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CASES DECIDED JULY – DECEMBER 2013

Cases added since the last update are indicated by a vertical line in the left margin.

Administrative law – administrative decisions and acts – decision adverse to applicant – remedies available to person aggrieved – entitled to apply to High Court for relief – proceedings under s 4(1) of the Administrative Justice Act [*Chapter 10:28*] – how application to be made – not necessary to seek review of administrative decision

Gurta AG v *Gwaradzimba NO* HH-353-13 (Mathonsi J) (Judgment delivered 16 October 2013)

The applicant was a company incorporated in Switzerland. The respondent was the administrator of SMM Holdings (Pvt) Ltd, an entity under reconstruction. He was appointed in 2004, on the day a reconstruction order was issued in relation to SMM Holdings. As administrator, the respondent entered into an agreement of purchase and sale with the applicant in October 2009, in terms of which he sold certain chrome mining claims belonging to SMM. The respondent complied with all the procedural requirements, including securing the authority of the Minister of Justice and Legal Affairs, to sell and transfer the mining location and was duly paid the purchase price. Although the mining claims were subsequently registered in the name of the applicant, which even commenced operations, the mining location was soon claimed by a third party, who used every means at his disposal, including enlisting the services of the police to arrest the applicant's employees on site, approaching the High Court laying claim to the mining location and generally preventing the applicant from enjoying the benefit of what it had purchased.

Believing that SMM was in breach of the sale agreement, in particular the warranty against eviction, the applicant approached the respondent with a view to reaching an out of court settlement, but this approach was rebuffed. The applicant then applied to the respondent in terms of s 6(b) of the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*], seeking his leave to commence legal proceedings against SMM for the cancellation or confirmation of the cancellation of the sale agreement and a refund of the purchase price. The respondent ignored this application. The applicant then applied to the High Court for an order declaring s 6(b) to be in contravention of s 18 of the Constitution of Zimbabwe 1980 and therefore null and void; alternatively, that it be granted leave, in terms of s 6(b), to institute proceedings against SMM to claim payment of the purchase price, together with interest and costs of suit. The alternative application was made in terms of s 4(1) of the Administrative Justice Act [*Chapter 10:28*], the applicant arguing that the respondent's failure to consider the application for leave and to make a decision as an administrative authority amounted to a breach of s 3 of the Act. The applicant supported its request for the court to grant leave on the basis that not only was the court armed with all the facts to enable it to make that decision, but also that the respondent appeared to have taken a position not to grant leave and was unlikely to alter his position.

The respondent opposed the application, objecting to the applicant bringing a constitutional challenge to the High Court instead of the Constitutional Court (then the Supreme Court). He also took the view that the question of whether s 6 of the Reconstruction Act violated s 18 of the 1980 Constitution was now *res judicata*, having been decided by the Supreme Court in 2011. The respondent also questioned the regularity of the application which, he argued, should have been brought by way of a review.

The application itself was brought under the provisions of the 1980 Constitution, which was in place at the time of filing the application in February 2013. Subsequent to that the 2013 was promulgated on 22 May 2013 although all of its provisions did not come into operation until 22 August 2013 (the effective date) which was the date of the assumption of office by the President elected in terms of the new Constitution.

Held: (1) In terms of para 18(8) of the Sixth Schedule to the 2013 Constitution, any pending constitutional case in which argument from the parties had not been heard before the publication date must be transferred to the Constitutional Court. As the application was commenced on 1 February 2013, it may, in terms of para 18(9), be continued as if the new Constitution had been in force when the application was filed but using the procedure that was applicable before 22 August 2013. However, the provisions of the new Constitution conferring jurisdiction on the High Court in constitutional matters did not apply to the present case. Para 18(9)(a) made it clear that the procedure to be followed is the procedure that was applicable to this case immediately before the effective date. What should be followed therefore is the procedure in terms of the old system. Procedurally, the High Court, composed as it is of a single judge, could not strike down current legislation, which was a preserve of a full bench of the Supreme Court in terms of s 24(4) of the former Constitution. Reference to the Supreme Court only in s 24 of that Constitution was a deliberate limitation of the inherent jurisdiction of the High Court. While the High Court can, in the exercise of its inherent jurisdiction, issue declaraturs, but the law forbade the issuance of such declaraturs in constitutional matters and specifically limited the power to strike down existing

legislation to the Supreme Court sitting as a constitutional court. The newly found jurisdiction bestowed on all courts by the new Constitution did not come into it because the matter had to be determined in terms of the procedure that obtained prior to the effective date.
(2) The Supreme Court had previously considered the constitutionality of s 16 *vis-à-vis* s 18 of the Constitution. Although the approach adopted by the applicant *in casu* was different from what was before the court in that case, that did not detract from the reality that the matter was considered. As to whether the highest court would be willing to reconsider the issue, that was is a matter for that court to decide.
(3) The respondent, as administrator of a company under reconstruction, was an administrative authority in terms of s 2 of the Administrative Justice Act. Only in his opposing affidavit did the respondent come out openly to say that he would not grant leave because the applicant had no cause of action on the merits. It was clear from his deposition that not only did he assume the obviously biased view that the applicant had no case against him and therefore could not sue him or SMM, but also that he arrived at that position prematurely and without regard to due process, in that his "final position" was achieved months before an application for leave was actually made. The respondent was pre-occupied with his own defence in the intended suit and not with considerations of fairness and according the applicant the opportunity to present his case before an impartial court. The respondent inevitably fell into the trap of self- preservation. An administrative authority is required by s 3 of the Act to act lawfully, reasonably and in a fair manner. Section 4 of that Act authorises any person aggrieved by the failure of an administrative authority to comply with s 3 to apply to the High Court for relief. The section made no reference to a review application. If the legislature had desired to provide for a remedy of review, it would have specifically said so. It however elected to create a statutory remedy, in terms of which a party is entitled to approach the High Court by application where the administrative authority has come short.
(4) While it is rare that the court would be justified in usurping the decision making function of the administrative authority, there are situations where the court might take such action. These are: (a) where the end result is a foregone conclusion and it would be a waste of time to refer the matter back; (b) where further delay could prejudice the applicant; (c) where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction again; and (d) where the court is in as good a position as the administrative body to make the decision.
Although some of the requirements may be said to be mutually exclusive, all of them existed here. The applicant should be granted leave to sue SMM.

Administrative law – *audi alteram partem* rule – application – failure to grant hearing before taking decision – legitimate expectation on part of affected person that hearing would be granted – limited situations where subsequent hearing may constitute compliance with rule

Mangenje v *TBIC Invstms (Pvt) Ltd & Ors* HH-377-13 (Mafusire J) (Judgment delivered 30 October 2013)

The applicant in these two amalgamated cases had been given an "offer letter" by the Minister (first respondent in the second case) in respect of a farm. The original owner had sub-divided the farm and sold two portions of it, leaving a little over half of the original farm. The remainder was then sold to the first respondent in the first case (TBIC), who leased it to the second respondent (the tenant) in that case. The following year, 2000, the whole property was identified for compulsory acquisition for resettlement, in spite of part having been sold previously. At that time, the period of validity of a notice of acquisition was one year. The acquisition of the property was not subsequently confirmed in court in accordance with the provisions of s 8 of the Land Acquisition Act [*Chapter 20:10*]. Another notice of acquisition was published in 2003, again referring to the full original property. This notice was withdrawn after about 10 weeks. A third notice of acquisition was published and withdrawn. In spite of these withdrawals, and the expiry of the first notice, the property was listed in Schedule 7 on the Constitution of Zimbabwe 1980. This Schedule had 157 preliminary notices that had been published in the *Government Gazette*. They listed the properties that had been "identified" for acquisition. The two notices of 2000 and 2003 were on the list. On 3 November 2005 the original title deed for the whole property was endorsed by the Registrar of Deeds in line with s 16B(4) of the Constitution to the effect that the farm was now State land..
In August 2006 the Minister, in terms of the standard term "offer letter", allocated the remainder of the farm to the applicant. The applicant accepted the offer in February 2007. When he tried to occupy the farm, he found the tenant in occupation. The tenant refused to move. In 2009 TBIC somehow managed to take transfer of the remainder of the farm, in spite of the endorsement by the Registrar of Deeds.
The applicant sought a declaratory order that the compulsory acquisition of the property by government had been valid, as well as several other orders: the nullification of the transfer of the property to TBIC; the nullification of TBIC's lease of the property to the tenant; and the eviction of the tenant and anyone else claiming occupation through TBIC.

About four months before the date of hearing, the Minister gave the applicant a written notice of the immediate withdrawal of the offer letter. The withdrawal letter was said to be in terms of the conditions of offer attached to the offer letter. The applicant was required to forthwith cease all operations on the property and to immediately vacate. The withdrawal letter concluded by inviting the applicant to make representations, if he wished to do so, within seven days of the receipt of the letter. The reasons for the withdrawal letter were explained as being that the property was owned by an indigenous entity, that it was not the policy of the ministry to dispossess indigenous owners of land and that therefore the applicant could not insist on enforcing his rights against TBIC. An alternative piece of land in another district was offered, but the applicant found it unsuitable for his purposes. The Minister's withdrawal letter was not motivated by any breach by the applicant of the conditions contained in the offer letter. The Minister did not specify any such condition.

The applicant then brought the second case, against the Minister. He sought the setting aside of the withdrawal letter and the reinstatement of the offer letter on the grounds that the withdrawal letter had offended against the rules of natural justice in that he had not been afforded an opportunity to make representation before the Minister had taken the adverse decision against him. He also argued that by taking that administrative function the Minister had failed to act fairly and had therefore breached the Administrative Justice Act [*Chapter 10:20*].

The Minister and TBIC argued that it was a mistake that the property was included on Schedule 7 to the Constitution as the listing notices had either lapsed or been withdrawn.

Held: (1) The *audi alteram partem* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule is so basic to jurisprudence that it is often termed a rule of natural justice. The legitimate expectation doctrine is an extension of the *audi alteram partem* rule. Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard. An administrative decision made in violation of natural justice can be set aside, especially if it is to be implemented immediately. Once a decision has been reached in violation of natural justice, even if it has not been implemented, a subsequent hearing will be no meaningful substitute. The prejudicial decision taken will be set aside as procedurally invalid. In this way the human inclination to adhere to the decision is avoided. There are some limited situations where a subsequent hearing will constitute compliance with natural justice, but only if, in all the circumstances, it was sufficiently fair as to have the effect of curing the failure to hold a hearing before. The Minister had not observed the rules of natural justice when he issued the withdrawal letter.

(2) On the issue of the applicant's *locus standi*, the holder of an offer letter in respect of land acquired for resettlement in terms of the land reform programme is entitled to occupy the land and to use it. He is entitled to sue for the eviction of anyone interfering with that right, unless that person proves a superior right of occupation. In this case, therefore, the applicant had the requisite *locus standi*.

(3) The Administrative Justice Act requires an administrative authority to observe the rules of natural justice whenever it makes an administrative decision or takes an administrative action adverse to vested rights or legitimate expectations. The Minister was undoubtedly an "administrative authority" within the meaning of s 2 of the Act. His withdrawal letter was an "administration action." The Minister breached s 3 of the Act in relation to the manner the withdrawal letter was issued. He failed in his duty to act in a fair manner; he failed to give applicant any notice of the nature of his action and he gave the applicant no opportunity to make adequate representations before he implemented his decision, let alone before making it.

(4) The mode of compulsory acquisition of agricultural land that was ushered in by s 16B of the 1980 Constitution was materially different from that under the Land Acquisition Act. Under the Act it was the "acquiring authority" that was tasked with the duty to compulsorily acquire land for agricultural purposes. The "acquiring authority" was the President or any Minister authorised by the President. Under s 16B(2)(a), particularly subparagraphs (i) and (ii) thereof, short circuited the process under the Act. In one fell swoop, Parliament, and not the acquiring authority, cancelled the prior deeds of transfer in the names of the previous owners, and transferred ownership of the acquired lands to the State. In enacting s 16B, the Legislature was alive to the issue of possible mistakes that could have been made by the "acquiring authority" in the previous dispensation in relation to the identification of agricultural lands targeted for compulsory acquisitions. If the property appeared in the list then that would be the end of the matter. It would be the property being acquired by Parliament; the property the ownership of which was being divested from the previous owner and the property the ownership of which was being vested in the State. If indeed such a property would have been withdrawn but nonetheless found itself back on the list in terms of s 16B, then the acquisition in terms of the Constitution would prevail. Such an error, if ever it was one, would be "… any error whatsoever contained in such notice…" within the meaning of s 16B(5)(a) and (b).

Administrative law – *audi alteram partem* rule – legitimate expectation – an extension of *audi* rule – when legitimate expectation arises – whether perceived right is merely a privilege – mere privilege giving no grounds for legitimate expectation

Hutchings v *St John's College* HH-416-13 (Mafusire J) (Judgment delivered 18 November 2013)

The applicant, a pupil at a boys' senior school (the respondent), had been denied the right to attend the school leavers' dance to be held at the end of the last term of the school year. He complained that he had not been charged with any offence, but was being punished. He claimed that the respondent had violated the rules of natural justice. It was meting out the most severe punishment without having charged him with any offence, let alone affording him the chance to be heard. The school had a code of conduct. The applicant alleged that the respondent had violated it.

The respondent said that the applicant would not be barred or hindered from completing whatever remained of his schooling component. However, the leaver's dance was purely a privilege, not a right. The school had the right to withdraw it because of applicant's conduct, which included instances of indiscipline, disobedience to school rules, and deceit.

Held: (1) On the facts, the applicant had manifestly been in breach of the school rules. The respondent had been entitled to discipline him. Before it had done so, it had called for an explanation. This had been ignored. The school had then taken measures in an effort to get a response. It had withheld applicant's entitlement to attend the leavers' dance. That had been the only event of significance still remaining for the applicant at the school. There was no fault in the measures taken by the respondent, which had been what the exigencies of the situation had demanded. The applicant had spurned the opportunity that he had been afforded to explain his absenteeism. The application failed on this basis alone.

(2) The *audi alteram partem* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule requires public officials, judicial and quasi-judicial officers, and really anyone entrusted with the power to make decisions or the power to take action affecting others adversely, to exercise such powers fairly. The rule has been extended to the realm of private contracts between a private individual and a private entity. In all cases fairness is the overriding consideration.

(3) The legitimate expectation doctrine is an extension of the *audi alteram partem* rule. Although it is now finding expression in statutes, for example s 3 of the Administrative Justice Act [*Chapter 10:28*], it is a product of judicial activism meant to fill up a lacuna in the law. The legitimate expectation doctrine simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body. Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard. The *audi alteram partem* rule, and its extension, the doctrine of legitimate expectation, are flexible tenets. Their proper limits are not precisely defined. A formal charge that is followed by a formal hearing and culminating in a formal verdict and a formal penalty are not always absolute pre-requisites. The exigencies of the matter determine the situation.

(4) The classification of a benefit as a right or as privilege is not necessarily the sole criterion for determining one's legitimate expectation to be heard in any given case. A regular practice may give rise to a legitimate expectation. One of the problems with the concept of legitimate expectation has been its imprecise limits. The courts have been careful not to leave it too loose. The doctrine of legitimate expectation has no application where the perceived rights were in fact mere privileges.

The leavers' dance was a tradition in the school. In the school's code of conduct, privileges and traditions were accorded the same status. A student's attendance at the dance in question was a mere privilege that the school could withdraw at any time.

(5) Finally, the applicant failed to satisfy one of the requirements for an interdict. What he purportedly sought was simply a temporary interdict, in which case he only had to prove a *prima facie* right as opposed to a clear right. However, it was undoubtedly a final relief that was being sought, where a clear or definite right must be shown. No case for a final interdict had been shown.

Appeal – criminal matter – distinction from review – appeal court confined to considering matters contained in record

S v *Maphosa* HH-323-13 (Hungwe J, Mavangira J concurring) (Judgment delivered 11 July 2013)

The essential difference between review and appeal procedure is that where the grievance is that the judgment or order of the magistrate is not justified by the evidence, and there is no need to go outside the record to ventilate the particular grievance, then the more appropriate procedure to follow for relief is by way of appeal. An election to appeal confines the legal practitioner to matters reflected in the record of proceedings.

Where issues are raised challenging the propriety of the proceedings of an inferior tribunal and the facts which have to be proved in order to support these issues do not appear as established on the face of the record, the proceedings should be by way of review. In this event, the applicant would, by way of affidavit, bring under review other matters which do not appear *ex facie* the record.

An appeal against sentence, on the ground of irregularity in the proceedings of the magistrates court, cannot be entertained unless the irregularity appears on the face of the record.
When an applicant desires leave of an appeal court to refer the matter back to the magistrate in order to lead further evidence which was not led at the trial, the correct procedure is to make an application, on notice of motion to the Attorney General, in the course of prosecution of the appeal. The application will be granted only in exceptional circumstances, such as where, if the conviction is left undisturbed, there is a possibility, amounting to a probability, that a miscarriage of justice will take place. To lay a proper foundation for the exercise of the court's discretion in such an application, the court should be acquainted with the nature of the evidence proposed to be led and the reasons for the failure to lead it at the proper time.

Appeal – grounds – amendment of – point of law being raised on appeal for first time – court's discretion to allow such amendment, provided no unfairness to other party is occasioned

Nyemba & Ors v *Alshams Bldg Materials* S-58-13 (Gowora JA, Malaba DCJ & Ziyambia JA concurring) (Judgment delivered 5 December 2013)

The applicants sought to amend their grounds of appeal by raising the issue of the legality of the contract out of which the matter arose. The respondent, although accepting that a point of law going to the root of the matter can be raised at any time, provided it does not occasion any unfairness to the other party, argued that an amendment is not availed for the mere asking. It was argued that the amendment sought it would result in unfairness and that prejudice would be occasioned to the respondent in the conduct of its case. The respondent also disputed the suggestion that illegality appeared ex facie the papers.
Held: In an application to amend pleadings, the court has a wide discretion, which discretion should however be exercised judicially. The discretion reposed in the court in respect of amendments must be exercised in a manner which allows the issues between the parties to be fairly tried, and the possibility that an amendment to the pleadings might lead to the defeat of the other party is not the kind of prejudice that should weigh with the court. The question whether the transaction relied upon was a valid transaction was a question of law. Any such question may be advanced for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed. The duty of a court on appeal is to ascertain if the court below came to a correct conclusion on the case submitted to it. An appeal court therefore has regard to the issues placed before it in the pleadings filed by the parties to the dispute. Parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry, but within those limits the court has wide discretion. The mere fact that a point of law which is brought to the applicants' attention was not taken earlier will not, on its own, be sufficient grounds for a court refusing to give effect to it. There was no indication that the respondent would have conducted its case differently. Not to allow the amendment might result in prejudice to the appellants, while the respondent had not established that any prejudice apart from the issue of costs would ensue if the amendment were to be granted.

Appeal – notice of – requirements for notice to be valid – need to state grounds of appeal concisely – unnecessarily prolix grounds not valid and may be struck out – need for notice to challenge order made – notice may challenge reasons for order so as to attack order itself

Econet Wireless (Pvt) Ltd v *Trustco Mobile (Pty) Ltd & Anor* S-43-13 (Garwe JA, Malaba DCJ and Ziyambi JA concurring) (Judgment delivered 26 September 2013)

Rule 32 of the Rules of the Supreme Court 1964 requires that a notice of appeal shall state the grounds of appeal concisely. "Concise" means brief, but comprehensive in expression. A notice of appeal must comply with the mandatory provisions of the Rules; if it does not, it is a nullity and cannot be condoned or amended. A notice of appeal which is unnecessarily prolix is not concise. Grounds of appeal which offend against the requirement to be concise will be struck out.
An appeal must be directed at the order made and not the reasons therefor, although there may well be instances, such as where a cross appeal is noted, where it might be necessary to attack the reasoning itself rather than the order. It is also permissible to challenge the reasoning of the court *a quo* in order to challenge the order.

Appeal – noting of – effect – judgment appealed against suspended – rationale for practice – position in English practice – need there for unsuccessful party to apply for stay of execution pending appeal – desirability of following such practice in Zimbabwe

Chematron Products (Pvt) Ltd v *Tenda Tpt (Pvt) Ltd & Anor* HH-343-13 (Mafusire J) (Judgment delivered 9 October 2013)

In this country, unless otherwise provided, the common law rule of practice is that the noting of an appeal automatically suspends the execution of the judgment appealed against. The party that succeeds in the court of first instance has to seek the leave of the court to execute the judgment whilst the appeal is pending. The rationale for this rule is that there is need to prevent an irreparable damage from being caused to the appellant. On the other hand, if the purpose of the rule is to prevent an irreparable damage from being caused to the intended appellant, the automatic suspension of the judgment or decision appealed against may equally cause an irreparable injustice or harm to the respondent, who would have been the successful party. It is he who is prevented from enjoying the fruits of his success in the court of first instance.
In England, the noting of an appeal does not automatically suspend the execution of the judgment appealed against. The intending appellant must apply, and show special circumstances, for the execution to be stayed. The rationale for the English position is that a successful litigant should not be deprived of the fruits of his litigation.
It should be for the unsuccessful party to have to seek leave for the judgment to be suspended if an appeal is noted. That party should be the one required to show that special circumstances exist which justify the suspension sought. The system that prevails in Zimbabwe must have the effect of encouraging some debtors or persons with doubtful claims to appeal simply in order to play for time. Since an appeal automatically suspends execution, a debtor who wants to delay may as well appeal, even if he knows the appeal is hopeless or even if he knows that he will abandon it. At least it will buy him time. Our rule tends to encourage an abuse of the court process. In practice, a party that loses the first round in the court of first instance is less likely to want to press for the expeditious determination of the appeal, especially as the outcome is uncertain. Given the inevitable and often inordinate delays experienced in the appeal process, the appellant is often content to let matters drag on and, in the process, frustrate the respondent who was the successful party. The respondent has to wait patiently before he can enjoy the fruits of his success. The situation can be quite desperate in eviction cases. Where the landlord obtains an order for the ejectment of the tenant from the rented premises for which the tenant is not paying rent and the tenant appeals the order, the landlord can be stuck with the intransigent tenant for months on end, even years, unless he obtains leave to execute.
The situation obtaining in the English legal system has been adopted in Zimbabwe in maintenance and labour cases. The appellant must apply for the order appealed against to be suspended.

Arbitration – award – challenge to – award granted following referral in terms of Labour Act [*Chapter 28:01*] – award challenged on grounds set out in Arbitration Act [*Chapter 7:15*] – jurisdiction of High Court to entertain challenge not ousted

Mapini v *Omni Africa (Pvt) Ltd* HH-494-13 (Tsanga J) (Judgment delivered 18 December 2013)

The applicant had been dismissed from her employment with the respondent. Aggrieved by what she considered to be unfair dismissal, she sought resolution of the matter through compulsory arbitration. She obtained a default judgment from the arbitrator, the respondent not being present after a number of postponements, of which it had been notified. The respondent then brought an application in terms of article 34 of the schedule to the Arbitration Act [*Chapter 7:15*], seeking the setting aside of the arbitral award. It argued that the award made by the arbitrator in its absence violated the dictates of natural justice in that it had not been granted a hearing. The respondent succeeded in setting aside the arbitral award. This was not on the basis of consideration of any merits but as a result of a default judgement granted in an unopposed matter.
The applicant sought to have this default judgment set aside. Among other points raised, she challenged the setting aside of the arbitral award on the grounds that the High Court lacked the necessary jurisdiction to hear the matter. She maintained that the setting aside of an arbitral award is the exclusive jurisdiction of the Labour Court in terms of the Labour Act [*Chapter 28:01*].
Held: Where specific statutes apportion responsibility and authority for hearing certain matters, it is vital for the swift administration of justice that the jurisdiction accorded any specific courts be recognised, respected and enforced. Clarity on the part of the legislature in according such jurisdiction is equally important as its absence can result in overlapping jurisdiction. A key issue in this regard is whether the jurisdiction of the High Court pertaining to setting aside arbitration awards in labour matters is now indisputably the strict preserve of the Labour Court or whether the High Court maintains its jurisdiction. This issue arises in light of the wording of the applicable provision that deals with this issue. Article 34 still specifically mentions the High Court in no uncertain terms as the forum for applying for the setting aside of an arbitral award. The purported ouster of the High Court's jurisdiction in labour matters, while the provision remains couched as it is, is doubtful. There is no

inconsistency between the jurisdictional provisions of the Labour Act on issues relating to arbitration and the provisions of article 34 that would justify the invocation of s 5 of the Arbitration Act, because the issues envisaged in article 34 for setting aside an award are not dealt with elsewhere in the Labour Act. In the absence of a specific ouster through an amendment clarifying the non-application of article 34 to labour matters, the jurisdiction of the High Court in such issues cannot be said to have been ousted. There is nothing that stops the legislature from effecting the desired clarity in the interests of the smooth administration of justice in labour matters if indeed its intention was and is to exclude these from the ambit of the provision of article 34 in favour of the Labour Court. Consequently, the issue was properly before the court.

Editor's note: the decision of Chiweshe JP, referred to in the judgment, is reported as *Samudzimu* v *Dairibord Hldgs* Ltd 2010 (2) ZLR 357 (H). As the learned Judge President came to a different conclusion, legislative clarification would seem desirable.

Arbitration – award – registration – grounds for refusing registration – limited grounds on which registration may be refused – averment that award contrary to public policy – what must be shown

Wei Wei Properties (Pvt) Ltd v *S & T Export & Import (Pvt) Ltd* HH-336-13 (Mathonsi J) (Judgment delivered 9 October 2013)

The operative clause in a lease agreement about the duration of the lease provided that the lease would be for a fixed term, but also provided that either party could terminate this agreement by providing three months' notice. Acting in terms of this provision, the applicant gave the respondent three months' written notice of termination of the lease on the ground that it required the premises for its own use. The ensuing dispute was referred to arbitration. The arbitrator confirmed the validity of the notice of termination, holding that the clear meaning of the contract was that either party could at any time terminate the lease agreement on giving three months' notice, without having to give any reason or justification for the termination and that the applicant was entitled to an order for the eviction of the respondent. When the applicant sought to register the award, the respondent opposed registration on the ground that the award offended the established precepts of law and natural justice, in that it is not competent at law to terminate a lease agreement when there has been no breach on the part of the tenant.
Held: Registration of an arbitral award or its recognition for purposes of enforcement can only be refused if the person against whom it is invoked satisfies the court of the existence of grounds of refusal set out in article 36 of the Model Law contained in the First Schedule to the Arbitration Act [*Chapter 7:15*]. The only ground that might have been relied on was to show that recognition or enforcement would be contrary to the public policy of Zimbabwe. This can only be shown where the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award. In such a case, it would be contrary to public policy to uphold the award. Here, the arbitrator gave effect to the wishes of the parties, who contracted to the exclusion of any protection they may have enjoyed under the law. They agreed that the lease would be terminable on the giving of three months' notice. The arbitrator did not go outside the contract. He did not make a contract for the parties but merely respected the sanctity of contract. His conclusion could not be faulted. The award should therefore be registered.

Arbitration – award – registration of – need for award to sound in money before it can be registered – original award specifying six months' salary as damages, without stating amount – arbitrator subsequently approving amounts calculated by judgment creditors – document signifying such approval part of main award – not necessary that it comply fully with requirements of article 31 of Schedule to Arbitration Act – failure by arbitrator to remit copy of award to Ministry of Labour – such failure not vitiating award

Muchenje & Ors v *Stuttafords Removals (Pvt) Ltd* HH-374-13 (Tsanga J) (Judgment delivered 16 October 2013)

The applicants sought to register a quantified arbitral award for unlawful retrenchment of the applicants by the respondent. In his award, the arbitrator ordered that each of the applicants be paid, as damages, an amount equivalent to six months' salary and benefits. He did not specify the amount at the time he made his award. The applicants' legal practitioners proceeded to calculate what was due to each applicant and came up with concise figures as to how much was due and payable to each in liquid terms. Forty days after the award was handed down, they sent to the arbitrator, and addressed to the respondent, a document entitled "Application for

Quantification" detailing how much each was to be paid. The arbitrator endorsed, signed and dated the quantified document in these terms: "Approved as a correct quantification of the award granted by me …"
The respondent opposed the application. The first ground was that the Arbitration Act [*Chapter 7:15*] makes no provision for the kind of application for quantification which was filed by the applicants with the arbitrator. They also argued that article 33 of the First Schedule to the Act, which allows for the correction of an award, requires that the application for correction must be made within 30 days of the award. The second ground was that the arbitrator's approval of the quantification was not compliant with the requirements of article 31, that an award must be in writing and signed by the arbitrator, stating the reasons on which it is based. It must also state its place and date of arbitration after which it ought to be delivered to each party. The "Application for Quantification", it said, fell short of all of the above requirements. It is in the form of an endorsement to the award document, as opposed to being an award document that complied with those requirements. Thirdly, it was argued, the arbitrator had failed to comply with the requirements of s 5 of the Labour (Arbitrators) Regulations 2012 (SI 173 of 2012), in that he had failed to remit a copy of his decision to the provincial office of the Ministry of Labour and Social Services within 7 days of disposal of the matter, thereby vitiating the decision.
Held: (1) the application to the arbitrator was not one under article 33, which is for correction of errors in computation or typographical errors or errors of a similar nature. Since the arbitrator did not spell out any curtailing time limits within which the applicants should have enforced the award, it could not be argued that they were out of time. Article 33 was a non-issue. Indeed, the respondent, as employer, could just as easily, of its own volition after the award was granted, have gone ahead to do the calculations of six months' salary and benefits for each applicant based on the award. If the parties agreed to the correctness of such computations, that would have been the end of the matter.
(2) In practice, when an award is submitted for registration in terms of s 98(14) of the Labour Act [*Chapter 28:*01], it should sound in money, either in the main in the alternative, because jurisdictionally the determination as to which court to register the award in can realistically only be one made with knowledge of the amount involved. The applicants were not seeking to introduce an alien document. The document in question was part and parcel of the arbitral award in that it gives the award the final push in the correct direction to the appropriate enforcing judicial forum, based on its amount.
(3) The arbitrator made one award which complied with the requirements of article 31. The document approving the application for quantification could not be seen as an entirely new award whose validity depended in its entirety on the observation of those requirements. A computation of what is due is part and parcel of a main award – a supporting, supplementary or back up document to the main award. As such, it must be authentic in terms of the criteria set out in article 31; but it is not the actual award itself, but its accompaniment. The original award on its own was not registrable for enforcement purposes as it was not in liquid terms. The quantification was not a new award separate from the arbitration award. It gave precision to the outstanding claim so as to make it executable, given that the employer had not taken any steps to make a pay-out. As a general rule, where more than one interpretation of an award is possible, an interpretation resulting in the award being effective is to be preferred to one rendering the award meaningless.
(4) A valid award cannot be rendered invalid by virtue of events occurring subsequent to the making of the award. Common sense dictates that an arbitrator need not cross every "t" or dot every "I". To require absolute finality could delay completion of the arbitration and unnecessarily increase costs of the proceedings.

