before making a determination. The

applicant's legal practitioner did not appear at the hearing; the evidence was that his firm had refused to accept service of the notice of hearing, and that the applicant's counsel, who happened to be at the court on the date of set-down, indicated that he would not attend.

Held: judges are not endowed with the gift of infallibility. They often make mistakes. Once such mistakes are noted, they must be addressed at the earliest possible opportunity to avoid perpetuating a miscarriage of justice. Rule 449 is one rule which a judge can invoke in order to do justice between litigants. For a legal practitioner to advise his law firm to refuse to accept court process for whatever reason would represent an act of brutality to the rules of professional ethics. Such an act is clearly calculated to subvert court process and is unacceptable. It is unforgivable for a legal practitioner to conspire to defeat court process by arrogantly instructing his law firm to refuse to accept court process in the misplaced hope that his client can hold onto a court order obtained ex parte.

Mines and minerals – tribute agreement – effect – minerals extracted in terms of agreement but not removed from site by date of termination of agreement – tributor entitled to remove minerals subject to compliance with terms of agreement relating to payment of royalty

HEM Granite Industries (Pvt) Ltd v Keeley Granite (Pvt) Ltd S-18-09 (Malaba DCJ, Ziyambi & Garwe JJA concurring) (Judgment delivered 9 September 2008)

See above, under CONTRACT (Termination – effect)

Police – discipline – dismissal from force – dismissal in terms of s 48(a) of Police Act following conviction – conviction set aside on appeal – dismissal thereby rendered unlawful

Mpofu v Commissioner of Police & Anor S-15-08 (Chidyausiku CJ, Sandura & Gwaunza JJA concurring) (Judgment delivered 2 September 2008)

The appellant was a police officer. He had in 1999 been convicted of assault and sentenced to a fine, together with a suspended short term of imprisonment. He appealed against conviction and sentence, but before the appeal was heard the first respondent, the Commissioner of Police, acting in terms of s 48(a) of the Police Act [Chapter 11:10], summarily dismissed him from the police force. In September 2001 the High Court quashed the conviction and set aside the sentence. The appellant applied for reinstatement. The Commissioner rejected his application. An appeal to the Police Service Commission was rejected as being out of time, s 51 of the Act requiring that an appeal be noted within seven days. In October 2003 the appellant launched an application in the High Court for the rescission of the decision of the Commission. The judge a quo dismissed the application on the ground the appeal to the Commission was out of time and prescribed.

Held: (1) The judge a quo was correct in holding that the appeal to the Commission was out of time.

(2) However, it is quite clear from s 48 of the Act that a member of the police force has to stand convicted of an offence before he can be dismissed in terms of the section. At the time that the Commissioner of Police discharged the appellant, the appellant stood convicted of assault, but on appeal to the High Court the conviction was quashed and the sentence set aside. The successful appeal had the retrospective effect of obliterating the conviction which was the basis of the appellant's dismissal. To hold that the appellant stood discharged from employment on the basis of a conviction that was quashed would be a travesty of justice and totally irregular. His dismissal in terms of s 48(a) of the Act in casu was unlawful because he stood convicted of no offence.

(3) This was a proper case for the court to exercise the review powers conferred by s 25 of the Supreme Court Act [Chapter 7:13] to correct a blatant irregularity by an administrative authority in dismissing the appellant. The matter would be remitted to the High Court for the purposes of determining whether following the unlawful dismissal of the appellant he should be reinstated, as he requests, or be paid damages in lieu of reinstatement.

Practice and procedure – action – ancillary issue not specifically before court – whether court entitled to deal with such issue mero motu

Taylor v Taylor S-70-07 (Garwe JA, Cheda & Ziyambi JJA concurring) (Judgment delivered 15 September 2008)

See above, under CONTRACT (Donation – inter vivos).

Practice and procedure – action – dismissal of – application by defendant for dismissal of action on grounds that it is frivolous and vexatious – need for defendant to file plea, answering plaintiff's allegations, before applying for dismissal of action

Gwizi v Ndebele & Ors HB-68-08 (Kamocha J) (Judgment delivered 17 July 2008)

Where an application is made for the dismissal of an action on the grounds that it is frivolous and vexatious, the defendant must file his reply to the allegations raised by the plaintiff before he makes an application to the court for dismissal of the plaintiff's action. He may not do so before filing his reply, because he can only convince the court by his plea that the plaintiff's action is frivolous or vexatious. That is not possible if there is no reply from the defendant.

