Latest update: 19 July 2014 (2nd edition)

CASES DECIDED JANUARY – JUNE 2014

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

Administrative law – Administrative Justice Act [*Chapter 10:28*] – applicability – contract between individual and the State – contract providing that State could cancel contract for reasons set out in the contract – not necessary to apply rules of administrative justice if State intends to exercise right to cancel

Chaeruka v *Min of Lands & Anor* HH-75-14 (Mathonsi J) (Judgment delivered 26 February 2014)

See below, under LAND (Acquisition – offer letter).

Appeal – court's powers on appeal – relief sought on appeal different from relief sought in lower court – lower court having power to grant relief sought – appeal court having no jurisdiction to entertain or determine matter

Magodora & Ors v *Care Intl Zimbabwe* S-24-14 (Patel JA, Malaba DCJ & Guvava JA concurring) (Judgment delivered 25 March 2014)

See below, under EMPLOYMENT (Contract – termination – fixed term contract).

Appeal – criminal matter – appeal from magistrates court – appeal by Attorney-General against decision to discharge accused at close of prosecution case – such appeal requiring leave of judge of the High Court – judge refusing leave – no appeal lying to Supreme Court against judge's refusal

A-G v *Muchadehama & Anor* S-23-14 (Malaba DCJ, in chambers) (Judgment delivered 20 March 2014)

The respondents had been charged in the magistrates court with contempt of court. They had been discharged at the end of the prosecution case, the magistrate finding that the respondents could not be found by a reasonable court to have had the intention to impair the dignity, reputation or authority of the judge towards whom they were alleged to have shown contempt and that there was no evidence that the respondents committed the offence charged or any offence of which they might be convicted thereon and returned a verdict of not guilty. Eight months after the magistrate's decision was given, the applicant applied to the High Court, in terms of s 198(4)(b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*], for leave to appeal against the magistrate's decision to discharge the respondents. The section gives the Attorney General a conditional right to appeal to the High Court, if he is dissatisfied with a decision of a magistrate finding an accused not guilty of an offence charged at the close of the case for the prosecution. He must first obtain leave to appeal from a judge of that court. Leave may be granted or refused. The effect of the restriction is that a right of appeal is not available, unless leave to appeal is granted. A judge of the High Court refused leave to appeal, on the ground that there were no prospects of success on appeal. Eleven months after the decision by the judge, the Attorney General made what he called an application for condonation and extension of time within which to appeal against the decision of the judge. He argued that the jurisdiction for entertaining the application was to be found under r 19(1) of the Supreme Court Rules 1964. The respondents argued that the rule applied to cases in which the High Court would have exercised jurisdiction and a right to appeal to the Supreme Court lay with leave of a judge of that court or if refused, with leave of a judge of the Supreme Court.
Held: (1) Rule 19(1) falls under Part IV of the Rules, r 16 of which provides that that Part applies to "criminal appeals from the High Court". Rule 19(1) is limited to the application for leave to appeal in respect of appeals from decisions of the High Court in criminal matters, where that court would have been exercising its own jurisdiction. The right to appeal in respect to which leave must be applied for, is given to the person convicted of a criminal offence by the High Court. Refusal of leave to appeal *to* the High Court cannot be said to be a decision in a criminal matter before the High Court. The refusal of leave has the effect of preventing the proceeding coming into existence in the High Court.
(2) Giving a right to appeal from a decision of a judge of the High Court refusing leave to appeal to that court from a decision of a magistrates court made in terms of s 198(3) would defeat the whole object of giving a judge of the High Court the power to decide on the merits whether to grant or refuse leave to appeal to that court. When a right to appeal is given, subject to the condition that leave to appeal be granted, the intention of the

legislature is that some tribunal must have the power to decide whether the right to appeal should be given or not. The object is to protect the process of the appellate court from frivolous and unnecessary appeals by means of an exercise of a screening power. A right to appeal may be given by statute or conditionally as a result of a grant of leave to appeal. Where the granting of leave is the chosen method of acquiring a right to appeal unless leave is granted, the right does not arise. Under s 198(4)(b), the legislature gave the power to consent to or refuse the right to appeal against a decision of the magistrates court under s 198(3) to a judge of the High Court. No other tribunal has that power. The matter was entrusted and intended to be entrusted to his discretion. It is for the judge of the High Court alone to look at the merits of the application for leave to appeal to that court and decide in the proper exercise of his discretion to grant or refuse leave to appeal. The clear intention of the legislature, which the Supreme Court must respect, is that the decision of a judge of the High Court refusing leave to appeal to that court in the exercise of jurisdiction must be final. No enactment provides for an appeal against a decision of a tribunal entrusted with the power to grant or refuse leave to appeal.
(3) It is a principle in our legal system that no right of appeal lies to an ultimate court of appeal against a decision of an intermediate court of appeal refusing leave to appeal to it in the exercise of its jurisdiction on the merits. The object of giving the tribunal power to grant or refuse leave to appeal is to enable it to control what it should hear and *ipso facto* prevent frivolous and unnecessary appeals that would taint the process of the intermediate appellate court. That object would be defeated if the Supreme Court would also enter the question of whether, on the merits, the case was fit for appeal to the intermediate appellate court. The intention is that there should be one decision to grant or refuse leave in respect of one right of appeal. If a refusal to give leave to appeal is appealable, so too must be the granting of leave, which would result in absurdity.
(4) The application would be struck off the roll.

Appeal – interim relief pending appeal – relief sought not relating to a matter to be determined in the appeal – not competent to grant relief in respect of such an issue

Chidawu & Ors v *Shah & Ors* S-10-14 (Chidyausiku CJ, in chambers) (Decision given 2 December 2011; reasons for decision published 19 February 2014, at request of respondents)

The first applicant had entered into a loan agreement with the first respondent. Under that agreement, the first applicant surrendered certain shares to the first respondent in negotiable form. The first applicant was unable to repay the loan by due date. The first respondent called up the loan and threatened to liquidate the security in his possession by selling the shares. In due course, the shares were sold, in spite of abortive attempts by the first applicant to obtain an interdict to prevent the sale. The shares had not been transferred by the time of the present application.
An urgent High Court application by the first applicant was dismissed on the grounds that the supporting papers were fatally defective. An appeal was noted against that ruling, the grounds of appeal being, in essence, that the judge had erred in holding that the certificate of urgency was defective. The relief sought was that the matter be determined by the High Court on the merits.
In the application to the Supreme Court, the first applicant sought an order setting the matter down on an urgent basis and interdicting the fifth respondent (the stockbroker) from transferring the shares.
Held: the relief sought was incompetent. The pending appeal was concerned with procedural issues. The transfer of the shares was not an issue that fell for determination in the appeal. The notice of appeal related entirely to the issue of whether the court *a quo* should have heard the matter on an urgent basis or not. The court *a quo* did not make a determination on the transfer of the shares, in which case there could be no appeal against a non-existent determination. It would be nonsensical to grant an interdict pending the determination of an issue which the Supreme Court was not going to determine, namely the transfer of the shares.

Editor's note: the Supreme Court's judgment was given in *Chidawu & Ors* v *Shah & Ors* S-12-13 (judgment dated 18 March 2013). The matter was determined on the issue of the validity of a certificate of urgency.

Appeal – leave – application for – should be dealt with summarily – court not required to hear oral argument from both sides, nor to give reasoned judgment

Alagonia Farming (Pvt) Ltd & Ors v *Northern Tobacco (Pvt Ltd & Ors* HH-72-14 (Hungwe J) (Judgment delivered 19 February 2014)

The applicant sought to have an order granting leave to appeal set aside on the grounds that leave had been granted without the judge having given the other side an opportunity to be heard, either orally or through written submissions.
Held: By their very nature applications for leave to appeal ought to be dealt with summarily. It is a procedure by which all superior courts world-wide regulate their case-flow. To require the court to listen to argument and give reasoned judgments in applications for leave to appeal which have no substance, or even to give reasoned judgments in such matters without hearing oral argument, would defeat the purpose of the requirement that "leave" be obtained. Such matters can and should be disposed of summarily. Courts of appeal in many democratic countries have a procedure for applications for leave to appeal. It is not customary for reasons to be furnished for the refusal of leave. In countries such as the United States of America and Canada, one of the reasons for requiring leave to appeal is to enable their courts of final instance to control their dockets. In those jurisdictions, leave may be refused even where there are prospects of success on appeal. This rule of practice also prevails in our jurisdiction. Reliance on a breach of s 69(1) of the Constitution would be misplaced.
In any event, the court was *functus officio*. The Supreme Court was now seized with the matter.

Appeal – leave – when required – interlocutory order – rationale for requiring leave to appeal against such order – distinction between such orders and ruling which are not appealable

Sikona Farm (Pvt) Ltd & Anor v *Carey Farm (Pvt) Ltd & Anor* HH-139-14 (Chigumba J) (Judgment delivered 24 March 2014)

An interlocutory order is one granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such an order may be either purely interlocutory or an interlocutory order having final or definitive effect. In an application for leave to appeal such against an interlocutory order, the court must consider the distinction between "rulings" (such as one of the admissibility of evidence or on which party should begin) and simple interlocutory orders, and consider the rationale behind the restriction of the right of appeal. History shows that it has generally been thought advisable to limit appeals in certain respects. A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. Apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics. Desirable as it would be to ensure that all such orders are properly made, it has been widely felt, in different ages and countries, that a line between appealable and non-appealable orders of this preparatory or procedural character ought to be drawn somewhere, for if they were all appealable, the delay and expense might be excessive, while if none of them were, the injustice resulting from wrong orders might be intolerable.

Arbitration – award – registration of – appeal pending – award may nonetheless be registered – remedies open to party seeking to avoid execution of award

Giya v *Ribi Tiger Trading* HH-57-14 (Chigumba J) (Judgment delivered 19 February 2014)

An appeal to the Labour Court against the merits of the decision of an arbitrator does not suspend the operation of the decision appealed against: s 92E of the Labour Act [*Chapter 28:01*]. However, there is a medley of interlocutory remedies that can be employed pending determination of an appeal. The Labour Court, may, pending the determination of the appeal, make interim orders that meet the justice of the case. Stay of execution pending appeal and suspension of the arbitral award are but some of the interim remedies that may be sought before the Labour Court pending determination of an appeal.
It would also be open to the respondent argue that the registration of the arbitral award was contrary to public policy because the making of the award was induced or effected by fraud or corruption or there was a breach in the rules of natural justice in the making of the award: article 36(3) of the Schedule to the Arbitration Act [*Chapter 7:15*].

Arbitration – award – registration of – appeal pending in respect of part of award – applicant entitled to have rest of award registered

Mvududu v *ZBH* HH-122-14 (Makoni J) (Judgment delivered 12 March 2014)

The applicant was employed by the respondent. A dispute between them had been referred to arbitration, and the arbitrator found in the applicant's favour. She appealed against part of the award relating to quantification of the benefits payable, but sought to register the part of the award which related to salary, against which she was not appealing. The respondent argued that she could not do this, as it would amount to approbation and reprobation, as well as being a breach of the "once and for all" rule..
Held: The applicant had not appealed against that part of the award relating to salary, nor had the respondent cross-appealed against it. The amount awarded by the arbitrator therefore stood and was therefore not subject to the universal common law that an appeal suspends the decision appealed against. The principle of the "once and for all" rule that the respondent sought to rely on in countering the applicant's argument did not apply in this situation. The rationale behind the rule is to prevent a multiplicity of actions based on a single cause of action and to ensure that there is an end to litigation. Here, there was a quantified and certified award which the respondent had not appealed against, neither had it settled it. There was no cogent reason why it should not be registered.