Arbitration – proceedings – pending proceedings – interim protective measures – may be sought from High Court – measures include interdict to secure preservation of goods and any other order to ensure arbitral proceedings not rendered ineffectual

Northern Farming (Pvt) Ltd v *Vegra Merchants (Pvt) Ltd & Anor* HH-328-13 (Mafusire J) (Judgment delivered 3 October 2013)

See below, under PRACTICE AND PROCEDURE (Interdict – "anti-dissipation" interdict).

Bank – account – monies in name of account holder – whether capable of attachment

Bank – account – escrow account – nature of such account

Deputy Sheriff, Harare v *Metbank Zimbabwe & Anor* HH-230-13 (Chigumba J) (Judgment delivered 24 July 2013)

See below, under PRACTICE AND PROCEDURE (Execution – attachment).

Bank – client – bank's obligations to – moneys paid by client into bank – ownership of such moneys – bank's duty to repay money to client on demand – bank surrendering money in client's account to Reserve Bank in obedience to unlawful directive – bank nonetheless obliged to repay money to client on demand

Standard Chartered Bank Zimbabwe Ltd v *China Shougang Intl* S-49-13 (Ziyambi JA, Garwe & Hlatshwayo JJA concurring) (Judgment delivered 11 October 2013)

The appellant was a registered commercial bank in Zimbabwe and the respondent was one of its customers. The respondent was a foreign investor with two bank accounts with the appellant. In 2007, the appellant, in obedience to a directive issued by the Reserve Bank of Zimbabwe ("RBZ"), surrendered the balance of the respondent's foreign currency accounts ("FCA's") to the RBZ. The appellant thereafter refused to repay the respondent on demand, as it claimed that the intervention of the RBZ had rendered it impossible for it to comply with its contractual obligation to make payment to its client. The respondent was granted an order by the High Court compelling re-payment of its money by the appellant.
Held: (1) the general rule relating to deposits made in a bank account by a customer is that its money becomes the property of the bank which can use such deposit as it pleases, so long as it repays the depositor, on demand, the equivalent of the amount deposited. Accordingly, deposits by the respondent became the property of the bank and what the bank paid over to the RBZ was its own money. The respondent's right to be re-paid the equivalent of its deposits, on demand, remained unaffected by its bank's dealings therewith. The transfer to the RBZ, in obedience to its directive, did not extinguish the customer bank's contractual obligation to make payment to the respondent.
(2) Any "impossibility to make payment" must be established and not merely alleged. The bank failed to prove that repayment of the money to the respondent was "impossible" as opposed to inconvenient. In any event, impossibility resulting from the act of one of the parties to a contract does not dissolve the contract and its obligations. Rather, it leaves the party whose act created the impossibility liable for the consequences that flow from it.
(3) Where a ministerial directive is given without statutory authority, obedience thereto will not qualify as a *vis maior* or *casus fortuitus*. *In casu*, the directive was issued without statutory authority, being *ultra vires* the provisions of s 35 of the Regulations which grants no authority to the RBZ to confiscate deposits in the accounts of customers of the bank.
(4) Any dealings by the appellant with deposits in its clients' accounts, namely, its payments over to RBZ, were made at its own risk and did not affect its own obligation to repay to the respondent its deposit on demand.

Editor's note: judgment of BERE J in *China Shougang Intl* v *Standard Chartered Bank Zimbabwe Ltd* HH-310-11; 2011 (2) ZLR 456 (H) confirmed.

Bills of exchange and negotiable instruments – promissory note – what is – construction of terms of note – normal rules for interpretation of contracts applicable

African Export-Import Bank v *RioZim Ltd* HH-464-13 (Chigumba J) (Judgment delivered 4 December 2013)

The plaintiff claimed provisional sentence in the amount of USD8 million, based on a liquid document, a promissory note which was executed and issued on behalf of the defendant in favour of the plaintiff, in terms of which the defendant promised to pay to the plaintiff, or its order, the sum of USD8 million. When the plaintiff presented the note for payment, the bank confirmed that the defendant's account with it was not funded and that consequently they were unable to pay the amount on the note The defendant resisted the claim, on the grounds that the note ousted the jurisdiction of the High Court in Zimbabwe in favour of the courts of England. It was alleged that not only had the plaintiff approached the wrong court, it had applied the wrong laws in construing the terms of the promissory note. The defendant averred further that the *domicilium citandi et executandi* specified in the note made it clear that summons ought to have been served in England, and consequently, service of the summons in Zimbabwe was improper and invalid at law. Finally, the defendant claimed that the amount owed had been reduced by some USD600 000, as it has repaid part of the loan secured by the note. The note stated, *inter alia*, that it should
"be governed by and construed in accordance with the laws of England. The courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Promissory Note.

The holder at its discretion may bring any suit, action or proceeding in the courts of whatever jurisdiction that it may that it may select and the Issuer submits for this purpose to the jurisdiction of each court selected as aforesaid."
The note also nominated a company in England as its agent to accept service on behalf of the defendant.
Finally, the note stated that the defendant undertook to pay the stated amount "without set off, counterclaim, restrictions or conditions of any nature and free and clear of deductions or withholdings".
Held: (1) A promissory note is a negotiable instrument. It is an unconditional promise in writing, made by one person to another, signed by the maker, and engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to bearer. In interpreting written contracts, the courts look for the intent of the parties at the time they entered into the contract. The mutual intention of the parties at the time of the contract will govern the court's resolution of a contractual dispute if that intention can be determined. If the language of the contract is clear and definite, that language will determine the mutual intent of the parties. In determining whether the contract language is clear and definite, the court will give the words their ordinary and common meaning. Contracts are interpreted as a whole, if possible, in order to give effect to all parts of the contract. The court will not look outside the contract unless there is ambiguity in a provision.
(2) *In casu*, the wording of the relevant clauses was clear and unambiguous. The language used was plain and ordinary. The clauses, read together, and with the rest of the note, clearly did not purport to exclude the jurisdiction of the Zimbabwean courts in favour of the courts of England. The parties clearly intended that the holder of the note, at its sole and exclusive discretion, had a right to elect to bring any action or suit in the courts of any jurisdiction of its choice, but that the laws of England be used to govern and interpret the note whenever a dispute arose in regards to the terms of the promissory note.
(3) With regard to the service of process in Zimbabwe, there was nothing which supported the contention that any and all legal process in regards to the promissory note ought to be served in England at the agent's address. In any event, the defendant accepted service of the letter at its Harare address addressed to it by the plaintiff, in which the plaintiff advised that the promissory note had been dishonoured by non-payment. No effort was made to disabuse the plaintiff of the notion that it had effectively placed defendant *in mora* by delivery of the letter to that address. The defendant ought to have advised the plaintiff to deliver the letter to its *domicilium citandi et executandi.*

(4) When a plaintiff sues on a liquid document, the court will ordinarily grant provisional sentence unless the defendant produces proof that the probability of success in the principal case is against the plaintiff. It is therefore necessary to decide whether or not there is a balance of probabilities in favour of the defendant in this case, which would justify the refusal of an order for provisional sentence. If there is no balance of probabilities in favour of either party in any principal case that may eventuate, then the law is that plaintiff is entitled to provisional sentence. The question of onus is therefore important in determining whether or not there is a balance of probabilities in favour of either party. There are two distinct aspects or types of onus. Firstly, there is the onus in the provisional sentence proceedings and, secondly, there is the onus in the principal case. If the onus in the principal case is on the plaintiff, then of course it may be easier for the defendant to discharge the onus resting upon him in provisional sentence proceedings of showing that there is a balance of probabilities in his favour. The question to be answered would therefore be whether the plaintiff was likely to succeed in its claim in the main matter, or if the defendant had a valid defence to that claim, which was likely to succeed, rendering the granting of provisional sentence premature and incompetent.

(5) The promissory note was valid and binding on the parties. It was a liquid document at law, and valid for purposes of r 20 of the High Court Rules. The defendant did not deny that the promissory note was dishonoured by non-payment. The plaintiff had discharged the onus on it to show that it has a good case in the main matter. With regard to the averment that the defendant would be prejudiced if provisional sentence were granted in the sum of USD 8 million, such a quibble about the quantum because defendant owed less than that fell short of the requirement to show cause why defendant had not honoured the promissory note. The question of quantum was not a valid defence, capable at law of defeating a claim for provisional sentence, regard being had to the terms of the promissory note.
Provisional sentence would therefore be granted.

Company – director – who is – person holding himself out to be a director even if not registered as such – third parties entitled to rely on such representation – liable for acts of company – person who was a party to carrying out of company's business recklessly or with intent to defraud – liability of such person even if not a director

Govere v *Ordeco (Pvt) Ltd & Anor* S-25-14 (Patel JA, Ziyambi & Hlatshwayo JJA concurring) (Judgment delivered 23 September 2013)

Proceedings had been brought against a company by the first respondent to recover outstanding rentals and other costs. When the company failed to pay, the first respondent applied to the High Court for an order, in terms of s 318 of the Companies Act [*Chapter 24:03*], declaring the appellant personally liable for the judgment debt of the company. The appellant had admitted that he was a director of the company, though, as he put it, "unofficially". There was no return from the companies registry confirming his position as a director the company, but a letter from the company and a company resolution both clearly identified him as a company director. The High Court upheld the application. The appellant was a Sccordingly ordered to pay the claimed amount together with interest and costs on a legal practitioner and client scale. In the event of the appellant's failure to pay, the first respondent was entitled to execute the order for payment against his two immovable properties. On appeal, the appellant argued that he should not have been found liable. It was also argued that an order for special execution against immovables is normally only granted for preferential or secured creditors, such as mortgage bond holders, and that in terms of r 326 of the High Court Rules execution must first be applied against the judgment debtor's movables before it can be effected against his immovables. The first respondent contended that the order of the court *a quo* entitled it, without any qualification, to execute against the appellant's immovables

Held: (1) There could be no doubt that the appellant represented or held himself out as a director of the company and its trading subsidiaries at the relevant time. Consequently, third parties dealing with him were entitled to rely upon that representation for the purposes of legal liability in terms of s 12 of the Companies Act. Even if it were to be accepted that the appellant was not a director of the company, this would not absolve him from personal responsibility for the company's debts and liabilities under s 318(1) of the Act, because that provision extends personal liability not only to "the past or present directors of the company" but also to "any other persons who were knowingly parties to the carrying on of [the company's] business" recklessly or with gross negligence or with intent to defraud.

(2) The order for execution granted by the court *a quo* would only into operation if the appellant failed to pay the judgment debt. The order was clearly conditional and contingent upon such failure. Therefore, the appellant was perfectly at large to tender his movables in satisfaction of the judgment before any process for the execution of his immovables was initiated.

(3) Rule 326 patently did not differentiate between secured and unsecured creditors. It applied to both without distinction. The plain meaning of this rule was that the judgment creditor has the option to sue out a separate writ of execution for the attachment of immovable property or a single writ for the attachment of both movable and immovable property. In either event, before proceeding to attach immovable property, the sheriff or his deputy is enjoined to satisfy himself that the judgment creditor does not own any or has insufficient movable property to satisfy the judgment debt.

(4) There were no grounds for ordering costs against the appellant on the higher scale.

Editor's notes: (1) the judgment appealed against was that of Chigumba J in *Ordeco (Pvt) Ltd* v *Govere & Anor* HH-179-13 (judgment delivered 5 June 2013).

(2) The date given for the Supreme Court's judgment is the date on which the court's decision was announced. The full reasons for the decision were made available in 2014, hence the 2014 judgment number.

Company – legal proceedings – proceedings against company – company carrying on business under trade name other than its registered name – may be sued in name in which it carries on business

Sheriff of Zimbabwe v *Mackintosh & Ors* HH-330-13 (Mathonsi J) (Judgment delivered 9 October 2013)

The judgment creditor in these interpleader proceedings entered into a written contract with an entity styling itself "Harare Kawasaki", which was represented by the first claimant. The contract stated that "Harare Kawasaki" was "a company incorporated in Zimbabwe". Following legal proceedings successfully brought by the judgment creditor against Harare Kawasaki, the sheriff placed under attachment certain items of property located at the business address of Harare Kawasaki. All the goods placed under attachment were claimed by the first claimant, a director of the second claimant, a company, as well as by the second claimant itself. The first claimant stated that the applicant wrongly attached his assets as well as those of the second claimant, because Harare Kawasaki was not a separate legal entity capable of owning assets or suing or being sued in its own right, it being merely a brand name under which the second claimant conducted business. He maintained that the writ of execution issued against Harare Kawasaki was a nullity for the same reason, given that it was issued against a non-existent entity.

It was argued for the claimants that, while r 8C of the High Court Rules 1971 allows for a person carrying on business in a name or style to be sued in that name or style, the rule does not apply to corporations.

Held: It is a central principle of company law that a company, once incorporated, becomes a fictitious person. To that extent, therefore, the use of the word "person" in r 8C should, of necessity include a corporation. A corporation which carries on business in a name or style can be sued in that name or style. While r 7 defines

"association" as including a trust, a partnership, a syndicate, a club or any other association of persons which is not a body corporate, r 8C does not refer to an "association" as defined in r 7, but to "a person." The judgment creditor was thus entitled to sue the second claimant in its trading name or style. The second claimant presented itself to the public as "Harare Kawasaki". The contract of the parties even referred to Harare Kawasaki as "a company incorporated in Zimbabwe." It was dishonest in the extreme for the second claimant to attempt to evade liability in terms of the judgment taken against it in the name or style in which it related to the public. What belonged to Harare Kawasaki clearly belonged to the second claimant.

Company – winding up – grounds – company unable to pay its debts – court's discretion even where company shown to be unable to pay its debts – amount of debt disputed and agreement made to refer dispute to arbitration – company paying off debt and in process of recapitalisation – winding up refused

Dominion Trading FZ LLC v *Victoria Foods (Pvt) Ltd* HH-324-13 (Mathonsi J) (Judgment delivered 2 October 2013)

The applicant, which was in the business of selling bulk grain commodities to wholesale customers, entered into written agreements with the respondent, which was in the business of purchasing such commodities for resale to the local retail market. In pursuance thereof, the applicant supplied wheat, maize and rice to the respondent and invoiced the respondent for payment which was due within a period of 60 days from the date of invoice. The responded made certain payments towards the debt and was credited for such payment, as well as for some wheat which was damaged by rain and weight variance, thereby reducing the applicant's claim. A dispute arose as to the exact amount owing: the respondent disputed the figures presented by the applicant, the quantities allegedly delivered and the values. It turned out that some of the wheat allegedly delivered was still locked up in the applicant's silos and had not in fact been delivered. The parties instead agreed to refer the dispute to arbitration and an arbitrator was appointed. However, the applicant, impatient with that process, made an about turn and launched an application in terms of s 206(f) and (g) of the Companies Act [*Chapter 24:03*], that the respondent was unable to pay its debts and that it was just and equitable that it be wound up. The applicant insisted that, when demand for payment was made, the respondent failed to effect payment, even though it acknowledged indebtedness and repeatedly undertook to pay. Additionally, the applicant maintained that it had lost confidence in the manner in which the respondent was run and, as creditor, it would rather have the respondent wound up, it being just and equitable to do so.

The respondent opposed the application, stating that the debt was not yet due because there was a serious dispute as to the exact amount owing, which dispute had been referred to arbitration. The respondent itemised various areas of conflict, and argued the dispute should be resolved by arbitration in terms of the agreement of the parties.

The facts showed that the respondent owed the applicant substantial sums of money, the exact figure of which was in dispute. Although the respondent admitted to owing some of the money, it had not admitted a specific amount; but the respondent had continued to pay to the applicant.

The applicant submitted that the best evidence of solvency is the payment of debts and, the respondent having failed to pay on demand, it was insolvent and should be wound up. The disputation of the amount owing by the respondent was merely a ruse to buy time.

Held: while, in terms of s 205 of the Act, the respondent could be regarded as being unable to pay its debts, the court has a very wide discretionary power to accede to the application or not. Indeed, even where it has been shown that the company is unable to pay its debts, the court still has a narrow discretion: narrow in the sense that a creditor is entitled to a winding up *ex debito justitiae,* save in exceptional circumstances. The essence of the discretion is a decision as to whether to withhold relief, objective grounds for the granting of which have been established. The discretion is a judicial value judgement to be made on all the relevant factors.

If the company whose winding up is sought can show that it has a *bona fide* and reasonable defence to the petitioning creditor's claim, the creditor cannot succeed. Where *prima facie* it appears that the respondent is indebted to an applicant in an application for liquidation, the onus is on the respondent to show that such indebtedness is disputed on *bona fide* and reasonable grounds. Here, the respondent had shown that the amount being claimed by the applicant was disputed and that such dispute was awaiting arbitration. The respondent pointed to discrepancies in the applicant's figures and indeed the applicant also made some small concessions, reducing the amount claimed in the process. The respondent had thus discharged the onus resting upon it. It would be unsafe to allow the liquidation of the respondent, regard being had to its far reaching consequences, only for the liability to be successfully contested.

Further factors influencing the discretion in favour of the respondent were: (a) the fact that the parties had agreed to refer the dispute to arbitration must have involved a realisation that there was a *bona fide* dispute involving figures; (b) the fact that, without a fair determination of the dispute, the applicant pursued this application for winding up, thereby seeking to deprive the respondent of the opportunity, provided by the

agreement between the parties, to have the dispute determined by arbitration; and (c) the fact that the respondent had assets of substantial value. While the existence of assets would not necessarily disentitle the creditor to a winding up order, it is a factor that could not be overlooked, especially where, as here, the respondent had not only been paying the debt, but also was in the genuine process of recapitalisation.
To insist on winding up, against this background, was indicative of an abuse of process and amounted to harassment or oppression of the respondent.

Constitutional law – Constitution of Zimbabwe 1980 – Consolidated Revenue Fund – revenues collected must be deposited in Fund – transfer of such revenue to anyone else prohibited – transfer of funds collected by Revenue Authority to Reserve Bank –transfer unlawful

RBZ v *ZRA* S-44-13 (Malaba DCJ, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 20 September 2013)

The appellant and the respondent were legal entities, established by statute for the achievement of specific purposes, with a right to sue and be sued. The respondent was established in terms of the Revenue Authority Act [*Chapter 23:11*] to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues due to the state and the transfer of that revenue to the Consolidated Revenue Fund for appropriation by Government. It was authorised to open accounts with banks to receive deposits by individuals of the revenue due to the State. It was under an obligation, as an agent, to account for all the money deposited into the accounts and generally collected by it, by transferring the money into the Consolidated Revenue Fund. Under s 101 of the Constitution of Zimbabwe 1980 and s 28(2) of the Act, the respondent was under an obligation not to transfer that money to any body, other than the Consolidated Revenue Fund. Under s 102(3) of the Constitution, no money can be withdrawn from the Consolidated Revenue Fund unless an act of Parliament authorizes such withdrawal and prescribes the exact manner and form of such withdrawal.
The appellant was established under the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] for the purposes of managing the financial affairs of private banking institutions and those of the State in terms of the law. The powers which appellant exercised in the execution of its functions in respect of private banking institutions are set out in s 45 of the Banking Act [*Chapter 24:20*].
The appellant received into its own account from two commercial banks money held by those banks on behalf of the respondent. This was pursuant to a directive issued to the banks to transfer the money from accounts held with them by the respondent. The directive was purportedly made in terms of s 6(1)(d) of the Reserve Bank of Zimbabwe Act (the paragraph was later repealed), which imposed on the respondent the duty to advance the general economic policies of the Government by doing those things which are permitted by the law. Under s 8(1) of the Act, the respondent could be called upon to meet the settlement by Government of its obligations towards its debtors. In pursuance of this objective, the respondent's Governor issued, through a monetary policy statement announcement, a directive to all commercial banks to transfer all foreign currency held by individuals and institutions with them, into appellant's own account.
The respondent demanded the refund of the money; the appellant did not respond to the demand, and proceedings were instituted by the respondent to recover the money. The appellant opposed the claim, on three grounds: (a) that it had a right under ss 6(1)(d) and 8(1) of the Act, to issue the directive; (b) that the respondent should have sued the commercial banks, as opposed to itself, for the recovery of the money, there being no privity of contract between the two; and (3) that s 18 of the Act granted it immunity from proceedings of this nature.
Held: (1) The obligation imposed by the Constitution applies to all concerned, including the respondent, the commercial banks, and the appellant. The obligation prohibits, in absolute terms, any transfer of revenue collected by the respondent to any other recipient except the Consolidated Revenue Fund. Any act which has the effect of transferring the money to any other recipient, prior to it getting into the Consolidated Revenue Fund, would be unlawful under the Constitution, regardless of who authorized that transfer. It would not be a valid defence to say that the money was used by government or that the directive came from Government because the Constitution is binding on the Government.
(2) The appellant overshot the scope of its powers under ss 6(1)(d) and 8(1) of the Act. The sections placed on the appellant an obligation, limited to the exercise of the powers of monitoring financial systems. The obligation to advance the economic policies of the Government by making funds available to it is limited to the appellant having monies in its own accounts. The obligation does not authorize the appellant to force transfers of money from other people's accounts.
(3) The immunity the appellant claimed was limited to a situation where the appellant has acted within the confines of the statute. If the appellant were to be sued for a debt, the defence of immunity would only be available to it if the action complained of, or the debt was incurred, in the proper exercise of the powers

conferred upon it by the statute. At the time the directive was issued, the immunity provision had not yet come into force.
(4) The unlawful directive issued by the appellant to the commercial banks was the *causa sine qua non* of the respondent's loss and the appellant was therefore liable to make good the loss. Under s 17 of the Banking Act a commercial bank is under an obligation to comply with any directions given to it by the Reserve Bank in terms of the Act. Whilst the commercial banks were not obliged to obey the directive because it was unlawful, the fact that they acted in accordance with its demands did not absolve the appellant from liability for the consequences of its unlawful conduct.

Editor's note: (1) the judgment appealed against was given by Gowora J (as she then was) in *ZRA* v *RBZ* 2011 (1) ZLR 539 (H) in June 2011.
(2) The equivalent provisions in the 2013 Constitution relating to the Consolidated Revenue Fund are ss 303 and 304.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 20(1) – freedom of expression – permissible limitations on in interests of public safety and public order – any legislation affecting freedom of expression must full under one of such limitations – need for proportionality between any limitations imposed and effect on freedom of expression– legislation prohibiting false statements with intent to undermine public confidence in law enforcement agency – legislation not requiring knowledge of falsity – not permissible to prohibit statements simply because they are untrue – any prohibition must relate to lawful conduct of law enforcement agency – draconian penalties provided – further indication of lack of proportionality – need for person making statement to be aware that it is untrue

Chimakure & Ors v *A-G* S-14-13 (Malaba DCJ, Chidyausiku CJ, Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 30 October 2013)

Section 31(a)(iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]" ("the Code") prohibits the publication or communication to any other person of a wholly or materially false statement with the intention, or realising that there is a real risk or possibility, of undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe. The section does not require proof by the State that the false statement undermined public confidence in the security service institution concerned or that the accused had knowledge of the falsity of the statement.
The applicants were charged with contravening this provision. They were, respectively, a reporter for, the editor of and the publisher of a weekly newspaper. It was alleged that they had published a false statement, to the effect that a law enforcement agency abducted people during the period extending from 25 November to 13 December 2008 and that they published the statement with the intention of or realising that there was a real risk or possibility of undermining public confidence in the security service institutions. The issue of the constitutionality of the provision was referred to the Supreme Court. The applicants argued that it contravened s 20(1) of the Constitution of Zimbabwe 1980. They accepted that the right to freedom of expression is not absolute at all times and under all circumstances and that inherent in the exercise of the right to freedom of expression is a duty not to injure the rights of others or the public interests listed in s 20(2). They argued that the restriction imposed by s 31(a)(iii) of the Criminal Code was an impermissible legislative limitation of the exercise of freedom of expression.
The background was that a few human rights activists and some members of a political party were abducted from different places at different times, following a number of bomb explosions around Harare. The identities of the abductors and places where the abductees were taken was kept secret. No-one knew what had happened to the people abducted. These abductions were widely reported in the media. The question of who had kidnapped the people concerned became a matter of public discussion. The law enforcement agencies claimed that they had no knowledge of who the abductors were and what their motive was.
After 27 days, the victims appeared at various police stations in Harare and later charged with various security crimes. Indictments, lists of witnesses and summaries of their evidence were served on them. The witnesses were all members of law enforcement agencies. The applicants then published the article complained of. It stated that the Attorney-General's Office had "revealed the names of some members of Central Intelligence Organisation and the police who were allegedly involved in the abduction of human right and MDC activists last November", and went on to name the members. The Attorney-General was of the view that the articles contained false statements about the involvement of the law enforcement agencies and its members in the abduction of the human rights activists and members of the political party. He concluded that the articles contained statements which were materially false and prejudicial to the State, and authorised the institution of criminal proceedings against the applicants.

The applicants argued that, although the restriction was contained in a law passed by Parliament, the provision was not a rule of law because the essential elements of the crime did not define the scope of the prohibited acts in a language which was sufficiently clear and adequately precise. They said that the phrase "real risk or possibility" used on s 31 of the Code referred to anything which could scientifically happen without it necessarily being probable. Similarly, the word "false" was wide enough in meaning to embrace a statement which was merely incorrect or inaccurate. It is always difficult to conclusively determine total falsity. With regard the undermining of public confidence, it was argued that the concept of "public confidence" was nebulous and so susceptible of change as to render the offence unconstitutionally vague. It was almost impossible to measure "public confidence" in a public institution, as it depended on such factors as the political and economic conditions of a country at any given time.

Held: There is one indivisible freedom for every individual and that is freedom from unwarranted interference by Government. The fundamental rights protected by the Constitution and exercised by the individual are assertions against the State of different aspects of the freedom inherent in every individual as a human being. Freedom of expression asserts the autonomy of thinking, linguistic and communicative elements of the life of an individual and a thin slice of the universe of communication policy. Section 20(1) defines in broad terms the nature, content and scope of the cluster of rights the enjoyment of which is protected against interference by the Government under the principle of freedom of expression. Liberty of publishing or communicating one's thoughts, ideas and information expressed in an oral, written or symbolic act to others is essential to the enjoyment of freedom of expression.

There are three dimensions to the process of the exercise of the rights guaranteed by s 20(1): an internal dimension (the formation and holding of opinion, ideas and information); a communicative dimension (the expression of opinion, imparting of ideas and information); and an external dimension (the effect of opinions, ideas and information on the addressee or the audience i.e. on the rights of others or public interests listed in s 20(2)(a)). The guarantee of freedom of expression affects all three dimension, which constitute an indissoluble unit.

Protection of the fundamental right to freedom of expression is based on the belief that man is an autonomous and rational agent capable of acquiring knowledge which he uses to distinguish right from wrong. He is under a duty to promote the general welfare of the community to the extent that it is not injurious to his own lawful interests. Freedom of expression is defined not only in terms of the protection of the right to hold opinions but also to receive and impart ideas and information without interference. What is protected by the right is not only the benefits of the communicative process but also the effects the dissemination of ideas and information has on the audience including public interests. The State may interfere with the exercise of freedom of expression only when the activity or expression poses danger of direct, obvious and serious harm to the rights of others or the public interests listed in s 20(2).

The nature and scope of the rights guaranteed covers every activity which conveys or attempts to convey a message in a non-violent form. Freedom of thought means that the mind must be ready to receive new ideas, to critically analyse and examine them and to accept those which are found to stand the test of scrutiny and to reject the rest. Any form of violence by which meaning is conveyed is an antithesis of freedom of expression. The purpose of the guarantee is to ensure that people can manifest and convey the meaning of their thoughts and feelings in non-violent ways without fear of censure.

Publication or communication of a false statement to any other person on any subject matter or topic in a non-violent form is an activity which conveys or attempts to convey meaning. The protection provided by s 20(1) does not have regard to the truth or falsity of the meaning of the ideas and information published or communicated. The section is a value-free provision which does not recognise any basis for the test of truth. Truth is not a condition *sine qua non* of the protection of freedom of expression. The content of a statement should not therefore determine whether it falls within s 20(1)'s protection. Freedom of expression finds its true meaning when its enjoyment is protected from interference by Government. The Constitution recognises the fact that people tell lies in a variety of social situations for different reasons. Lies are not necessarily without intrinsic social value in fostering individual self-fulfilment and discovery of truth. For that reason the Constitution protects against State interference the rights of every person to speak or write and communicate or publish to others what he or she thinks. The only limitation on the "freedom" or "liberty" is the duty not to injure the rights of others or the collective interests listed in s 20(2)(a). It is the rights of others or the public interests and actual or potential harm thereto that help to determine whether a restriction on the expression is valid.