Practice and procedure – action – dismissal of for want of prosecution – courses open to defendant – procedure under r 236(3) of High Court Rules not appropriate

Anchor Ranching (Pvt) Ltd v Beneficial Entprs (Pvt) Ltd & Ors HB-103-08 (Bere J) (Judgment delivered 16 October 2008)

There have been numerous applications recently, made under r 236(3) of the High Court Rules, for the dismissal of an action for want of prosecution after closure of pleadings. This procedure is not the correct one: the procedure under r 236(3) relates to the dismissal of an application for want of prosecution. Where pleadings are closed and the plaintiff does not prosecute his claim, the defendant has numerous courses open, under Orders 16, 23, 24 or 26.

Practice and procedure – affidavit – founding affidavit – hearsay evidence in – when such evidence is admissible

Hiltunen v Hiltunen HH-99-08 (Makarau JP) (Judgment delivered 19 November 2008)

The applicant's founding affidavit was deposed to, not by the applicant herself, but by a person to whom a general power of attorney had been granted by the applicant. There were no facts in the affidavit that the deponent, as a general agent of the applicant, would have personal knowledge of. The entire founding affidavit was hearsay and was an affidavit of belief and information. The deponent either believed that what she was saying was correct or had been informed and believed the information to be correct.

Held: (1) In application proceedings, it is to the founding affidavit that the court will look to for the cause of action being alleged by the applicant and the evidence that the applicant has to sustain such a cause of action. Hence an applicant must stand or fall by his founding affidavit and the facts alleged therein because those are the facts which the respondent is called upon either to affirm or deny. Generally speaking, affidavits must be confined to such facts as the witness is able of his own knowledge to prove. In interlocutory motions, in which statements as to belief, with the grounds thereof, affidavits containing hearsay evidence may be admitted. It is also a long-standing practice in urgent applications to receive hearsay evidence if an acceptable explanation is given why direct evidence is not available and the source of the information and the grounds for the belief in the truth of the statement are disclosed.

(2) The practice of the court has to some extent been amended by the relaxation to the rule against hearsay evidence provided in s 27 of the Civil Evidence Act [Chapter 8:01], making first-hand hearsay evidence admissible on conditions. For first-hand hearsay to be admissible under the Act, the evidence

must be about a statement made orally or in writing by another person. The person who made the statement must be identified and it must appear from the nature of the evidence that the contents of the statement would have been admissible from the mouth of that person were he present and testifying. Thus, if the statement were, for instance, on an opinion held by that other person, then the evidence would be inadmissible because opinion evidence is inadmissible from the mouth of any witness other than expert witnesses. Similarly, second- and third-hand hearsay remains inadmissible as the amendment to the law only provides for first-hand hearsay.

Practice and procedure – condonation – application – when application must be made – failure to comply timeously with applicable rule – no need to apply for condonation when no rule breached

Practice and procedure – execution – sale – setting aside of – common law right to have sale set aside on good cause shown

Garati v Mau Mau & Ors S-19-08 (Malaba JA, Sandura & Garwe JJA concurring) (Judgment delivered 15 August 2008)

The appellant's property had been sold to the first respondent in a sale in execution at the instance of the second respondent, a building society. The sale took place in November 2001. In January 2002 the appellant wrote to the third respondent, the sheriff, protesting that the sale price was unreasonably low. In April 2002 the sheriff confirmed the sale in terms of r 359(7) of the High Court Rules 1971. The first respondent, however, did not pay the purchase price immediately. Six months later, the building society expressed its concern about the delay. In January 2003, the price still being unpaid, the appellant wrote to the building society asking it to cancel the sale. The building society in turn asked the sheriff to cancel the sale. On 31 January 2003 the purchase price was finally paid. On 18 February, the appellant made application for an order setting aside the sale on the ground that there had been an inordinate delay in the payment of the purchase money by the first respondent. He said that because of the hyper-inflationary conditions obtaining in the country, he would lose considerably if the sale in favour of the fist respondent were allowed to go through. He also alleged that by failing to take steps to cancel the sale on the ground that the first respondent had failed to pay the purchase price within a reasonable time, the sheriff aided and abetted the first respondent in delaying the payment. The first respondent averred that the application was in term of r 359(8) and so had to have been made within one month after the appellant was notified of the decision of the sheriff. He contended that the application was not properly before the court as it was made outside the time limit. No condonation of non-compliance with r 359(8) had been applied for and granted. The appellant at first disputed that there was any need to apply for condonation, then accepted that he should apply for condonation. His application for condonation was rejected.