Arbitration – award – setting aside of – grounds – award in conflict with public policy – what must be shown – effect of award in wage negotiation case would be to drive employer into insolvency – such an award in conflict with public policy

Zimbabwe Posts (Pvt) Ltd v *Communication & Allied Svcs Workers' Union* HH-60-14 (Mutema J) (Judgment delivered 19 February 2014)

The applicant was the employer of members of the respondent union. The parties engaged each other in negotiating wage and salary adjustments. The negotiations yielded no positive results and a deadlock was declared. The parties then agreed to submit the dispute for arbitration. A senior legal practitioner was appointed as arbitrator. After hearing submissions, he made an award in which a modest increment was granted to the employees. He did so in spite of also finding that the applicant was operating at a loss and would continue to do so even in the foreseeable future. He agreed that applicant had no ability to pay as it was in a precarious financial position and that any adjustment would simply contribute to the already existing deficit and funding gap.
The applicant sought to have the award set aside on the grounds that it was contrary to the public policy of Zimbabwe. It argued that the arbitrator, despite his findings about the applicant's financial position, made an award which was certain to drive the applicant into insolvency. Such an award would be contrary to public policy.
Held: Article 34(5)(a) and (b) of the Model Law (set out in the Schedule to the Arbitration Act) spells out two instances when an award is in conflict with the public policy of Zimbabwe, but also makes it clear that the two instances are not exhaustive. The determination of other instances as falling under the category of being contrary to the public policy of Zimbabwe is a question of value judgment, for the words "public policy" are a wide and vague concept. Examples from decided cases included situations where the substantive effect of the award, after a consideration of the merits of the dispute endorsed immorality or crime and where there has been a violation of fundamental principles of the forum state's legal order, hurting intolerably the feeling of justice.
The approach to be adopted is to construe the public policy defence restrictively in order to preserve and recognize the basic objective of finality in all arbitrations. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The substantive effect of the arbitral award upon the applicant – never mind that the awarded increments were not substantial – would be to drive it into insolvency, with the inevitable consequence of liquidation with massive loss of jobs for all its employees and mass suffering for their dependants. All these affected people would be rendered destitute, with little or no prospects of getting alternative employment in a tight job market, starvation and school dropouts for their children. Certainly this would constitute a palpable inequity and the conception of justice in Zimbabwe would be intolerably hurt by this substantive effect of the award. That the award would be viewed as being in conflict with the public policy of Zimbabwe would be beyond cavil.

Arbitration – award – setting aside of – grounds – party unable to present its case – arbitrator deciding to receive written rather than oral submissions – not a ground for setting aside award – conduct of proceedings – arbitrator's wide discretion – no requirement to receive oral submissions or evidence

Makonye v *Ramodimoosi & Ors* HH-62-14 (Chigumba J) (Judgment delivered 19 February 2014)

In order to set an arbitral award aside on the basis that it is contrary to public policy, it must be shown that some fundamental principle of law or morality or justice is violated or that the decision is so defiant of logic or accepted moral standards that the concept of justice in Zimbabwe would be intolerably hurt. An award by the arbitrator is not contrary to public policy merely because it wrong in law or in fact in reaching the conclusion arrived at.

The fact that the arbitrator, with the consent of the parties, decides to receive written, rather than oral, submissions does not mean that either of the parties was not able to present its case. The arbitrator has a wide discretion as to how to conduct the proceedings. Article 24 of the Model Law (set out in the Schedule to the Arbitration Act) gives the arbitrator the power to override any agreement between the parties themselves in regards to how the matter should proceed, and stipulates that the arbitral tribunal shall decide whether to hold an oral hearing or whether the proceedings shall be conducted on the basis of documents or other materials. In essence, the conduct of the hearing is entirely at the tribunal's discretion. There is no onus on the tribunal to hear oral submissions. The onus on the tribunal relates to notification of the hearing, and an arbitrator has exclusive jurisdiction, contrary to the parties' wishes, to decide how to collate evidence. There is no provision to compel the arbitrator to hear oral evidence. What is required is for all the parties to be notified of the hearing, to be given an opportunity to present their case as stipulated by the arbitrator, and to have sight of the submissions made by the other parties, if in writing.

Company – judicial management – purpose of – when should be ordered – principles – directors of company placed under provisional judicial management – no *locus standi* to represent company – return day of order for provisional judicial management – options open to court – may refer matter to opposed court roll

Zimbabwe Textile Workers' Union v *David Whitehead Textiles Ltd & Ors* HH-170-14 (Makoni J) (Judgment delivered 19 March 2014)

Although applications for winding up and judicial management are similar in nature, they are not necessarily identical in terms of the processes involved and their objectives. In the Companies Act [*Chapter 24:03*] there are separate provisions relating to judicial management and liquidation. The provisions relating to liquidation do not provide for a return date, as is the position with provisional judicial management in terms of s 305(1). The provisional judicial manager, in terms of s 303(a), assumes the management of the company upon the granting of the judicial management order. There is no such corresponding provision in relation to liquidation. Further, the matters and reports to which a court shall have consideration to on the return date in terms of s 305(1) do not include anything required from the directors of the company. The directors would have no *locus standi* to appear on behalf of the company on the return day.

In terms of s 305(1), on the return day fixed in the provisional judicial management order, the court has three options open to it: it may grant a final judicial management order; it may discharge the provisional judicial management order; or it make any other that it thinks just. The last option would include referring the matter to the opposed roll where it could be properly ventilated and determined.

Generally, a company should not be permitted to be dissipated by winding up and dissolution because it has suffered a setback with regard to the repayment of its debts or the performance of its obligations, which, if it were to be given time, it would be able to surmount and become successful. The procedure of judicial management is intended to be a means for affording it such time. Judicial management should not be instituted or continued merely on the basis that, while it subsists, the company's assets may be sold more advantageously than they would be in winding-up: judicial management is not intended to be an alternative method of liquidation. Judicial management is a special dispensation which can be granted to a company only in exceptional cases. It implies that there be a temporary reconciliation of conflicting interests – those of the company in being unable, despite its difficulties, to continue its operations in the ordinary course and those of its creditors in not being prevented from enforcing their rights, including the way of winding-up. It is because of these conflicting interests that the Act requires the court to be satisfied both that there is a reasonable probability that, were there to be judicial management, the company would be able to achieve the goals envisaged by s 300(a) (that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern) and that it is just and equitable to afford it the opportunity to attempt to do so. As such, judicial management cannot be instituted merely on the ground that it would improve the efficiency of the company's management or increase the profitability of its operation.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – referral of matter to Supreme Court – referral can only be of matter pending, not a matter which has been determined – objection to being placed on remand on grounds that breaches of Declaration of Rights disclosed – no request made to refer alleged breaches to Supreme Court – applicants placed on remand on grounds that reasonable suspicion shown that applicants committed alleged offences – referral by High Court during subsequent trial – not competent

S v *Dhlamini & Ors* CC-1-14 (Malaba DCJ, Chidyausiku CJ, Ziyambi JA, Garwe JA & Cheda AJA concurring) (Judgment delivered 17 March 2014)

The applicants had been abducted from their homes by security agents, kept incommunicado and tortured before they were taken to the magistrates court to be placed on remand on allegations of committing various security-related offences. They challenged the application by the State to have them placed on remand. They raised at that stage the question of their detention as a violation of their fundamental right to personal liberty, but they did not request the magistrate to refer any such question to the Supreme Court for determination. The magistrate placed the applicants on remand on the ground that there was a reasonable suspicion that they had committed the offences with which they were charged. At their subsequent trial, the High Court referred, for determination under s 24(2) of the Constitution of Zimbabwe 1980, the questions of alleged violations of the fundamental rights of the applicants guaranteed under ss 13(1) (right to personal liberty); 15(1) (right not to be subjected to torture or to inhuman or degrading treatment) and 18(1) (right to the protection of the law).

Held: the referral was incompetent. If the applicants were of the view that the decision to place them on remand was a violation of their fundamental right to the protection of the law, they could, before the decision to remand them was made, have requested that the question of violation of their right to personal liberty be referred to the Supreme Court for determination in terms of s 24(2) of the Constitution. If that request had been refused on the ground that the raising of the question was frivolous and vexatious, they could, as an exceptional remedy, have applied to the Supreme Court for redress in terms of s 24(1) of the Constitution. The Supreme Court would then have decided whether the decision to place the applicants on remand was a violation of their right to the protection of the law under s 18(1) of the Constitution. The applicants did not invoke the provisions of s 24(2) of the Constitution at the time they ought to have done. They accepted the legality of the decision to place them on remand.

Prima facie, in finding that there was reasonable suspicion that the applicants committed the offences with which they were charged, the magistrate did not violate the applicants' right to personal liberty. This was confirmed on review by the High Court, which held that the decision of the magistrate to place the applicants on remand was based on a proper application of the principle and finding on the facts that there was a reasonable suspicion that the applicants had committed the offences of which they were charged. Once the decision to remand the applicants was made on the ground that there was a reasonable suspicion of their having committed the offences with which they were charged, and that position still prevailed at the time they appeared in the High Court for trial, the prosecution could not be stopped on the basis that they had been tortured or subjected to inhuman or degrading treatment.

There was no legal basis on which the trial judge could refer the questions of contraventions of ss 13(1), 15(1) and 18(1) of the Constitution to the Supreme Court for determination, because the question of the existence of a reasonable suspicion of the applicants having committed the offences with which they were charged had already been determined justifying their arraignment before the High Court. The High Court could not turn the proceedings before it into an inquiry into the correctness or otherwise of the decision of the magistrates court to place the applicants on remand. It could not seek to have the correctness of that decision impugned through the procedure under s 24(2) of the Constitution because the Supreme Court would no longer be exercising original jurisdiction in the circumstances. The court would not be determining the question of violation of the right to personal liberty but reviewing the decision of the magistrates court.

Section 24(2) of the Constitution clearly precludes a situation where the question is referred to the Supreme Court in respect of a matter which is no longer necessary for resolution by the lower court in the determination of the dispute before it.

Constitutional law – Constitution of Zimbabwe 2013 – fundamental human rights – freedom from arbitrary eviction (s 74) – effect on eviction following conviction for unlawfully occupying gazetted land – requirement for court to take all relevant factors into account – need to balance out opposing claims

S v *Munotengwa & Ors* HH-134-14 (Muremba J) (Judgment delivered 12 March 2014)

See below, under LAND (Gazetted land – occupation).

Contract – breach – damages – purpose of damages – to put plaintiff in position he would have been if breach of contract had not occurred – loss of chance to participate in scheme – how damages to be assessed – exact calculation not possible – court nevertheless obliged to attempt to make assessment – nominal damages – when may be awarded – purpose of awarding nominal damages

Wynina (Pvt) Ltd v *MBCA Bank Ltd* S-27-14 (Gowora JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 28 Match 2014)

The appellant was engaged in the business of growing tobacco. During the 2007/2008 tobacco season, the Reserve Bank of Zimbabwe ("the RBZ") embarked on a retention scheme in terms of which tobacco growers would be paid a portion of the proceeds on tobacco sales in foreign currency. Farmers wishing to participate in the scheme had to file applications through their commercial banks, which, in turn would forward the applications, accompanied by the requisite payment in the local currency, to the RBZ. The appellant successfully participated in the scheme and was paid a portion of the proceeds from the sale of tobacco for that season. In September 2008 the appellant submitted an application with the respondent bank for participation in the scheme for the next season and made the necessary deposit into the account held by it with the respondent to meet the local component of the foreign currency to be paid by the RBZ under the scheme. Several months later, the RBZ published a list of farmers entitled to benefit under the scheme. The appellant's name was not on the list. The appellant made enquiries with the respondent, said that during the relevant period the appellant's account had been overdrawn and as a result the application could not be forwarded to the RBZ. Attempts to persuade the RBZ to accept the application even though the deadline had passed proved fruitless and the appellant thereafter sued the respondent for damages in a sum representing the amount in foreign currency that the appellant alleged it would have received from the RBZ, had the application been received and processed by the RBZ.

Although it published the list, the RBZ did not make payments to all the participants under the scheme for the year 2008/2009. It had not fully honoured its obligations for the previous growing season and that the payments for the 2008/2009 season had only been satisfied in respect of small scale growers whose individual claims did not exceed US$1 000. Affected farmers instituted a class action against the RBZ for payment under the 2008 foreign currency scheme. That suit had not yet been determined when the appellant brought the present action. The trial court held that until such time as that matter was finally determined or until the RBZ opted to voluntarily pay out the listed growers, whether fully or partially, it was not possible to quantify the measure of damages due to the appellant by reason of the respondent's breach of contract. The appellant held essentially a contingent right to damages as against the bank, dependent upon the eventual outcome of the claims lodged by the listed growers.