The fact that a person has told lies to others on any subject matter should not be of concern to the State. The Government is not a monitor of truth. What is protected is the indivisible freedom of everyone to speak, even when they may after they have done so be called liars. Anyone has a right to impart or receive ideas and information about the activities of security service institutions, regardless of the falsity or truth of the message conveyed, provided no harm or real likelihood of harm to the rights of others or public interest results in breach of law. No exercise of the right to freedom of expression can, without more, be restricted on the ground that the

message conveyed is false, offensive or not favourable. If expression has to be prohibited because of content, there has to be a demonstrable direct and proximate causal link between it and actual or potential harm to a public interest listed in s 20(2).

Section 20(2) prescribes strict requirements for any measure in the exercise of State power which has the effect of restricting the exercise of the right to freedom of expression. The recognition of the power of Government to limit the exercise of freedom of expression is based on the concept of a free and democratic state based on the rule of law and on the possibility that freedom of any kind, even constitutional freedom of expression, could be abused for the purposes of harming the rights of others or public interest. The exercise of the power to limit the exercise of the right to freedom of expression is not only required to be constitutionally justified. It is itself restricted by the principle of proportionality. It is only the prohibition of those acts in the exercise of freedom of expression shown to pose danger of direct, obvious, and serious harm to one or more of the public interests listed in s 20(2)(a) which is justifiable.

In deciding whether a measure imposes restrictions to the exercise of freedom of expression the court examines its purpose or effect, not its objective. The applicants would have to show that (a) there was no rational connection between the restriction on the exercise of the right to freedom of expression and the objective sought to be achieved by the provisions of the statute; (b) even if there was a rational connection between the restriction on the exercise of freedom of expression and the objective pursued, there were other, less intrusive, means available which the legislature could have used to restrict the exercise of the right to freedom of expression to achieve the same objective; and (c) the effects of the restrictive measure so severely affected the right to freedom of expression that the legislative objective sought to be achieved was outweighed by the restriction on freedom of expression.

The criterion of the proportionality test applicable will vary depending on the circumstances of each case. It is the duty of the court as guardian of the Constitution and fundamental human rights and freedoms to ensure that only truly deserving cases are added to the category of permissible legislative restrictions of the exercise of the right to freedom of expression. It is a fundamental principle of constitutional law that any restriction which hinders the enjoyment of a fundamental right must be introduced by a legal provision. The grounds for the justification of the restriction must be found in the law by which it is imposed. This requirement is expressive of and consistent with the principle of the rule of law. The "rule of law" is an indispensable principle on which any free and democratic society is based. It is an integral part of the vision and way of life in a free society. Where there is rule of law there is peace, justice and freedom. Law plays its proper role only if it takes due account of all the three elements. It does not admit of the rule of man. No individual is above the law.

Section 20 requires that any restriction must be "contained in ... any law" or "done under the authority of any law", that is, that the restriction must have all the universally recognised characteristics of a legal norm. *Prima facie*, the restriction is contained in law because it is provided for in s 31(a)(iii) of the Criminal Code. Behind the requirement that restrictions must be based in law lies an order of completeness, allowing the complete extent of such restrictions to be identified on the basis of the interpretation of the provisions of the law. It is important that the concepts chosen to define the essential elements of the offence provide for the judiciary and the executive a workable means of enforcing the restriction.

The rationale underlying the principle of unconstitutional vagueness of a statute is that it is essential in a free and democratic society that people should be able, within reasonable certainty, to foresee the consequences of their conduct in order to act lawfully. This is a fundamental element of law, order and therefore peace. The second component of the doctrine is based on the belief that if arbitrary and discriminatory enforcement is to be preventable laws must provide explicit standards for those who apply them. The discretion of those entrusted with law enforcement should be limited by clear and explicit legislative standards. This is especially important in the use of criminal law, because people are potentially liable to deprivation of personal liberty if their conduct is in conflict with the law. A vague law impermissibly delegates basic policy matters to policemen, prosecutors and judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. So the legislature is prevented from passing arbitrary and vindictive laws.

Many laws are inevitably couched in terms which are to a greater or lesser extent vague. Their interpretation and application in many cases are questions of practice by the courts. The standard is one of sufficient clarity. It is not one of absolute clarity.

A norm imposing restrictions on the exercise of the right to freedom of expression will be unconstitutionally vague if it fails to provide a standard for legal debate and discussion as to whether a particular conduct is in violation of it or not.

The words "real risk or possibility" in s 31(a)(iii) denote a test to be used to establish a subjective state of mind accompanying the publication or communication of a false statement relating to the security service institution referred to in the provision. The requisite state of mind is related to the aim of the unlawful conduct and the real likelihood of it materialising. Whether there is a "real risk or possibility" of an event happening as a natural consequence of another is a question of fact provable by evidence. Whether or not an accused person had the requisite state of mind at the time he engaged in the prohibited conduct is a question to be determined by

reference to the circumstances of the case. The fact of a person having foresight from the circumstances of his own conduct of a "real risk or possibility" of an event happening as a natural consequence of what he is doing is a common feature of criminal offences. The concept of "realisation of a real risk or possibility" of the occurrence of a specific event as a consequence of the proscribed conduct has been used in the definition of crimes for many years to denote a subjective state of mind of crimes to the extent that it has now acquired a special meaning in criminal law jurisprudence.

A statement is a means by which a person expresses to others by way of spoken or written words or any other action a message about the relationship between what he thinks and the real world. Where the relationship is presented in terms of a correspondence between the idea or information imparted or received and reality or fact the statement is a true statement. The truth or falsity of an alleged fact is a matter of evidence. Where there is no relationship of correspondence between the ideas or information imparted or received and reality the statement is false. To say something has happened when it has not happened is a lie. A statement is indeed defined by s 19 of the Criminal Code to mean "any expression of fact or opinion whether made orally, in writing, electronically or by visual images". So a "false statement" of fact is a statement which is in "conflict with reality".

The words "public confidence" are not so vague as to escape definition by the courts. These words are to be interpreted in the context of the performance by a security service institution referred to in s 31(a)(iii) of the Code of functions in the exercise of the powers conferred on it by the Constitution. Public confidence in that context refers to the trust reposed in the institution by the public. The basis of the trust is a belief that members of a security service institution will be able to execute their duties in accordance with the purposes for which the institution was established under the Constitution.

The contention that s 31(1)(iii) of the Criminal Code as it is framed is unconstitutionally vague as to fail the test of legality is clearly unsustainable. The concepts of "false"; "real risk or possibility" and "public confidence" do not in themselves cause insurmountable problems of interpretation. The meaning to be given to each word or phrase as used in s 31(a)(iii) is clear. What they describe is adequately foreseeable. Thus, the restriction is contained "in law" within the meaning of s 20(2) of the Constitution.

A law is not in contravention s 20(1) if the objective of its enactment is the protection of a public interest listed in s 20(2)(a). Interference with freedom of expression may only be justified if it pursues a legitimate aim. The specific aims which must be pursued by a provision imposing restrictions on the exercise of freedom of expression and the legitimacy of them are pre-determined and established directly by the Constitution. The public interest here is that members of the security service institutions referred to in s 31(a)(iii) be left to enjoy public confidence in the performance, according to law, of the functions for which they were established. The list of the interests in s 20(2) is exclusive, in the sense that they are the only interests whose protection might justify a restriction on freedom of expression.

All the institutions referred to in s 31(a)(iii) were established by the Constitution for the specific purpose of enforcing laws for the maintenance of public order and the preservation of the security of the State. An Act of Parliament governs each institution. Security service institutions are important national institutions which form part of the essential framework of a constitutional democracy. They are known and accepted by the public at large as being responsible for the defence of the country, preservation of public safety and maintenance of public peace and tranquillity. An impression should not be created in the minds of the public that the exercise of the right to freedom of expression is not subject to the responsibility to keep peace and tranquillity. While there should be freedom of expression, in the exercise of the right, conditions should not be deliberately created for the undermining of the maintenance of the public order or preservation of public safety. There is a direct and vital relationship between the exercise of freedom of expression and the preservation of public peace and tranquillity.

A law cannot be used to restrict the exercise of freedom of expression under the guise of protecting public order when what is protected is not public order. The maintenance of public order or preservation of public safety is synonymous with the protection of fundamental human rights and freedoms. Public order is a concept used to describe the state of calm or even tempo of the life of the community brought about by laws enforced by the State. Order is the basic need in any organised society. It implies the orderly state of society or community in which people can peacefully pursue their normal activities of life. It refers to the absence of acts which aim at endangering the safety of the lives and property, peace and tranquillity of the community. Whether an act is of a character that affects public order is a question of degree. It is not the quality of the act that matters but its potentiality. An act may in one context have effects that injure the individual only, whilst in another the same type of act may have effects that endanger the peace and tranquillity of the community. What is clear is that the maintenance of public order is equated with the maintenance of public peace and tranquillity.

On the face of it, the specific purpose of s 31(a)(iii) is to protect public confidence in a security service institution referred to in the provision. It is protected from being undermined or the likelihood of being undermined by a false statement published or communicated with the requisite state of mind. That would, however, suggest that public confidence in a security service institution is an end in itself equivalent to and as important as the public interests listed in s 20(2)(a) of the Constitution. Protection of public confidence in a

security service institution is not one of the legitimate aims for the achievement of which permissible legislative limitation on the exercise of freedom of expression can be imposed.
Section 31(a)(iii) of the Code does not create a crime out of acts which breach public peace and tranquillity or public safety directly. Other provisions of the Code create and define such crimes. The section creates a crime out of acts which have the effect of interfering with the ability of the security service institutions to prevent occurrences of those offences which breach public order or endanger public safety directly.
The proscription of the publication or communication of a false statement about lawful activities of a security service institution with the intention of undermining public confidence in that institution, is in the interests of public order or public safety when specific conditions are met. It must be shown that public confidence in the institution is an essential element in the ability of the institution to efficiently and effectively secure the maintenance of public order or preservation of public safety. If it appears on the examination of the relevant factors that the intention is to establish a rule of conduct carefully designed to ensure that security service institutions are able to efficiently and effectively secure the maintenance of public order or the preservation of public safety, then the legislation would be "in the interests of public order" or "public safety".
The interest of the public is not in the mere existence of a security service institution without reference to the manner in which the exercise of its functions affects the enjoyment of their rights and freedoms. The public interest is in ensuring that the exercise of freedom of expression does not cause direct, serious and proximate harm to lawful performance by the security service institutions of the functions for which they were established by the Constitution. Members of security service institutions cannot operate in a vacuum. They carry out their duties in the communities they serve. Public confidence is therefore the result of the knowledge by members of the public of the truth about the lawful activities carried out by members of the security service institution in securing the maintenance of public order or preservation of public safety. It is the justified public confidence in the institution which the provisions of s 31(a)(iii) of the Code protect. The efficient functioning of a security service institution is not valuable in itself. It is only valuable when it is in accordance with the law and therefore based on truth. Public confidence may be undermined when the public know the truth about unlawful activities by members of the security service institutions. This is because unlawful activities by members of a security service institution are inconsistent with the protection of fundamental human rights and freedoms. It is clear that public confidence in a security service institution is based on or linked to evidence of lawful activities by its members in securing the maintenance of public order or the preservation of public safety. It is not linked to the reputation of the institution.
It is the duty of a free media of communication to give accurate information to the public on unlawful activities of members of a security service institution. It is in the public interest that the media should be free to provide criticism of such conduct.
There is danger of unjustified loss of public confidence in a security service institution if false statements about its lawful activities are published. Such a false statement about lawful activities of a security service institution in the maintenance of public order or preservation of public safety may lead to withdrawal of support for law enforcement. Publication or communication of altogether untrue statements which have been merely invented for the purpose of providing arguments for a campaign against a security service institution would be an abuse of the right to freedom of expression. The imposition of the restriction creates conditions in which the relationship between the exercise of freedom of expression and justified public confidence for the achievement of public order or public safety can prevail. The provision meets the "legitimate aim" test. The purpose of protecting public confidence in a security service institution as a means of ensuring efficiency and effectiveness in the performance of its constitutional mandate falls within the scope of the legitimate aim of protecting the interests of public order and public safety within the meaning of s 20(2) of the Constitution.
The next question is whether or not the restriction imposed by s 31(a)(iii) of the Code on the exercise of freedom of expression is rationally connected with the objective of protecting public order or public safety. The law should not in its design have the effect of overreaching and restricting expression which is not necessary for the achievement of the objective concerned. The court applies the principle of proportionality to test the relationship between the restriction to the exercise of the right to freedom of expression and the objective pursued. For the provision to constitute protection of a public interest listed in s 20(2)(a) of the Constitution, the restriction imposed on the exercise of freedom of expression must form a barrier between the proscribed acts and the public interest thereby breaking the chain of causation of direct and proximate actual or likely harm on the public interest. There cannot be a pressing social need for the imposition of a restriction on the exercise of freedom of expression for the purpose of protecting a public interest when that interest is not under threat of direct and proximate harm from the exercise of freedom of expression. The Constitution forbids the imposition of a restriction on the exercise of freedom of expression when it poses no danger of direct, obvious, serious and proximate harm to a public interest listed in s 20(2)(a).
Fundamental human rights are personal rights. Freedom of expression belongs to the individual. Any restriction must be based on the concept of personal responsibility constituted from personal conduct accompanied by a subjective state of mind. Where it has been necessary to restrict the exercise of freedom of expression by means

of criminal law the individual must be the unit of analysis in the determination of the question whether the law is constitutionally valid or not. The prohibited acts and their actual or potential harmful effects on the public interest must be traceable to the speaker, writer, publisher or actor as the source. If that is not the case, they cannot be the basis for restricting the exercise of freedom of expression. There must be a causal link between the prohibited conduct and the injury to be prevented. The sole motive of the State should be to ascertain that the protected interests of the community are respected by the individual or that a guarantee exists that they will be respected. The purpose must be to ensure that people are able to make use of their right to freedom of expression to full effect without damaging public interest.

Not every case of actual or potential harm on the public interests listed in s 20(2)(a) justifies the imposition of restrictions on the exercise of freedom of expression. If that were the case, the realm of freedom of expression as protected by the Constitution would eventually shrink to zero. The exercise of the right to freedom of expression is not protected because it is harmless. It is protected despite the harm it may cause. A restriction is unlikely to be considered proportionate where a less restrictive, but equally effective, alternative exists. The adage that "best remedy for a bad speech is another speech" may be all that is required to refute the false allegations and disclose the truth. Government has sufficient resources for doing so. Competitive persuasion is one of the means by which a public institution can effectively protect a public interest against the publication or communication of false statements about its activities without having the exercise of the right to freedom of expression curtailed by means of criminal law. The means by which the restriction to the exercise of freedom of expression is imposed must be narrowly drawn and specifically tailored to achieve the objective pursued by the legislation. The question is not whether the means the legislature employs to accomplish the end pursued are the wisest or the best. A restriction which is not rationally connected with the objective pursued is an unreasonable, unnecessary and arbitrary interference with the exercise of freedom of expression.

As a means of protecting the interests of public order and public safety by the State, s 31(a) (iii) of the Code is problematic. It is not narrowly drawn and carefully tailored to achieve the objective pursued. Whilst placing substantial restriction on the basic right to freedom of expression the effectiveness of the impugned statute in achieving the legislative purpose is in practice very uncertain. The section prohibits publication or communication of a false statement when it is accompanied by the subjective state of mind to secure the results specified in subparas (i), (ii) (iii) and (iv). The prohibited consequences show the interest protected. Subparagraph (i) protects public safety or public order. Subparagraph (ii) protects the defence and economic interests of Zimbabwe. It must follow that subpara (iii) protects public confidence in the security service institutions referred to in the provision, although it makes no reference to public peace and tranquillity or public safety except by inference drawn from the reference to security service institutions in the provision.

Public order, public safety, defence and economic interests of Zimbabwe are interests specifically listed by s 20(2)(a) for the protection of which imposition of a restriction on the exercise of freedom of expression may be justified. Public confidence in a security service institution is not one of those interests. As an end in itself protection of public confidence in a security service institution cannot justify the imposition of a restriction on the exercise of freedom of expression, as part of the means of securing the maintenance of public order or preservation of public safety.

Section 31(a)(iii) of the Code prohibits publication or communication of a false statement on any subject matter accompanied by the requisite state of mind, without regard to whether the fact about which the lie is published or communicated relates to an important aspect of the performance by a security service institution of its functions. For the protection of public confidence in a security service institution to have any connection with the legitimate aim of protecting the interests of public order and public safety, the false statement must relate to the performance by the security service institution of its functions as defined by law.

The matter to which the false statement relates does not have to be a matter within the jurisdiction of a security service institution referred to in s 31(a)(iii) of the Criminal Code. The prohibition is not even limited to apply only to a publication or communication which reaches a significant number of people. A conversation between two people in a private home would be covered.

A statement which is suppressed because its content is intended to undermine public confidence in a security service institution may not also undermine the ability of the security service institution to efficiently and effectively secure the maintenance of public order and preservation of public safety. There are many activities by security service institutions on which false statements may be published but which are unrelated to their efficient performance of the functions of maintaining public order or preserving public safety. It would be actual or likely harm to the public interest in the ability of the security service institution to efficiently and effectively perform the function of maintaining public order and preserving public safety which would justify the imposition of the restriction on the exercise of freedom of expression.

There is the problem of the use of the words "wholly" or "materially" false. The word "wholly" suggests an intention to exclude a statement which is a "half-truth" because it is always also a "half-lie". The use of words "materially false" in the alternative undermines that conception. To say a statement is "materially false" is to say it is not "wholly false".

False news that is harmless to the effectiveness of a security service institution in maintaining public order or preserving public safety would be covered by the offence as long as it is accompanied by an intention to undermine public confidence in the security service institution. The provision has the effect of shielding the public interest from every possibility of harm, even harm which is only remotely possible. A remote possibility of harm to the maintenance of public order or preservation of public safety cannot be a reasonable basis for the legislative imposition of a restriction on the exercise of freedom of expression. When the enforcement of the provisions of a criminal law can lead to conviction and punishment of a person even in situations in which the harm intended to be prevented is a remote possibility the reason for the law is lost. Prohibition of the exercise of freedom of expression is a measure so stringent that it would be inappropriate as a means for averting a relatively trivial harm to society. Where the evil apprehended is not relatively serious, the fact that the exercise of freedom of expression is likely to undermine public confidence in a security service institution is not enough to justify its suppression.

The provision permits the State to restrict constitutional rights in circumstances that may not justify the action. As the offence relates to expression, state of mind and effects on attitudes of people, it was imperative that it be narrowly drawn and specifically tailored to achieve the objective so as not to inhibit expression which does not require that the ultimate sanction of the criminal law be brought to bear. Protecting public confidence in a security service institution may give rise to a situation where the law is invoked to prevent the publication or communication of a false statement because it upsets people.

Without specific reference to maintenance of public order or public safety in the provision, there would be no obvious obligation on the State to prove that the proscribed conduct posed any real danger to the public interest concerned. Nothing in the language of the statute limits its applicability to situations where the prohibited acts directly and proximately cause harm to the maintenance of public order or preservation of public safety. Whilst it does not specify any subject matter of a false statement published or communicated with the requisite state of mind, the provision fails to require that the subject matter then conveyed must be shown to have a direct and proximate deleterious effect on the public interest the protection of which is the objective pursued. An enactment which is capable of being construed and applied to cases where no danger to the listed public interests could arise cannot be held to be constitutional and valid to any extent.

The provision also covers a person who, at the time he publishes or communicates a statement, sincerely believes that it is true, although it happens to be false. It is assumed in every case that the accused person had reasonable opportunity to investigate the accuracy of the statement and knowing that it was false, deliberately chose to publish it. This assumption ignores the fact that news media often work in situations in which information changes fast, denying even the most responsible journalist time to verify the accuracy of the information received.

The respondent argued that a person who does not know that a statement is false at the time he publishes it would not be convicted because the State would not prove that he had the requisite intention. This argument assumes that the intention to undermine public confidence in the institution is a substitute for knowledge of the falsity of the statement. It fails to appreciate the fact that insistence on knowledge as a requirement of a law imposing restrictions to the exercise of freedom of expression is an element of permissible legislative limitation. It also overlooks the fact that intent and knowledge have different meanings, depending on the elements to which they are connected. Knowledge is a different state of mind from intent. It refers to a conscious awareness of the existence of a thing, whilst intent refers to the purpose of an act. Whilst intent is associated only with the relevant consequences there is no knowledge associated solely with the relevant conduct. The knowledge element is important, because a false statement may be deliberate, or it may originate from someone else with the accused person being a facilitator in publishing it, or it may be a result of interpretation of facts in a statement made by another person. A person who sincerely believes, at the time of publication of the statement, that it is true would not have the state of mind justifying the imposition of criminal liability. Liability must be based on the notion of personal responsibility inherent in the concept of the exercise of freedom of expression.

An accused person may not be in a position to prove at the trial the facts given rise to his belief that the statement is true. This could lead to the inference that he knew or "must have known" that the statement was false and intended to use it to undermine public confidence in the security service institution concerned. A person who voices a genuine concern about selective or discriminatory enforcement of the law by the law enforcement agency may find himself charged and convicted of the offence because of the difficulty of proving the truth of the allegation in a court of law. Genuine criticism of the way law is enforced may be suppressed. The suppression may be justified by labelling the statement a false statement published or communicated with intent to undermine public confidence in the law enforcement agency. Information confirmatory of the truth of a statement may in some cases be in the possession of the institution, which may withhold the information, resulting in a situation where the statement is labelled as false. A statement may also be regarded as false because a journalist feels compelled to uphold the principle of confidentiality protecting the sources of his information within the institution from disclosure.

It is a fundamental principle of the protection of freedom of expression that the State should not penalise people who make false statements in good faith about a matter of public concern, where the statement is published without knowledge of its falsity or without reckless disregard as to whether the statement is false or not. The statement must be a knowing or reckless falsehood. The harm caused by the unacceptable chilling of the exercise of freedom of expression is comparatively greater than the harm resulting from the chilling of other activities. The principle is that taking into account the importance of freedom of expression in a democratic society it would be better to let ten irresponsible journalists free than have one responsible one refrain from reporting an otherwise true story for fear of ending up in jail lest the story is found to have been false.
A rational connection between the restriction and the objective pursued by the legislation would be one which incorporate the requirement of knowledge of the falsity of the statement as the element of the offence on the basis of knowledge of its effectiveness as part of measures for the protection of the interests in public order and public safety, without the chilling effect on freedom of expression.
Section 31(a)(iii) of the Code is particularly invasive because of the maximum penalty provided. A penalty of imprisonment up to twenty years for this offence is draconian and disproportionate to the harm against which the public interest in the ability of the institution to efficiently and effectively perform its functions is protected. The constitutional principles of justice and a State governed by the rule of law presuppose that every penalty imposable must be proportionate to the legitimate aim pursued and the seriousness of the offence. The maximum penalty of imprisonment to which a person convicted of this offence is made liable does not meet this test. The only inference is that the punishment is intended to have a chilling effect on the exercise of freedom of expression, as opposed to merely deterring the occurrence of the prohibited acts. By its nature the offence is committed in a peaceful environment and does not usually give rise to actual disturbance of public order. In this case the ability of the law enforcement agency to maintain peace and tranquillity in the community was unaffected.
The proportionality requirement takes into account the fact that a threat of criminal prosecution, conviction and punishment for publishing or communicating falsehood to undermine public confidence in a security service institution must inevitably have an inhibiting effect on the exercise of freedom of expression. The principle is concerned to prevent inhibition which extends beyond the subject matter of the law. Taking into account the fact that freedom of expression is peculiarly more vulnerable to the "chilling effects" of criminal sanctions than any other fundamental right, it has been stated by the UN Special Rapporteur on freedom of opinion and expression that penal sanctions, particularly imprisonment, should never be applied to offences of publishing false news. It is difficult to excise false statements on matters of public concern such as the performance of law enforcement agents without significantly damaging democratic self-governance. Because of the severity of the deleterious effects on the exercise of freedom of expression of the level of the maximum penalty of imprisonment the law is not justified by the objective it is intended to serve. The requirement that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the measure applied by the State in restricting the exercise of freedom of expression was not met.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – application to Supreme Court to declare legislation unconstitutional – High Court having no jurisdiction to entertain such application – application commencing before promulgation of 2013 Constitution but continuing afterwards – application to be dealt with under procedure obtaining at time application commenced

Gurta AG v *Gwaradzimba NO* HH-353-13 (Mathonsi J) (Judgment delivered 16 October 2013)

See above, under ADMINISTRATIVE LAW (Adminsitrative decisions and acts).

Constitutional law – Prosecutor-General – duties of – duty to exercise functions impartially and without fear, favour, prejudice or bias – Prosecutor-General declining to prosecute on grounds that dispute was a civil one – reinstituting criminal proceedings under pressure from complainant – dereliction of constitutional duty

S v *Bredenkamp* HH-305-13 (Chatukuta J) (Judgment delivered 12 September 2013)

The accused was charged with fraud arising out of a business deal between himself and the complainant. Initially the Attorney-General, then responsible for criminal prosecutions, had declined to prosecute on the grounds that the matter was a civil dispute. The Attorney-General nonetheless refused the complainant's request for certificate of *nolle prosequi*. The Attorney-General brokered a settlement that the accused was to pay the complainant certain sums by a stipulated date. Sometime after that date, the Attorney-General changed his mind and decided to prosecute the accused, apparently under pressure from the complainant, presumably because the accused had not paid the sums in full.

Held: Whilst the act of declining to prosecute a matter and refusing to grant a certificate of *nolle prosequi* does not bring a criminal matter to finality and the Prosecutor-General can reinstitute prosecution, that must be in cognisance of the rights of the accused, particularly when the Prosecutor-General has communicated an earlier decision not to prosecute the matter. In this matter, the conduct of the Prosecutor-General to reinstitute prosecution amounted to a dereliction of his duty under the Constitution. He shied away from his responsibility to decline to prosecute a matter and burdened the court with the responsibility to discharge the accused. Section 260 of the Constitution provides for the independence of the Prosecutor-General. Subsection (2) provides that the Prosecutor-General is not subject to the direction or control of anyone and "must exercise his or her functions impartially and without fear, favour, prejudice or bias." Here, the driving force behind the prosecution was the complainant. The Prosecutor-General succumbed to the pressure from the complainant to prosecute an apparently civil matter and therefore acted in complicity with the complainant to use a criminal court to put pressure on the accused in order to collect a civil debt.
State counsel appeared to go through the motions of a trial merely to satisfy a persistent complainant, even in the face of inherently inadequate and inconsistent State evidence. The proper course thing that would have been expected of counsel was to withdraw the charge at the close of the State case. State counsel under the National Prosecuting Authority, just like any other officer of the court, owe a duty to the court to assess the strength of their case as the trial proceeds. Where it becomes apparent that they cannot sustain the charge, they should proceed to withdraw the charge instead of defending the indefensible and shift their responsibility onto the court as happened in the present case.

Contract – breach of promise of marriage – essential elements – damages – *contumelia* associated with breach – not a separate cause of action – *contumelia* may aggravate damages

Mupazviwiro v *Kubeta* HH-227-13 (Mawadze J, Makoni J concurring) (Judgment delivered 25 July 2013)

The essential elements for a breach of promise to marry are (a) that the defendant made a promise to marry the plaintiff; (b) that the plaintiff accepted the promise and communicated his or her acceptance of promise to the defendant: and (c) that the defendant had broken his or her promise without just cause.
While it might be very useful corroborating evidence for the plaintiff to show that there was an engagement witnessed by a number of people and that love tokens were exchanged between the parties in order to prove that a promise to marry was made by the defendant, such issues are not essential elements of the breach of promise to marry.
With regard to damages, a claim for breach of promise to marry is not a separate cause of action from one for *contumelia* when one deals with the same action for breach of promise to marry. The action for breach of promise to marry is a composite one combining both the contractual and delictual elements. In practice these two elements must be clearly separated in the pleadings and in the assessment of damages, but this does not mean that these are two separate causes of action. The cause of action remains the breach of promise to marry. While damages may be aggravated by contumelious or injurious conduct by or on the behalf of the defendant, such *contumelia* does not constitute a separate cause of action.

Contract – cancellation – breach of contract by one party – party giving notice of intention to suspend obligations towards other party – anticipatory breach of contract – right of other party to accept repudiation

Econet Wireless (Pvt) Ltd v *Trustco Mobile (Pty) Ltd & Anor* S-43-13 (Garwe JA, Malaba DCJ and Ziyambi JA concurring) (Judgment delivered 26 September 2013)

In determining whether a party has repudiated a contract, the test to be applied is whether the party has acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. It is also correct that repudiation is a species of anticipatory breach. Repudiation may manifest itself in a variety of ways. If it takes place before performance is due, it is sometimes described as anticipatory breach and may take the form of a statement that the party concerned is not going to carry out the contract, or an unequivocal tender to perform less than is due, or an unwarranted but unequivocal refusal by a buyer to pay the full purchase price, irrespective of his true intention and the amount of any reduction that may be claimed, or the taking of some action inconsistent with the intention to perform, or by his own conduct putting it out of his power to perform.
A clear intimation by one party that it was going to suspend all its obligations towards the other party, contrary to the procedure, set out in the contract, to be followed in the event of an alleged breach, would be an anticipatory breach of contract. The other party would then have a choice: it could refuse or resist such

repudiation and insist on specific performance, arguing, *inter alia,* that the notice of termination was not *ex nunc* and therefore invalid. Alternatively, it could accept the repudiation, such acceptance having the effect of terminating the agreement between the parties.