Held: (1) An application for condonation is made when there has been failure to comply properly or timeously with a rule under which a party is bound to act in seeking relief from the court. The judge a

quo proceeded on the basis that a question of condonation of non-compliance by the appellant with r 359 (8) had arisen for determination. In fact, the appellant did not apply to have the sheriff's decision confirming the sale set aside. The main application was for an order setting aside the sale on the ground that the purchase money was paid by the first respondent after an unreasonably long period of time. The ground on which the relief was sought arose after the decision of the third respondent in terms of r 359 (7) and was a consequence of the conduct of the first respondent. There was therefore no question of non-compliance for the purposes of founding an application for condonation with a rule the appellant was not bound to comply with in seeking the relief from the court.

(2) Under the common law an owner of property which has been sold in execution but not yet transferred may seek an order of restitutio in integrum setting aside the sale on good cause shown. When he applied to have the sale in execution of his property set aside on the ground that the purchase money had been raised and paid by the first respondent after an unreasonably long time, the appellant was exercising this common law right. The judge a quo should have heard and determined the main application.

Practice and procedure – judgment – correction of – judgment or order erroneously granted in absence of party affected thereby – judge mero motu invoking provisions of r 449 of High Court Rules 1971

Mufundisi v Rusere HH-22-09 (Bere J) (Judgment delivered 6 November 2008)

See above, under LEGAL PRACTITIONER (Conduct and ethics – refusal to accept court process).

Practice and procedure – judgment sounding in foreign currency – when may be granted – need for loss to have been felt in foreign currency – exchange rate to be used – not competent for court to grant judgment at any rate other than official exchange rate

National Merchant Bank Ltd v The Cold Chain (Pvt) Ltd HH-96-08 (Mtshiya J) (Judgment delivered 16 September 2008)

The plaintiff, an authorised dealer in foreign currency, used to source currency to enable the defendant company to import goods. The defendant had no foreign currency and could only access it through the plaintiff. The practice was that the plaintiff would source foreign currency from the market and credit it to its customers in return for payment in Zimbabwe currency. The defendant paid the plaintiff, in Zimbabwe currency, to source South African currency to pay for a shipment from its supplier in that country. Two months later, the plaintiff, believing that the payment had not gone through, paid the supplier again. The supplier used the duplicated payment to supply another shipment. The plaintiff

initially demanded payment in Zimbabwe dollars. The defendant tendered payment at the official rate of exchange, which was about a quarter of the "parallel" or market rate that the plaintiff actually had to use to acquire currency. The plaintiff then demanded payment of the South African currency it had sourced, alternatively, payment in Zimbabwe currency at the market rate. The questions that arose for determination were (1) whether or not the defendant was obliged to return the overpayment in rands; and (2) if not, what was the applicable rate of exchange to determine the Zimbabwe currency equivalent.

Held: (1) the court has the power to give a judgment sounding in foreign currency. This would normally obtain where there is evidence or agreement that the loss suffered by a plaintiff was indeed felt in foreign exchange. While the options for how to recover a foreign debt must be left to the judgment creditor's discretion, such options should, however, be spelt out at the time of making the transaction and should be in compliance with foreign exchange regulations. Only then will a court proceed to enforce a claim in the agreed currency. Here, the established dealings between the parties dictated that the plaintiff's payment should be in local currency. The practice was for the plaintiff to source foreign currency for the defendant from the market and in return the defendant would pay the plaintiff in Zimbabwe currency. That position did not change because of the duplicated amount. The defendant was still expected to meet his obligation in local currency. (2) While in the current inflationary environment, the use of the parallel market rate made a lot of sense, that route remained illegal and could not be endorsed by the court. The court could only recognize the official exchange rate that was used by the defendant.

Practice and procedure – parties – citation – Electoral Commission – requirement to cite chairperson, not Commission itself – citation of Commission – whether fatal to proceedings

Shumba & Anor v ZEC & Anor S-11-08 (Chidyausiku CJ; Sandura, Ziyambi, Malaba & Garwe JJA concurring) (Judgment delivered 1 August 2008)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1)).

Practice and procedure – parties – deceased estate – must be represented by executor – citation of – must be cited in name of executor

Nyandoro & Anor v Nyandoro & Ors HH-89-08 (Kudya J) (Judgment delivered 16 October 2008)

See above, under ADMINISTRATION OF ESTATES (Deceased estate – litigation).