On appeal, the appellant argued, *inter alia*, that the court should quantify and asses the damages due to it arising from the loss of the chance to participate in the scheme. It did not have to prove that it would, on a balance of probabilities, have received any payment from the RBZ. Once it was apparent that the appellant had sustained some loss, then the court was obliged, by making a value judgment, based on the best information it has before it, to assess the value of that loss.

Held: (1) when the breach occurred due to the failure by the bank to meet the deadline in submitting the appellant's application, the appellant's loss of the chance to participate in the scheme occurred and damages immediately became due and payable. It was then that the complete cause of action arose and the period of prescription would have started running as from that date. In view of this, the appellant did not have to prove on a balance of probabilities that it could have received payment from the RBZ, as long as it established that it was deprived of the chance to receive payment as a result of the respondent's breach. The appellant could not now join in the suit against the RBZ and was not in the same situation as the farmers whose applications were duly processed and accepted by the RBZ. It had, though, suffered damages by the failure to have its application placed before the RBZ and was deprived of the chance to benefit under the scheme. Had the respondent performed its contractual obligations, the appellant would have been included in the list published by the RBZ. It could also have instituted a claim for payment under the scheme.

(2) It was not necessary to join the RBZ as a party. The appellant instituted proceedings against the bank premised on a breach of the latter's contractual obligation. No allegations were made against the RBZ and there was no suggestion that the RBZ was in some way responsible for the failure by the respondent bank to perform its obligations. The appellant's suit was not concerned with the obligations of the RBZ but the breach of the respondent's obligations to the appellant.

(3) In a claim for damages arising out of breach of contract, the plaintiff has to be placed in the same position he would have been in had the contract been properly performed. If the bank had submitted the application for the

appellant to participate in the 2008 scheme the appellant would at best have a claim pending against the RBZ, as did all the tobacco farmers who applied to participate in the scheme. The appellant's claim arose from the loss of an expectation to receive payment under the retention scheme.
(4) A plaintiff who sues for damages is required to prove his damages. If he can prove none he is not entitled to any damages. This is not, however, not a strict rule. What the plaintiff must do is to place before the court all the evidence that is reasonably available to him. Before this principle can come into effect it must be established that the plaintiff has suffered some damages and that all that has to be established is the quantum of those damages. Some types of damage are difficult to estimate, but the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty. The decided authorities have gone so far as to state that a court doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess. The existence of a contingency which is dependent upon the volition of a third person does not necessarily render the damages for breach of contract incapable of assessment. The appellant suffered damages but on the facts presented to the court *a quo* it was almost an impossible task for a court to make an assessment of the monetary damages due to the appellant. The court would be virtually pondering the imponderable, but must do the best it can on the material available, even if the result is an informed guess.
(5) There has been much debate within the courts as to when a plaintiff should be awarded nominal damages, and it is not exactly clear, despite the debate both from the courts and jurisprudential authors, as to whether or not nominal damages should be awarded to a plaintiff who has proved breach of contractual obligations and has suffered loss, but has not proved the extent of the damages suffered. A reading of the various South African cases leaves a distinct impression that the courts have accepted that the principle of nominal damages is available to a plaintiff in certain circumstances and that it is not necessarily available to a plaintiff who has proved a technical breach of contract and is unable to prove damages. It is a concept derived from the English law, although its application did not follow the English law, and in the later cases there appears to be an attempt on the part of the courts to adhere to the English law in applying the principle on the awarding of nominal damages. Sometimes nominal damages may appropriately be given to establish a right; nominal damages in the different sense of a token payment of ordinary damages may also be awarded when the plaintiff proves breach causing him loss but is unable to prove the amount of the loss or that it is substantial.
(6) The courts both in this country and in South Africa have recognised the principle of prospective loss in restricted instances. One such instance relates to the loss of a chance, which is a form of prospective loss which has been recognised in England and South Africa. In assessing damages the court must, as one of the aspects, have regard to the events that have occurred from the damage-causing event to the date of the action in order to reach a more realistic assessment of the damage. Here, the appellant appointed the respondent as its agent in the facilitation and implementation of its application under the scheme. When it lodged its application with the respondent and paid the local currency stipulated, it acquired a benefit to participate and at the conclusion of the season receive a value in foreign currency. It thus acquired an advantage to which a value could be attached. It was therefore the duty of the court to estimate the pecuniary value of that advantage. Factors to consider included the possibility that the RBZ might be able to satisfy a trial court that it had no obligation to meet the claims of the tobacco growers who participated in the scheme or that if a court found in favour of the farmers, the RBZ would seek statutory protection to avoid payment under the scheme; the fact that payment was made to farmers with smaller claims would point to a lack of capacity to pay as opposed to reluctance to pay; and finally, even though the applicant funded its account with the required local currency, it was not transmitted to the RBZ. Damages would be awarded in the sum of 25% of that claimed.

Contract – duress and undue influence – threats unlawful or *contra bonos mores* – threat of criminal prosecution – whether such threat unlawful – unlawful if creditor exacts something to which not entitled

Mlambo v *Mupfiga* HH-65-14 (Mafusire J) (Judgment delivered 19 February 2014)

Duress or coercion, in jurisprudence, is where someone performs an act as a result of violence or threats of violence or some other pressure. In the law of contract, duress, or *metus*, relates to a situation where someone enters into an agreement as a result of threats. Such a contract is voidable at the instance of the aggrieved party. Consent which is a result of coercion is not true consent. Where a party seeks to avoid a contract on the basis of duress he must establish five elements: (1) that the fear was a reasonable one; (2) that the fear was caused by the threat of some considerable evil to that party or his family or property; (3) that the threat was that of an imminent or inevitable evil; (4) that the threat or intimidation was unlawful or *contra bonos mores*; (5) that the moral pressure used caused damage. These five elements are considered cumulatively.

A contract that is induced by threats of a criminal prosecution may be set aside. The signature on a liquid document that is procured by reason of such threats may render the document unenforceable. Such a threat may be illegitimate. It may be *contra bonos mores*. It may amount to the crime of compounding. A person who is legally entitled to lay a criminal charge against another does no legal wrong in bringing the charge. However, it is *contra bonos mores* for him to resort to a criminal process, or to threaten to resort to it in order to induce a promise for the payment of a private debt.

Compounding is an offence. It refers to an agreement to stifle a prosecution in return for a reward. Such conduct stifles the proper administration of justice. In the context of contracts induced by threats, compounding relates to the linking of one's right to recover one's private debt to the right to bringing a public prosecution for the crime committed by the debtor. The test in determining the validity of an acknowledgement of debt procured under a threat of a criminal prosecution is whether by such a threat the creditor exacted or extorted something to which he was otherwise not entitled. Where the sum which the debtor agrees to pay in fear of arrest is in fact the sum which was due, the creditor does not act *contra bonos mores* in using the threat of criminal prosecution to induce him to acknowledge his true liability. In these circumstances he is doing no more than exercise his legal rights. Where, however, the creditor does not know and probably cannot establish the amount of the debtor's indebtedness, it is an improper use of his rights to threaten to prosecute the debtor unless the debtor undertakes to pay an amount which the creditor more or less arbitrarily estimates to be due. Thus the threat of an arrest or of a criminal prosecution to induce a promise to pay that which was due is not *contra bonos mores*. It is the threat to extort a promise to pay that which was not due or was unknown which is illegal. The argument that ought to be decisive is that although the debtor has worsened his position by signing the promissory note or IOU, he has not worsened it as much as if he had responded to the threat by paying what he owed in cash, and if he had done that he could have had no complaint.

It is often the case that an acknowledgment of debt induced by a threat of an arrest or a criminal prosecution gives the creditor a reward or an advantage to which he may otherwise not have been entitled. Some of the more obvious and common rewards or advantages may be: (1) the creditor removes or minimises the burden of proof on him, in that where previously he would have had to prove liability and quantum, he would now merely have to produce the liquid document which often speaks for itself; (2) with regards to quantum in particular, where there was some doubt or dispute as regards the actual amount allegedly due, whether as capital or as interest and other charges, or both, the liquid document would settle all that, even together with the issue of the costs of suit; (3) a typical acknowledgement of debt would have an acceleration clause where, among other things, in the event of a default the entire balance of the amount outstanding at the time of the default would become immediately due and payable; (4) the benefits of the legal exceptions such as *non causa debiti* would inevitably be renounced by the debtor; and (5) the liquid document would give the creditor the advantage of proceeding to recovery by way of procedures such as provisional sentences or summary judgment.

Court – contempt – committal for – what party seeking committal must show – need for order to have been served personally on party in respect of whom committal sought

Mukambirwa & Ors v *Gospel of God Church Intl 1932* S-8-14 (Gowora JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 27 February 2014)

The crime of contempt of court is committed intentionally and in relation to administration of justice in the courts. The object of proceedings for contempt is to punish disobedience so as to enforce an order of court and in particular an order *ad factum praestandum*, that is to say, orders to do or abstain from doing a particular act. Failure to comply with such order may render the other party without a suitable, or any, remedy, and at the same time constitute disrespect for the court which granted the order. Before holding a party to be in contempt of a court order, a court must be satisfied that there is a court order which is extant, that the order has been served on the individuals concerned and that the individuals in question know what it requires them to do or not do; that knowing what the order dictates, the individuals concerned deliberately and consciously disobeyed the order. In addition to that, the court must be satisfied that, not only was the order not complied with, but also that the non-compliance on the part of the defaulting party was wilful and *mala fide*. An applicant seeking such an order must set out clearly in his application such grounds as will enable the court to conclude that the onus resting upon the applicant of proving the contempt has been discharged. The applicant must also prove that the respondent has failed to comply with the order. Before seeking to enforce an order through contempt proceedings, it is necessary to prove that the judgment or order which is alleged to have been disobeyed has been properly served. The applicant must also show that the order with which the respondent has failed to comply has either been served upon him personally or has come to his personal notice. The general rule is that no judgment or court order will be enforced by process of contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

Court – High Court – jurisdiction – review – Labour Court decision – matter one which Labour Court could have dealt with – High Court having no jurisdiction

Zimpapers Group of Companies v *Khupe & Anor* HB-9-14 (Moyo J) (Judgment delivered 23 January 2014)

The applicant sought to bring a decision of the Labour Court on review before the High Court, the grounds for review being (a) that there was a gross irregularity in the proceedings, in that the court entertained the matter when it had not been properly set down in terms of the law; and (b) that the court issued an order that was actually different from the original order sought, which order could only have been granted had new proceedings been instituted. The first respondent raised a point *in limine* that the matter was not properly before the court, as the applicant should have made an application for rescission of the judgment in terms of s 92C of the Labour Act [*Chapter 20:01*] and that s 89 of the Act excluded the High Court's powers of review of matters in the Labour Court.
Held: (1) Section 92C of the Act provided for the rescission or alteration by the Labour Court of its own decisions. The legislature had given the Labour Court the power to revisit all its decisions, including the void ones. The applicant therefore had a remedy in terms of s 92C, which covered the applicant's very own circumstances.
(2) Section 89 of the Act clearly gave the Labour Court review powers and took away from any other court the powers to determine or hear matters provided for in that section, the power of review being one of them. Section 26 of the High Court Act [*Chapter 7:06*], which gave the High Court power of review over all inferior courts, subjected those power to the provisions of any other law, meaning that if another law already provided otherwise, the High Court would not be in a position to exercise the same powers.

Court – High Court – jurisdiction – labour matter – review of – High Court generally having no jurisdiction

Zimasco (Pvt) Ltd v *Marikano* S-6-14 (Garwe JA, Gowora JA & Omerjee AJA concurring) (judgment delivered 13 January 2014)

In respect of labour matters, the Labour Court shall exercise the same powers of review as does the High Court in other matters. The jurisdiction to exercise these powers of review is in addition, and not subject, to the power the court has to hear and determine applications in terms of the Act. The powers of review exercisable by the High Court are to be found in ss 26 and 27 of the High Court Act [*Chapter 7:06*], but this does not mean that the High Court has review powers in respect of labour matters.
In order for a review to be the subject of a hearing, such review must be brought by way of application: r 256 of the High Court Rules, 1971. Clearly an application for review is not the type of application contemplated in s 89(1)(a) of the Labour Act [*Chapter 28:01*].