Editor's note: the decision appealed against was that of Mutema J in *Trustco Mobile (Pty) Ltd & Anor* v *Econet Wireless (Pvt) Ltd & Anor (1)* 2011 (2) ZLR 14 (H).

Contract – donation – what is – requirements for formation – requirements for validity

Kudzanga v *Kudzanga & Ors* HH-485-13 (Mawadza J) (Judgment delivered 12 December 2013)

A donation at law is a contract where the essential elements of a contract of offer and acceptance are to be present if there is to be a valid contract. A true donation is an agreement whereby the donor, motivated by pure liberality, undertakes to give a donee a gift without receiving or having received or expecting to receive any advantage in return for it. A donation cannot be presumed. The onus is on the party alleging a donation to prove that a donation was made. The common law position as regards donation has to some extent been altered by s 8 of the General Law Amendment Act [*Chapter 8:07*]. In general, a donation *inter vivos* can be made verbally; it is not necessary, for the donation to be valid, that it be registered or notarially executed.

Contract – formation – implied – vicarious liability – not a basis for creation of contract – no privity of contract

Katsande v *Welthunger Hilfe & Anor* HH-396-13 (Mathonsi J) (Judgment delivered 6 November 2013)

The plaintiff, the senior partner in a law firm, sued the defendants for legal fees arising from his representing the second defendant at a criminal trial. The second defendant was an employee of the first and had been charged with culpable homicide, following a traffic accident. When the second defendant briefed the plaintiff, he assured the plaintiff that his employer would pay the legal fees. However, the plaintiff was never so advised by any official of the first defendant. In evidence, he said that the basis for his claim against the first defendant was the first defendant's vicarious liability for the work that he performed for the second defendant, and that his was a delictual claim because the fees that he charged were reasonably foreseeable, the nexus being the contract of employment between the first and second defendants. He also said that the fee demanded had not been agreed on beforehand, nor had it been taxed.
Held: (1) the plaintiff's reliance on vicarious liability in seeking a payment of his legal fees from the first defendant was extremely strange indeed and constituted a claim as outlandish as it was unheard of in our legal system. Vicarious liability is a concept of our law of delict and not contract. It is a doctrine as alien to contract law as water is to oil. No delict was shown in this matter. A person who is not a party to a contract cannot be held liable or claim on it because, as it is usually expressed, he is not privy to the contract. There was no question of agency or *stipulatio alteri* here.
(2) It is inappropriate for a legal practitioner to sue out a summons for legal fees, a bill of which has not been taxed. Legal practitioners charge fees in accordance with a tariff of fees set by the Law Society of Zimbabwe, which tariff has regard to, *inter alia*, the nature of the service to be rendered and the seniority of the legal practitioner involved. Therefore a client is entitled to challenge the fee charged following the dictates of the Law Society tariff. In order to defeat such a challenge, the legal practitioner is generally required to tax his bill through the taxing officer. Where the bill has not been taxed, it remains open to challenge and the client is not obliged to pay merely because of the self-serving say-so of the legal practitioner. If the fee has been agreed in advance, the lawyer may sue for his fee without taxation, but in other cases taxation is necessary to prove the reasonableness of the amount charged, if this is disputed by the client.
(3) The level of lack of understanding exhibited by the plaintiff, a senior lawyer running his own legal practice, was lamentable indeed. His persistence with a claim not based on any recognisable principle of law, through pre-trial conference to a full trial and right up to the wire, is deplorable. In the process he succeeded in wasting the court's time and in putting the first defendant unnecessarily out of pocket. There could be no better way of registering the court's displeasure at such abuse than an order for costs on a punitive scale, for it is the only soothing balm which is at the court's disposal.

Costs – *de bonis propriis* – legal practitioner – misconceived application for recusal – application made respectfully and without scandalizing court – order of costs not warranted

Rushesha & Anor v *Dera & Ors* HH-385-13 (Zhou J) (Judgment delivered 25 September 2013)

See below, under COURT (Judicial officer – recusal).

Costs – legal practitioner and client scale – senior lawyer pursuing claim based on no recognizable principle of law – costs on higher scale warranted

Katsande v *Welthunger Hilfe & Anor* HH-396-13 (Mathonsi J) (Judgment delivered 6 November 2013)

See above, under CONTRACT (Formation).

Costs – security for – application – who may request security for costs – defendant not an *incola* – not entitled to request security for costs

Wong & Ors v *Liu & Anor* HH-380-13 (Mathonsi J) (Judgment delivered 30 October 2013)

There are no rules providing for an order for security for costs. The issue of security for costs arises out of judicial practice. A *peregrinus* who initiates proceedings in our costs must as a general rule give security to the defendant for his costs, unless he has within the area of jurisdiction of the court immovable property with a sufficient margin unburdened to satisfy any costs which may arise. The court however retains the exclusive discretion to make such order or not to. A party seeking the remedy of security for costs must satisfy the court that he is an *incola* before the protection can flow to him. The term *incola* connotes the element of residence: not temporary residence but domicile in a country.
Where the defendant is also a *peregrinus*, security for costs will not be ordered.

Court – High Court – reference in statute to High Court – does not necessarily exclude jurisdiction exercised in chambers – application to High Court for registration of arbitral award – may be made to a judge in chambers

Dhlomo-Bhala v *Lowveld Rhino Trust* HH-263-13 (Mafusire J) (Judgment delivered 26 August 2013)

See below, under EMPLOYMENT (Arbitral award – registration with High Court for enforcement purposes)

Court – judicial officer – conduct and ethics – act with absolute honesty – alteration of record in criminal matter following query by scrutinising regional magistrate – impropriety of

S v *Zuze* HH-274-13 (Uchena J) (Judgment delivered 10 July 2013)

Judicial office calls for absolute honesty. A judicial officer's record of proceedings must be trustworthy. It should not be treated with caution because of a judicial officer's lack of integrity. His record must be trusted and relied on as the truth of what happened during the proceedings. A judicial officer becomes *functus officio* on concluding the proceedings before him. He should never alter the record when issues are raised by the scrutinising regional magistrate or reviewing judge. All he can do is explain what happened without altering the record. If anything is to be changed that can only be done by a reviewing judge. Tampering with a record of proceedings is an offence and might result in prosecution.

Court – judicial officer – recusal – grounds – bias – action brought by Judicial Service Commission – no reasonable grounds for apprehension of bias in favour of Commission

Judicial Svc Commission v *Ndlovu & Ors* HB-172-13 (Moyo J) (Judgment delivered 19 December 2013)

In an action brought by the Judicial Service Commission for rescission of a judgment made against it, the first respondent requested the judge to recuse herself, on the grounds of bias. The alleged grounds were that (1) a serving judge was likely to be sympathetic with the applicant, as it is the employer of judicial officials in Zimbabwe; (2) abuse of office by a former employee of the Commission resulting in the suit by the first respondent against the Commission would render a serving judge sympathetic with their employer as such a

scenario was likely to paint the Judicial Service Commission in a bad light in regard to the training of its officers; and (3) the Commission, being composed of the Judge President, the Chief Justice and the Deputy Chief Justice, having decided to apply for rescission, a serving judge was likely to be persuaded by such a decision having been taken by her superiors.
Held: an application for recusal must be based on a reasonable litigant's apprehension of bias and the apprehension must itself be reasonable. Mere apprehensiveness on the part of a litigant that a judge will be biased – even a strongly and honestly felt anxiety – is not enough. The court must scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.
To suggest that a serving judge, who took an oath of office, would be concerned about what the Judicial Service Commission becomes liable or not liable to pay to an individual defied logic and was farfetched. Again, to say that a serving judge would worry about what image the numerous officers employed by the Commission portray so as to paint their employer in bad light to the extent that the judge becomes partial is in fact so grossly unreasonable and desecrates the independence of the judiciary. Why would a serving judge, a constitutional appointee, be worried about the misdeeds, if any, of the employees of the Commission as an organisation to the extent that she lacks objectivity on issues brought before her for determination? A judge sitting in court applies the law to the facts before her and makes a decision in accordance with the legal principles enunciated in our law. To say that a judge make a decision on the basis that the senior judges are part of the Commission and their mere decision to challenge the judgment would mean that a serving judge would then be persuaded to blindly find in favour of the Commission, was unfounded and totally baseless.
In terms of s 180(2) of the Constitution, the Judicial Service Commission does the administrative work leading to the appointment of judges. However, in terms of s180(3), the authority to appoint the nominees selected by the Commission vests in the President, who has the final say in such appointments, as he can decline to appoint any of the Commission's nominees. Judges are constitutional appointees whose tenure of office is protected in terms of s 187 of the Constitution, which stipulates the grounds upon which judges can be removed from their office.
There was no allegation of bias against the judge personally; the application in this matter arose out of a blanket apprehension of bias as against all the serving judges in this jurisdiction.

Court – judicial officer – recusal – grounds – bias – test for – sufficient if reasonable person would believe judicial officer would be biased

Nkomo & Ors v *TM Supermarket (Pvt) Ltd* HB-113-13 (Cheda J) (Judgment delivered 18 July 2013)

The test for bias is whether the person challenged has so associated himself with one of the two opposing views that there is a real likelihood of bias or that a reasonable person would believe that he would be biased. The reason is plain enough: justice must be rooted in confidence. Such confidence is destroyed when right minded people go away thinking: "the judge was biased." Where a presiding officer's relation to one party can reasonably be viewed as biased in favour of that party, such a presiding officer should without more ado recuse himself. While a judicial officer is trained to dispense justice without bias, fear or prejudice, human nature being what it is, he should not rigidly cling to office and completely shut out from his mind the likelihood of bias based on his perception of a litigant. Where such likelihood exists, a judicial officer should consider the motives of the application. Where the application is actuated by the best motives, the judicial officer should no doubt recuse himself.

Court – judicial officer – recusal – grounds for – bias – judicial officer having, when acting as counsel in an earlier and unrelated case, made submissions indicating disapproval of party's manner of conducting business – not a ground for recusal

Rushesha & Anor v *Dera & Ors* HH-385-13 (Zhou J) (Judgment delivered 25 September 2013)

Counsel for the fourth defendant in a trial applied for the judge to recuse himself. The grounds given for the request were that, before he was appointed as a judge, he was counsel in an action against the fourth defendant and in that capacity had, during argument, expressed a "severe opinion" on the manner in which the defendant conducted its business. Accordingly, the fourth defendant was wary that the judge might still hold such an

opinion about it. The content of the opinion was not disclosed, other than that the opinion was expressed in an urgent chamber application.
Counsel for the plaintiff argued that the court should order the fourth defendant's counsel to pay the costs of the application *de bonis propriis*, on the ground that the application scandalised the court.
Held: (1) Where a judicial officer is disqualified from hearing a case, a party to that case is entitled to apply for the recusal of the judicial officer concerned. Such an application, known as an *exceptio recusationis,* must be founded upon reasonable cause – *justa causa recusationis* – which the applicant must prove. Trivial grounds cannot found a recusal.
(2) Enmity or hostility towards a party or expression of opinions indicative of bias are grounds for seeking recusal. Here, recusal was sought on the basis of an alleged opinion expressed in a matter in which the fourth respondent was a party and the judge represented the other parties therein as an advocate. The so-called opinion could only have been a submission made in court based on the facts before it, as counsel is expected to make submissions and not expressions of opinion. The relevance of that opinion to the instant matter was neither alleged nor disclosed. The opinion was not made in connection with the instant matter. Above all, it was not made by the judge in his capacity as a judge; but even if that were the case, the law is clear that it is no ground for recusal that a judicial officer expressed an opinion at a previous stage in another case. It would be impossible to conduct the administration of justice in the proper way if judges and magistrates were to be recused because at some prior time they had expressed unfavourable opinions as regards persons who subsequently come before them. Sometimes lay persons do entertain the mere possibility of bias on the part of a judicial officer, but that is insufficient to ground an application for recusal in the absence of an extrajudicial expression of opinion in relation to the case or in the absence of the other recognised grounds.
(3) The application was indubitably vexatious and in the ordinary course would have readily attracted a punitive order of costs. However, an application for recusal necessarily places a legal practitioner who is making it in an unenviable position and should not be looked at as any other application. A *bona fide* application for recusal, presented in proper language, should not readily trigger an enquiry into the motives or propriety of the legal practitioner's conduct. A court should not exhibit unnecessary sensitivity in dealing with an application for recusal. Although this application was misconceived, it was made respectfully without scandalising the court and the lawyer should not be penalised.

Court – jurisdiction – High Court – arbitral award – award granted following referral in terms of Labour Act [*Chapter 28:01*] – award challenged on grounds set out in Arbitration Act [*Chapter 7:15*] – jurisdiction of High Court to entertain challenge not ousted

Mapini v *Omni Africa (Pvt) Ltd* HH-494-13 (Tsanga J) (Judgment delivered 18 December 2013)

See above, under ARBITRATION (Award – challenge to).

Criminal law – defences – diminished responsibility – not a complete defence – lack of criminal capacity due to mental disorder or defect – what must be shown – nature of disorder or defect – cause or duration of defect irrelevant – severe emotional and psychological stress – may deprive actor of criminal capacity – bipolar disorder – may remove criminal capacity

S v *Mashungu* HH-375-13 (Hungwe J) (Judgment delivered 5 July 2013)

Criminal capacity is a prerequisite for fault, be it negligence or intent. Without the necessary criminal capacity, a person cannot be guilty of an offence. Further, criminal capacity can be defined in terms of two legs which are inquired into after it is determined whether the accused, at the time of the commission of the offence, suffered from any biological condition that could impact on his criminal capacity or if there were any other circumstances that could have had such an effect. The two legs, which must both be present and proven in order for a person to be held criminally capacitated, are set out in s 218(1)(a) and (b) of the Code. The first is the cognitive ability or the ability to understand and appreciate the wrongfulness of the act; the second is the conative ability or the ability to act in accordance with this understanding.
In terms of s 227 of the Criminal Law Code [*Chapter 9:23*], the fact that a person charged with a crime was suffering from mental disorder or defect when he did or omitted to do anything which is an essential element of the crime charged is a complete defence to the charge if the mental disorder or defect made him (a) incapable of appreciating the nature of his conduct, or that his or her conduct was unlawful, or both; or (b) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful or both, of acting in accordance with such an appreciation. The cause or duration of the mental disorder or defect is immaterial.

Section 227 reinforces the subjective test for *mens rea* in specific intent crimes. A plea of diminished criminal capacity, where the evidence shows it, amounts to a claim that, due to overwhelming severe psychological and emotional stress which worked to deprive the accused of the capacity to appreciate the wrongfulness of his conduct, he could not, in that state, form the necessary capacity to act in accordance with the appreciation of the wrongfulness of his conduct.
Diminished responsibility, on the other hand, does not operate as a complete defence but only serves to mitigate sentence or reduce the crime from a serious one to a less serious one. This common law position is confirmed in s 218 of the Code.
Bipolar disorder is a condition which is reflected by severe mood swings between manic and depressive moods. A person in the manic phase would not be aware of his mental state or behaviour and may take high risk actions that may endanger himself or those around him without appreciating the effect of those actions. Bipolar mood disorder can be inherited. It can also be the result of underdeveloped ego which leads to loss of self-esteem later in life due to, possibly, the lack of consistent feedback from the mother or father. The condition may manifest itself in different ways, such as a feeling of hopelessness, worthlessness and helplessness. The patient may show psychotic features such as hallucinations and delusions of religiosity, presenting themselves as paranoia jealousy. The patient may indulge in self-injurious behaviour as a result of pre-occupation with thoughts of death.
Severe emotional and psychological stress may, in some cases, deprive an individual of the capacity to appreciate the wrongfulness of his conduct or to act in accordance with such an appreciation and, for this reason, it will be sufficient to constitute a complete defence to criminal liability as contemplated in s 227.

Criminal law – offences under Criminal Law Code – bigamy (s 104) – second marriage entered into outside Zimbabwe – courts of Zimbabwe having no jurisdiction to entertain charge

S v *Moyo* HB-123-13 (Kamocha J) (Judgment delivered 12 September 2013)

The accused had married a woman in Zimbabwe in terms of the Marriage Act and, a few years later, knowing that the marriage still subsisted, purported to enter into another monogamous marriage in South Africa. He was charged before a magistrates court in Zimbabwe with bigamy and convicted. On review:
Held: the courts of Zimbabwe have no jurisdiction to convict of bigamy in a case like this where the alleged bigamous marriage took place in some other country.

Criminal law – offences under Criminal Law Code – kidnapping (s 93) – elements of crime – no different from common law position – irrelevance of whether victim an adult or a child – consent of child – not a defence – different sentence may be imposed if victim a child

S v *Chinounda* HH-218-13 (Hungwe J, Mavangira J concurring) (Judgment delivered 17 July 2013)

The common law crime of kidnapping consists in unlawfully and intentionally depriving a person of liberty of movement and/or his custodians of control. The offence is thus an attack on, and the infringement of, the personal liberty of the individual. The law is concerned with two things: the protection of personal liberty (a) from any interference and (b) from any restraints on the freedom of movement, so that the relevant ingredient of the crime is the absence of consent of the person who is taken, even where that person is a child. The seizure of a person with evil intent without his consent, however transient, is an interference with his personal liberty. The length of time for which a child may be removed may be of importance as showing the intention of the parties. Even a very short time may be sufficient to show that there was the intention of removing the child out of the custody of his parents. The time would only become irrelevant in cases where the *de minimis non curat lex* principle is applicable.
The intent involved in kidnapping may be said to differ according to whether the victim is an adult or a child. In the case of a child, the child's consent is not relevant.
Section 93 of the Criminal Law Code [*Chapter 9:23*] has not in any way altered the common law position regarding the crime of kidnapping. Consistent with the common law position, the Code, in s 93(3), provides for distinct recognition of the offence as it relates to children and addresses its implication on parental authority. The fact that the child consents to her removal or spiriting away is not a defence. Parental control is specifically recognised where a child is involved. The statutory provisions are consistent with Zimbabwe's regional as well as international treaty obligations.

Criminal law – offences under Criminal Law Code – making false statement with intention of undermining confidence in law enforcement agency (s 31(a)) – provision in contravention of s 20(1) of Constitution 1980 – not a permissible derogation of right to freedom of expression

Chimakure & Ors v *A-G* S-14-13 (Malaba DCJ, Chidyausiku CJ, Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 30 October 2013)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Declaration of Rights – s 20).

Criminal law – offences under Criminal Law Code – theft – of stock – progeny of stray cow – stray cow duly registered and sent to pound but calf retained – whether calf capable of being stolen from original owner of cow – whether keeping calf constituted *contrectatio* – accused's belief that entitled to retain calf in return for looking after its mother – such belief negativing *animus furandi*

S v *Gwingwidza* HH-434-13 (Hungwe J, Mavangira J concurring) (Judgment delivered 12 July 2013)

Three stray cattle wandered into the appellant's herd. He reported this fact to the authorities, who registered the cattle. The cattle were eventually collected by the poundmaster and auctioned in terms of the law. In September 2011, he again registered a stray cow which had joined his herd the previous year. On 10 December 2011 the police, together with district council officials, approached the appellant to collect the stray cow. He did not disclose that the cow had dropped a calf whilst under his care. The calf remained in his possession.

The appellant was charged with stock theft, the charge averring that the calf was the property of the State. When asked about why he did not register the calf, he explained that the reason he had not registered it was that he did not know the procedure of dealing with the progeny of a stray beast. The magistrate convicted him, holding that the only reasonable and plausible explanation for his failure to disclose the calf to the authorities was the motivation to deprive the State permanently of the progeny of the stray cow.

Held: (1) the averment that the calf belonged to the State was fatal. Such an averment betrays the accepted status of the stray cow. If it belonged to the State it would not be classified as stray. The correct position is that the calf belonged to the owner of the stray cow who was, to the prosecutor, unknown.

(2) An error of fact may be a complete defence, negativing *mens rea*. The appellant was in lawful possession of the *res* and laboured under a genuine and reasonable mistake of fact regarding his ownership of the calf. Judicial notice may be taken of the fact that, under customary law and practice, a person who has taken care of another's herd of cattle, whether under agreement or not, was entitled to a portion of the progeny, depending on the length of the period for which such care was undertaken. Such a defence amounts to a claim of right. The appellant had a *bona fide* belief that he was entitled to keep the calf, as that calf was not subject to the same status as the cow. His evidence in court was not shown to be false nor his belief to be dishonest. The fact that he had openly possessed the bullock must negative any intention to deprive the owner permanently of his ownership of the bullock.

(3) The mental element for theft, *animus furandi* (the intention to steal), could not have been met in circumstances where the appellant had taken steps to notify several people of the existence of firstly the cow and later the calf. He believed he was entitled to some benefit of his agency for the pound master.

(4) Although our law recognises assumption of control as sufficient indication of the element of *contrectatio* required for theft, it was debatable whether the appellant effected *contrectatio* by merely assuming control of the newly-born calf.

(5) An accused can, in various situations, escape conviction because of his *bona fide* belief that he was entitled to act in the way he did. The fact that a belief is unreasonable would no more than evidence of a lack of good faith.

(6) There was no proof that the subject matter was property capable of being stolen in the particular circumstances of this case. Our law recognises that *res nullius* are things unowned but capable of ownership. They may be acquired by *occupatio.* Two categories relevant to this enquiry are *res derelictae* and wild animals. *Res derelictae* cannot be stolen. However, for a thing to be classed as a *res derelicta*, it must not merely have been lost to the owner, but the owner must have written it off or lost all hope of recovering it in every sense. Where, however, the property was merely lost and not abandoned, and thus capable of being stolen, the critical question is always whether the accused effected *contrectatio* with the intention to steal it in two aspects; i.e (a) did he intend to deprive the owner of the full benefit of his ownership or merely to look after the *res* pending enquiries; and (b) did he genuinely believe it to have been abandoned? The appellant was saying he was not aware whether he was obliged by law to register the calf and therefore to surrender it together with its dam. This was clearly a plea of mistake of fact as well as mistake of law.

(7) Although by *accessio*, the calf accrued, as fruit, to the owner of the cow, here there was no owner of the cow at the time of the coming into being of the "fruit" and, therefore the lawful possessor of the cow at the time became the legal owner of the fruit by *occupatio.* The appellant should not have been charged with theft of the property as it was incapable of being stolen in these circumstances.

Criminal procedure – plea – plea and exception made together – court's discretion as to which to hear first – exception upheld – accused not entitled to verdict – issues raised by plea must still be tried

Parson & Anor v *Chibanda NO & Anor* HH-273-13 (Musakwa J) (Judgment delivered 5 September 2013)

The applicants spleaded not guilty in the magistrates court to a charge of fraud. At the time of pleading they also excepted to the charge on the ground that it did not disclose an offence. The exception was upheld and the magistrate ordered an amendment to the charge. They applied to the High Court for a stay of the criminal proceedings instituted against them pending the determination of a review application that has been filed with the court. It was argued that because the applicants had pleaded and excepted at the same time and the exception was upheld, the trial court could not order that the charge be amended and should have ordered the discharge of the applicants. State counsel argued that where an accused pleads not guilty, irrespective of whether he has also excepted, the matter proceeds to trial.
Held: it is not correct to say that once an accused person pleads and excepts together, then he is entitled to a verdict. This is because an objection to a defective charge or indictment can only be made by way of exception in terms of s 170 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. A court before which an exception is made has a discretion to order an amendment if this does not prejudice the accused in his defence. The trial court was entitled to order the amendment *mero motu*. In any event, once an accused pleads to a charge the issues raised by such plea must be tried. The applicants had filed a defence outline in which they denied the charge. That on its own meant that they were not prejudiced in their defence. The charge was defective, but a defective charge may be cured by evidence: s 203 of the Act, and the outline of the State case made clear what the allegations were against the applicants. There was thus no prospect of success in the review proceedings that had been instituted.

Criminal procedure – record – alteration of – impropriety of altering record in response to query by scrutinising magistrate

S v *Zuze* HH-274-13 (Uchena J) (Judgment delivered 10 July 2013)

See above, under COURT (Judicial officer) (Conduct and ethics)

Criminal procedure – review – distinction from appeal procedure – need to seek review, rather than appeal, when issues complained of do not appear *ex facie* the record

S v *Maphosa* HH-323-13 (Hungwe J, Mavangira J concurring) (Judgment delivered 11 July 2013)

See above, under APPEAL (Criminal matter)

Criminal procedure – review – incomplete proceedings – when a superior court may interfere – refusal to grant discharge at end of State case – no evidence linking accused with offence – accused being put on his defence to "clear" his name – superior court entitled to interfere

S v *John* HH-242-13 (Mafusire J) (Judgment delivered 7 August 2013)

The applicant was charged with fraud, the allegation that he had misrepresented that he was the new owner or director of a certain company, the original owners and directors of which had emigrated. He was alleged to have fraudulently drawn up certain company documents and filed them with the registrar of companies. At the close of the State case the applicant applied for a discharge. The application was based on the alleged glaring defects in the charge and the evidence led. The application was refused and some weeks later the applicant filed an application for review, challenging the magistrate's decision to put him on his defence. Shortly after that,

applicant applied for a stay of the trial pending the determination of the review application. That application was also refused, the magistrate ruling that he would not stop the proceedings unless an order to that effect was obtained from the High Court. The applicant then filed an urgent chamber application, seeking a stay of the trial proceedings in the magistrates court, pending the determination of the application for review.
The applicant showed that none of the State witnesses incriminated him in any way. In particular, the witness from the registrar of companies, who was alleged to have been prejudiced, had actually exonerated him. The only evidence that seemed to have influenced the magistrate in his decision was the hearsay evidence of the investigating officer who apparently was under pressure from a disgruntled former employee of the company. The magistrate, in ordering that the applicant be put on his defence, said that he did so for the applicant to "clear" his name. The respondents argued that superior courts normally refrain from interfering in uncompleted proceedings and that there was no danger of an irreparable harm or of a miscarriage of justice. The trial should be allowed to proceed without interference. If, at the end of it, the applicant were aggrieved by the outcome, he could always appeal.
Held: (1) Generally, the superior courts do not encourage the bringing of unterminated proceedings for review, but there may be circumstances which may justify the reviewing of unterminated proceedings. An application of this nature could only succeed if the application for review has prospects of success. A superior could will normally intervene only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is so clearly wrong as to seriously prejudice the rights of the litigant.
(2) A court must acquit at the close of the State case where (a) there is no evidence to prove an essential element of the offence; (b) there is no evidence on which a reasonable court, acting carefully, might properly convict; or (c) where the prosecution evidence is so manifestly unreliable that no reasonable court could safely act on it. The question whether at the close of the State case there is, or there is no, evidence that the accused committed the offence charged is one of fact. It is a misdirection where the trier of facts sees facts that are completely absent or fails to see facts that are patently conspicuous. The magistrate, despite glaring deficiencies in the State evidence, nonetheless failed to consider that there was no evidence linking the accused to the crime. There was thus every likelihood that the review court might find that that there was a misdirection so gross as to warrant interference with the trial before it was completed. The review court might also find that the directive by the magistrate that the applicant be put on his defence to "clear" his name was irregular and amounted to a shifting of the onus to the applicant to prove his innocence.
(3) In weighing the balance of convenience between the need for a judicial officer to manage his court by, for instance, insisting on the continuation of a scheduled hearing in the interests of justice and the efficient administration of justice, against fairness and the delivery of quality justice, the balance favoured the postponement of the trial to allow the review application to be heard.

Criminal procedure (sentence) – general principles – suspended sentence – conditions – person charged with have sexual relations with young person – portion of sentence suspended on condition that he marry the complainant – not a competent sentence

Criminal procedure (sentence) – offences under Criminal Law Code – extra-marital sexual intercourse with young person (s 70(1)9a)) – age difference – offence aggravated when age difference considerable – complainant pledged in marriage to accused – such pledge a criminal offence and not mitigating

S v *Ncube* HH-335-13 (Tsanga J) (Judgment delivered 25 September 2013)

The accused pleaded guilty to a charge of having sexual intercourse with a young person in contravention of s 70(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to a term of imprisonment, of which most was suspended on conditions relating to future good conduct and the rest on condition that he married the complainant. He was 30 years old at the time of the offence and the complainant, his wife's younger sister, was just under 15 years old. She had come to stay with them. On the night the offence initially occurred, he had gone to the hut where she was sleeping and had attempted to have intercourse with her and she had refused. Undeterred in his resolve by her refusal, he had gone back again that night with the same demand, which had then been acceded to. Sexual intercourse had taken place four times that night. About a month later, she went back to her rural area and shortly afterwards discovered that she was pregnant. The matter was reported to the police.
The mitigating factors put forward by the accused included the fact that he had been given the complainant as a wife by her parents when she became of age. His wife was asthmatic. Furthermore, he was the one who had educated her. The trial magistrate also noted in his reasons for sentence that there was a smack of a love affair between the complainant and the accused, which he deemed a strong indicator of the consensual nature of their relationship.

Held: Pledging a female under the age of 18 is an offence under s 94(1)(b) of the Criminal Law Code and no regard could be had to such a pledge. This provision also indicates the State's seriousness in complying with the requirements of article 19(1) of the UN Convention on the Rights of the Child, to which Zimbabwe is a party, that the State should take measures to "protect the child from all forms of physical abuse or mental violence, …. maltreatment or exploitation, including sexual abuse". Whilst not automatically incorporated into our law unless done so by an Act of Parliament, international instruments such as this nonetheless provide significant guidelines and permissible prisms for examining local legislation against international standards. Ordering marriage to the complainant amounted to sanctioning a violation of what the law clearly forbids. Furthermore, in sanctioning an impermissible marriage, the magistrate effectively cast aside the protective function of the law on sexual intercourse with young persons.