Practice and procedure – parties – locus standi – beneficiary under a will – locus standi to claim recovery of inheritance wrongly given to another

Moyo vNcube & Ors HB-122-08 (Kamocha J) (Judgment delivered 27 November 2008)

A beneficiary under a will has locus standi to bring an action to recover an inheritance which he believes was wrongly given to another person.

Practice and procedure – parties – locus standi – fugitive from justice – what must be shown before person may be regarded as fugitive from justice

Practice and procedure – parties – locus standi – person specified in terms of Prevention of Corruption Act [Chapter 9:16] – need for investigator's approval to expend assets – whether person may be prevented from challenging correctness of investigator's decision

Mawere v Min of Justice S-67-07 (Cheda JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 11 September 2008)

See above, under CRIMINAL PROCEDURE (Specification in terms of Prevention of Corruption Act [Chapter 9:16]).

Prescription – pleading – how should be pleaded – not necessary to raise matter in special plea

Nyandoro & Anor v Nyandoro & Ors HH-89-08 (Kudya J) (Judgment delivered 16 October 2008)

See above, under ADMINISTRATION OF ESTATES (Deceased estate – litigation).

Property and real rights – immovable property – bona fide possessor – entitlement to fruits or produce as long as he remains a bona fide possessor

Fantaisie Farmers (Pvt) Ltd & Ors v Manyeruke & Ors S-65-07 (Cheda JA, Gwaunza & Garwe JJA concurring) (Judgment delivered 11 September 2008)

The appellants were all owners of farms on which they cultivated and produced sugar cane in the Hippo

Valley and Triangle area. The farms were acquired by the State in terms of s 8(1) of the Land Acquisition Act [Chapter 20:10] and allocated to the first group of respondents who settled thereon. The settlers reaped the sugar cane which had been planted there and sold it to sugar mills in the area. The acquisition orders were subsequently set aside as being invalid. The appellants argued that because the acquisition orders were subsequently set aside the Minister's actions were invalid right from the beginning and therefore the settlers have no lawful right to the proceeds of the sugar cane that they delivered to the millers during the period of the acquisition.

Held: (1) There was nothing to suggest that the settlers knew, or were aware, that in settling them on the sugar cane farms the Minister was not acting in accordance with the provisions of the relevant law. It was not for them to question the legality of the Minister's actions. They were therefore bona fide occupants of land regarding its fruits or produce. Under the common law, a bona fide possessor acquires all the fruits gathered by him before the litis contestatio in an action regarding the possession or ownership of the ground whether they have been consumed or are still in existence; but he is bound to restore to the owner of the property all fruits actually gathered by him after litis contestatio, because by litis contestatio a bona fide possessor becomes converted into a mala fide possessor. A bona fide possessor is not answerable to the person actually entitled for acts done by him in accordance with his supposed title, nor for the loss or deterioration of the thing possessed which occurred before he became aware of the other's right.

(2) The fact the production of sugar cane by the settlers was in contravention of the Sugar Production Control Act [Chapter 18:09] did not mean they should be deprived of the sugar cane, or that the sugar cane could then become the property of someone who did not produce it.

Property and real rights – spoliation order – incorporeal property – information stored on computer – such information being illicitly copied without consent of owner of computer – not possible under mandament van spolie to require person copying information to delete it from his computer

Mutsinya v Dande Hldgs (Pvt) Ltd & Ors HH-78-08 (Makarau JP) (Judgment delivered 22 August 2008)

The respondents unlawfully "cracked" the password on a computer belonging to the applicant, who was employed by the first respondent. They then copied a number of files and information onto their computers. The information that was transferred from the applicant's computers was personal and confidential to the applicant. He sought an order under the mandament van spolie compelling the respondents to delete from their computers all the information that they transferred from his computer in the interim and as final relief, that the respondents be restrained from using the information that they transferred from the applicant's computers.

Held: the mandament van spolie is a remedy for the restoration of possession and is usually used to

restore physical possession of movable or immovable property. It is a remedy of a very specific nature. Its sole purpose is to restore the parties to the status quo ante after one of them has been despoiled against his will or without his consent of possession of something by the other party's violence, fraud, stealth or other illicit conduct. This is why the rights of the parties to the property do not enter the picture and no attempt is made or is indeed permissible to determine the merits of the underlying dispute between the parties. It is settled law that the remedy now applies to incorporeal rights.