Court – High Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of terminated contract of employment – High Court having jurisdiction to determine matter arising from acknowledgment of debt

Homodza v *Chitungwiza Municipality* HH-38-14 (Takuva J) (Judgment delivered 12 February 2014)

The applicant resigned from her employment with the respondent on medical grounds. She was advised in writing of what her terminal benefits were. Portion of those benefits was paid and the applicant then brought legal proceedings for the recovery of the balance. The respondent filed an appearance to defend and subsequently a special plea, to the effect that the high Court had no jurisdiction to determine the matter, as issues relating to non-payment of terminal benefits and arrear salaries were specifically within the purview of the Labour Court, as these matters were provided for in the Labour Act [*Chapter 28:01*]. The applicant argued that that the High Court had inherent jurisdiction to deal with the matter since the Labour Act did not specifically preclude it from determining a claim for non-payment of terminal benefits properly quantified and acknowledged by the employer. Further, there was no employer/employee relationship or dispute that is provided in terms of the Act, as the cause of action was clearly premised on a document acknowledged by the respondent reflecting the quantified amount owed to the applicant. This document amounted to an

acknowledgement of debt. By signing it, the respondent signified its intention and willingness to be bound by the terms of the document.
Held: while the matter had its origins in labour law, these had been superseded by the acknowledgement of debt, which formed a separate cause of action based purely on the law of contract. There was no labour dispute, other than the respondent's intransigence in refusing to pay the amount owed. There was no provision in the Labour Act that would allow the applicant to approach the Labour Court directly seeking a similar remedy she was now seeking. Accordingly, the High Court had jurisdiction.

Criminal procedure – private prosecution – who may prosecute – company which has suffered loss – may bring private prosecution – right not restricted to natural persons – Attorney-General's certificate of *nolle prosequi* – grounds on which such certificate may be withheld – not entitled to withhold certificate where applicant has shown a substantial and peculiar interest in the issue, and attendant criteria

Telecel Zimbabwe (Pvt) Ltd v *A-G* S-1-14 (Patel JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 28 January 2014)

The appellant, a private company, discovered a potentially massive fraud perpetrated against it by certain of its employees. The respondent later withdrew the charges against all the four accused persons before plea, on the grounds that there was insufficient evidence. The appellant decided to mount a private prosecution. However, the respondent refused to issue a certificate of *nolle prosequi*, also on the grounds that there was insufficient evidence. The appellant then applied to the High Court on review for that decision to be set aside as being both unlawful and grossly irrational. The High Court held that a company, as distinct from a private individual, had no *locus standi* to institute a private prosecution. In so doing, the court relied largely on a South African Appellate Division decision. That decision was based on the wording of the South African Criminal Procedure Act 1977, which gave the right to institute private prosecutions to "private persons". The Appellate Division held that this phrase meant "natural persons". Accordingly, the court decided that it was not necessary to determine the further question as to the respondent's discretion to withhold his certificate.
Held: (1) historically, the system of criminal procedure that prevailed in England was predominantly one of private prosecutions. No public official was designated as a public prosecutor, either locally or nationally. In essence, private citizens were responsible for preserving the peace and maintaining law and order. The Prosecution of Offences Act 1879 first introduced the office of Director of Public prosecutions. However, this Act did not fundamentally undermine private prosecutions, because public prosecutors enjoyed very limited authority. The successor Act of 1908 did not substantially increase the powers of public prosecutors. It was only with the enactment of the Prosecution of Offences Act 1985 that England established an effective system of public prosecution through the Crown Prosecution Service. Even then, this Act continued to preserve a limited right of private prosecution.
In the Cape of Good Hope (whose legal system was adopted here), the Roman-Dutch law of criminal procedure and evidence remained in force until the early 19th century. Following various alterations to the structure of the courts in the Cape, this adjectival law was radically anglicised in 1828 and 1830 to form the foundations of our modern law. As regards the institution of prosecutions, the British Government accepted that the conditions prevailing in the Cape did not permit the unmodified adoption of the English system of private prosecution. The right of prosecution was vested in the Attorney-General but, where he declined to prosecute, a private individual might prosecute in respect of an injury to himself or to someone under his care. In principle, therefore, the law governing private prosecutions, both in Zimbabwe and in South Africa, does not originate in the Roman-Dutch law but is derived from the English common law.
(2) The right of private prosecution originates in the reparation of individual injuries and the vindication of individual as opposed to corporate rights. The interests that the right to prosecute is conceived to safeguard are manifold. They are certainly not confined to purely pecuniary loss or the kind of injury that might ordinarily be sustained by corporate entities in the normal course of their business. Permission to prosecute in such circumstances was conceived as a kind of safety-valve. An action for damages may be futile against a man of straw and a private prosecution affords a way of vindicating imponderable interests which cannot be expressed in monetary terms. The vindication is real: it consoles the victim of the wrong; it protects the imponderable interests involved by the deterrent effect of punishment and it sets at naught the inroad into such inalienable rights by effecting ethical retribution. Finally it effects atonement, which is a social desideratum.
(3) Although the South African Criminal Procedure Act and the Zimbabwean Criminal Procedure and Evidence Act [*Chapter 9:07*] has similarities on the issue of private prosecutions, the most fundamental distinction

between the two statutes was the usage of "private person" in the South African Act as contrasted with the references to "private party" in the CP&E Act. A "person", in law, meant "a human being (*natural person*) or body corporate or corporation (*artificial person*), having rights or duties recognised by law". Again, in the legal context, the word "party" meant "each of two or more persons (or bodies of people) that constitute the two sides in an action at law, a contract, etc." While some of the phraseology employed in s 13 of the CP&E Act – in particular, the reference to "some injury which he individually has suffered" – strongly supported the proposition that the right to prosecute is confined to natural as opposed to artificial persons, the references to "public bodies and persons" and "public body or person", in ss 14 and 16 respectively, suggest otherwise. The definition in s 12 of "private party" was plainly tautologous and unhelpful, but in s 2 of the Act and in s 3(3) of the Interpretation Act [*Chapter 1:01*] "person" includes companies.

(4) It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion. The English common law right of private prosecution was not confined to natural persons but extended as well to juristic and artificial entities. That common law right migrated to the Cape Colony and remained intact until 10 June 1891, at which stage it became an integral part of our law (*cf* s 89 of the former Constitution). The provisions of Part III of the CP&E Act should be construed, insofar as is consistent with their language and context, so as to preserve the common law components of the right to prosecute rather than to diminish or extinguish them. In these provisions there was no clear or positive legislative intention to alter pre-existing rights or to constrict the common law position relative to corporations. This interpretation was fortified by the reality that a company is in essence an association of persons and therefore should, albeit subject to its obvious physical limitations, enjoy the same rights and privileges as the individual members comprising it, including the right of prosecution. Accordingly, the right of private prosecution conferred by s 13 vests in natural as well as artificial persons, including private corporations.

(5) The mere possession of the Attorney-General's certificate of *nolle prosequi* does not in itself confer an absolute right of private prosecution. The other requirements must still be met. If they are not, the court will interdict the person proposing to prosecute privately. The court may also, in the exercise of its inherent power to prevent abuse of process, interdict a private prosecution pursuant to such certificate.

(6) The exercise by the Attorney-General of his discretion *vis-à-vis* any intended private prosecution involves a two-stage process. The first stage is for him to decide whether or not to prosecute at the public instance. If he declines to do so, the next stage comes into play, *i.e.* to decide whether or not to grant the requisite certificate. In so doing, he must take into account all the relevant factors prescribed in s 13 of the Act, namely, whether the private party in question "can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence". If he cannot show any such interest, the Attorney-General is entitled to refuse to issue the necessary certificate. However, where the private party is able to demonstrate the required "substantial and peculiar interest" and attendant criteria, the Attorney-General is then bound to grant the certificate. At that stage, his obligation to do so becomes peremptory.

(7) While the Attorney-General's decision not to prosecute at the public instance was not reviewable, it deciding not to issue his certificate, he failed to exercise his statutory powers on a proper legal footing. Having declined to prosecute at the public instance, he should have considered whether or not the appellant satisfied the "substantial and peculiar interest" requirement of s 13 of the Act. He did not do so but proceeded to decline his certificate *nolle prosequi* on the basis that there was insufficient evidence to prosecute. In so doing, he was guilty of an error of law by purporting to exercise a power which in law he did not possess.

Editor's note: decision of Hlatshwayo J (as he then was) in *Telecel Zimbabwe (Pvt) Ltd* v *A-G* 2011 (2) ZLR 310 (H) reversed.

Criminal law – statutory offences – tampering with electrical apparatus resulting in supply being cut off – Electricity Act [*Chapter 13:19*] – s 60A(3)(a) – reconnecting domestic electricity supply after it had been cut off – not an offence under the subsection

S v *Dzotizei* HH-126-14 (Tsanga J) (Judgment delivered 6 March 2014)

The accused, a man of over 70 years of age, was convicted of contravening s 60A(3)(a) of the Electricity Act [*Chapter 13:19*] (tampering with any apparatus for generating, transmitting, distributing or supplying electricity with the result that any supply of electricity is interrupted or cut off) and sentenced to the mandatory minimum sentence of 10 years' imprisonment. He had re-connected his electricity supply after it had been cut off for non-

payment of his bill. He was also convicted of unlawfully abstracting electricity, in contravention of s 60A(1) of the Act for which he received a wholly suspended sentence of 24 months.
Held: (1) the charge under s 60A(3)(a) was inapplicable. By no stretch of the imagination could it be said that the accused's action resulted in any interruption or cut-off of electricity as envisaged by the subsection. The legislature clearly had in mind such conduct as stealing oil from transformers and stealing cables, which have indeed often resulted in massive black outs and cut offs and serious damage to apparatus. The situation where ordinary residents illegally abstract and divert electricity by switching themselves back on or self-connecting is adequately covered by s 60A(1)(a) and (b).
(2) It is imperative that the age of the accused is always accurately captured. It is a vital fact which has a material bearing in most situations. Inaccuracy creates unnecessary confusion on review when a judge is faced with contradictory data. If the accused was a 71 year old pensioner living in a context where assistance from the State for old people is so limited as to be virtually non-existent, then even a suspended sentence of 24 months on count 2 was manifestly excessive. Under s 82 of the Constitution, the State owes some duty of care to persons over the age of 70. In this instance the criminal court, a vital part of the State machinery, can at least play a protective role by ensuring that the elderly are not unduly harshly penalised for electricity self-reconnection offences. The court cannot purport to act in complete oblivion of the real circumstances that some of the disadvantaged elderly find themselves or with complete disregard to the different facets of possible interventions by the State in promoting rights of the elderly. Where needy elderly people are involved in cases of self-reconnections, one role that the criminal courts can play is to ensure that nominal, rather than punitive, sentences are imposed, if they must, only by way of discouraging wanton breaking of the law. The sentence on the second count should be reduced to one of 3 months' imprisonment, wholly suspended.

Criminal procedure (sentence) – general principles – factors affecting – age of accused – persons aged over 70 – State's duty of care towards the elderly – need to ensure that elderly not unduly penalised for offences arising out of economic hardships

S v *Dzotizei* HH-126-14 (Tsanga J) (Judgment delivered 6 March 2014)

See above, under CRIMINAL LAW (Statutory offences).

Criminal procedure (sentence) – statutory offences – making false statement in affidavit – statute providing for fine or imprisonment or both – misdirection to impose sentence of imprisonment without considering fine first – trivial lie which was irrelevant to matter in respect of which affidavit made – imprisonment inappropriate

S v *Zuwa* HH-10-14 (Mathonsi J) (Judgment delivered 15 January 2014)

The accused, a 38 year old single mother of five, was charged with lying under oath in contravention of the Justices of the Peace and Commissioners of Oath Act [*Chapter 7:09*]. The false statement was contained in an affidavit she had filed in support of an application for increased maintenance from the father of one of her children. She said the increase was necessary because of the fees at the school to which she wanted to send the child, and that she was sending the child there because two of her other children were going to a comparable private school, which she named. In fact, they were attending a different private school.
Section 10(1) of the Act provides for a sentence of a fine not exceeding level 7, or imprisonment for a period of up to 2 years, or both. The magistrate sentenced the accused to 15 months' imprisonment, of which 6 months was suspended for 5 years on condition of future good behaviour.
Held: Where a statute provides for a penalty of a fine or imprisonment, it is a misdirection on the part of the sentencing court to impose imprisonment without giving serious consideration to a fine, particularly on a first offender. Other than saying that a fine would trivialise the offence – an offence which was trivial anyway – the trial court did not explain why it was departing from the sentencing policy propounded in numerous authorities. Even if one has regard to the circumstances of the offence, there is no way the matter qualified for the imposition of imprisonment. The untruth about what school the other children were attending would not have influenced the maintenance court at all, because consideration of the application for variation hinged on the changed circumstances of the first child and the ability of the father to pay. A small fine or a wholly suspended sentence would have met the justice of the case.