The offence is aggravated where, among other factors, the accused is much older than the complainant. Here, the accused in this case was twice the complainant's age. The magistrate's allusion to a consensual relationship neglected the effects of such a vast age discrepancy on the complainant's ability to withstand the lecherous advances and persuasions of the accused. The age discrepancy and its attendant power dynamics should have been central in interrogating the unlikelihood of a truly consensual relationship. The two persons were at different levels in terms of emotional maturity. Her ability to stave off his persistent advances would undoubtedly have been weaker. To accept love as a mitigatory factor when the disparity in ages is great and the girl's age is known to the accused is to break the ring of protection accorded complainants by the law. Frequency of intercourse is not an indicator of genuineness of affection, but more likely to show lasciviousness on the part of the man.

In our cultural context, where some married men believe the wife's unmarried sister is equally for the taking, ordering marriage gives a very unhealthy nod to predatory behaviour and does little to foster attitudes of respect and dignity towards females in what should be a safe family environment. Ordering marriage under such circumstances also does nothing towards sending a strong message of disapproval to such adult males who, behind a cloak of negative cultural practice, coerce a relative who is a minor into having sexual intercourse. The fact that the family reported the criminal conduct was indicative of the fact that they regarded him as having crossed the boundaries of what they regarded as acceptable behaviour. He was already married to her sister and had five children. It could not have made for a healthy sibling relationship.

Further, there was no indication that the complainant's views had been ascertained. If a marriage had taken place, it remained critical for the magistrate to ascertain that she was not in it because she was pledged or because the court wrongly ordered the accused to marry her.

Customary law – chief – appointment of by President – customary principles of succession – president required to give "due consideration" to such principles – need for recommendation to President to be based on such principles – recommendation not based on those principles – President not able to give due consideration to those principles – appointment made without due consideration to customary principles of succession void

Moyo v *Mkoba & Ors* S-35-13 (Malaba DCJ, Gowora JA & Cheda AJA concurring) (Judgment delivered 7 August 2013)

Only the President has the power to appoint a chief. Chiefs are Government officials who hold office during pleasure and contingent upon good behaviour. The appointment of chiefs has since 1927 been controlled by statute. In deciding to appoint a particular person as the chief to preside over a community, the President acts on his own deliberate judgment. He is not obliged to appoint that person. In those matters in respect of which the President is empowered to act in his own discretion, the manner in which he exercises that discretion is not subject to judicial review unless he has exercised his discretion outside the law, that is, where the President has in the exercise of his discretion, made an error of law.

In terms of s 3(2) of the Traditional Leaders Act [*Chapter 28:17*], the President, in appointing a chief, is required to give due consideration to the prevailing customary principles of succession, if any, applicable to the community over which the chief is to preside. An inquiry is required to be carried out by officials of the Ministry of Local Government to establish the prevailing customary principles of succession applicable to the community over which the person to be appointed chief is to preside. If there is a dispute, the court ought to inquire into the question of whether those investigations produced the information on the matters to which the President is required to give due consideration. The President is required to act on his own deliberate judgment *after* he has information relating to the prevailing customary principles of succession applicable to the community to which he must give due consideration. Whether the information placed before the President relates to the matters to which he is required to give due consideration is a justiciable question. An appointment

of a chief not preceded by a demonstrable compliance by the President with the obligation to give due consideration to the prevailing customary principles of succession to the chieftainship would be null and void.
The Minister's recommendation forms the basis of the President's decision, as it should be based on information relating to matters to which he is required to give due consideration before acting on his own deliberate judgment.
The Act governs the appointment of a person to a particular chieftainship and the recognition and establishment or abolition of any particular chieftainship. Under the Act, these functions are vested in the President. In exercising these powers the President has an absolute discretion, unfettered by any statutory shackles other than the duty to give due consideration to the customary principles of succession if any, applicable to the community over which such chief is to preside. It is only the President who can determine who shall be appointed as chief. The courts have no power to investigate, determine or even recommend to the President who should be appointed as the chief in the area. However, where it is shown that the appointment of a chief deviated from the ordinary customs and traditions of the clan in question, and that the Minister had not given due consideration to the customary principles of succession before making his recommendation to the President, the court can make the declaration to the effect that the customary principles of succession to the particular chieftainship were not given due consideration by the President. Where the recommendation made to the President is not based on any prevailing customary principle of succession, the effect is that the President would not have before him facts on the prevailing customary principles of succession to which he is required to give due consideration before making the appointment. Where the law requires that a particular thing be done in a particular way and something else is done there is not only a procedural impropriety but the resultant decision is irrational.

Editor's note: decision of Ndou J in *Moyo* v *Mkoba & Ors* 2012 (1) ZLR 143 (H) reversed.

Damages – delict – assessment – *actio injuriarum* – malicious prosecution and wrongful imprisonment – global figure preferable to damages based on a rate per day of detention – factors to be considered

Abu-Busutu v *Moyo* HB-173-13 (Makonese J) (Judgment delivered 12 December 2013)

See below, under DELICT (*Actio injuriarum* – malicious prosecution and wrongful imprisonment).

Delict – *actio injuriarum* – malicious prosecution and wrongful imprisonment – action against individual who is not a state agent – action permissible – what must be established

Abu-Busutu v *Moyo* HB-173-13 (Makonese J) (Judgment delivered 12 December 2013)

The defendant and plaintiff were co-directors of a company registered in South Africa. A bank account was opened in the company's name. The defendant, who was working for another business, fraudulently transferred money from his employers to the company's account. He then proceeded to withdraw all the ill-gotten funds from the account for his personal use without the plaintiff's knowledge. He then fled South Africa and went to Zimbabwe, where he spent the funds. The plaintiff was arrested by the South African police and detained for 98 days before the charges of fraud brought against him were withdrawn. He brought an action against the defendant for malicious prosecution, basing the damages on a fixed amount per day.
Held: (1) The delict of malicious prosecution and detention is usually brought against government institutions where a person's liberty and freedom is wrongfully deprived. In appropriate circumstances, actions for wrongful arrest and detention can also be brought against individuals. The test is that where a party's direct or indirect conduct leads to the wrongful arrest of another, the person whose liberty has been infringed is entitled to recourse against the party causing such arrest and detention. The essential requirements in claims based on malicious arrest and prosecution are that (i) the defendant set the law in motion; (ii) the defendant acted maliciously and (iii) without reasonable and probable cause; and (iv) he acted without a duty of care towards the plaintiff.
(2) By utilizing the bank account of the company his illicit dealings, the defendant acted maliciously and set the law in motion against the plaintiff without reasonable and probable cause. When he fled South Africa he was well aware that he was exposing the plaintiff to the risk of arrest and detention. The defendant was well aware of the consequence of his actions. As co-directors the defendant owed a special duty of care to the plaintiff not to utilise the company account in a manner that would not endanger the plaintiff in any manner whatsoever. The defendant not only broke the trust between himself and the plaintiff but also breached the duty of care to operate the company's bank account for lawful means. The plaintiff's arrest and detention was a direct consequence of

the defendant's nefarious activities and plaintiff is entitled to compensation for the unwarranted deprivation of his liberty. The plaintiff's life was needlessly disrupted by the incarceration. He was prevented from carrying out his normal duties and his daily activities. His loss of income for the 98 days he was in detention is not capable of easy ascertainment.
(3) The plaintiff did not set out the basis upon which he arrived at the daily rate claimed, for which there was no rational basis. The correct approach to the quantum of damages would be to award a global figure based on a fair reflection of an award that would adequately compensate the plaintiff. There was a need in all the circumstances of the case to award exemplary damages, regard being had to the following factors:
(a) the award must be fair and reasonable.
(b) the award must provide adequate compensation to the injured party.
(c) the award must penalise the defendant for his malicious and reckless conduct.
(d) the award must be exemplary, in that the defendant had benefited financially whilst placing the plaintiff at serious risk.

Editor's note: the judgment does not explain how the courts of Zimbabwe could have had jurisdiction in respect of a cause of action that arose wholly within South Africa.

Delict – *actio legis Aquilia* – negligence – harm giving rise to claim for damages – limits to forms of harm giving rise to damages – mental distress – need for plaintiff to have suffered recognised psychiatric complaint requiring treatment – duty of care – when duty of care exists – need to show that harm was reasonably foreseeable and that a reasonable person would have guarded against such harm – claim – need to allege negligence and set out particulars

Delta Beverages v *Rutsitso* S-42-13 (Garwe JA, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 26 September 2013)

The respondent (plaintiff in the court *a quo*) issued summons claiming payment of damages and costs of suit. The basis of his claim was that he had consumed a contaminated Coca-Cola and that further inspection of the bottle had revealed "a rusting iron nail and blackish foreign substances." In his declaration, he alleged that the appellant, as the manufacturer of the beverage in question, owed him and the general public a duty of care to ensure that the product was safe, clean and fit for human consumption and that the appellant had breached that duty by producing the contaminated drink. In the alternative, he alleged that the appellant had "negligently allowed the production and selling of contaminated Coke" which he consumed. In the result he sought damages in the sum mentioned for what he termed "distress and anxiety."
It was not shown whether the particular bottle was produced by the appellant or by another associated bottling company. The respondent agreed during cross examination in the court *a quo* that no psychiatric condition resulted. The medical report produced before the court showed that there were no pathogens in the sample that was analysed. No harm requiring medical treatment was proved. Indeed no medical evidence was called to confirm whether he had suffered any nervous shock as suggested. The respondent in evidence admitted that the only outcome of the event was that he had become more cautious about drinking bottled beverages. An application for absolution having failed, the appellant appealed.
Held: (1) A claim for damages in respect of pain and suffering strictly constitutes more than a head in a general Aquilian action; it is in origin a separate remedy. It aims at compensating the victim for all pain, suffering, shock and discomfort suffered by him as a result of the wrongful act. It includes both physical and mental pain and suffering and both past and future pain and suffering. Moreover, account must be taken, not only of the pain and suffering suffered as a direct consequence of the infliction of the injuries, but also of pain and suffering associated with surgical operations and other curative treatment reasonably undergone by the plaintiff in respect of such injuries.
(2) Damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law. The concept of damage is not unlimited in scope. It does not include every form of harm whatsoever and indeed some forms of harm are excluded. Only harm in respect of legally recognised patrimonial and non-patrimonial interests of a person qualifies as damage. This may be the reason why losses and harm such as inconvenience, disappointment, fear or frustration are not compensable in terms of the Aquilian action. Mere mental distress, injured feelings, inconvenience or annoyance cannot support an award of Aquilian damages. Damages cannot be claimed for transient nervous distress which does not lead on to a recognised psychiatric complaint requiring treatment.
(3) With regard to whether negligence had been shown, the expression "duty of care" is used in two separate and distinct senses. The first is in connection with negligence: a person is said to have breached the duty of care (i.e. to have been negligent) when he fails to foresee and guard against harm which the reasonable person would

have foreseen and guarded against. The second is in connection with wrongfulness: although the reasonable man would have foreseen and guarded against harm, the defendant is not liable as the law does not recognise any duty of care to avoid causing that sort of harm (i.e. the conduct was not wrongful or, to put it another way, there was no recognised legal duty to avoid causing harm by negligent conduct). In other words, in determining whether or not a person was negligent, there is need to determine whether harm was reasonably foreseeable and, if so, whether the reasonable person would have guarded against such harm. As no particulars of the negligence alleged were set out or proved, there was no basis upon which the appellant could have been placed on its defence. In an Aquilian action in which a plaintiff claims damages, whether for patrimonial or non-patrimonial loss, it is incumbent upon him to plead negligence on the part of the defendant and to set out the particulars of such negligence. Where such particulars are not set out, the defendant is embarrassed in his defence, as he cannot know the basis on which liability is claimed. It is not enough to allege negligence and fail to give particulars of such negligence. A defendant is entitled to know the outline of the case that a plaintiff will try to make against him.
(4) The liability of a beverage manufacturer or brewery is not absolute. If the steps it took to avoid contamination were reasonable, in the sense that nothing more could reasonably have been done, then it would not be liable, because it would not have been negligent. It was for the respondent to prove that the manufacturing processes of the appellant were deficient in particular respects. Only then could the appellant have been placed on its defence. No such evidence was led.
(5) Absolution should accordingly have been granted.

Delict – defamation – when material defamatory – test – exception to pleadings – test as to whether matter defamatory – court required to decide only whether reasonable person might or could regard statement as defamatory

Mnangagwa v *Alpha Media Hldgs (Pvt) Ltd & Anor* HH-225-13 (Mathonsi J) (Judgment delivered 25 July 2013)

The respondent (plaintiff) brought an action against the excipients (defendants) for damages for defamation. The sum claimed was one million US dollars. The defendants excepted to the claim, arguing that the declaration disclosed no cause of action, in that the words complained of were not defamatory *per se* and could under no circumstances be damaging to (the) plaintiff's good name and reputation.
Held: (1) the amount of damages claimed was outrageous. Quite often in recent years litigants in this country come up with these outlandish claims for damages, even for the slightest of infractions, which are completely divorced from the economic realities of this country and are detached from existing precedence and legal realities of our jurisdiction. It is the kind of habit which legal practitioners must take responsibility for encouraging, as ultimately it is they who advise litigants and draft the processes filed in court. Legal practitioners engaged by litigants to represent them and to draft court processes on their behalf should take care in drafting such court papers and claims and should apply their minds to the task reposed upon them. After all, they are paid to provide such service and it is the height of irresponsibility to come up with outrageous claims which not only fail to ventilate the relief the litigant seeks but also fail to conform with existing precedents on the subject.
(2) It is a first principle in dealing with exceptions that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action. Thus, where exception is taken to the plaintiff's declaration in a defamation case, the test of what constitutes defamatory matter is different from that at the trial stage. All the court is called on to decide at this stage is whether a reasonable person of ordinary intelligence, having heard the defendants' words and having knowledge of the circumstances *might* reasonably understand these words as meaning that the plaintiff had been guilty of illegal or criminal conduct. The test on exception is, therefore, whether a reasonable person of normal intelligence and with knowledge of the circumstances *could* or *might* regard the statement as defamatory, whereas at the trial stage the test is whether a reasonable person *would* regard it as defamatory. The question which must be answered is: what immediate impact would the contents of the article in question have on the mind of the ordinary reader of the publication and what would be the overall impression gained by him? Or, put another way, in the contest of the article as a whole; are the words used reasonably capable of conveying to the reasonable reader the defamatory meanings ascribed to them by the plaintiff in his declaration?

Delict – negligence – driving – driving a vehicle without requisite licence and having an accident – presumption created that manner of driving resulted from lack of requisite skill and experience

Ndava v *Takaruwa & Anor* S-56-13 (Malaba DCJ, Ziyambi & Gowora JJA concurring) (Judgment delivered 5 December 2013)

Whilst driving a motor vehicle without the requisite licence is not on its own sufficient evidence of negligence when considered in light of all the circumstances of the case, driving requires a special skill and experience commensurate with the standard of due care which a driver owes to his passengers as well as other road users. Where a person has no driver's licence for the vehicle in question, there is a presumption that his manner of driving which forms part of the particulars of negligence was as a result of lack of the requisite skill and experience expected of a reasonable driver in possession of an appropriate driver's licence.

Employment – arbitral award – award granted following referral in terms of Labour Act [*Chapter 28:01*] – award challenged on grounds set out in Arbitration Act [*Chapter 7:15*] – jurisdiction of High Court to entertain challenge not ousted

Mapini v *Omni Africa (Pvt) Ltd* HH-494-13 (Tsanga J) (Judgment delivered 18 December 2013)

See above, under ARBITRATION (Award – challenge to).

Employment – arbitral award – registration with High Court for enforcement purposes – application – documents that must be submitted with application – not necessary to submit duly authenticated original of award – substantial compliance with requirement to submit award sufficient

Employment – arbitral award – registration with High Court for enforcement purposes – application – may be made to a judge in chambers

Dhlomo-Bhala v *Lowveld Rhino Trust* HH-263-13 (Mafusire J) (Judgment delivered 26 August 2013)

The applicant, an employee of the respondent, had been dismissed from her employment. The matter had been referred for compulsory arbitration. The arbitrator had made an award in favour of the applicant, in terms of which the respondent was to pay a sum of money in lieu of outstanding salaries and other employment benefits. The respondent noted an appeal to the Labour Court in terms of s 98(10) of the Labour Act [*Chapter 28:01*]. It also, in terms of s 92E of the Act, applied to the Labour Court on an urgent basis for a stay of the operation of the arbitral award pending the determination of its appeal. At the time of the hearing of the present application both the appeal and the urgent application for stay were still pending. The applicant made a chamber application for registration of the award with the High Court in terms of s 98(14) of the Act. The application was opposed.
The first ground of opposition was to the form of the application. It contended that "High Court" in s 98(14) meant the open court and not a judge sitting in chambers. Similarly, the reference to the High Court in article 35 of the schedule to the Arbitration Act [*Chapter 7:15*] also meant the open court and not a judge in chambers.
The next objection was that by reason of the appeal to the Labour Court the arbitral award had been suspended and that therefore there was nothing yet to register. This objection was based on the common law rule that an appeal suspends the judgment appealed against. It was also argued that, because the heading to s 92E of the Labour Act is "Appeals to the Labour Court generally", the section was concerned with *general* appeals to the Labour Court and that therefore there must also be *special* appeals to that court. It was submitted that an appeal from the decision of an arbitrator was a special appeal, not covered by s 92E(2), and that noting the appeal had the effect of suspending the decision appealed against in terms of the common law rule.
The third ground of objection was that in an application for the registration of an arbitral award in terms of s 98 of the Act it is not just a copy of the award that must be submitted for registration but one which is certified. The document relied on the by applicant was a copy.
The fourth ground of objection was that the documents tendered by the applicant for the registration of the arbitral award were inadequate, in that in terms of article 35 a party seeking the registration of an arbitral award for enforcement purposes is required to submit not only the duly authenticated original of the award or a duly certified copy thereof, but also the original arbitration agreement. It was argued that the applicant ought to have attached the reference to arbitration form in lieu of the arbitration agreement or, alternatively, her statement of claim before the arbitrator together with the respondent's statement of defence.
Held: (1) there is no rigid rule that the word "court" excludes jurisdiction exercised in chambers. Regard must be had to the context and to the ordinary practice, which the legislature must be assumed to know. There was no justification for limiting the import of "High Court" in the two provisions above to an open court. The

legislature did not make such limitation. Neither Act defined "High Court". However, the Interpretation Act [*Chapter 1: 01*], in s 3, defines "High Court" as "the High Court of Zimbabwe referred to in subsection (1) of section 81 of the Constitution" (now s 170 of the 2013 Constitution). Neither the Constitution nor the Acts were concerned with the *form* of proceedings in the High Court. The two Acts merely specified the *forum* to which registration applications for the registration of arbitral awards should be referred. There was nothing to suggest that the legislature meant to ascribe to that term the more technical meaning of "court" as spelt out in the High Court Rules, which distinguish between the "court" and "a judge".

Court applications and chamber applications are governed by Order 32 of the Rules. The one essential difference between a court application and a chamber application is that a court application is determined in an open court and a chamber application in the judge's chambers; but otherwise they are similar: both are made in writing and supported by affidavits; both are determined by a judge sitting alone; in both, the resultant order is an order of the High Court, having the same force and effect; and in a court application notice to all interested parties has to be given, although the same applies to some chamber applications.

In terms of r 226(2) certain matters cannot be brought by way of chamber applications unless they fall within one or more of the exceptions specified therein. One of those is that the relief sought is procedural. An application to register an arbitral award as an order of court for the purposes of enforcement is clearly an application seeking a procedural relief. The court is not being asked to determine the merits of the arbitration anew.

(2) The provisions of s 92E(2) of were unequivocal: the noting of an appeal to the Labour Court does not suspend the operation of the order appealed against, although s 92E(3) enables the Labour Court to suspend or stay an award upon application by the aggrieved party. Under s 7 of the Interpretation Act, headings and marginal notes form no part of the enactment and are deemed to have been inserted for convenience of reference only. If it was intended to categorise an appeal from the decision of an arbitrator as "special" and therefore as one different from the general appeals referred to in s 92E, it would have been simple for the legislature to have said so. The provisions of ss 92E and 98 were so plain as to require no such tortuous constructions as urged by the respondent. Appeals from the decisions of an arbitrator were made in terms of s 98(10) of the Act. They were appeals "in terms of this Act" within the meaning of s 92E, which appeals did not have the effect of suspending the determinations or decisions appealed against. Section 92E is an omnibus provision regarding all appeals made in terms of the Labour Act. It must necessarily cover appeals from the determinations or decisions of the arbitrator to the Labour Court. Decisions based on the wording of s 97 of the Act, which was repealed in 2007, were no longer applicable.

(3) With regard to the form in which the arbitral award was presented, where a party has substantially complied with the requirements of the law and where there is no discernible prejudice to the other party it would make justice turn on its head to deny relief. Here, while the impeached document may have lacked care and precision in its preparation, it substantially complied with the requirements for certification. It sufficiently identified the arbitral award in question by, among other things, the case reference number, the names of the parties, the name of the arbitrator and the quantum involved. Furthermore, in the papers placed before the court by both parties, there were annexed the copies of the documents in the proceedings pending in the Labour Court. These documents included several copies of the arbitral award. By its own documents the respondent confirmed that the award sought to be registered was the award which was now the subject matter of the dispute.

(4) As regards the argument that a party seeking the registration of an arbitral award for enforcement purposes is required to submit not only the duly authenticated original of the award or a duly certified copy thereof, but also the original arbitration agreement, s 5 of the Arbitration Act provides that where an enactment requires any matter to be determined by an arbitrator or by arbitration in accordance with any law relating to arbitration, such requirement shall be deemed to be an arbitration agreement for the purposes of this Act. However, in terms of s 98 of the Labour Act and s 5 of the Arbitration Act, the application of the Arbitration Act to arbitrations is made subservient to the Labour Act. The Labour Act does not require the submission of the arbitration agreement in an application for the registration of an arbitral award for enforcement purposes. Compulsory arbitrations under s 98 of the Labour Act are by operation of the law. Where conciliation has failed to resolve the employment dispute, it is a statutory requirement that the dispute be referred for compulsory arbitration. It is the Labour Court or the labour officer that refers the dispute for compulsory arbitration, appoints the arbitrator and fixes the terms of reference for the arbitrator. It is not a matter governed exclusively by the private agreement of the parties as in most commercial arbitrations. Accordingly, the failure by the applicant to annex the reference to arbitration form (or the statement of claim and of defence as the substitutes for the arbitration agreement) did not form a legitimate ground for opposing the application for the registration of the arbitral award.

Employment – disciplinary proceedings – charge – theft – conviction of negligent discharge of duties – not a competent verdict on charge of theft

Employment – disciplinary proceedings – penalty – dismissal – code of conduct providing for dismissal for negligence after two previous warnings – dismissal without such warnings *ultra vires* code

Nyarumbu v *Sandvik Mining & Construction Zimbabwe (Pvt) Ltd* S-31-13 (Patel AJA, Ziyambi & Garwe JJA concurring) (Judgment delivered 9 July 2013)

The appellant and a co-employee were charged with the theft of goods from the respondent, their employer, after the goods went missing. The appellant was acquitted in the criminal courts but convicted following disciplinary proceedings and dismissed. The Labour Court found the appellant not guilty of theft but found him guilty of negligence because of his apparent admission to that effect in the proceedings before the disciplinary committee. The court took the view that negligence was a competent verdict on a charge of theft and convicted him of negligent performance of duty resulting in loss to the employer. It then confirmed the penalty of dismissal. On appeal:
Held: (1) As a general rule, the standard of proof required in disciplinary matters is that on a balance of probabilities. A disciplinary tribunal is endowed with a greater measure of flexibility than is a criminal court. Nevertheless, one basic principle that neither a court nor tribunal may depart from is that the offence that the accused is found guilty of must be commensurable with the offence that he has been charged with: both offences must bear some legally cognisable affinity with one another. In our criminal law, the essential elements of theft and offences based on negligence do not share any meaningful convergence. They are *sui generis* and fundamentally distinct offences. The same applies to the treatment of these offences *qua* acts of misconduct in disciplinary matters. In the applicable code of conduct, theft and negligence were clearly separate and distinct acts of misconduct and fell under different items in the code. A finding of negligence was clearly not a competent verdict on the particular charge of theft preferred against the appellant.
(2) In relation to the offence of negligence specified in the code of conduct, a first offence calls for a written warning and a second offence invites a last written warning. It is only the commission of a third offence of negligence that attracts the ultimate penalty of dismissal. No such previous warnings had been given to the appellant. Thus, even if negligence was a competent verdict on a charge of theft and there was clear evidence of negligence on the part of the appellant, the penalty of dismissal imposed by the Labour Court was clearly *ultra vires* the code and therefore invalid.
(3) In criminal as well as disciplinary proceedings, a person cannot be found guilty of an offence that has not been preferred against him, unless that offence is a competent verdict on the offence originally charged. The reason for this is that the accused person must be made aware of the case against him in order to enable him to effectively prepare his defence. Although under s 89(2)(a)(ii) of the Labour Act [*Chapter 28:01*], the Labour Court may, on appeal, confirm, vary, reverse or set aside the decision, order or action that is appealed against, or substitute its own decision or order, it cannot, *mero motu*, substitute its own charge or make a finding of guilt on an entirely different offence. Sitting as a court of appeal, it can only deal with the matter on the basis of the grounds of appeal that have been raised by the appellant. The grounds of appeal before the Labour Court were confined to theft, without any reference to negligence, and negligence was not canvassed by the parties in the proceedings before it.

Employment – employee – who is – distinction between employee, agent and independent contractor – test of control and supervision as showing whether person is an agent or independent contractor

Masango v *Farmers' Commodity Stock Exchange (Pvt) Ltd & related cases* HH-248-13 (Mafusire J) (Judgment delivered 12 August 2013)

An employee, an agent and an independent contractor all render service to another person for remuneration, but there are differences. An accurate test for distinguishing the agent from the independent contractor is that the agent has authority to bind his principal in contract, whereas the independent contractor has no such power. The degree of control, supervision and freedom also helps in determining whether a particular contractual relationship is one of master and servant or one of an independent contractor and principal. Control is a wide concept. It includes, *inter alia*, the right of an employer to decide what work is to be done by the employee, the manner in which it is to be done by him, the means to be employed by him in doing it, the time when and the place where it is to be done by him. Supervision implies the right of the employer to inspect and direct the work being done by the employee.
The difference between an agent and an independent contractor is that an agent is bound to act in the matter of the agency subject to the directions and control of the principal, whereas an independent contractor merely undertakes to perform certain specified work, or produce a certain specified result, the manner and means of performance or production being left to his discretion, except as far as they are specified by the contract. The

contract between master and servant is one of letting and hiring of services (*locatio conductio operarum*), whereas the contract between a principal and a contractor is the letting and hiring of some definite piece of work (*locatio conductio operis*).
The fact that the employer provides a motor vehicle or an office or a telephone, or that restrictions are placed upon the work the person does for the employer, does not necessarily make the person an agent.

Employment – Labour Court – appeal to – against dismissal for theft – grounds of appeal confined to theft – negligence not raised by either party to appeal – not competent for court *mero motu* to substitute another charge or make a finding of guilt on a different offence

Nyarumbu v *Sandvik Mining & Construction Zimbabwe (Pvt) Ltd* S-31-13 (Patel AJA, Ziyambi & Garwe JJA concurring) (Judgment delivered 9 July 2013)

See above, under EMPLOYMENT (Disciplinary proceedings)

Employment – Labour Court – appeal to – effect – does not suspend operation of order appealed against – need for aggrieved party to apply to Labour Court of suspension of order

Employment – Labour Court – appeal to – from decision of arbitrator – not a special appeal – such an appeal one in terms of Labour Act and subject to same procedures as any other appeal

Dhlomo-Bhala v *Lowveld Rhino Trust* HH-263-13 (Mafusire J) (Judgment delivered 26 August 2013)

See above, under EMPLOYMENT (Arbitral award – registration with High Court for enforcement purposes)

Employment – Labour Court – appeal to – right of appeal – who has such right – all persons to whom Labour Act applies having right of appeal – dismissal in terms of statutory instrument not providing for appeal to Labour Court – such dismissal unfair and appealable – regulations not overriding Act

Tamanikwa & Ors v *Zimbabwe Manpower Development Fund* S-33-13 (Gowora JA, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 16 July 2013)

The respondent was a statutory body created in terms of s 47 of the Manpower Planning and Development Act [*Chapter 28:02*]. In terms of s 69 of the Act, the Minister enacted the Zimbabwe Manpower Development Fund (Conditions of Service and Misconduct) Regulations (SI 258/1996). The appellants, who were employed by the respondent, were charged with disciplinary offences, found guilty of the charges and dismissed from employment. They appealed to the Trustee, the Minister of Higher and Tertiary Education, in terms of s 44 of the Regulations and were unsuccessful. They then noted an appeal to the Labour Court, which held that there was no right of appeal to the Labour Court provided for in the Regulations and that an appeal to the respondent's Trustee is final and unappealable. It held that although s 3 of the Labour Act [*Chapter 28:01*] provided that the Act applied to all employees except those specifically excluded in that section, it did not confer jurisdiction upon the court to hear and determine appeals arising out of dismissals effected under the Regulations.
The appellants contended that, notwithstanding the provisions of s 44(1) of the Regulations under which they were charged and dismissed from employment, they were, by virtue of the provisions of the Labour Act, entitled to be heard by the Labour Court by way of appeal and that consequently, their appeal was properly before the court *a quo*. They contended further that the inconsistencies within the legislation did not oust the jurisdiction of the Labour Court to entertain their appeal. With regard to the conflict between the Regulations and the provisions of the Act, they contended that in view of the provisions of s 2A of the Act, the Act prevailed over the Regulations and consequently there existed a right of appeal to the Labour Court.
Held: (1) in terms of s 3, the Labour Act applies to all employers and employees except for those whose conditions of employment are governed by the Constitution or the Public Service Act [*Chapter 16:04*]. The finding by the lower court that the Act applied to the appellants was clearly contradictory to the subsequent finding that the court did not have jurisdiction to determine the appeal filed by the appellants. It followed, therefore, that under s 89(1) employers and employees whose conditions of employment are covered under s 3 have the right to appeal to the Labour Court. It is only those employers and employees who are excluded by s 3 who cannot have access to the Labour Court for the resolution of disputes.