The applicant was in possession of all the information on this computer before the cracking of his password. He had exclusive control over access to that information. The conduct of the respondents in gaining access to his files without his consent and in his absence was illicit. However, by gaining access to his information and mirroring such information onto their own computers, the respondents did not deprive the applicant of "possession" of the information in such a manner that such possession could be restored by a spoliation order. The applicant remained in possession of the information that was originally on his computer. The respondents did not "take away" the information they had accessed. What they did was to simply obtain copies thereof, albeit illicitly.

The remedy of mandament van spolie cannot be used to assert and vindicate any other right in the property that is not possession, so the applicant could not use the remedy to interdict the respondents from accessing information that they were not entitled to but which they now had, or to eradicate from their own computers information that they illicitly obtained from his. His remedy would lie in some other branch of the law and not in the possessory remedy that he has invoked. What the applicant lost through the actions of the respondents was the right to have exclusive access, knowledge and use of the information that was on his computer. Such a right, albeit incorporeal, is incapable of restoration once access has been had to the information. It is a right that is incapable of being possessed physically and it cannot be protected by the mandament van spolie.

Property and real rights – spoliation order – what applicant must show – not necessary for applicant to show he had some reasonable or plausible claim to the property of which he was despoiled

Shiriyekutanga Bus Svcs (Pvt) Ltd v Total Zimbabwe (Pvt) Ltd HH-64-08 (Makarau JP) (Judgment delivered 30 July 2008)

In an application for a spoliation order, there are two requirements that an applicant has to set up and prove. These are that he was in peaceful and undisturbed possession of the property and that the respondent deprived him of such possession. The court does not look at all into the juridical nature of the possession claimed. It is not necessary for him to show that he had some reasonable or plausible claim to the property of which he was despoiled.

Succession – will – beneficiary – locus standi to bring action to recover inheritance wrongly given to another

Moyo vNcube & Ors HB-122-08 (Kamocha J) (Judgment delivered 27 November 2008)

See above, under PRACTICE AND PROCEDURE (Parties – locus standi – beneficiary under will).

Succession – will – validity – disposition affecting property rights of surviving spouse – which rights are affected – only those existing at time will is executed may not be eroded

Est Wakapila v Matongo NO & Ors HH-71-08 (Kudya J) (Judgment delivered 31 July 2008)

The provisions of s 5(3)(a) of the Wills Act [Chapter 6:06] prevent a testator from eroding the property rights vested in his spouse by law in either his or their joint estate. These rights are those that the spouse has at the time the will is executed, as opposed to future or contingent rights that arise on the death of the testator. This is because the variation or prejudice does not arise on the demise of the testator but at the time the will is written, notwithstanding that the will only commences to operate on his demise. It is fallacious to argue that at the time of death the surviving spouse is vested with rights in a deceased estate in which a testamentary disposition has been made. The first reason is that the divested property, subject to acceptance by the beneficiary, no longer belongs to the testator. The second reason is that giving such a meaning to the provision in issue would result in a radical alteration of the common law power of a spouse to dispose of his property to whomsoever he wishes. If the lawmaker intended such a radical departure from the common law, it would have said so in clear language. It would be absurd to allow the spouse to dispose of his property during his or her lifetime but take away that power from him to dispose of it by will. The third reason is that a wife married under customary law can only inherit from her husband's estate if he dies intestate. Where he has disposed of his estate by a will, she does not inherit and thus has no rights in any property belonging to his estate.

Succession – will – validity – will not complying with formalities set out in Wills Act [Chapter 6:06] – Master's discretion as to whether or not to accept will in spite of such lack of compliance – process to be followed

Mujuru NO & Ors v The Master & Ors HH-112-08 (Guvava J) (Judgment delivered 20 November 2008)

See above, under ADMINISTRATION OF ESTATES (Master of the High Court – acceptance of will by).

Words and phrases – "dependant" – Deceased Persons Family Maintenance Act [Chapter 6:03] – s 2

Maloya v Nyamupfukudza NO & Anor HH-115-08 (Makoni J) (Judgment delivered 26 November 2009)

See above, under ADMINISTRATION OF ESTATES (Maintenance – dependant – who is).

Words and phrases – "exchange" – Exchange Control Regulation 1996 (SI 109 of 1996) – s 4(1)

Gambiza v Taziva HH-109-08 (Gowora J) (Judgment delivered 27 August 2008)

See above, under CONTRACT (Illegality – agreement to pay foreign currency).