Criminal procedure (sentence) – statutory offences – offence for which mandatory minimum sentence provided unless special circumstances shown – need for court to make specific enquiry into whether such circumstances exist

S v *Makoni* HH-11-14 (Mathonsi J) (Judgment delivered 15 January 2014)

In our jurisdiction, the legislature regularly prescribes minimum sentences for particular offences where it is of the view that deterrent punishment is called for because of the prevalence of the offence or its effect on society. By doing so, the legislature would be interfering with the normal sentencing discretion of the courts. In light of that, in order to balance the harshness of the sentence, the legislature usually adds a rider that the mandatory sentence does not have to be imposed where there are "special reasons" or "special circumstances" which justify a lesser sentence. It is therefore imperative that magistrates understand clearly what special circumstances are in respect of mandatory sentences and that they also appreciate how they affect our sentencing jurisprudence. This is because they are enjoined to explain to unrepresented accused persons what special circumstances are and that if the accused person is able to show their existence they will avoid the rigours of a mandatory minimum sentence. It would be disingenuous for the magistrate to say he inquired into special circumstances by merely asking the accused why he committed the offence. The court would not be entitled to impute the non-existence of special circumstances from the answer given to a question which was not inquiring into special circumstances.

Criminal procedure (sentence) – suspended sentence – sentence suspended on condition of payment of restitution – appeal noted – need for accused to apply for restitution to be suspended pending appeal – failure to pay restitution – options open to court

S v *Chauke* HH-163-14 (Tagu J) (Judgment delivered 19 March 2014)

The accused was convicted of theft and sentenced to a term of imprisonment, wholly suspended on condition that he repaid the sum stolen by a stipulated date. He noted an appeal against the conviction. He failed to pay restitution as required and was brought before the magistrate. It was argued on behalf of the accused that argued that he was not in wilful default because he had noted an appeal to the High Court and thought that the payment of restitution had been automatically suspended. The magistrate held that the accused should have approached the court and make an application to have the court order set aside pending appeal. He ordered that the accused should serve the sentence that had been suspended. A few weeks after the accused had started serving his sentence, his counsel filed a court application for postponement of the sentence and suspension of the payment of restitution in terms of s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The magistrate acceded to this request, extended the time for repayment for just over six months and ordered the accused's liberation. On review at the instigation of the complainant:
Held: in terms of s 358(7) of the Act, the magistrate had two options when the accused was brought before him, not having complied with the conditions of suspension: the first was to commit accused to undergo the sentence which was passed at the end of the trial; the second was to further suspend the sentence for a period not exceeding five years. The magistrate chose the first option. Having done so, he became *functus officio*. The application for further postponement was not proper. It should have been made at the time of the hearing of the default or soon thereafter when the magistrate made his intentions known that he wanted to send him to prison. The decision made was tantamount to the magistrate reviewing his earlier order. The order he subsequently made was therefore incompetent. However, because the matter was the subject of an appeal, it was competent for the High Court, in the exercise of its review powers, to order that the order for restitution be suspended until the appeal was determined.

Damages – delictual – assessment – loss resulting from unwanted pregnancy – losses for which compensation payable

Mapingure v *Min of Home Affairs & Ors* S-22-14 (Patel JA, Garwe & Gowora JJA concurring) (Judgment delivered 25 March 2014)

See below, under DELICT (*Actio legis Aquiliae*).

Delict – *actio injuriarum* – malicious institution of legal proceedings – elements – making report to police – when making report might constitute malicious institution of proceedings – merely placing information or facts before police not sufficient – not necessary that police or parent Ministry be cited as parties

Munukwi v *Tsanga* HH-113-14 (Chigumba J) (Judgment delivered 12 March 2014)

The malicious institution of legal proceedings, as a cause of action, differs from unlawful arrest and detention. The requirements and elements are different, and it is not necessary, for purposes of a cause of action founded on malicious institution of legal proceedings, that either the police, or the parent Ministry of Home Affairs, be cited as parties to the proceedings. The cause of action is applicable to malicious institution of civil proceedings, and is not confined to malicious institution of criminal proceedings.

The plaintiff must allege and prove that the defendant instituted the proceedings, that the defendant actually instigated or instituted them. The mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient. The test is whether the defendant did more than tell the police the facts and leave them to act on their own judgment. Inherent in the concept of "setting the law in motion" or "instigating or instituting the proceedings", is the causing of a certain result, i.e. a prosecution, which involves the vexed question of causality. This is especially a problem where, as in most instances, the necessary formal steps to set the law in motion have been taken by the police and it is sought to hold someone else responsible for the prosecution. 'The principle is that where the defendant acts in such a way that a reasonable person would conclude that he is acting clearly with a specific view to a prosecution of the plaintiff and such prosecution is the direct consequence of that action, the defendant is responsible for the prosecution. Similarly, an informer who makes a statement to the police which is wilfully false in a material respect instigates a prosecution and may be personally liable.

The plaintiff must allege and prove that the defendant instituted the proceedings without reasonable or probable cause, which means an honest belief, founded on reasonable grounds, that the institution of proceedings is justified. The concept involves an objective and a subjective element.

This cause of action cannot be used to prejudge the reasonableness of the proceedings that form the subject of the complaint, so the plaintiff must allege and prove that the proceedings were terminated in his favour.

Delict – *actio legis Aquiliae* – liability – omissions – when omissions or failure to act may give rise to liability – police – when duty to protect and assist arises – victim of rape – duty to assist victim to prevent pregnancy arising from rape – negligence – professional negligence – medical practitioner – when may be held liable – failure without good reason to administer drug to prevent pregnancy following rape – practitioner liable for consequent pregnancy

Mapingure v *Min of Home Affairs & Ors* S-22-14 (Patel JA, Garwe & Gowora JJA concurring) (Judgment delivered 25 March 2014)

The appellant was raped by robbers at her home. She immediately lodged a report with the police and requested that she be taken to a doctor to be given medication to prevent pregnancy and any sexually transmitted infection. Later that day, she was taken to hospital and attended to by a doctor. She repeated her request, but the doctor only treated her for an injured knee. He said that he could only attend to her request for preventive medication in the presence of a police officer and that the medication had to be administered within 72 hours of the sexual intercourse having occurred. She went to the police station the following day and was advised that the officer who dealt with her case was not available. She then returned to the hospital, but the doctor insisted that he could only treat her if a police report was made available. Three days after the rape, she attended the hospital with another police officer. At that stage, the doctor informed her that he could not treat her as the prescribed 72 hours had already elapsed. Eventually, a month after the rape, the appellant's pregnancy was formally confirmed.

Thereafter, the appellant went to see the investigating police officer who referred her to a public prosecutor. She told the prosecutor that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. Four months after the rape, acting on the direction of the police, she returned to the prosecutor's office and was advised that she required a pregnancy termination order. The prosecutor then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate nearly six months after the rape, but the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure and declined to do so. Eventually, after the full term of her pregnancy, the appellant gave birth to her child.

The applicant brought an action against the Ministers of Home Affairs, Health and Justice for damages for physical and mental pain, anguish and stress suffered and for maintenance for the child until the child turned 18.

The basis of the claim was that the employees of the three Ministries concerned were negligent in their failure to prevent the pregnancy or to expedite its termination. The particulars of negligence were itemised. Her claim was dismissed.

The questions for determination on appeal were whether or not the respondents' employees were negligent in the manner in which they dealt with the appellant's predicament; and if they were, whether the appellant suffered any actionable harm as a result of such negligence and, if so, whether the respondents were liable to the appellant in damages for pain and suffering and for the maintenance of her child.

Held: (1) in respect of the doctor, the principles of Aquilian liability for medical negligence can be summarised thus: *culpa* arises if (a) a reasonable person in the position of the defendant (i) would have foreseen harm of the general kind that actually occurred; (ii) would have foreseen the general kind of causal consequence by which that harm occurred; (iii) would have taken steps to guard against it; and (b) the defendant failed to take those steps.

(2) With respect to the liability of the police, in the context of their prescribed functions and duties, there is no general legal duty on a person to prevent harm to another, even if such person could easily prevent such harm, and even if one could expect, on purely moral grounds, that such person act positively to prevent damage. However, in certain circumstances, there is a legal duty on a person to prevent harm to another. If he fails to comply with that duty, there is an unlawful omission which can give rise to a claim for damages. An omission is regarded as unlawful conduct when the circumstances of the case are such that the omission not only occasions moral indignation but where the legal convictions of the community require that the omission be regarded as unlawful and that the loss suffered be compensated by the person who failed to act positively. When determining unlawfulness, one is not concerned, in any given case of an omission, with the customary "negligence" of the *bonus paterfamilias*, but with the question whether, all facts considered, there was a legal duty to act reasonably. Just as a duty to rescue can sometimes be a legal duty, so a duty to protect may be a legal duty, and it would depend on all the facts whether such duty is a legal duty or not. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect him to have taken positive measures to prevent the harm. In applying the concept of the legal convictions of the community the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the legislature and judges. The duty of the police to act cannot be confined to their statutorily prescribed functions. In any given case, it may be legally incumbent upon them to act outside and beyond their ordinary mandate, so as to aid and assist citizens in need, in matters unrelated to the detection or prevention of crime. Consequently, where such a legal duty is found to exist, and harm that is foreseeable eventuates from the failure to prevent it, the victim of that harm may be entitled to pursue and obtain appropriate compensation through a claim for damages, having regard in every case to considerations of public policy.

(3) It is proper and necessary for national courts, as part of the judicial process, to have regard to the country's international obligations, whether or not they have been incorporated into domestic law. By the same token, it is perfectly proper in the construction of municipal statutes to take into account the prevailing international human rights jurisprudence. In the present context, relevant international instruments include the Convention on the Elimination of All Forms of Discrimination against Women 1979, ratified by Zimbabwe on 13 May 1991; article 4 of the United Nations Declaration on the Elimination of Violence against Women 1993, which provides that women who are subjected to violence "should be provided with access to the mechanisms of justice and … just and effective remedies for the harm that they have suffered" as well as information on "their rights in seeking redress through such mechanisms"; and articles 4 and 14 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2003.

(4) Notwithstanding what might be accepted as the ordinary functions of the police, the inaction of the police in this case could not be treated in isolation. It had to be seen in conjunction with the conduct of the doctor who treated the appellant after she was raped. The doctor declined to administer the preventive medication requested by the appellant without a police report. When a police officer eventually accompanied the appellant to the hospital, the doctor again refused to administer the drug because 72 hours had already elapsed since the occurrence of the sexual intercourse. There was nothing in the record to show why the doctor insisted on a police report or why he regarded the period of 72 hours as being critical. The only recourse available to the appellant, at the relevant time and in the prevailing circumstances, was the medication that could and should have been administered by the doctor himself.