(2) Despite the absence of a provision in the Regulations for an appeal process against the decision of the Trustee, the appellants were not deprived of a remedy against their dismissals under the Regulations. An appeal lay to the Labour Court, which had jurisdiction in terms of ss 2A, 3 and 92D of the Act. Although the provisions of s 44(1) of the Regulations were inconsistent with the Act (in particular ss 3 and 2A thereof), the Regulations were subservient to the Act in relation to the manner of termination of employment, and in particular s 2A(3). This subsection provides that Act shall prevail over any other enactment inconsistent with it.
(3) The general rule of statutory interpretation is that where two statutes are in conflict with each other, the later statute is deemed to be the superior one on the basis of implied repeal, it being presumed that when the legislature passed the latter Act it had knowledge of the earlier Act. This applies only when the language used in the subsequent statute is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, to the extent that the court is justified in coming to the conclusion that the earlier Act has been repealed by the later one. Otherwise, the law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it.
(4) In view of the provisions of s 3 and s 2A(3) of the Act, the only logical conclusion was that the Act applied to the appellants and, that consequently they would be entitled to redress under the provisions of the Act and that the Labour Court would have jurisdiction to entertain the appeal. The absence of an appeal process to the Labour Court in the Regulations could not have overridden, and was never intended by the legislature to override, the peremptory provisions of s 2A, which the court *a quo* should have had recourse to. To the extent that an apparent conflict would be manifest due to absence of a specific provision in the Regulations for an appeal beyond the Trustee, the Labour Act prevailed over the Regulations, suggesting an implicit repeal of the Regulations.
(5) In any event, the Regulations, being subsidiary legislation were subordinate legislation and an inferior form of legislation. As a consequence, s 44 of the Regulations was subservient to the Act and by virtue of s 2A(3) the Act must supersede the Regulations.
(6) Section 12B of the Act made it mandatory for any dismissal to be effected in terms of a registered code of conduct or the Labour National Employment Code of Conduct (SI 15 of 2006). The issue was whether the appellants could claim a right of appeal directly to the Labour Court despite being dismissed under a statutory instrument which was not an employment code as defined by the Act. On the face of it, s 92D of the Act was in conflict with s 3 of the Act, which conflict stemmed from the fact that s 92D appears to exclude from its ambit any employee whose grievance does not emanate from a determination made under an employment code. This would suggest further that an employee in the same position as the appellants who is dismissed except in terms of an employment code has no right to appeal to the Labour Court.
(7) It is a well-established canon of construction that courts should endeavour to reconcile *prima facie* conflicting statutes as well as apparently conflicting provisions in the same statute. Courts therefore do not readily come to the conclusion that there is a conflict; by using all means at their disposal, they attempt to effect a reconciliation. It is also an established canon of construction that different parts of the same statute should, if possible, be construed so as to avoid a conflict between them. Accordingly, where there are two sections in an Act which seem to clash but which can be interpreted so as to give full force and effect to each, then such an interpretation is to be preferred as opposed to an interpretation that will partly destroy the effect of one of them. It is also an elementary principle of construction that the legislature will not be presumed to take away any acquired rights. The intention to do so must be expressed or very clearly implied from the language of the statute. It cannot have been the intent of the legislature to exclude any employee from obtaining access to an appeal upon the termination of his employment. The appellants were, under s 3, guaranteed a right to redress from the Labour Court. It would therefore amount to an absurdity to find that in terms of s 92D they could not have their appeal heard on the grounds that their dismissal was not effected in terms of an employment code.
(8) There were obvious contradictions between the provisions of s 3 and those of s 12B and 92D of the Act. If regard is had to the provisions of ss 2A, 3, 12B and 92D of the Act, it was evident that there was discord and contradiction in the Act, requiring legislative intervention.
(9) The right to an appeal under the Act could not be taken away through a provision inconsistent with the clear and unambiguous provisions of ss 3 and 2A. Despite the provisions of s 92D, the Labour Court had jurisdiction to determine the appeal filed by the appellants and accordingly the appeal was properly before it.
(10) In terms of s 12B a dismissal must be in terms of an employment code or the national code. A dismissal effected other than in terms of that section is an unfair dismissal and the appellants would have recourse to the Labour Court on the basis of the unfair dismissal in terms of s 12B. The Regulations, which provided for dismissal other than in in terms of s 12B, were to that extent in conflict with s 12B and the provisions of s 12B should prevail. Any disciplinary procedures which were effected outside the peremptory provisions of s 12B were clearly unlawful. The dismissal of the appellants was therefore null and void. Consequently, the appellants were entitled to an order of reinstatement to their former positions without loss of salary and benefits.

Employment – Labour Court – application to – quantification of damages in lieu of reinstatement – proof of – affidavits by parties not required

Employment – wrongful dismissal – damages in lieu of reinstatement – assessment – onus – onus on person claiming damages to prove amounts claimed – quantification of by Labour Court – what court must do – court not entitled to guess amount – need to calculate figure precisely – back pay – period for which back pay may be ordered

Heywood Invstms (Pvt) Ltd v *Zakeyo* S-32-13 (Gowora JA, Malaba DCJ & Garwe JA concurring) (Judgment delivered 9 July 2013)

The respondent had been dismissed from his employment by the appellant on the grounds of theft. He successfully appealed to the Labour Court, which ordered that the respondent be reinstated to his former position with full benefits, and that should reinstatement be no longer possible, he be paid damages in lieu thereof. In the event of the parties failing to agree on the damages they were free to approach the Labour Court for quantification of the damages. The Labour Court's decision was upheld on appeal. The appellant chose not to reinstate the respondent. The respondent filed a court application with the Labour Court for an order for the quantification of damages on the grounds that the appellant had failed to reinstate him into employment. He itemized the claim under various heads. The Labour Court in due course granted an award, against which the appellant appealed. In its award, damages for loss of salary were not based on the salary which the appellant said would have been paid to someone in the respondent's position at the time of dismissal, nor on what the respondent claimed; the court took the view that in the interests of fairness the average between what was claimed and what was suggested on behalf of the respondent would meet the justice of the case.

The first ground of appeal was that the respondent's application was fatally defective for want of form, in that it failed to comply with the requirements of the Labour Court Rules (SI 59 of 2006), r 14 of which requires that an application to the Labour Court in terms of s 89(2)(b), (c) or (d) of the Labour Act be in Form LC 1. The Labour Court had held, on this point, that the appellant had no basis for objecting to the manner in which the application was filed and could not raise a defect on the papers presented by the respondent as a defence to the application when the appellant itself had failed or refused to comply with the order directing it to reinstate the respondent.

The second ground was that the Labour Court misdirected itself in finding that the appellant had not furnished any evidence to controvert the claim by the respondent. The appellant also contended that the court misdirected itself by finding that the appellant bore the onus to disprove the respondent's claims and in finding that the appellant should have filed affidavits to counter the respondent's claim.

Held: (1) the Labour Court failed to appreciate the legal issue raised by the point *in limine.* It is incumbent upon a court before which an application is made to determine it. A court before which an interlocutory application has been made should not proceed to determine a matter on the merits without first determining the interlocutory application. The question of whether the failure to comply with the provisions of r 14 was such as to render the application fatally defective had to be considered in isolation of the alleged failure by the appellant to comply with the order of reinstatement. The refusal by the court to determine the point *in limine* was a misdirection on a point of law.

(2) Rule 14 does not provide for the filing of affidavits by either party to the dispute. The finding by the Labour Court that the appellant omitted to file affidavits to counter the assertions of the respondent was a misdirection.

(3) It was incumbent upon the respondent to adduce evidence in support of his claim for damages. The application had attached to it an affidavit in which the respondent made assertions as to the basis upon which he sought to claim damages. There was, however, no evidence placed before the court on the specific heads under which the respondent sought an order of damages. The Labour Court placed an onus upon the appellant to counter what it clearly found was not evidence. The Court is obliged in terms of s 90A(4) of the Act to ascertain facts in any proceedings before it and, where necessary, to call parties to give evidence. It is further empowered to examine any witness appearing before it. What the court is not empowered to do is to award damages in the absence of any evidence in support of such award. The court's reasoning that the appellant should have filed documents or affidavits to contradict the respondent's claim was grossly unreasonable.

(4) The reasoning of the court that the suggested average was in the interest of fairness and justice was grossly unreasonable and a misdirection on the law. Where damages can be assessed with precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damages and to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork. The evidence of what the rate of earnings applied to an employee in the respondent's grade was readily available in collective bargaining agreements which the respondent could easily have obtained. The damages were consequently capable of assessment with precision. The court *a quo*, instead, embarked upon conjecture and plucked a figure out of the air.

(5) Back-pay cannot legally be awarded in respect of a period after the date of the order of reinstatement is granted.

Employment – Labour Court – jurisdiction – exclusive jurisdiction in labour matters – no jurisdiction to provide common law remedies – vindicatory action arising out of labour dispute – High Court having jurisdiction

CFI Hldgs Ltd v *Nyahora* HH-231-13 (Chigumba J) (Judgment delivered 24 July 2013)

The respondent was found guilty, pursuant to disciplinary proceedings brought against him by his employer, the applicant company, of the various charges and dismissed from his employment. He noted an appeal to the Labour Court against his dismissal. He refused to return a motor vehicle that had been allocated to him. The vehicle was owned by the company. The company's vehicle policy stated that the vehicle user would be given the first option to purchase the vehicle at disposal time and that the purchase price would be set by the executive committee, reviewed as necessary. The applicant brought a vindicatory action against him.
The respondent argued (a) that the matter was a labour dispute which fell under the exclusive jurisdiction of the Labour Court; and (b) that he had a claim of right to the motor vehicle emanating from the applicant's company car scheme and that this claim of right had not been extinguished by the termination of his contract of employment, because his appeal against that termination was still pending before the Labour Court.
Held: (1) In terms of s 89(1)(a), as read with s 89(6), of the Labour Act [*Chapter 28:01*], the Labour Court enjoys exclusive jurisdiction, at first instance, in relation to all matters that may be classified as purely labour disputes, such as suspension from employment and termination of employments contracts. However, this was an application for vindication of the applicant's property. The *actio rei vindicatio* cannot be termed to be a purely labour remedy which falls under the exclusive purview of the Labour Act. The Labour Court, being a creature of statute, may only do that which it is expressly authorized to do. The High Court, having inherent jurisdiction, may do anything except that which it is expressly prohibited from doing. There is no exclusive provision of the Act which expressly authorizes the Labour Court to adjudicate in matters involving the *actio rei vindicatio*, which is a common law remedy. There is nothing in the Labour Act which expressly ousts the High Court's jurisdiction in regards to matters which have aspects of labour disputes but in which common law remedies are sought.
(2) The clear effect of the vehicle policy was to allow the applicant a discretion as whether or not to offer the vehicle to its employee, at a price to be determined by a committee within the company. This had not been done at the time that the respondent was suspended, or at the time that he was dismissed, from employment. The respondent thus never acquired a right to purchase the motor vehicle and no claim of right arose. A legitimate expectation does not amount to a claim of right.
(3) The noting of an appeal to the Labour Court did not suspend the decision to dismiss the respondent.

Employment – suspension pending disciplinary proceedings – suspension set aside and reinstatement ordered by Labour Court – disciplinary proceedings and penalty resulting therefrom falling away

Nhari v *ZABG* S-51-13 (Garwe JA, Chidyausiku CJ & Omerjee AJA concurring) (Judgment delivered 31 October 2013)

The appellant was a senior employee with the respondent bank. She reported directly to the CEO. The bank introduced a new management structure, under which the appellant was to report to a divisional head. The new structure did not affect her grade, salary or benefits. She was not happy about the change and made complaints directly to the Board, despite being told not to. She was was suspended from work without salary or benefits in terms of the Labour (National Employment Code of Conduct) Regulations 2006 (SI 15 of 2006) and charged with two offences, namely, any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of a contract and wilful disobedience to a lawful order given by the employer. A disciplinary hearing was conducted two weeks after her suspension. The matter was postponed so that the disciplinary committee could consider the verdict. The appellant did not attend further hearings of the committee.
The appellant filed an urgent application in the Labour Court in which she sought an order setting aside her suspension and reinstating her to her former position without loss of salary and benefits. The basis of the application was that since the respondent had failed to conclude the matter within the period of 14 days prescribed in the Regulations, the proceedings had become a nullity. Additionally she averred that the suspension was unlawful as no act of misconduct had been committed and the circumstances merely indicated the existence of a misunderstanding. Notwithstanding the filing of the application, the disciplinary committee

determined a few weeks later that the appellant be dismissed. Subsequently, the Labour Court granted a default judgment in favour of the appellant in terms of which the suspension was set aside and re-instatement was ordered. She then filed an application for the review of the decision to dismiss her. The application was dismissed by the Labour Court.
Held: where action is taken by an employer in terms of s 6 of the Regulations, the employer must have good cause to believe that an employee has committed a misconduct as defined in s 4 of the Regulations. If he does have good cause, the employer may (but does not have to) suspend the employee with or without pay and benefits. A copy of the letter of suspension with reasons and grounds of suspension must forthwith be served on the employee. Within 14 days of serving the employee with the letter of suspension, the employer must investigate the matter and conduct a hearing into the alleged conduct. After reaching a verdict, the employer must serve a notice on the employee either terminating the employment if the misconduct has been proved or removing the suspension where the grounds of suspension are not proved.
Where the suspension is set aside and re-instatement ordered, any verdict or penalty imposed pursuant to any allegation made as part of the reason for the suspension must fall away. The suspension and the misconduct alleged against an employee are intertwined. There can be no suspension where there is no misconduct alleged against an employee. Since the suspension in this case was set aside by an order of court, which order remained extant, the findings of the disciplinary committee and the penalty of dismissal that was imposed could not stand.

Evidence – credibility – sexual case – child witness – when court may accept such evidence as reliable

S v *Tafirenyika* HH-441-13 (Hungwe J, Mavangira J concurring) (Judgment delivered 30 October 2013)

It is a well-established rule of our law that judicial officers are required to warn themselves of the danger of convicting on the uncorroborated evidence of certain categories of witnesses who are potentially suspect. Complainants in sexual offences is one such category. Single witness cases is another. The fact that the witness is a child would add to the caution required in assessing the credibility of such a witness. This however does not detract from the ability of the court to satisfy itself on the issues of competency when confronted by a child witness. It is not suggested that a court will, in all cases, require a child interviewer to be specialist in order to adduce evidence from a child. There is no principle of law that says it is inconceivable that a child of tender age will not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in future.
As a general rule, it can be said that in a case where a child explains relevant events at the crime scene without improvement or embellishment, and, at the same inspires the confidence of the court, his deposition does not require any corroboration whatsoever. A child of a tender age, it is now accepted, is incapable of having any malice or ill-will against any person. The competency of a child to give evidence is determined by the common law. It relates to whether the child has sufficient intelligence, sense and reason in order to understand the difference between truth and falsehood and recognise that it is wrong to lie. This is determined by the presiding judicial officer after the judicial officer, as well as the prosecution and defence, have had an opportunity to question the child.
This approach accords with article 12(1) of the UN Convention on the Rights of the Child, 1989, which requires signatories to the convention to accord to "the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." These rights are only extended to children who are capable of forming their own views and those views are only given due weight according to the age and maturity of the child in question. The courts can rely on evidence tendered by a child if it inspires its confidence and there was no embellishment or improvement in it.

Evidence – circumstantial – when may be said to have established guilt of accused – only conclusion must be that accused is guilty – evidence must also be inconsistent with accused's innocence

S v *Fata* HH-420-13 (Hungwe J, Mavangira J concurring) (Judgment delivered 20 November 2013)

When a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (a) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (b) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (c) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (d)

the circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused; and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Evidence – criminal cases – hearsay – rule against – dying declarations as exception to rule – rationale for admissibility – requirements for admission – approach court should take even where requirements are met

S v *Mubaiwa* HH-480-13 (Bhunu J) (Judgment delivered 18 December 2013)

Dying declarations are only admissible in cases of murder or culpable homicide. The requirements for their admission are: (a) the declarant must have died; (b) the declarant must have made the statement in a state of hopeless expectation of death; (c) the statement must be complete; and (d) the declarant must have been a competent witness at the time the statement was made.

The rationale for their admission despite being hearsay evidence has been stated to be "that they are declarations made in extremity when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the more powerful consideration to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice". Although these philosophical sentiments constitute powerful persuasive rational justification, it is by no means conclusive and does not fit every case. There certainly would be exceptional cases where a dying person might have a motive to misrepresent facts, particularly where there is a history of acrimony and enmity between the deceased and another as appears to be the position in this case. It is not difficult to imagine a dying person in those circumstances being mistaken or deliberately misrepresenting facts in order to get even with his adversary as a parting shot as he departs this world. His vision and perception of the facts and circumstances surrounding his mortal injury is likely to be coloured and distorted by fear and apprehension of death.

However, this exception to the rule against hearsay has become too firmly imbedded in the law to be dislodged. Even if it is accepted that a dying person could have no motive to lie, there is still considerable danger in relying upon his statement because his injuries are likely to have impaired his memory or powers of observation. The court must therefore take into account that the value of a dying declaration as evidence is diminished by the lack of opportunity to cross-examine the declarant.

Dying declarations therefore ought to be taken with a measure of scepticism and rejected out of hand where they fall short of essential elements and safeguards.

Evidence – foreign law – finding or decision of court of foreign country – when such finding or decision may be accepted as stating what law of such country is

Morten v *Morten & Anor* HH-339-13 (Uchena J) (Judgment delivered 10 October 2013)

The plaintiff, a Philippines national resident in Zimbabwe, married her first husband, also a Philippines national, in the Philippines in 1984. In February 2000, in Zimbabwe, she married her second husband (since deceased), an American who was resident in Zimbabwe. She presented herself as a divorcee, presenting a divorce order apparently granted in the Dominican Republic. The first defendant was the daughter of the plaintiff's second husband. She had been appointed the executrix dative of her late father's estate. She challenged the validity of the plaintiff's Zimbabwean marriage, to her late father.

It was argued that the first defendant had established that, according the Constitution of the Philippines, Philippine nationals are not allowed to divorce. Counsel relied on the evidence of the first defendant and on a judgment of the Philippines Supreme Court. Further, according to the certified records held by the Administrator and Civil Registrar General National Statistics' Office of the Republic of The Philippines, the plaintiff was still married to her first husband. The first defendant admitted that she was not an expert in Philippine law.

Held: with regard to what the law of the Philippines was, under s 25(3)(a) of the Civil Evidence Act [*Chapter 8:01*], the court, in considering any issue as to the law of any foreign country or territory, may have regard to any finding or decision purportedly made or given in any court of record in that country or territory, where the finding or decision is reported or recorded in citable form. In terms of subs (5), a finding or decision shall be taken to be reported or recorded in citable form only if it is reported or recorded in writing in a report, transcript or other document which, if the report, transcript or document had been prepared in connection with legal proceedings in Zimbabwe, could be cited as an authority in legal proceedings in Zimbabwe. The judgment produced was a finding or decision in terms of s 25(3)(a) and could be accepted in considering the Philippines

law on divorce and how it would affect the plaintiff's purported divorce in the Dominican Republic. The official records from the Administrator and Civil Registrar General also presented a serious challenge to the validity of the plaintiff's marriage to the first defendant's father.

Exchange control – Reserve Bank – directive to commercial bank to surrender money in client's foreign currency account – lawfulness of such directive – directive *ultra vires* s 35(c) of Exchange Control Regulations (SI 109 of 1996)

Standard Chartered Bank Zimbabwe Ltd v *China Shougang Intl* S-49-13 (Ziyambi JA, Garwe & Hlatshwayo JJA concurring) (Judgment delivered 11 October 2013)

See above, under BANK.

Family law – husband and wife – breach of promise of marriage – essential elements – damages – *contumelia* associated with breach – not a separate cause of action – *contumelia* may aggravate damages

Mupazviwiro v *Kubeta* HH-227-13 (Mawadze J, Makoni J concurring) (Judgment delivered 25 July 2013)

See above, under CONTRACT (Breach of promise of marriage).

Interpretation of statutes – ambiguity – conflicting provisions in same or another statute – when later provision may be said to have impliedly repealed earlier one – need for inconsistency to be manifest – court's duty to try to reconcile provisions to avoid conflict – acquired rights – need for intention to remove such rights to be manifest

Tamanikwa & Ors v *Zimbabwe Manpower Development Fund* S-33-13 (Gowora JA, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 16 July 2013)

See above, under LABOUR (Labour Court – appeal to – right of).

Interpretation of statutes – section headings and marginal notes – not part of enactment

Dhlomo-Bhala v *Lowveld Rhino Trust* HH-263-13 (Mafusire J) (Judgment delivered 26 August 2013)

See above, under EMPLOYMENT (Arbitral award – registration with High Court for enforcement purposes)

Land – acquisition – land identified for acquisition – notice of acquisition having lapsed or been withdrawn – land nonetheless included in Schedule 7 to 1980 Constitution – land thereby acquired by State

Mangenje v *TBIC Invstms (Pvt) Ltd & Ors* HH-377-13 (Mafusire J) (Judgment delivered 30 October 2013)

See above, under ADMINISTRATIVE LAW (*Audi alteram partem* rule).

Landlord and tenant – lease – sum paid to secure lease – payment of such sum a breach of Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) – landlord committing an offence in demanding such sum – sum refundable to prospective tenant

Goodliving Real Estate (Pvt) Ltd & Anor v *Lin* S-61-13 (Garwe JA, Ziyambi & Patel JJA concurring) (Judgment delivered 14 October 2013)

The respondent entered into an agreement with the appellants for payment of what the parties termed "a commitment fee" in respect of commercial premises then undergoing renovations. A tendency has arisen in the housing market where prospective tenants seeking rental space in buildings where there is a high demand for

such space are requested by the lessor to pay what is variably termed "a commitment fee", "goodwill of the rental space" or "lease preference fees". The purpose of this fee is to enable the prospective tenant to be given first priority in concluding a lease agreement in respect of the premises once they are available for occupation. Without payment of such a fee, a prospective tenant would stand little, if any, chance of even being considered for possible occupation of the premises.

The respondent paid a sum as a deposit to the second appellant, leaving a balance which was to be paid once the renovations were complete. Once the balance was paid, the parties were then to agree on the amount of rental payable per month. Having formed the opinion that he had been misled, the respondent decided to demand a refund of the sum of the deposit. The appellant refused to refund the money, claiming that the respondent had been in breach of the terms of the agreement. The respondent then instituted proceedings for the recovery of the amount in question. The court *a quo* found that no agreement had been reached that the deposit would be non-refundable and that the appellants had been unjustly enriched at the expense of the respondent. It ordered the appellants to refund the deposit, together with interest and costs of suit. The appellants then noted an appeal against that order.

Held: in terms of s 19 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), no lessor shall, in respect of commercial premises let or to be let by him, require or permit the lessee or prospective lessee of the premises to pay, in consideration of the grant, continuation or renewal of the lease concerned, any bonus, premium or other like sum in addition to the rent, or any amount for negotiating the lease. Section s 21 of the Regulations makes it clear that anyone who receives payment in circumstances similar to those of this case cannot retain that payment. A breach of s 19 is an offence in terms of s 32. The clear intention of the legislature was to prohibit the tendency on the part of some landlords to take advantage of desperate tenants seeking to rent accommodation by demanding, over and above the amounts that a landlord may lawfully demand from a lessee, such as rent and a security deposit, other amounts that are not permissible in terms of the Regulations. It is impermissible, and a breach of the law, for a landlord to demand payment of "a commitment fee", or "goodwill", or "a lease consideration fee" or any other fee, by whatever name, which amounts to a bonus or premium or a consideration for negotiating the lease. This provision has been part of our law for a long time.

It must be noted that a security or good tenancy deposit does not constitute a prohibited payment in terms of s 19. This is clearly recognised in s 20 of the Regulations, which provides that only such deposit must be refunded to the lessor within 14 days of the termination of the lease in question.

Legal practitioner – conduct and ethics – calling on judicial officer in connection with contested matter – obligation to notify other parties and invite them to attend – such obligation extending to calling on judicial officer for practitioner to introduce himself – renunciation of agency – requirement to give reasonable notice – payment of wasted costs if unreasonably short notice given – practitioner absenting himself from postponed proceedings – need to obtain leave of court

Deputy Sheriff, Harare v *Maketshemu & Ors* HH-491-13 (Zhou J) (Judgment delivered 5 December 2013)

The need for the legal profession to reclaim and assert its position as a profession which was matched only by consecrated priesthood requires continuing introspection and thorough training on ethical standards. It is a cardinal rule of ethics that whenever a legal practitioner wants to see a judge or other judicial officer in chambers in connection with a contested matter he is ethically obliged to notify the other parties to the litigation or their legal representatives and invite them to attend together with him to see the judicial officer. It is improper for a legal practitioner or a party involved in a contested matter to see a judicial officer in chambers in connection with that matter in the absence of the other parties to the matter unless those other parties have elected not to attend after being duly informed. This practice extends even to cases where a legal practitioner in a contested case intends to pay a courtesy call upon the judicial officer for the purpose of introducing himself.

A legal practitioner may for good cause renounce agency by giving reasonable notice to his client, the registrar and all other parties to the proceedings. Late notice, or no notice, resulting in postponement of the case, could result in the legal practitioner concerned paying the wasted costs personally.

Similarly, it is inexcusable for a legal practitioner who has had a matter stood down to just absent himself from the postponed proceedings without the leave of the court. Such conduct could result in an order that he should not recover his fees as he failed to properly represent the clients.

Legal practitioner – conduct and ethics – duty – establishing identity of party – need to ensure that party presenting himself to the practitioner identities himself satisfactorily

Vela v *Magolis* HH-429-13 (Mawadze J) (Judgment delivered 14 November 2013)

The applicant sought to have a decree of divorce set aside on the grounds of fraud. The divorce had been granted, purportedly by consent, after the respondent and another woman, who gave out that she was the applicant, approached a legal practitioner together. A consent paper was drawn up and signed by the imposter and the respondent. The legal practitioner did not ask for proof of identity of the parties when they came to see him.

Held: (1) the proceedings would be set aside, being a nullity *ab initio*.

(2) In view of the apparent increase in the number of cases of fraud of this nature in divorce proceedings, the registrar of the High Court would be directed to bring the judgment to the attention of the Secretary of the Law Society of Zimbabwe so that legal practitioners would be alerted to the prevalence of this obnoxious practice which threatens to erode confidence in our judicial system in unopposed divorce matters.

Legal practitioner – conduct and ethics – duty to client – allegation of possible breach of law by magistrate and prosecuting authorities – practitioner informing Attorney-General of allegations – no impropriety in so doing

Mutanda v *A-G & Anor* S-55-13 (Malaba DCJ, Garwe & Gowora JJA concurring) (Judgment delivered 5 December 2013)

The appellant and the second respondent were arrested on allegations of fraud and theft, the complainant being their employer. They were placed on remand and granted bail on condition, *inter alia*, that they would not go back to their place of employment. The appellant later went to his place of work. The State considered that to be a breach of his bail conditions and that led to an application being made for the reversal of the relaxed bail conditions.

A hearing commenced before a magistrate to determine whether the appellant had breached his bail conditions. The investigating officer was called to testify but proceedings were stopped before he was cross examined. The appellant was at the time represented by a legal practitioner, who made an application for refusal of further remand. The decision of that application was reserved. Before the hearing resumed, the appellant withdrew his instructions from his first legal practitioner and engaged another, who wrote to the Attorney-General to say that the allegations made against the appellant on the request for remand form were contrary to the evidence on hand. She alleged that the appellant was therefore wrongly placed on remand on the basis of false information. While aware of the fact that an application had already been made for refusal of further remand and that a decision was pending on the matter, she suggested to the prosecutor that the appellant be removed from remand. She was also aware of the fact that evidence on the statement of bail had not been completed as the investigating officer was still to be cross examined. She concluded her letter to the Attorney-General by saying that her client had received information that

"…a ruling may already have been prepared in anticipation of the next hearing date, wherein the application for refusal of further remand shall be dismissed and our client found guilty of breaching bail conditions [and] being sentenced to one year in custody with six months being suspended on the usual conditions …"

She said that in that event she would bring proceedings against all parties concerned for violation of her client's rights, miscarriage of justice, abuse of office, and damages.

When the hearing resumed before the magistrate, the prosecutor brought to the attention of the magistrate the allegations made in the letter. He said that the letter amounted to contempt of court and criminal defamation, as well as being abusive, mischievous and malicious. The matter was postponed, and when it resumed the magistrate announced his decision to recuse himself from the proceedings, because the allegations made in the letter to the Attorney-General by the appellant through his legal practitioners were serious and that whatever decision he made would not be accepted by either party as being impartial. He forwarded the record of proceedings to the High Court with a request that it be placed before a judge for quashing of proceedings so that fresh proceedings could commence before another magistrate.

When the referral came to the notice of the appellant's legal practitioner, she filed an application in the High Court for review of the same proceedings on the ground that there was no real and substantial justice. In the application, she alleged that the appellant had been placed on remand on false information. The High Court dismissed the application. In so doing, the judge *a quo* said that the legal practitioner had used abrasive, coarse, intemperate language unbecoming of a legal practitioner both in her *viva voce* submissions in court and written communications to the Attorney General's Office. He said that her conduct was unethical and an abuse of process. He directed that a copy of the judgment be served on the Attorney-General, the Judicial Services Commission and Secretary of the Law Society.

It was against this direction that the appellant appealed.

Held: (1) the letter was originally not intended for public consumption was not intended for the magistrate to know. It expressed fear by the legal practitioner on behalf of her client, of something he said he had been told by people he met. The letter also showed that investigations of the truthfulness of the allegation made by the appellant had to be made. Having come across information like that, it is difficult to say that the legal practitioner ought not to have brought this information to the attention of the Attorney General. The Attorney General represents public interests and is entrusted with the responsibility of having matters of breach of law investigated. The magistrate himself appreciated the seriousness of the allegations and did not take them against the legal practitioner. The magistrate gave the legal practitioner the opportunity to put forward her version of what happened to him.

(2) Lawyers should represent their clients, competently, diligently, promptly and without any conflict to their duty to court. There was nothing in the record to support the accusation of the legal practitioner being combative and hostile. She had a duty to her client and the only forum to address her client's concerns was to approach the Attorney General's Office as she rightfully did. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and take whatever lawful and ethical measures may be required to vindicate a client's cause. The appellant's legal practitioner could not to be faulted for the course of action she took. If due consideration is given to her conduct before the court when the first respondent's representative drew the court's attention to the letter in question, there was nothing to indicate she compromised her duty to the court as a court official.

Legal practitioner – conduct and ethics – duty to client and court – making outrageous claims for damages (*plus petitio*) – irresponsibility of such claims

Mnangagwa v *Alpha Media Hldgs (Pvt) Ltd & Anor* HH-225-13 (Mathonsi J) (Judgment delivered 25 July 2013)

See above, under DELICT (Defamation)

Legal practitioner – conduct and ethics – duty to court – preparation of case – request for postponement – practitioner must be prepared to proceed in event of refusal of request for postponement

Midkwe Minerals (Pvt) Ltd v *Kwekwe Consol Gold Mines (Pvt) Ltd & Ors* S-54-13 (Ziyambi JA, Chidyausiku CJ & Mutema |AJA concurring) (Judgment delivered 2 September 2013)

See below, under PRACTICE AND PROCEDURE (Postponement – grant of).

Legal practitioner – conduct and ethics – Prosecutor-General – duties of

S v *Bredenkamp* HH-305-13 (Chatukuta J) (Judgment delivered 12 September 2013)

See above, under CONSTITUTIONAL LAW (Prosecutor-General).

Legal practitioner – conduct and ethics – State counsel in criminal matter – duty to withdraw charge when evidence shows charge not sustainable

S v *Bredenkamp* HH-305-13 (Chatukuta J) (Judgment delivered 12 September 2013)

See above, under CONSTITUTIONAL LAW (Prosecutor-General).

Legal practitioner – fees – claim for – fees not agreed in advance – client entitled to challenge fee – impropriety of suing for fees when bill has not been taxed and where fee not agreed in advance

Katsande v *Welthunger Hilfe & Anor* HH-396-13 (Mathonsi J) (Judgment delivered 6 November 2013)

See above, under CONTRACT (Formation).

Legal practitioner – practice – requirement for three years' practical training before being entitled to practise on own account – person proposing to practise as an advocate – not exempt from requirement for appropriate training – "pupillage" arrangement effectively allowing newly qualified practitioner to practise on his own account not lawful

Sibanda & Anor v *Ochieng & Ors* S-46-13 (Ziyambi JA, Garwe & Patel JJA concurring) (Judgment delivered 1 October 2013)

The appellants were legal practitioners who were registered in terms of the Legal Practitioners Act [*Chapter 27:07*]. Shortly after their registration, the appellants applied to Advocates Chambers and were admitted as "pupils". The appellants had not, at the time of their admission to chambers, completed the mandatory 36 months' employment in the service of a legal practitioner of four years standing, required b s 4 of the Legal Practitioners Regulations 1999. They were instructed to, and did, obtain practising certificates from the Law Society and started. They were told they would be pupils under the supervision of the senior members of Chambers and that all work which they returned to their instructing legal practitioners must be signed by their respective pupil masters.
The agreement between the appellants and the thirteenth respondent was contrary to s 4 of the Legal Practitioners Regulations 1999. By joining Advocates Chambers they were able to practise freely on their own account. They were granted practising certificates as "advocates" by the fifteenth respondent ("the Law Society"), accepted briefs in their own names, charged their own fees and were not accountable for their whereabouts to anyone save that their work was supervised by their "masters". In their new position as "pupil advocates" they were able to avoid the restrictions imposed on them by s 4 of the Regulations. The advocates' association became aware of the illegality and in an attempt to redress the matter revised the terms of the appellants' "pupillage" in an endeavour to bring their arrangement within the confines of the Regulations. Under the revised terms, the appellants could no longer be called "advocates" and their practising certificates would not describe them as advocates; they could not accept briefs or charge fees in their own names; they could not appear in the superior courts in the absence of their masters; their practising certificates would bear an endorsement that the pupils could only accept instructions under the supervision of their masters; the pupillage would be for 36 months and the pupils were to account to their masters for their whereabouts. The appellants objected to these new terms and sought an order to enable them to continue with the arrangements under which they had joined chambers. The application was refused, and the appellants appealed.
Held: The provisions of s 4 of the Regulations were mandatory. The appellants could not lawfully practise as legal practitioners on their own account except in compliance therewith. They would therefore have had to have been employed by legal practitioners of a minimum of four years' standing for a period of three years before they could practise on their own account. The fact that they accepted briefs in their own names, charged their own fees and accounted to no one for their time, was evidence that they were practising as principals on their own account. The letter of admission from Advocates Chambers could not legalise their unlawful conduct. The court *a quo* was therefore correct both in its assessment of the law and in its refusal to grant the order sought.

Judgment of Mtshiya J in *Sibanda & Anor* v *Ochieng & Ors* HH-382-12 (judgment delivered 3 October 2012) upheld.

Motor vehicle – negligent driving – driving a vehicle without requisite licence and having an accident – presumption created that manner of driving resulted from lack of requisite skill and experience

Ndava v *Takaruwa & Anor* S-56-13 (Malaba DCJ, Ziyambi & Gowora JJA concurring) (Judgment delivered 5 December 2013)

See above, under DELICT (Negligence).

Police – duties – duty to maintain law and order – duty to allow lawful activities to take place and to protect persons exercising their rights

ZCTU v *OC ZRP Harare Central & Ors* HH-297-13 (Mathonsi J) (Judgment delivered 18 September 2013)

See below, under STATUTES (Public Order and Security Act [*Chapter 11:17*]).

Practice and procedure – *Anton Piller* order – what is – notice to other side not required – need for party against whom order is directed nevertheless to be cited – order not competent unless specific respondent cited – order not binding on party not cited

Stanbic Nominees (Pvt) Ltd & Anor v *Remo Invstm Brokers (Pvt) Ltd* HH-354-13 (Mtshiya J) (Judgment delivered 16 October 2013)

The respondent obtained a loan from a company known as Interfin and pledged its shares as security. The respondent repaid the loan in full and then demanded the return from Interfin of its shares and certificates. The shares and certificates were not returned. The respondent then filed an urgent *ex parte* application for an Anton Pillar order. A provisional order granted. The Deputy Sheriff was then instructed to execute the order against those holding the shares and certificates. An attempt to execute on the applicants failed because the applicants argued that the order was not binding on them since they were not cited in the *ex parte* urgent application. They sought a declaratory order to that effect. They argued that they were not obliged to obey an order in which they were not cited. All they wanted was for the court to make a determination on whether or not the order granted to the respondent was binding on them when they were not cited as parties in the matter. Since the order was one *ad factum praestandum* (that is, an order to do, abstain from doing a particular act or deliver a thing), it would was imperative, in order for them to be bound by the orders obtained and sought to be enforced against them, that they be cited therein.
Held: An *Anton Piller* order is a modern legal remedy, devised to cater for modern problems in the prosecution of civil actions. The procedure allows a party to make an *ex parte* application, without notice to the other side, for the attachment and removal of documents or other evidence. An applicant for an *Anton Piller* order must *prima facie* establish: (a) that he has a cause of action against the respondent which he intends to pursue; (b) that the respondent has in his possession specific and specified documents or things which constitute vital evidence in substantiation of the applicant's cause of action, but in respect of which the applicant cannot claim a real or personal right; and (c) that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial or to the stage of discovery. The order should be directed to a specific respondent, to whom notice is being denied until the search is effected. That is what brings about a need for the court to proceed with caution and impose safeguards to protect the rights of the party against whom the relief is sought. Such a party (respondent) must be known and it can only be known through citation as a party to the proceeding(s). The respondent *in casu,* as contained in its founding affidavit, knew who it wanted to proceed against but decided to bring into the body of the order the "parties to be searched". The respondent knew that the premises belonged to the applicants. It could not be denied that the effect(s) of the order had an adverse impact on the applicants' rights and interests (i.e. present and future). Accordingly, execution against them when they were not parties to the matter had no place in our law. This was not an academic exercise on the applicants' part. They had a right to have the legal position pronounced in terms of the declaratory order they sought.

Practice and procedure – application – interlocutory application – point *in limine* being raised – duty of court to consider such application before determining merits of matter

Heywood Invstms (Pvt) Ltd v *Zakeyo* S-32-13 (Gowora JA, Malaba DCJ & Garwe JA concurring) (Judgment delivered 9 July 2013)

See above, under EMPLOYMENT (Labour Court – application to).

Practice and procedure – application – notice of motion – dispute of fact – genuine dispute – approach court may take – when relief may be granted in spite of existence of dispute of fact

Musevenzo v *Beji & Anor* HH-268-13 (Mafusire J) (Judgment delivered 4 September 2013)

In motion proceedings, a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one, always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact. Where there is a

genuine dispute of fact on the papers the court can proceed in one of several ways: (a) it can take a robust view of the facts and resolve the dispute on the papers; (b) it can permit or require any person to give oral evidence in terms of r 229B of the High Court Rules if it is in the interests of justice to hear such evidence; (c) it can refer the matter to trial, with the application standing as the summons or the papers already filed of record standing as pleadings; or (d) it can dismiss the application altogether, if the applicant should have realised the dispute when launching the application.
Even where real disputes of facts emerge, relief can be granted if the facts stated by the applicant, together with the admitted facts in the respondent's affidavit, justify such an order.

Practice and procedure – bar – automatic bar for failure to enter appearance to defend – upliftment of – application – what applicant must show – must give reasonable explanation for default and show that he has a *bona fide* defence on the merits – wilful default – what constitutes

William Bain & Co Hldgs (Pvt) Ltd v *Chikwanda* HH-290-13 (Mafusire J) (Judgment delivered 11 September 2013)

An application for the uplifting of the automatic bar in default of appearance to defend is made in terms of r 84 of the High Court Rules 1971. The rule does not set out any guidelines or parameters on how the judge's or court's discretion might be exercised. However, an applicant for the removal of the bar has to show good and sufficient grounds for the bar to be uplifted. Not only must there be a reasonable explanation for the default, but also the applicant must show that he has a *bona fide* defence on the merits. What constitutes wilful default and a *bona fide* defence depends on the merits of each case. Wilful default can be said to occur when a party freely takes a decision to refrain from appearing with full knowledge of the service or set down of the matter. It is akin to a waiver by the party of his rights. In practice, wilful default is seldom clear-cut. In most cases, it is a question of the degree of negligence by the defaulting party that the court is called upon to weigh and to determine whether or not that negligence amounts to wilful default. In coming to a conclusion, there is a certain weighing of the balance between the extent of the negligence and the merits of the defence.

Practice and procedure – court roll – removal of matters from – different ways in which matter may be removed from roll – nomenclature clarified

Practice Directive 3 of 2013 (Chidyausiku CJ) (Issued 29 November 2013)

In this practice direction, the Chief Justice clarifies the different ways in which matters may be removed from the court roll and the correct name to be attached to each method.
The term "struck off the roll" is used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place. Where a matter has been struck off the roll for failure by a party to abide by the rules of court, the party will have 30 days within which to rectify the defect, failing which the matter will be deemed to have been abandoned. However, a judge may, on application and good cause shown, reinstate the matter on such terms as he thinks fit.
The term "postponed *sine die*" is used where a matter is adjourned indefinitely without the court specifying the date when the matter shall be heard again. The term "removed from the roll" has the same meaning. Where a court either postpones a matter *sine die* or removes it from the roll, the court must direct what a party must do and the time frames by which the directive must be complied with. If no directive is given, or if a matter is not set down within three months of the postponement or removal, the matter will be rerated as having been abandoned.

Practice and procedure – exception – purpose of – what excipient must show – request for further particulars – not essential before excepting – permissible first to write letter to other party stating nature of complaint regarding pleadings

CMED (Pvt) Ltd v First Oil Co & Ors HH-495-13 (Tsanga J) (Judgment delivered 18 December 2013)

The third defendant was joined as one of the co-defendants in a matter in the plaintiff was claiming damages arising out of the non-delivery of fuel that was due to it from the first defendant. The plaintiff cited the third defendant jointly and severally as one of those obliged to deliver the fuel or to pay up on the basis of a letter that the third defendant wrote. In that letter it stated that it was holding the relevant amount of fuel on behalf of the

second defendant, which fuel had been reserved for the first defendant. The summons did not indicate whether the claim against the third defendant was in contract or in delict or how the third defendant was implicated.
The third defendant's legal practitioners wrote to the plaintiff's legal representatives, saying that the summons did not disclose a cause of action. They replied briefly, saying that the summons did disclose a cause of action. They did not amend the summons or provide any further particulars. The third defendant then excepted to the summons as being vague and embarrassing. The plaintiff argued that for an exception to be upheld the excipient must show that it has been prejudiced by the defect and that no other remedy was available. Further particulars should have been sought. The exception was meant to vex the plaintiff.
Held: (1) in terms of r 140(1) of the High Court Rules 1971, a defendant, before excepting to a pleading, may state by letter to the other party the nature of his complaint and call upon the other party to amend his pleading so as to remove his cause of complaint. The letter written by the third defendant's practitioners clearly complied with this provision. It is not necessary to request further particulars before an exception may be filed.
(2) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so series as to merit the costs even of an exception. An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed. Here, the summons and declaration disclosed no cause of action against the third defendant. It was genuinely difficult to unearth the cause of action from the summons and declarations against the excipient. Even when one looked at the new averments in the opposition papers, the link between the non-delivery of the fuel and any action in delict or otherwise on the third defendant's part was difficult to make. The exception would be upheld.

Practice and procedure – exception – when a pleading may be excipiable – pleading only excipiable if no evidence can disclose a cause of action – exception in defamation case – test of whether matter defamatory

Mnangagwa v *Alpha Media Hldgs (Pvt) Ltd & Anor* HH-225-13 (Mathonsi J) (Judgment delivered 25 July 2013)

See above, under DELICT (Defamation)

Practice and procedure – exception – when pleading may be excipiable so as to lead to dismissal of action – impropriety of seeking dismissal of action when proper remedy is for plaintiff to amend pleadings

Matewa v *ZETDC* HH-304-13 (Mathonsi J) (Judgment delivered 25 September 2013)

The defendant excepted to the plaintiff's summons on the grounds that it did not disclose a cause of action, as it did not specify whether the claim arose from a contractual obligation or a delictual one. It argued that the averment in the summons that the defendant's actions were wrongful and unlawful was not enough to found a cause of action and that in order to succeed in a suit for patrimonial loss under the Aquilian action the plaintiff must plead and prove that the defendant committed a wrongful act which resulted in actual loss.
Held: (1) The determination of whether a claim is excipiable or not cannot be premised on proof of an averment. Proof relates to evidence which is the province of a trial and not an exception. The essence of any claim is located in the pleadings, whose function is to inform the parties of the points of issue between them, to enable them to know in advance what case they have to meet, to assist the court define the limits of the action and to place the issues on record. To that extent pleadings are required to be drawn in summary form, must be brief and concise and must state only relevant facts and not evidence. It is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in the whole or in part. If there is not, then it must see if there is any embarrassment, which is real and cannot be met by the supply of particulars. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed. A pleading is excipiable on the ground that it does not disclose a cause of action only if no possible evidence led on the pleading can disclose such cause of action.
(2) The courts are increasingly being called upon to adjudicate over exceptions which are devoid of merit and appear intended to delay proceedings. Invariably excipients are approaching the court, frequently praying for a dismissal of claims, as *in casu*, when the proper remedy would be for the plaintiff to be directed to amend the impugned pleading. Where an exception of this nature is upheld, the plaintiff should be allowed to amend the pleading.

Practice and procedure – execution – attachment – judgment debtor's immovables – entitlement of judgment creditor to attach immovables – no distinction between secured and unsecured creditor – sheriff not entitled to attach immovables unless satisfied that judgment debtor has no or insufficient movable property to satisfy debt

Govere v *Ordeco (Pvt) Ltd & Anor* S-25-14 (Patel JA, Ziyambi & Hlatshwayo JJA concurring) (Judgment delivered 23 September 2013)

See above, under COMPANY (Director).

Practice and procedure – execution – attachment – monies deposited in escrow account – not capable of attachment – funds not property of account holder – only right, title or interest capable of attachment

Deputy Sheriff, Harare v *Metbank Zimbabwe & Anor* HH-230-13 (Chigumba J) (Judgment delivered 24 July 2013)

An escrow account, being a trust account, is different from normal and ordinary bank accounts. The escrow agent, the bank, is bound by the stipulated terms of the escrow agreement, and cannot invoke normal banking laws or practices to override or nullify the escrow agreement. The money held in trust by the escrow agent may be released only in accordance with the strict procedures agreed by the parties. In the absence of written instructions to the escrow agent on how or when to release the money from the parties, the escrow monies can validly be released in accordance with an order of a competent court.
The attachment of escrow monies by the deputy sheriff is invalid because money in an account held by a bank is incapable of attachment, being fungible. Even if the judgment debtors have an account with the escrow agent, only their right, title or interest in that account is capable at law of attachment in execution, but not the actual funds.

Practice and procedure – execution – sale – advertisement of sale – date of advertisement – date in relation to date of sale – no minimum period stipulated in Rules – need for sale to be properly advertised – purpose of advertisement – requirement to describe property adequately – failure to mention important features of property -- advertisement inadequate – sale set aside

Chikwavira v *The Sheriff & Anor* HH-357-13 (Dube J) (Judgment delivered 16 October 2013)

The applicant sought to have the sale in execution of his dwelling house set aside. His grounds were that the sale was improperly conducted and that the property was sold for an unreasonably low price. With regard to the first ground, he argued that the dates on which the property was advertised were too close to the date of the sale, resulting in many people who would have been prospective purchasers failing to come to inspect the property and thus did not take part in the auction. The only person that inspected the property and subsequently bought it was the second respondent, who was the only bidder. He further argued that the property was inadequately and misleadingly described in the advertisement. Among other things, the number of bedrooms was understated; a second five-bedroom house on the property was described simply as a "cottage"; there was no mention of the fact that there were two boreholes and two water tanks in the property; and there was no mention of a large fowl run.
Held: (1) The courts will not lightly set aside a judicial sale which has been confirmed as this may discourage people from participating in judicial sales. The onus rests on the applicant to show that the sale was improperly conducted or that the property was sold at an unreasonably low price or any other ground.
(2) Rule 352 of the High Court Rules places a duty on the Sheriff to advertise the property at least once in the *Gazette* and once in a newspaper circulating in the district in which the property is situated. The sale was advertised on three separate occasions over a period of about 10 days. The rule does not specify when the advertisements must be made in relation to the sale date. It places a duty on the Sheriff to advertise only once. That was done.
(3) It is implicit from r 352 that the sale must be properly advertised. An advertisement which inadequately describes the property is no advertisement at all. It will fail to comply with the Sheriff's mandatory obligation. The purpose of properly describing the property is not merely to identify it. It is also to inform the public of what which is being sold, with the aim of attracting the interest of potential purchasers to the auction, for it is in the interests of the judgment debtor, and probably in the interests of creditors, that the property to be sold should obtain as high a price as possible. In this case, a number of relevant features of the property were omitted. The size and improvements on a property have a bearing on the value of the property. In these days of erratic water

supplies, it is important to inform interested parties of the existence of supplementary sources and substitute water supplies in the form of boreholes. The existence of two boreholes on a property is likely to generate more interest in the property than where there is one borehole. The objective of informing the public of what was being sold with a view to attracting the interest of potential purchasers to the auction was not achieved. The provisions of r 352 are mandatory; a failure by the sheriff to describe the property adequately or properly invalidates the sale. The sale should therefore be set aside.
(4) It was, accordingly, unnecessary to decide whether the price realised was unreasonably low.

Practice and procedure – interdict – "anti-dissipation" interdict – nature and purpose of interdict – requirements for grant of – same as any other interim interdict – reasons to grant interdict – what must be shown

Northern Farming (Pvt) Ltd v *Vegra Merchants (Pvt) Ltd & Anor* HH-328-13 (Mafusire J) (Judgment delivered 3 October 2013)

The applicant had sold maize to the first respondent on a credit term arrangement. The first respondent had failed to pay in full, having paid about one third of what was due. The credit term facility had an arbitration clause. At the time of the hearing the arbitration proceedings had just been initiated. The applicant alleged that the first respondent was disposing of the maize to third parties and receiving payment but was refusing or failing to pay it. The second respondent was one of the third parties. It admitted owing money to the first respondent in terms of their own contractual arrangements. The applicant sought what it termed an anti-dissipation interdict to restrain the first respondent from disposing of the maize held for it by another company pending the determination of its claim by the arbitrator. The applicant said it feared that if the first respondent was not so restrained any award in its favour by the arbitrator would be a *brutum fulmen* because there would be nothing left to levy execution on, given that the first respondent was indigent.
Held: (1) An anti-dissipation interdict is just an ordinary interdict to restrain the disposal of assets. The name of the interdict and its essential content have been the subject of some debate. It has been variously called a *Mareva*-type interdict (after the term used in English law), an interdict *in securitatem debiti* and an anti-dissipation interdict. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. In some cases, the interdict is not sought to prevent the respondent from dissipating his assets, but rather from preserving them so well that the applicant cannot get his hands on them.
The normal grounds for the grant of an interim interdict must be shown.
The purpose of such an interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim, because justice may require such restriction in cases where the respondent is shown to be acting *mala fide* with the intention of preventing execution in respect of the applicant's claim, even though there would not normally be any justification to compel a respondent to regulate his *bona fide* expenditure so as to retain funds in his patrimony for the payment of claims. The purpose of the interdict is not to be a substitute for the claim but to reinforce it – to render it more effective. And the question whether the claim is a satisfactory remedy in the absence of an interdict would normally answer itself.
In an application for this type of interdict, one of the major considerations is whether the respondent would still have sufficient property to satisfy any judgment that may eventually be given against him and whether the respondent's continued disposal of his assets is deliberately intended to frustrate any such judgment.
In this case, the evidence was that, in the face of a demand for payment, and in the face of its claim having been submitted for arbitration, the respondent was still disposing of the maize but without remitting anything to the applicant. Not only was arbitration not a remedy to what the applicant feared, but also that there existed no other *satisfactory* remedy, the first respondent having no source other than the maize from which to satisfy its contractual obligations to the applicant.
(2) Although arbitration proceedings had been instituted, it was permissible, in terms of article 9 of the First Schedule to the Arbitration Act [*Chapter 7:15*], for the applicant to seek an interim measure of protection from the High Court where the arbitral tribunal has not yet been appointed and the matter is urgent. Such measures include an order for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute, an interdict or other interim remedy and any other order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual.

Practice and procedure – interdict – interim interdict – interdict having effect of final interdict – such interdict not permissible

Econet Wireless (Pvt) Ltd v *Trustco Mobile (Pty) Ltd & Anor* S-43-13 (Garwe JA, Malaba DCJ and Ziyambi JA concurring) (Judgment delivered 26 September 2013)

Generally, a court should not grant interim relief which is similar to or has the same effect as the final relief prayed for. Interim relief should be confined to interim measures necessary to protect any rights that stand to be confirmed or discharged, as the case may be, on the return date. The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case, because interim relief is normally granted on the mere showing of a *prima facie* case. Whilst no hard and fast rule can be laid down, there may well be cases where a court would be justified in holding, in such a situation, that the application is not urgent and that it should be dealt with as an ordinary court application. There may also be cases where the court itself, as it is empowered to do, may amend the relief sought in order to make it clear that what is granted is interim protection, whilst the final order sought would be the subject of argument on the return date.

Practice and procedure – interrogatories – when may be granted – defendant not answering claim in his plea and refusing to furnish any useful particulars when requested – plaintiff's entitlement to information to enable him to prepare adequately for trial

Mahlangu v *Dowa & Ors* HH-359-13 (Mathonsi J) (Judgment delivered 23 October 2013)

The plaintiff was a senior legal practitioner and a partner at a leading law firm. He has sued the first two defendant, who were police officers, the third defendant who was the Commissioner-General of the ZRP, the fourth defendant, who was the Attorney General and the Co-Ministers of Home Affairs for damages and compensation, plus interest and costs. He had been consulted in his capacity as a legal practitioner by a person who sought is professional legal advice. In pursuance of that, he had addressed a letter to the Attorney-General, in which he advised him that not only had his client not been validly subpoenaed as a prosecution witness in a trial which was pending but also that his client was not going to render any evidence relevant to the prosecution case in that trial. The Attorney-General instructed the Commissioner-General to arrest and detain the plaintiff on a charge of interference with the administration of justice. The plaintiff was then arrested by the first defendant, acting on the orders of the second, third and fourth defendants, without a warrant of arrest and detained for over 24 hours. The arrest without warrant was wrongful, unlawful and contrary to s 13 of the 1980 Constitution of Zimbabwe, because the first defendant did not hold a reasonable suspicion that an offence had been committed but merely acted on the unlawful orders of the second defendant, who acted on unlawful orders of the third defendant, who had in turn acted on the unlawful instructions or orders of the fourth defendant. None of the defendants exercised the discretion required by law or exercised it improperly and in so doing they acted in breach of the law and maliciously.

The Attorney-General pleaded to the summons. The plaintiff requested particulars from the Attorney-General to enable him to prepare for trial, probably because of the Attorney-General's failure to say anything useful in his plea. In that request the plaintiff put specific and direct questions, which did not yield any useful outcome. He then brought an application in terms of r 191 of the High Court Rules, seeking leave to administer interrogatories. He argued that the particulars he had requested could not be left for cross examination at the trial, as alleged by the Attorney-General, as he was entitled to them in preparation for trial. He maintained that the interrogatories were relevant to the matters in issue between the parties. The Attorney-General maintained that the interrogatories were not necessary and that the procedure of interrogatories had fallen into disuse.

Held: To say that the procedure for interrogatories had fallen into disuse, when it remained in the rules, could not be taken seriously. While r 191 is seldom employed – mainly because litigants usually find it easier to proceed in terms of r 143 and request discovery, thereby making it unnecessary to employ the procedure provided for in r 191 – here, the plaintiff had first proceeded under r 143 route but came away empty handed because the Attorney-General did not co-operate.

The relief sought by way of interrogatories is discretionary in nature, but that does not detract from the fact that a party to an action has a right to interrogate his opponent on matters which are relevant to an issue in which such party bears the onus of proof. The remedy provided for in r 191 has no counterpart in South African procedure, coming as it does from English law. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue. Interrogatories are admissible, not only for the purpose of supporting the applicant's case, but also for the purpose of impeaching or destroying his opponent's case.

The basic difference between interrogatories and commissions *de bene esse* is that, while in the latter case general evidence is required, in the former certain specific questions are formulated for the purpose of being put to the witness by the commissioner.
A litigant is entitled to information from his adversary which will enable him to adequately prepare for trial and should not be put in the position of preparing for trial in the dark. The issue of what informed the decision of the Attorney-General to act as he did in giving directions to the Commissioner-General terms of s 76(4a) of the 1980 Constitution, what he told the Commissioner-General, and whether the latter reported back to him and the contents of such report, were legitimate subjects for interrogation. Other than to say that he requested the Commissioner General to investigate and report to him, the Attorney-General's plea did not set out any facts that could be used to resolve the matter between the parties. It purposely avoided delving into the facts of the matter and left the plaintiff extremely embarrassed as to the evidence he had to meet at the trial.
The authorities make it clear that pretty nearly anything that is material to the issue between the parties may be asked and that interrogatories are admissible for supporting the plaintiff's case and also for impeaching or destroying his opponent's case. A very senior legal practitioner was arrested while discharging his duties. The details of what prompted that arrest were fair targets of interrogation in preparing for trial.

Practice and procedure – judgment – rescission – judgment granted in absence of affected party – different methods of seeking rescission – distinction between such methods – rescission of default judgment – strict time limits and requirement to show good and sufficient cause for rescission – judgment granted in error – nature of error which may allow rescission – no specific time limits – court's common law powers to rescind judgment

Mushoto v *Mudimu & Anor* HH-443-13 (Chigumba J) (Judgment delivered 27 November 2013)

There are three separate ways in which a judgment in default of one party may be set aside. This can be done in terms of r 63 of the High Court Rules, or r 449(1)(a), or in terms of the common law. An applicant is at liberty to elect to use whichever one of those three vehicles best suits the circumstances of the case. Whichever one he chooses, the court will have to consider the question of length of time that will have elapsed since the judgment sought to be rescinded was granted.
To qualify for relief under r 63, a litigant must show that:
- Judgment was given in the absence of the applicant under these rules or any other law;
- The application for rescission was filed and set down for hearing within one calendar month of the date when the applicant acquired knowledge of the judgment;
- Condonation of late filing has been sought and obtained where applicant fails to apply for rescission within one month of the date of knowledge of the judgment.
- There is "good and sufficient cause" for the granting of the order.