(5) There was a professional relationship between the appellant and the doctor. His duties required him to attend to all the physical injuries arising from the sexual assault inflicted upon her. Consequently, he was under a special duty to be careful and accurate in everything that he did and said pertaining to his relationship with her. He should have exercised that level of skill and diligence possessed and exercised at the time by the members of his profession. A reasonable person in his position would have foreseen that his failure to administer the

contraceptive drug, or his failure to advise the appellant on the alternative means of accessing that drug, would probably result in her falling pregnant. He should have taken reasonable steps to guard against that probability. However, despite the appellant's quandary and persistent pleas for treatment, he stubbornly failed to take any steps to mitigate her condition.
(6) The situation before the police was that of a victim of sexual violence requiring their urgent assistance. They were called upon either to compile a report on the assault or to accompany the appellant to the doctor within a specified period. The circumstances were such as to create a legal duty on the part of the police to assist the appellant in her efforts to prevent her pregnancy. They failed to comply with that duty, which they could have done with relative ease. Their inaction amounted to unlawful conduct by reason of their omission to act positively in the circumstances before them. They were under a legal duty to act reasonably and they dismally failed to do so.
(7) Although the originating cause of the appellant's pregnancy was the rape, its proximate cause was the negligent failure to administer the necessary preventive medication timeously. But for that failure, the appellant would not have fallen pregnant. The police and the doctor failed in their duties. These unlawful omissions took place within the course and scope of their employment with the first and second respondents respectively, who must be held vicariously liable to compensate the appellant in respect of the harm occasioned through the failure to prevent her pregnancy.
(8) In terms of ss 4 and 5 of the Termination of Pregnancy Act [*Chapter 15:10*] permission for the termination of pregnancy pursuant to unlawful intercourse may only be granted by the superintendent of a designated institution. The precondition for that permission is the production of a certificate from a magistrate within the same jurisdiction. The issuance of a magisterial certificate is preceded by a complaint having been lodged with the authorities and the submission of relevant documents by those authorities. The term "authorities" is not defined in the Act but, in the context of unlawful intercourse, *i.e.* rape or incest, it would ordinarily apply to mean the police authorities. The critical question was whether the responsibility for instituting proceedings in the magistrates court lies with the relevant authorities or the victim of the alleged unlawful intercourse. On a correct reading of the Act and the case law, the victim of the alleged rape must depose to an affidavit or make a statement under oath *in addition* to being present for possible interrogation by the magistrate. Given the *ex parte* nature of the procedure, an affidavit on its own may not always suffice to enable the magistrate to make the necessary determination, on a balance of probabilities, that the applicant was raped and that her pregnancy resulted therefrom. However, the applicant's affidavit or statement under oath is essential and required in every case, whether or not the magistrate decides to examine the applicant or any other person as he may deem necessary. It is the responsibility of the victim of the alleged rape to institute proceedings for the issuance of a magisterial certificate allowing the termination of her pregnancy. The role of the police and the prosecutor, upon request by the victim or in response to a directive by the magistrate, is to compile the relevant reports and documentation pertaining to the rape for submission to the magistrate. The role of the magistrate is to issue the requisite certificate upon being duly satisfied in terms of s 5(4), while that of the superintendent of the designated institution is to authorise its medical practitioner, upon production of the certificate, to terminate the unwanted pregnancy.
(9) Even on the broadest interpretation of the Act, taken as a whole, it is not within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy. It was for the appellant to have sought that advice *aliunde*, as soon as possible after she became aware of her pregnancy. The prosecutors and magistrate could not be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate.
(10) With regard to the claim for damages for pain and suffering and maintenance, having regard to the broad principles of delictual liability, there was no conceptual limitation to allowing a claim in general damages for foreseeable harm that eventuates from an unwanted pregnancy. Such a pregnancy could, depending on the circumstances of its occurrence, constitute actionable harm. Accordingly, the appellant was entitled to proven general damages arising from the failure to prevent her pregnancy. Similarly, there could be no objection in principle to a claim for delictual damages flowing from an unwanted pregnancy. This would apply not only to the costs of confinement and the physical pain of delivery but also to the expense of maintaining the child until it becomes self-supporting. However, because the responsibility for taking steps to terminate her pregnancy fell squarely upon the appellant's shoulders and the capacity to do so also lay within her hands, the respondents could not be called to account for any subsequent pain and suffering endured by the appellant, whether arising from her continued pregnancy or the delivery of her child or the period thereafter. The appellant's claim for damages must be limited to the period between the date of her rape and the date of confirmation of her pregnancy. The matter would be remitted to the trial court for assessment of the damages to which the appellant was entitled.

Editor's note: the judgment appealed against was *Mapingure* v *Min of Home Affairs & Ors* HH-452-12, a judgment of Bere J, delivered 12 December 2012 (to be reported in 2012 (2) ZLR).

Election – election petition – form of petition – must comply strictly with statutory requirements – must state allegations with precision – petition containing vague and general allegations cannot be referred to trial

Moyo v *Nkomo (Tsholotsho North Election Petition)* HB-8-14 (Makonese J) (Judgment delivered 31 January 2014)

The law governing the manner and grounds on which an election may be set aside is to be founded in statute. The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statues which create, confer, or limit those rights. Therefore, in deciding whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing the election. They have to function within the framework of that law and cannot travel beyond it.
The express provisions of the law allow a petitioner to lodge a petition in terms of the laid down procedure. The procedure for the filing and determination of electoral petitions is laid down by the Electoral Act and the Electoral Rules, 1995. An election petition shall be generally in the form of a court application and shall state the grounds relied on to sustain the petition and the relief sought. Whilst it may be convenient for a petitioner to present a petition with brief grounds set out in what the petitioner refers to as the "notice", accompanied by an affidavit and other supporting documents, this is not the format prescribed by statute.
Even if such an affidavit could be accepted, the allegations in it must be precise. Vague and general allegations are not sufficient.
Where the grounds upon which the petition is to be sustained are vague and imprecise, the court cannot cure such defect by referring the matter to trial, as to do so would amount to a fishing expedition.

Employment – arbitrator's award – registration of – appeal against award pending in Labour Court – award may nonetheless be registered – remedies open to party seeking to avoid execution of award

Giya v *Ribi Tiger Trading* HH-57-14 (Chigumba J) (Judgment delivered 19 February 2014)

See above, under ARBITRATION (Award – registration).

Employment – arbitration – award – registration of with High Court – what court must consider before registering award – no enquiry into merits – Labour Court's powers to suspend execution ending appeal

Muronzerei v *Petrol Trade (Pvt) Ltd* HH-95-14 MTshiya J) (Judgment delivered 5 March 2014)

The respondent opposed the registration of an arbitral award, granted in a labour matter, on the grounds that an appeal had been noted and an application for suspension of execution of the award was still pending before the Labour Court.
Held: In an application for registration of an award, the court does not inquire into the merits or otherwise of the award. That is the province of the Labour Court upon an application or appeal being made to that court. Registration of an award is only done for enforcement purposes because the labour structures have no enforcement mechanism. The registration of an award in terms of the Labour Act is a matter of course as long as the award remains enforceable or unsatisfied. The focus should be on whether or not the order or award before the court is lawful, sounds in money, and is still valid and competent. If the award meets these requirements, there is nothing that can militate against its registration. Section 92B(4) of the Labour Act [*Cap 28:01*] gives the Labour Court control of its orders even when they have been registered with the High Court. It can alter or amend it despite registration.

Employment – contract – termination – fixed term contract – legitimate expectation of renewal of contract – when arises – need for employee to have legitimate expectation and for employer to engage another person – contract providing that employee should have no legitimate expectation of further employment – employee bound by such term

Magodora & Ors v *Care Intl Zimbabwe* S-24-14 (Patel JA, Malaba DCJ & Guvava JA concurring) (Judgment delivered 25 March 2014)

The appellants were engaged by the respondent on fixed contracts of 9 months' duration. Before the expiry of the last such contract, the respondent purported to terminate the appellants' contracts of employment 3 months early. The appellants were to be paid one month's pay in lieu of notice. The contracts required the application of retrenchment procedures in the event of premature termination. After taking legal advice, the respondent reconsidered its position and accepted that the early termination may have been unlawful. It cancelled the termination and reinstated the contracts of employment with full pay up to the date the fixed term contracts would have expired without being renewed. The matter was then referred to arbitration. The arbitrator held that the appellants had not been retrenched and that the respondent was entitled to act as it did. On appeal to the Labour Court, the arbitrator's decision was upheld.

The contracts expressly provided that there would be no legitimate expectation of further employment beyond the stipulated date of termination.

On appeal to the Supreme Court, the appellants sought an order declaring them to have been unfairly dismissed and deeming them to be permanent employees on contracts without limit of time and without loss of salary and benefits, reckoned from the time of dismissal. Alternatively, they should be deemed to have been re-employed for a further period of 9 months from the date of dismissal, on the same terms of employment and without loss of salary and benefits. At the hearing of the appeal, the additional claim for the payment of retrenchment packages, in the event of reinstatement not being possible, was abandoned on the basis that such relief was not competent as it was inconsistent with the primary relief sought. It was argued that the repeated renewals of the appellants' contracts changed their status to that of permanent employees. They had a legitimate expectation of permanency or renewal of their contracts on similar terms.

Held: (1) the legitimate expectation provisions of s 12B(3) of the Labour Act [*Chapter 28*:01] only apply where another employee is engaged in place of the employee whose fixed term contract is terminated. The plain meaning of the provision is that the employee on a contract of fixed duration must have had a legitimate expectation of being re-engaged upon its termination *and* that he was supplanted by another person who was engaged in his stead. These requirements are patently conjunctive and the mere existence of an expectation without the concomitant engagement of another employee is not enough. In this case, no one else was employed and the appellants' jobs had effectively been abolished.

(2) The express provisions of the contract indisputably undermined and rendered untenable the appellants' contention of having been unfairly dismissed. They were bound by the express terms that they had agreed to and could not then complain, notwithstanding those terms, that they had a legitimate expectation of being re-engaged. It is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms.

(3) The terms of reference before the arbitrator primarily revolved around the question of retrenchment and the relief sought was that the matter be referred to the Retrenchment Board. The grounds of appeal to the Labour Court were also centred on retrenchment, challenging the arbitrator's decision for having declined the application of retrenchment procedures. On appeal to the Supreme Court, the relief that the appellants sought was completely different from what they sought hitherto. They were effectively inviting the court to sit as a court of first instance and to adjudicate a matter that was not ventilated before or determined by the Labour Court. It would be highly irregular and unfair for an appellate court to assume the jurisdiction of a court of first instance and to pronounce on issues which were properly cognisable in a court of first instance but had not been canvassed before that court. The merits of the primary relief sought by the appellants were never debated or considered by the court *a quo* and, consequently, they could not be entertained or determined by the Supreme Court.

Employment – Labour Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of terminated contract of employment – High Court having jurisdiction to determine matter arising from acknowledgment of debt

Homodza v *Chitungwiza Municipality* HH-38-14 (Takuva J) (Judgment delivered 12 February 2014)

See above, under COURT (High Court – jurisdiction – labour matter).

Employment – Labour Court – jurisdiction – review – court having review powers – High Court's powers of review over Labour Court – matter one which Labour Court could have dealt with – High Court having no jurisdiction

Zimpapers Group of Companies v *Khupe & Anor* HB-9-14 (Moyo J) (Judgment delivered 23 January 2014)

See above, under COURT (High Court – jurisdiction).

Employment – Labour Court – jurisdiction – review – court having same review powers as High Court in respect of labour matters

Zimasco (Pvt) Ltd v *Marikano* S-6-14 (Garwe JA, Gowora JA & Omerjee AJA concurring) (Judgment delivered 13 January 2014)

See above, under COURT (High Court – jurisdiction).

Employment – suspension from duty – suspension pending holding of disciplinary proceedings – public servant – suspension not a pre-requisite to holding of such proceedings – termination of suspension – does not prevent disciplinary proceedings from being held – extension of period of suspension – suspension may only be extended if period of suspension has not expired

Shumbayaonda v *Ministry of Justice & Anor* S-11-14 (Garwe JA, Ziyambi & Hlatshwayo JJA concurring) (Judgment delivered 25 February 2014)

The appellant was a public prosecutor at a magistrates court. Disciplinary proceedings were brought against him, alleging that he had solicited and received a bribe. He was suspended from duty by the Public Service Commission pending disciplinary proceedings being held. The suspension was for a period of three months. By the end of the three month period, the allegation of misconduct had not been heard or determined. Well after the initial period of suspension had expired, the Public Service Commission, purporting to act in terms of s 49(3)(b)(ii) of the Public Service Regulations (SI 1 of 2000), extended the order of suspension for a further period of three months but back dated the commencement of such extension to the day after the first period expired. The disciplinary hearing eventually took place, following which the appellant was found guilty and dismissed from the Public Service. Dissatisfied with the decision of the disciplinary committee, the appellant filed an application for review with the Labour Court. The Labour Court set aside the disciplinary proceedings and directed that the matter be heard *de novo* before a different committee within 30 days or such extended period as may, on good cause shown, be granted, failing which the appellant was to be reinstated without loss of salary and benefits. On appeal, the issues were whether, after the appellant's suspension had lapsed, it was competent for the respondents to continue with the disciplinary proceedings and whether, in remitting the matter for a rehearing, the Labour Court erred in granting relief that had not been sought by either party and in respect of which neither party had been heard.

Held: (1) Suspension is not a prerequisite to the holding of disciplinary proceedings and a disciplinary hearing does not have to take place during the period of suspension. The fact that a suspension has expired cannot prevent the holding of disciplinary proceedings. The Regulations clearly empowered the disciplinary authority to not only prefer charges of misconduct but also to decide whether a suspension order should be made, the two being separate though related exercises. The Regulations prescribed different procedures for preferring charges and suspension from duty.

(2) Whilst an order of suspension can only be imposed on a member who is suspected of having committed a misconduct, it is not a requirement that such suspension must be imposed in all cases. Indeed, s 48 provides that the disciplinary committee *may*, not must, suspend a member from service. The powers to suspend are not without limitation. A suspension is only warranted in a situation where the continued presence at the workplace of a member is undesirable for the reasons given in s 48(1) of the Regulations. An order of suspension in the ordinary course results in the member not being entitled to his salary and prevented from attending at his workplace. It is an order that can have dire implications for the employee. It is for this reason that s 49 obliges the disciplinary authority to determine any allegations of misconduct levelled against a suspended employee within three months from the date of its imposition and, where that does not happen, the order of suspension automatically falls away unless a directive is given by the Commission that it be extended for a further specified period.

(3) The corollary to this is that it is quite competent for a disciplinary authority to prefer charges of misconduct against a member without simultaneously suspending such member from work. In other words, a charge of misconduct stands on its own, although a suspension may be imposed taking into account the circumstances surrounding the allegation of misconduct. The contention that once a suspension falls away the entire proceedings also fall away could not possibly be correct. When the order of suspension falls away, only the suspension falls away, and not the charge that may have given rise to the order of suspension.
(4) The suspension had expired and the attempt to extend it by the Commission was null and void as it was executed well after the initial order of suspension had terminated. At that stage the suspension had been terminated by operation of law. There was therefore no suspension that the Commission could have extended.
(5) The order by the court *a quo* that the entire proceedings be set aside was therefore irregular. The disciplinary authority had the power to continue hearing the matter, notwithstanding the fact that the suspension had terminated. The order remitting the matter for a hearing *de novo* was improper and must also be set aside.

Employment – suspension from duty without pay or benefits – accommodation provided as part of terms of contract of employment – contract not yet terminated – employee entitled to retain possession of accommodation until contract terminated

Zimbabwe Posts (Pvt) Ltd v *Chizura* HH-63-14 (Chigumba J) (Judgment delivered 19 February 2014)

The applicant sought the eviction of the respondent from the house he had been occupying in terms of his contract of employment. The respondent had been suspended from duty without pay or benefits. After protracted proceedings, the issue of whether the respondent's contract of employment should be terminated was still undetermined and was waiting to be decided by an arbitrator. The issue for determination in the current proceedings was whether an employee, whose contract of employment has not been set aside, can be evicted from a house occupied in terms of that contract, whilst he is on suspension from employment without pay or benefits. It was common cause that the applicant was the registered owner of the property in question. What the court had to determine was whether the respondent could retain possession of the *res* on the basis that his contractual rights, which had not yet been determined, were not suspended when he was suspended from employment without pay or benefits. If he had a claim of right, then he could resist an application for vindication of the property.
Held: until 1999, the labour regulations provided that where an employee had been suspended from employment, pending determination of misconduct hearings, all benefits were lost until a labour relations officer decided whether to terminate the contract of employment. That is no longer the law. Accommodation is not one of those benefits that is capable of suspension, because it is a benefit that goes to the root of the contract of employment. It is either there, or it falls away when the contract falls away. It constitutes a claim of right, by the respondent, capable of defeating the *actio rei vindicatio*. Once the fate of the contract of employment is determined, the parties are at liberty to re-assess their attendant rights. If the contract of employment is terminated, the respondent will no longer have a claim of right, and the applicant will meet the full requirements of the *actio rei vindicatio*.

Employment – termination – grounds – excessive sick leave taken – duty of employer to notify employee of intention to terminate employment – where employment contract contains specific procedures to terminate, such procedures must be followed

Zimasco (Pvt) Ltd v *Marikano* S-6-14 (Garwe JA, Gowora JA & OMerjee AJA concurring) (Judgment delivered 13 January 2014)

Where employment is terminated on the grounds of excessive sick leave in terms of s 14(4) of the Labour Act, the employer would be obliged, at the very least, to advise the employee of the fact that he has taken the sick leave contemplated in s 14(4) and that for that reason it is intended to terminate his contract of employment in terms of that section on a date specified in such notice unless the employee returns to work before the expiration of the specified period. It would not be proper for an employer to invoke the provisions of s 14(4) and, without notice to the employee, proceed to terminate his contract of employment. The *audi alteram* principle would still need to be respected and failure to do so would render any such termination null and void.
Where the contract of employment provides favourable conditions than those in s 14, those conditions will take precedence over the periods provided for in s 14(4) and will need to be complied with before any termination is contemplated by the employer.

Enrichment – unjust enrichment – fees payable to deputy sheriff – fees demanded in excess of applicable tariff – payer entitled to recover excess – allegation that payment made voluntarily – payment made under colour of office – parties not on equal footing – payer entitled to recover

Matipano NO v *Gold Driven Invstms (Pvt) Ltd* S-19-14 (Gowora JA, Malaba DCJ and Ziyambi JA concurring) (judgment delivered 24 March 2014)

The High Court granted an order of provisional sentence against the respondent in favour of a bank, the respondent (the defendant in those proceedings) being in default of entry of appearance to defend. Pursuant to that judgment, the judgment creditor caused a writ to be issued for the payment of the debt. The appellant, the Deputy Sheriff for Harare, attached tobacco at the premises of the respondent and had it sold in execution. The proceeds of the sale were insufficient to settle the judgment debt and consequently the appellant attached more tobacco stocks in a bid to raise the sum required. A sale by public auction of the attached stocks was scheduled, but, before the scheduled date of the sale, the respondent and the judgment creditor agreed that the stocks should to be sold by private treaty in order to realise a better price. This was duly held and payment was effected. In anticipation of the successful conclusion of the sale, the judgment creditor instructed the appellant to cancel the sale in execution. The sale was cancelled. Subsequently, the appellant demanded payment from the respondent of a stated sum as commission. The respondent queried the amount being demanded. When the amount remained unpaid, the appellant gave instructions to an auctioneer to sell tobacco stocks in its possession for recovery of the alleged commission. The respondent then paid what was demanded. It later instituted an application in the High Court against the appellant in which it demanded a partial refund of the sum paid as commission. The High Court ruled that the payment of commission under the previous statutory instrument (the High Court (Fees and Allowances) Rules 2009) was unlawful and that any payments over what were allowed by the successor rules of 2011 should be refunded. The earlier rules had been in force when the tobacco was attached, but were replaced before the sale in execution took place. The percentage commission payable under the new rules was lower than under the repealed rules.

The appellant argued, firstly, that the matter was not properly before the High Court because that court was not the forum in which disputes concerning the quantum of a fee payable to a deputy sheriff are decided in the first instance. Under r 457 of the High Court Rules, he argued, and question as to the tariff of fees was to be determined by the Sheriff. The respondent should have insisted on a taxation of the fees due to the deputy sheriff before paying, alternatively, that the respondent should have paid under protest and sought taxation. Having failed to do either, the respondent had been left without remedy. He also argued that the respondent lacked *locus standi* to seek a declaratory order with regard to the correct tariff on which the fees were chargeable, and that it was the judgment creditor that was entitled to challenge the fees payable. The appellant also submitted that the only basis upon which a refund could found a cause of action of action was unjust enrichment and only the judgment creditor had the locus standi to claim on that basis. The *onus* was on the respondent to prove unjust enrichment and there was no such averment anywhere in the papers. Even if it was accepted that the sum was not wholly due, the appellant could not have been unjustly enriched if the money was paid voluntarily.

The respondent argued that the money was not due. Further, since the legislation under which the commission was levied had been repealed, the demand under the repealed legislation was unlawful and wrongful and thus a legal nullity.

Held: (1) Once it was accepted that the issue before the court *a quo* was to do with the applicable tariff to be applied in the calculation of the commission, then it stood to reason that the issue was one of law and firmly within the purview of the High Court. The Sheriff was not empowered to decide issues relating to the applicable law that the deputy sheriff is entitled to rely on in levying fees and charges. What r 457 provided for was for the Sheriff to determine the accuracy or otherwise of charges raised by his deputy. He could not, and was not empowered to, determine the applicable statutory instrument. That was an issue which is solely within the purview of a court.

(2) The respondent was seeking a declaratur, something that the High Court has jurisdiction to grant.

(3) Charges relating to execution are due and payable by the party whose property is subject to execution. Although the execution was instructed by the judgment creditor, any fees and commission due from and arising out of execution were claimed from the judgment debtor, which had an interest in the recovery of fees paid by it in excess of what was lawfully due and payable.

(4) From the facts set out in the founding and replying affidavits the respondent was able to state that that the fee charged was not wholly due. The cause of action was the unjust enrichment of the appellant by the payment of a claim that he was not legally entitled to receive. Extortion by colour of office occurs when a public officer demands, and is paid money that he is not entitled to, or more than he is entitled to, for the performance of his public duty. Examples of such exactions include excessive fees demanded by sheriffs.

(5) The parties were not on an equal footing. If one party has the power to say to another, "what you require will not be done except upon the conditions that I choose to impose", that party should not be allowed to contend that the parties acted on an equal footing. Such a situation does not fall within the category of payments made voluntarily. Money which a party has been wrongfully made to pay, whether under compulsion, or in circumstances in which he is unable to resist the imposition, may be recovered. Money paid as a result of actual or threatened duress to the person, or actual or threatened seizure of a person's goods, is recoverable. Money paid to a person in a public or quasi-public position to obtain the performance by him of a duty he is bound to perform for nothing or for less than the sum demanded is recoverable to the extent that he is not entitled to it.
(6) There is a general right to restitution of monies paid following upon an *ultra vires* and illegal demand, and so a right to the recovery of interest thereon. Once it is established that the monies were paid under an *ultra vires* law, then the payer has a right to recover. Such payments would constitute illegal payments and on that basis they can be recovered.
(7) Rule 327 does create an entitlement by the deputy sheriff to payment of fees based on the mere attachment of goods, whether movable or immovable. The rule seeks to protect the payment of fees to the deputy sheriff for any work done in connection with the writ. It does not set out the manner in which the deputy sheriff is obliged to levy and calculate his fees. The applicable law in calculating the commission is the tariff of fees set out in the High Court (Fees and Allowances) (Amendment) Rules. The fee accrues after the occurrence of any of the following events; on a sale in execution, payment by the debtor upon presentation of the writ, or withdrawal or suspension of the writ by the judgment creditor. In this case the writ was withdrawn by the judgment creditor which event triggered the calculation of the fees due. This occurred after the replacement rules came into effect, and those rules therefore governed the amount of the fees.

Evidence – civil case – onus – proof on balance of probabilities – meaning – when onus is discharged

City of Gweru v *Mbaluka* HH-93-14 (Chigumba J) (Judgment delivered 12 March 2014)

In a civil case, the standard of proof is never anything other than proof on a balance of probabilities. The reason for the difference in onus between civil and criminal cases is that, in civil cases, the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. The degree of proof required by the civil standard is easier to express in words than the criminal standard, because it involves a comparative rather than a quantitative test. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not. What is being weighed in the balance is not quantities of evidence but the probabilities arising from that evidence and all the circumstances of the case. The preponderance of probability in favour of the party bearing the onus must be strong. It is not a mere conjecture or slight probability that will suffice. The probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to shift the onus onto the other side to rebut it.