"Good and sufficient cause" has been construed to mean that the applicant must (a) give a reasonable and acceptable explanation for his default; (b) prove that the application for rescission is *bona fide* and not made with the intention of merely delaying plaintiff's claim; and (c) show that he has a *bona fide* defence to the plaintiff's claim.
To qualify for relief under r 449(1) (a) a litigant must show that:
- the judgment was erroneously sought or erroneously granted;
- the judgment was granted in the absence of the applicant or one of the parties; and
- the applicant's rights or interests were affected by the judgment.

In order to qualify for relief in terms of the High Court's common law power to rescind its own judgments a litigant must show that:
- the court' discretion that it is being asked to exercise is broader than the requirements of both rules 449 and 63; and
- whether, having regard to all the circumstances of the case, including the applicant's explanation for the default, it is a proper case for the grant of the indulgence.

The question is, what sort of error will suffice to bring an applicant squarely within the ambit of r 449(1)(a)? Is it an error of fact, an error of law, or both? An "error" in common and ordinary parlance, is defined as a mistake, fault, blunder, slip, slip-up, inaccuracy or miscalculation. The law is settled on the issue of if or when and whether the court ought to grant rescission of its own judgments in terms of rule 449. A party against whom default judgment had been granted is entitled to place before the correcting, varying or rescinding court facts which had not been before the court granting the default judgment. It is not necessary for a party seeking relief under r 449 to show "good cause". If a court holds that the default judgment was erroneously granted, it may be corrected, rescinded or varied without further enquiry. Rule 449 is one of the exceptions to the general principle that once a court has pronounced a final judgment or order it is *functus officio* and has itself no authority to

correct, alter or supplement it. Mistakes of fact are not precluded, although the mistakes must not be trivial or petty clerical ones. The mistake must have been made on the part of the party seeking the judgment in default, or of the judge who grants it, and the applicant ought to show that he was prejudiced as a result, or that there was a miscarriage of justice. In other words, despite having a good defence on the merits, judgment was given against him in error, as a result of such mistake. Any fact which was not brought to the attention of the court at the time judgment in default was given may be placed before the court dealing with an application to rescind judgment in terms of r 449.

It would be a proper exercise of the court's discretion to rule that, even if the applicant proved that the rule applied, the application could not be heard after the lapse of a reasonable time.

Rule 63 has strict time limits which must be adhered to and a litigant who falls foul of the time limits will not be heard unless condonation is first sought and obtained. The phrase "good and sufficient cause" is seemingly wide ranging and all encompassing. The explanation for the default must be reasonable and/or acceptable. The applicant must show that he has a *bona fide* defence to the claim.

On the other hand, the court's common law discretion to rescind its own judgments is wide and requires that regard be had to all the circumstances of the case, including the explanation for, and the length of the delay in bringing the application, and the prospects of success of the applicant in the main matter. Rule 63 is more in tandem with the court's common law discretion to rescind its own judgments. This is because, when regard is had to the wording of r 63, that "A party against whom judgment has been given in default, whether under these rules or under any other law", it becomes clear that r 63 recognizes the possibility that judgments may be rescinded under other laws which may not necessarily fall under the rules, such as the common law discretion that the court has to rescind its own judgments.

Practice and procedure – order of court – by consent – variation of – need for parties to apply to court for variation – not competent for parties to novate court order

Godza v *Sibanda & Anor* HH-254-13 (Uchena J) (Judgment delivered 15 August 2013)

Novation is an agreement between a creditor and a debtor in relation to an existing obligation, whereby the old debt between them is extinguished and a new obligation is created in the place of the old one. The parties in such an agreement are the creditor and the debtor. However, where the old agreement has been incorporated into a court order the parties cannot novate it. A court order has the same effect as a court's judgment even if it was granted by consent. The parties must apply for an amendment to or variation of the court order if they want to depart from its terms.

Practice and procedure – parties – citation – company – company carrying on business under trade name other than its registered name – may be sued in name in which it carries on business

Sheriff of Zimbabwe v *Mackintosh & Ors* HH-330-13 (Mathonsi J) (Judgment delivered 9 October 2013)

See above, under COMPANY (Legal proceedings).

Practice and procedure – parties – joinder – principles – joinder of third party – avoidance of multiplicity of actions dealing with same subject-matter and involving same evidence

Barclays Bank of Zimbabwe Ltd v *RBZ & Anor* HH-477-13 (Zhou J) (Judgment delivered 29 October 2013)

The second respondent, the University of Zimbabwe, held a foreign currency account with the applicant, a commercial bank. In 2007 the first respondent issued a directive ordering the applicant, together with other authorised dealers to, *inter alia*, lodge with and transfer to the first respondent all their corporate foreign currency accounts and non-governmental organisations balances by close of business on 2 October 2007. In compliance with that directive the applicant transferred to the first respondent the money held by it in the second respondent's account. In 2012 the second respondent issued summons against the applicant for payment of the money which was held in its account. Having entered appearance to defend the claim, the applicant applied in terms of r 93 of the High Court Rules 1971 for the joinder of the first respondent as a third party. The applicant contended that it was entitled to be indemnified by the first respondent for the amount being claimed by the second respondent. It argued that the question or issue of its liability to the second respondent was substantially the same question or issue to be determined as between the applicant and the first and second respondents.

The first respondent objected *in limine* to its citation on the ground that it should have been given notice of 60 days as required by s 6 of the State Liabilities Act [*Chapter 8:14*], as read with s 63B of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]. Section 6(1) of the State Liabilities Act requires such notice when a claim is instituted for money or for the delivery or release of any goods. It was also argued from the bar that the claim against the first respondent had prescribed. The applicant argued that this application was not such a claim, but that in any event the court could condone the non-compliance with the notice period.
Held: (1) the application for the joinder of the first respondent was not a claim for money and fell outside the ambit of s 6(1)(a). The fact that the applicant claimed an entitlement to contribution or indemnity does not transform the application for joinder into the claim for money. The averment that the applicant was entitled to contribution or indemnity was necessary to sustain the application for joinder.
(2) This would be an appropriate case for condonation. The first respondent would suffer no prejudice by not being given 60 days' notice of the application for joinder, which had been filed nine months earlier. The first respondent had ample time before being served with the pleadings in the main action to undertake any investigations regarding the factual background to the proposed claim against it. It would be aware of the institutions from whose accounts balances were transferred to it pursuant to its directives. This was not a claim that arose from the conduct of a single official or employee in some remote part of the country; it arose from the first respondent's directives.
(3) The defence of prescription was not sustainable. What triggers an application for the joinder of a third party is the service of summons against a defendant (the applicant *in casu*). The application can only be made after the applicant has entered appearance to defend the claim instituted against it. From the time that the summons in the main case was served and the applicant entered appearance to defend, a period of three years had not passed when the application for joinder was instituted. Thus the claim for joinder has not prescribed.
(4) The object of the third party procedure is to avoid multiplicity of actions dealing with substantially the same subject matter and largely involving the same evidence. The inconvenience of requiring the parties to prove the same facts over again is obviated, thereby saving time and mitigating the parties' expenses. The court has a discretion as to whether or not to order joinder. It will generally order joinder of a third party if a *prima facie* case is shown, unless the joining of the third party will embarrass the plaintiff or there are special circumstances militating against such joinder.
(5) Joinder would therefore be ordered.

Practice and procedure – parties – joinder – principles – joinder of third party – need for party to have direct and substantial interest in issues involved and in order which court may make – indirect interest insufficient

Mugano v *Fintrac & Ors* HH-394-13 (Tsanga J) (Judgment delivered 25 October 2013)

The applicant sought joinder of the first respondent, a registered trust called Fintrac, in a matter in which the applicant was being sued by the second respondent for a debt arising out of inputs received from it in the form of seed potato, fertilisers and chemicals. The applicant was one of a group of 234 farmers in Nyanga who received these inputs from the second respondent. The grounds for seeking joinder were (a) that the matter in which he was being sued could not be resolved without hearing the evidence of the first respondent, which, he alleged, initiated the relationship of all the parties involved in this matter. He claimed that the inputs were in fact received through the first respondent. His argument was that, at all material times, the farmers engaged with the first respondent through two of their employees; (b) the surety document that the applicant was alleged to have signed bore the signatures of the first respondent's two employees as witnesses. The matter could thus not be heard without hearing their evidence as to when and where they witnessed his signature.
The first respondent objected to the joinder on the basis that it had no direct and substantial interest in the matter, neither did it have a legal interest. It conceded that it indeed approached farmers in Nyanga, but said its role was strictly limited to offering assistance with technical support and identification of formal market linkages for their produce. This was in line with its organisational mandate.
Held: the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder or ensure that there is a waiver of the right to be joined, are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved, and the order which the court may make. Such an interest is one in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.
NGOs and charitable trusts such as the first respondent have come to play various types of developmental roles in their work with rural communities. The facts alleged by applicant could be said to exemplify difficulties that arise when such developmental initiatives and projects are seen by the recipient communities as being initiated, influenced and driven by outsiders, albeit with them as beneficiaries. There appeared to have been some

misunderstanding, at least on the part of the applicant and possibly the rest of the other farmers, regarding the transactional and negotiating roles and ultimate responsibility for risks. Although the first respondent conceded that it played a facilitative role, as communicator and facilitator, it shouldered some responsibility for poor communication flows regarding the implications of its initiative. However, the facilitative role of the first respondent could not be said to amount to a legal interest in the matter, nor to having a direct and substantial interest in the contract that was subsequently entered into by the farmers with the second and third respondents in a manner that would require its joinder. There is a need to distinguish between the type of legal interest that is required under the law to justify joinder and the type of mutual interest on the part of the applicant, the rest of the farmers, and the first respondent that stems from each of their activities. The kind of interest involved here is symbiotic in nature, as opposed to being one stemming from a contractual relationship, joint ownership or legal partnership of those involved. The joinder sought by the applicant was premised on a contractual agreement to which the first respondent was not an actual party. The effect of joinder would be to bind the first respondent to the outcome of the litigation. Any pronouncement by the court in the main matter would have no bearing in the first respondent, as the first respondent was not party to the contract.

Practice and procedure – postponement – grant of – in discretion of court – parties must be prepared to proceed in event of refusal of postponement

Midkwe Minerals (Pvt) Ltd v *Kwekwe Consol Gold Mines (Pvt) Ltd & Ors* S-54-13 (Ziyambi JA, Chidyausiku CJ & Mutema |AJA concurring) (Judgment delivered 2 September 2013)

The grant or otherwise of a postponement is in the discretion of the court. A party seeking the grant of a postponement or other indulgence at the hearing must come prepared for a grant or refusal of its request. A legal practitioner must be prepared, in the event of a refusal by the court to grant a postponement, to proceed with the hearing if so ordered. To appear before the court totally unprepared and totally ignorant of the merits of the case smacks of negligence on the part of the legal practitioner.

Practice and procedure – prescription – under State Liabilities Act [*Chapter 8:14*] – sixty day period – applicability – only applicable to claims for money or for delivery of goods – not applicable to claim for joinder – court's discretion to condone non-compliance with sixty day period – when discretion may be exercised

Barclays Bank of Zimbabwe Ltd v *RBZ & Anor* HH-477-13 (Zhou J) (Judgment delivered 29 October 2013)

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

Practice and procedure – process – service – on whom process must be served – claim for order affecting liberty of respondent – must be served on respondent personally

Mutyambizi v *Goncalves & Anor* HH-345-13 (Dube J) (Judgment delivered 9 October 2013)

In terms of r 39(1) of the High Court Rules 1971, process in relation to a claim for an order affecting the liberty of a person must be served by delivery of a copy thereof to that person personally. An application to commit the respondent to prison for contempt of court would be an instance of such an application. Imprisonment is a harsh form of punishment and deprives a person of his liberty and is therefore a grave consequence the respondent may have to endure. It is imperative, in contempt of court applications where the remedy sought is likely to result in imprisonment, that process is served personally. The fact that there is a proviso in the order sought that enables the court to suspend the imposition of a custodial sentence does not take away the requirement for personal service. Service on .the respondent's legal practitioner is not sufficient.

Practice and procedure – provisional sentence – distinction between provisional sentence and summary judgment procedure – what plaintiff must show – defendant's right to defend action

Interfin Banking Corp Ltd (in liq) v *Veanarcy (Pvt) Ltd* HH-388-13 (Mafusire J) (Judgment delivered 1 November 2013)

In terms of r 20 of the High Court Rules 1971, the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, may cause a summons to be issued claiming provisional sentence on the document. A "liquid" document is one which evidences by its own terms, without the need for extrinsic evidence, an unconditional acknowledgement of indebtedness in an ascertained sum of money the payment of which is due. In order to escape provisional sentence on a liquid document, the defendant must satisfy the court on a balance of probabilities that it is unlikely that the plaintiff will succeed in the principal case. Under r 21, a summons for provisional sentence shall *inter alia* call upon the defendant to satisfy the plaintiff's claim, or, in default, to appear before the court to show cause why he has not done so, and to acknowledge or deny the signature to the said liquid documents or the validity of the claim.

The provisional sentence procedure is designed to afford summary relief to a plaintiff whose claim is clear and based on a liquid document. The procedure provides a process whereby a creditor who has sufficient documentary proof with a speedy remedy for the recovery of money due without having to go through the expensive, cumbersome and often dilatory process of an illiquid action. A creditor who has a liquid document is able to obtain an enforceable provisional judgment speedily without having to wait for the final determination of the dispute between the parties. A judgment granted in terms of this procedure is founded upon the presumption of indebtedness evidenced by the document which is truly liquid without requiring assistance of extrinsic evidence.

Unlike the summary judgment procedure, also an extraordinary remedy the judgment of which is final unless appealed against, a provisional sentence, even though executable before trial, remains provisional. The defendant against whom a provisional sentence is granted can still have his day in court, if he so wishes. He may cause an appearance to be entered with the registrar to defend the action, and must notify the plaintiff of such entry. If he fails to do so within the stipulated time (one month), the provisional sentence immediately thereafter becomes a final judgment (r 28). The provisional sentence may also become a final judgment in terms of r 29 where the defendant appears in court and acknowledges the claim, or files with the registrar in advance an acknowledgement of the claim over his signature which is witnessed by his attorney or verified by affidavit. Where the defendant enters appearance to defend the action, the summons stands as the plaintiff's declaration, and the defendant must file his plea within ten days after the entry of appearance. Thereafter the matter proceeds as an ordinary action.

The efficacy of the procedure would be compromised if the summary nature of the proceedings were to be transformed into a fully-fledged opposed motion matter by canvassing in much detail the merits of the claim and the merits of the defence. This does not mean that in every situation where a plaintiff produces a liquid document and claims provisional sentence on it, the court cannot go behind that document. In appropriate situations it can. And the onus remains on the plaintiff. In discharging the *onus* the plaintiff might derive assistance from various factors. Thus, if the defendant does not deny his signature or the cause of action alleged in the summons, that *prima facie* entitles the plaintiff to provisional sentence.

Practice and procedure – provisional sentence – when may be refused – plaintiff likely to succeed in main case – issue of quantum not a valid defence to claim for provisional sentence

African Export-Import Bank v *RioZim Ltd* HH-464-13 (Chigumba J) (Judgment delivered 4 December 2013)

See above, under BILLS OF EXCHANGE AND NEGOTIABLE INSTRUMENTS (Promissory note).

Practice and procedure – rescission – judgment granted in error – nature of error justifying setting aside of judgment – evidence – when court confined to error appearing on record – when other evidence may be considered

Munyimi v *Tauro* S-41-13 (Garwe JA, Chidyausiku CJ & Omerjee AJA concurring) (Judgment delivered 26 September 2013)

It is a general principle of our law that once a final order is made, correctly reflecting the true intention of the court, that order cannot be altered by that court. Rule 449 of the High Court Rules 1971 is an exception to that principle and allows a court to revisit a decision it has previously made but only in a restricted sense. Where a court is empowered to revisit its previous decision, it is not, generally speaking, confined to the record of the proceedings in deciding whether a judgment was erroneously granted. The specific reference in r 449 to a judgment or order granted "in the absence of any party affected thereby" envisages a situation where such a party may be able to place facts before the latter court, which facts would not have been before the court that granted the order in the first place. Once a court holds that a judgment or order was erroneously granted in the

absence of a party affected, it may correct, rescind or vary such judgment or order without further inquiry. There is no requirement that an applicant seeking relief under r 449 must show "good cause".
A distinction should be drawn between a case where a court *mero motu* decides to rescind or vary an order and one where such an order is sought on the basis of an application. In the former case, or where an oral application is made from the bar, the error should appear on the record. In the latter, where a written application is made by a party whose rights are affected by an order granted in its absence, the court would have before it not only the record of the proceedings but also facts set out in the affidavits filed of record. Such facts cannot simply be ignored and it is not irregular to adopt such a procedure in seeking rescission. In fact, it might be necessary to do so in cases where no error could be picked up *ex facie* the record itself.
As to what constitutes an "error", such an error would exist where the judge was unaware of facts which, if he had been aware of them, would have made it highly unlikely that he would have found it permissible or competent to make an order against a party. Examples include (a) a default judgment being granted against an applicant who had filed an appearance to defend court but which appearance had not been brought to the attention of the judge; and (b) a false return of service being filed by the Deputy Sheriff indicating that service had been effected personally, when in fact no such service had been effected.

Practice and procedure – process – service – proof of – return of service *prima facie* evidence of matters stated therein – return of service challenged – need for deputy sheriff to assist court to determine truthfulness of return

Croco Properties (Pvt) Ltd v *Swift Debt Collectors (Pvt) Ltd* HH-220-13 (Mathonsi J) (Judgment delivered 24 July 2013)

In an application for rescission of a default judgment, the applicant averred that it was not in wilful default because it had not been served with the summons initiating the action and so had no knowledge of the claim. According to the deputy sheriff's return of service, the summons was served on a named receptionist who accepted service on behalf of the applicant at the latter's place of business. Apart from the affidavit of a director of the applicant that the company had no employee by the name mentioned in the return, an affidavit from the company's receptionist was submitted. She stated that she was at the reception desk on the date of alleged service but was never served with the summons or any court process. In answer, an affidavit from the assistant deputy sheriff repeated, almost word for word, the impugned return of service.
Held: While in terms of s 20(3) of the High Court of Zimbabwe Act [*Chapter 7*:*06*], the deputy sheriff's return of service is *prima facie* evidence of the matters stated therein, once the return has been challenged, the deputy sheriff must do more than just refer to the return. He must assist the court to determine the truthfulness of the return of service. His explanation was unhelpful as it merely repeated what was in the return of service. After the return of service was impugned, the erstwhile assistant needed to do more than that. For instance, more details of the location of the applicant's address, the appearance of the reception where the summons was served and a description of the recipient would have enhanced his credibility. Rescission would therefore be granted.

Practice and procedure – provisional sentence – claim opposed – set-down of opposed matter – should not be set down on unopposed roll where plaintiff becomes aware, before hearing date given in summons, that claim is opposed

Al Shams Global BVI Ltd v *Equity Properties (Pvt) Ltd* HH-237-13 (Zhou J) (Judgment delivered 29 July 2013)

A summons for provisional sentence is issued where a plaintiff is the holder of a valid acknowledgment in writing of a debt or a liquid document. The summons may be in one or the other of two forms, Form No. 4 or Form No.5. It must call upon the defendant to satisfy the plaintiff's claim, or in default to appear before the court at the hour and on the day and at the place stated in the summons to show why he has not done so, and to acknowledge or deny the signature to the said liquid document or the validity of the claim. Rule 25(1) of the High Court Rules provides that the defendant *may* file a notice of opposition and supporting affidavit prior to the date stated in the summons; the provision is not couched in peremptory terms. It therefore means that the defendant has a choice as to whether or not to file a notice of opposition and opposing affidavit. Rule 25(2) provides that Order 32 shall apply, *mutatis mutandis*, to the service of a notice of opposition and the filing and service of answering or further affidavits which may be filed by the parties subsequent to the filing of the opposing affidavit. Where a notice of opposition is filed, this does not mean that the matter will wait to be placed on the opposed roll, although the filing of further affidavits after the opposing affidavit are to be in terms of the provisions of Order 32.

It has previously been held that the practice of the High Court is to determine provisional sentence matters on the date appearing on the face of the summons. Issues of convenience to the court, which is essentially sitting as an unopposed court, can effectively be overcome by the presiding judge standing the matter down to the end of the roll for counsel to make their submission to court. However, r 223(1)(a) provides for the setting down of uncontested cases for provisional sentence on the roll for unopposed matters. There is no provision in the rules for contested cases for provisional sentence to be set down on the same roll. The setting down of contested cases for provisional sentence on the "unopposed" roll is, therefore, not in accordance with the provisions of the Rules. It is not always apparent that the matter is to be opposed, because Forms No. 4 and 5 make no provision for the *dies induciae* within which the defendant must file a notice of opposition and opposing affidavits, other than that it should be before the date of the hearing inserted in the summons. The three courses of action available to the defendant are (a) to satisfy the claim; or (b) to file opposing affidavits; or (c) to appear in court on the date stated in the summons to admit or deny the claim. Where a defendant chooses to appear in court on the date of the hearing to deny liability, it is only then that the court becomes aware that the matter is contested. But if the plaintiff becomes aware before the date of hearing that the matter is opposed, he should not set it down on the unopposed roll.

Property and real rights – possession – elements – direct and indirect possession – distinction – agent holding property for limited purpose – not a possessor

Property and real rights – spoliation order – requirements – who is entitled to – agent of possessor – not entitled to remedy on his own behalf – indirect possessor entitled to remedy – defences – possessor's possession illegal – not a defence – gives no right to spoliator to take possession

Mutanga v *Mutanga* HH-247-13 (Dube J) (Judgment delivered 24 July 2013)

The parties were, at the time of the events giving rise to this matter, married, but separated pending divorce. The applicant (the husband) retained possession of a Botswana-registered car, which he kept at his house, while the respondent retained another car. The applicant sent his girlfriend in the car to a shopping centre, where she encountered the respondent, who forcibly deprived her of the car. The application brought spoliation proceedings for the return of the car.

The respondent argued that the court did not have the right applicant before it: the applicant was not in physical possession of the vehicle when it was recovered but that of his girlfriend, who should be the applicant. She submitted that the law of spoliation protects physical possession only. It was also argued that the applicant had "dirty hands" and should not be entertained by the court, in that he allowed his girlfriend to drive the car in contravention of the conditions of the temporary import permit (TIP). These stated that the vehicle should not be used by residents of Zimbabwe and should be kept at the respondent's address. It was argued that the applicant had also contravened the law by failing to renew the TIP, thereby depriving fiscus of revenue. The girlfriend's possession was tainted with illegality and could not be peaceful and undisturbed possession.

Held: (1) A party seeking to rely on the *mandament van spolie* must prove (a) that he was in peaceful and undisturbed possession of the property; and (b) that he was forcibly, or by stealth, wrongfully deprived without his consent or without a lawful order. With regard to possession, two elements are involved: a physical element (*corpus*) and a mental element (*animus*), the intention to exercise control for one's own purpose or benefit. The physical possession may be exercised either personally or by a representative. In the latter event, physical control of a thing need not be exercised personally but may be exercised indirectly by a representative or a servant of a possessor. All that is required to be established is that the possessor should have the intention of deriving some benefit from the object in issue. Both the direct and indirect possessors should in principle be entitled to the *mandament*. The direct possessor should have the first opportunity of instituting the *mandament*, but if he is unwilling to or unable to institute the *mandament*, the vicarious possessor should be entitled to avail himself of the *mandament.*

(2) An agent who holds the property for a limited purpose and has no interest in the property which he holds for his principal, or who derives no benefit from holding it, is not entitled to claim the relief of a *mandament van spolie,* which is a remedy available to a possessor; it does not extend to a mere *detentor.* A *detentor* who does not have the intention to hold the thing in question for his own benefit and not for another is indeed merely a *detentor.* He is merely a custodian and the possessor is the person on his behalf he is holding the property. The girlfriend's use of the vehicle was temporary and was limited to the purpose for which she was given the car. She intended to hold the vehicle, not for herself, but for the applicant and was a custodian and a mere *detentor* who had no right to a spoliation order. The applicant was the indirect possessor and entitled to a spoliation order.

(3) The defence that the possessor's possession was illegal does not suffice as a defence in spoliation claims. No matter how unlawful a person's possession may be, his possession may not be interfered with except through due process of law.

Property and real rights – spoliation – application for *mandament van spolie* – must satisfy requirements for matter to be heard on urgent basis – counter-application – not permissible – onus on applicant – must prove entitlement to order – *prima facie* right only established – courses open to court

Dreamoss Invstms (Pvt) Ltd v *National Housing Delivery Trust & Anor* HH-490-13 (Zhou J) (Judgment delivered 11 December 2013)

Notwithstanding the urgent nature by which a *mandament van spolie* must be dealt with, an applicant is nevertheless enjoined to prove that the circumstances of his case require the urgent intervention of the court. The *mandament van spolie* is a unique and summary procedure by which a dispute must be resolved expeditiously in order to prevent self-help. In other words, if an applicant seeks a spoliation order on an urgent basis he must satisfy the requirements for the matter to be heard on an urgent basis.
The difficulty of instituting an application for a spoliation order as an ordinary court application or by way of summons is that the applicant might be confronted with a counter-application or a counterclaim for the *rei vindicatio* which would negate the whole purpose of the *mandament,* which was designed to restore the *status quo ante* before the equities or merits of the case are considered. In order to deal with a situation of a counter-application the approach of the court is to invoke the principle *spoliatus ante omnia restituendus est* – the person who has been despoiled must first be restored to his former position before the merits of the case can be considered. By application of this principle the court will not countenance a counter-application in an application for the *mandament*. An applicant who seeks a *mandament van spolie* on an urgent basis must show that he acted with due expedition and did not wait until the day of reckoning came. A spoliation order is a final order. Before it is granted the respondent must be allowed to state his case. The applicant, on the other hand, must, just as in other civil cases, prove on a balance of probabilities that he is entitled to the order for the return of property. Where the applicant's right is only *prima facie* established, the appropriate interim order should not be the return of the property (because that is a final order), but an interim interdict restraining the respondent from alienating the thing or some such similar relief, coupled with an order for the respondent to show cause, if any, why he must not be ordered to restore possession at a future date. The rationale for such an approach is that a respondent should not be allowed to obtain a final order on the basis of *prima facie* proof.

Property and real rights – vindicatory action – defences – claim of right – when arises – contract giving owner option as to whether to sell item to possessor – legitimate expectation – no claim of right created thereby

CFI Hldgs Ltd v *Nyahora* HH-231-13 (Chigumba J) (Judgment delivered 24 July 2013)

See above, under EMPLOYMENT (Labour Court – jurisdiction).

Revenue and public finance – Reserve Bank – duties and powers – directive by Reserve Bank to commercial banks to transfer funds to itself – such directive unlawful

RBZ v *ZRA* S-44-13 (Malaba DCJ, Ziyambi JA & Omerjee AJA concurring) (Judgment delivered 20 September 2013)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 1980 – Consolidated Revenue Fund).

Statutes – Public Order and Security Act [*Chapter 11:17*] – regulation of public gatherings – notification to police of intended public gathering – exemption from requirement to notify police – registered trade union – gathering for *bona fide* trade union purposes – such gathering not required to be notified

ZCTU v *OC ZRP Harare Central & Ors* HH-297-13 (Mathonsi J) (Judgment delivered 18 September 2013)

The applicant was a registered conglomeration of trade unions, engaged in the furtherance of its members' interests. In the normal conduct of its trade union activities, the applicant wrote a letter to the first respondent, the regulating authority for Harare Central in terms of the Public Order and Security Act [*Chapter 11:17*] notifying him of its intended commemoration activities due a month after the date of the letter. They consisted of the clean-up of a particular bus stop area, followed by a march through the city via a specified route to the applicant's offices. About 150 people were expected to take part in the march.

The first respondent's initial reaction was to note the contents of the applicant's letter, and ask it to confine the events to the venues and times outlined and to co-operate with the police and government agencies. He said that the police would monitor the event. About two weeks later, however, he wrote to the applicant, saying that the "permission" that had been granted had been withdrawn for "security reasons". He claimed that "the political situation [was] not yet conducive for such events" and that "intelligence at hand" indicated that there were some people who were waiting to hijack any march or procession.

The applicant sought an order declaring that there was lawful basis to purport to deny authority for the holding of a procession planned by the applicant for any of its activities and perpetually interdicting the second respondent (the Commissioner-General of Police) from interfering, prohibiting or banning processions and gatherings held by the applicant. The applicant argued that, as a registered trade union, it did not require the authority of the first respondent to hold the procession which was for *bona fide* trade union purposes and as such was exempted from the provisions of the Act requiring notice to be given to the police. For that reason, the applicant should be protected from the first respondent's interference in the conduct of its trade union business.

The first respondent stated that he has received intelligence (which he did not elaborate on) that there were some unscrupulous elements waiting to hijack the situation and that, as the march would be conducted across greater Harare by a huge crowd, this would compromise security and disturb business and traffic.

Held: Regarding the disturbance of business and traffic, this claim could not be taken seriously, because it was the duty of the police to manage the situation. The first respondent also appeared to be labouring under the misunderstanding that he had power and authority to grant "permission" to the applicant for the holding of a procession. The applicant was a genuine and registered trade union. The procession was for *bona fide* trade union business in the interest of its members and or affiliates. For that reason, it enjoyed an exemption from the provisions of the Act relating to notification being given to the regulating authority. Clearly, therefore, the first respondent could not withdraw permission, which he did not have authority to give in the first place. It is the constitutional duty of the police to maintain law and order as the citizens of this country go about the enjoyment of their rights, including the rights of trade unions to engage in commemorations and processions which further their interests. The police should therefore protect the applicant's members as they go about their activities, as opposed to preventing and curtailing the enjoyment of their rights.