Family law – child – divorce of parents – division of property and other consequences of divorce – effect on children – need for court to ensure that best interests of children taken fully into account – constitutional imperatives to so ensure

Family law – husband and wife – divorce – division of property following divorce – effect of such division on children – need for court to ensure that best interests of children taken fully into account – constitutional imperatives to so ensure

Katsamba v *Katsamba* HH-77-14 (Tsanga J) (Judgment delivered 26 February 2014)

The primary issue in this divorce action was the disposal of the matrimonial home. The husband had left the home, while the wife remained there with their two minor children. The husband wished to dispose of the house immediately, with the parties sharing 50-50, while the wife sought to delay the disposal of the house until the youngest of the children reached the age of majority, or became self-supporting.
Held: The approach to division of property on divorce in s 7(4) of the Matrimonial Causes Act [*Chapter 5:*13] is essentially evaluative. The considerations to be taken into account are both adult and child centred. Among the check list of factors to be examined by the court in exercising its evaluative discretion, are issues such as income earning capacity, financial needs, obligations and responsibilities, as they are likely to affect each spouse and

child for the foreseeable future. Section 7(4)(b), on future financial obligations and responsibilities, especially aims at ensuring that arrangements take into account children's future needs before a divorce is finalised.
Child rearing and caring duties and responsibilities continue to be experienced differently by men and women in the face of rather laboured progress towards dismantling stereotypical gender roles. On divorce, more often than not, the parties to a marriage are left in the very same personal situation in terms of the roles and responsibilities that the marriage assigned to them. Thus, where a wife, as in this case, has performed the child rearing and caring role, relying largely on financial support from her husband, the reality of continuing such obligations post separation, without adequate support, can be particularly detrimental for the physical and mental wellbeing of the spouse and children. The responsibilities that a divorced custodial parent can expect to face in relation to the children primarily include ensuring that their needs for shelter, food, clothing education and health care are met. In addition to time and emotional devotion that these responsibilities require, the bottom line is that they need an assured source of income.
Whilst an immediate partnership approach in the division of the matrimonial home especially as pressed for by the plaintiff, with each spouse getting 50% of the value of the house, may appear just and equitable as between the spouses, the very nature of the obligations and responsibilities that the custodial parent is likely to face may in fact place her at a greater disadvantage compared to the husband.
The best interests of the child as a principle permeates our laws as they relate to children. Our new Constitution specifically incorporates children's rights within the thematic framework of the three pillars of protection, provision and participation that characterises the UN Convention on Children's Rights, to which Zimbabwe is a party. Devoting separate provisions to children's rights is a clear indication of the role that the observation of children's rights is expected to have in building a just society. Section 81(1), (2) & (3) of the Constitution is an example of a protective provision within our Constitution, This section is an inherent part of the Declaration of Rights in the Constitution and is binding and non-negotiable in every respect. Moreover, in terms of s 44 of the Constitution, the duty to respect fundamental rights rests not just on the State and its institutions but on every individual person as well. It is the duty of parents as much as the State to ensure that children have adequate education, health care, nutrition and shelter. In terms of s 81(3), what is in the interests of the children is clearly not entirely in the private domain of the parents. Where there is cause for the court to intercede, it will. The non-payment of maintenance and the clear difficulties that the defendant had encountered in terms of enforcing the maintenance order required the court to exercise its discretion with regards to what would be in the best interests of the children and whether the best interests of the children would lie in delaying the sale of the house.
In addition to the fundamental rights contained in the Declaration of Rights, s 19(1) and (2) of the Constitution, which falls under National Objectives, is also another protective provisions in terms of children's rights. Thus the legal system, in addition to other mechanisms, is to be utilised in realisation of National Objectives. In particular the State, through the courts, is required to interpret laws and policies taking into account these National Objectives.
Financial arrangements and needs cannot be looked at outside existing circumstances and challenges that have already manifested themselves. Given the difficulties the defendant had encountered in getting the plaintiff to pay maintenance, the sale of the house at this point would make the children's position extremely insecure. It is the role of the courts to minimise eventualities such as increased risks of poverty from inadequate post-divorce support arrangements that can often be brought to bear upon children as a result of their parents' divorce. The sale should thus be delayed as prayed for.

Family law – husband and wife – divorce – division of property following – factors to consider – requirements of Constitution and relevant international instruments – need for such to guide court in exercise of its discretion

Nezandonyi v *Nezandonyi* HH-115-14 (Tsanga J) (Judgment delivered 12 March 2014)

When a court makes an order with regard to the division of property following divorce, in addition to the exhortations of s 7(4)(e) of the Matrimonial Causes Act [*Chapter 5:13*], it is also vital to be guided by the new Constitution and international instruments that speak to women's standing in marriage and family life. This is especially necessary in light of the often less than equal role with which unpaid work in the home is often accorded. Settling such disputes in light of an understanding of constitutional and human rights values is likely to result in a more equitable outcome for both parties.
Section 56 (3) of the Constitution clearly prohibits the treatment of any person in a discriminatory matter on grounds such as culture, sex, gender, or economic or social status, among others. Pitting the breadwinner's role against that of the homemaker is gender discrimination, given the difficulty of placing a monetary value on domestic contributions. To accord a wife a lesser standing in allocation of property on divorce because she was

"merely a housewife" would offend the letter and spirit of the Constitution in terms of non-discrimination. It would amount to discriminating against the wife on account of her social and economic status. Furthermore, given that in most instances it is women who find themselves, as a result of gender roles, saddled with unpaid work in the home, regarding women's gender-driven roles as inferior would also amount to discrimination. Section 26(c) of the Constitution which articulates that the State should take measures to ensure there is *equality of rights* and *obligations* of spouses *during marriage* and at its *dissolution*.

In addition to these provisions, Zimbabwe is also party to several international instruments that are of relevance in articulating standards to be exercised in granting a divorce. These yardsticks essentially embody the values of equality or equity. Article 169(c) of the Convention on The Elimination of All Forms of Discrimination Against Women, for example, accords women the same rights and responsibilities during marriage and at its dissolution. Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa similarly states that on separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property deriving from marriage. Zimbabwe is party to both these instruments. Although, in terms of s 327(2)(b) of the Constitution, international treaties do not automatically form part of Zimbabwean law unless incorporated into law through an Act of Parliament (subject to some exceptions), s 327(6) clearly imposes a duty on the courts, in interpreting legislation, to be guided by international instruments to which Zimbabwe is a party. The values of equality and equity that are enshrined in the international instruments referred to are therefore essential guiding beams for the court in the exercise of its discretion that is accorded by s 7(4) of the Matrimonial Causes Act.

Human rights – rights of women – elimination of violence against women – international instruments to which Zimbabwe a party – application of – police failing to assist victim of rape – use of such instruments in deciding whether police under a duty to act

Mapingure v *Min of Home Affairs & Ors* S-22-14 (Patel JA, Garwe & Gowora JJA concurring) (Judgment delivered 25 March 2014)

See above, under DELICT (*Actio legis Aquiliae*).

Immovable property – transfer – conveyancer – representative and agent of seller – purchaser not entitled to nominate conveyancer

Scapelox Trading (Pvt) Ltd v *Mashangwa Family Trust & Ors* HH-91-14 (Mathonsi J) (Judgment delivered 5 March 2014)

The applicant sold a property to the first respondent. As the seller, it nominated the conveyancer, a firm of legal practitioners. Part of the purchase price was to be paid immediately. The conveyancer would retain the title deed until the conveyancing was complete. When the conveyancer rendered an account for the transfer and conveyancing fees, the second and third respondents, representing the first respondent, went to the conveyancer's firm and forcibly removed the title deed, making it clear that a conveyancer of their choice would do the conveyancing for a lower fee. The applicant sought an order for the return of the title deed and ancillary relief.

Held: (1) a conveyancer represents the seller and as such the practice in this jurisdiction is that the seller chooses a conveyancer of his choice to transfer the property from the seller to the purchaser. It is for this simple reason that it is the seller who gives a power of attorney to the conveyancer to pass transfer to the purchaser. The preamble to a deed of transfer generally states that the property has been sold and that the conveyancer, as the attorney of the seller, transfers the property to the new owner, the purchaser. If the purchaser could choose the conveyancer, the conveyancer could not transfer the property from the seller, not being an attorney of the seller.

(2) Undercutting in conveyancing has become a thorny problem in this jurisdiction. Quite often legal practitioners find themselves having to undercut in conveyancing fees because of the cut-throat competitive nature of this country's conveyancing practice, usually pitting established law firms, who have enjoyed a monopoly in that field, against small and upcoming firms. The latter firms usually fall into the temptation of accepting to undertake transfers at far less than the tariff prescribed by the Law Society of Zimbabwe, in order to attract clients. This is a shameful practise which has no place in our legal system. The legal profession in this country is self-regulating, meaning that legal practitioners regulate themselves through the Law Society of Zimbabwe which is established in terms of the Legal Practitioners Act [*Chapter 27:07*]. In exercising its regulating authority, the Society is enjoined by s 53 of the Act to represent the views of the legal profession, maintain its integrity and status as well as "to define and enforce correct and uniform practice." As well as

fixing the hourly rate of fees to be charged by legal practitioners, the Society also sets the conveyancing tariff to be uniformly followed by conveyancers undertaking transfers. The tariff relevant to this matter was published in the Law Society of Zimbabwe (Conveyancing Fees) By-laws SI 24 of 2013. It is the tariff that was employed by the applicant's conveyancers to determine transfer fees to be paid by the respondents in this matter. It is clear, from the criminal manner with which the second and third respondents conducted themselves when they seized the title deed from the conveyancer, that another law firm had promised them service at far less than that offered by the applicant's chosen firm in terms of the tariff. Such conduct by legal practitioners is called undercutting. It is unlawful, because when the Society sets a conveyancing tariff, it is acting in accordance with power given to it by the Act and the regulations made under it. There must be uniform application of conveyancing fees. Anything else is unlawful and represents dishonourable and unworthy conduct by a legal practitioner, which should be punishable. Members of the legal profession who have elected to sacrifice the values of the noble profession for pieces of silver are bringing the name of the profession into disrepute.
(3) The first three respondents would be ordered to return the title deed. The relevant State authorities would be ordered not to effect any transfer or other related matters other than through the applicant's chosen conveyancers.

Land – acquisition – offer letter – nature of letter – constitutes contract between State and recipient – cancellation or withdrawal of offer letter – lawful if done in accordance with offer letter

Chaeruka v *Min of Lands & Anor* HH-75-14 (Mathonsi J) (Judgment delivered 26 February 2014)

The applicant had been given an "offer letter" in respect of a farm which had been compulsorily acquitted by the State. The farm had previously been owned by a company of which the second respondent was a director. The applicant cultivated only about 1 hectare of the farm's 498 hectares and about 8 months after he received the offer letter he was verbally notified by the then Vice-President that his offer letter was to be withdrawn and the farm re-allocated to the second respondent, who was also at the meeting. The second respondent was, nearly three years later, given an offer letter in respect of the farm. The applicant sought an order setting aside the withdrawal of his offer letter. He maintained that there was no provision in the contract entitling the Minister to terminate it. In addition, he argued that the withdrawal of the offer letter was in violation of s 3 of the Administrative Justice Act [*Chapter 10:28*] which enjoins the Minister to act lawfully, reasonably and in a fair manner. Specifically, he argued, the Minister should have given him notice of the intention to terminate, giving him adequate time to make representations.
Clause 7 of the offer letter stated that "The Minister reserves the right to withdraw or change this offer letter if he deems it necessary, or if you are found in breach of any of the set conditions. In the event of a withdrawal or change of this offer, no compensation arising from this offer shall be claimable or payable whatsoever." Among the conditions referred to was one to the effect that the recipient of land was required to undertake and initiate development on the farm in accordance with the 5 year development plan submitted, and another that the offer may be cancelled or withdrawn for breach of any of the conditions set out.
Held: (1) For the applicant to enforce a contract arising out of an offer letter, he had to bring himself within the provisions of that contract. If he accepted the offer letter, he accepted it on the basis of its terms, including the clause which gave the Minister unfettered power to cancel or withdraw the land as a result of a breach or "if he deems it necessary". The Minister was entitled to withdraw the offer letter if he deemed that to be necessary or where the applicant was in breach of the terms of the offer letter, which he was, because of the under-utilisation of the land. The government policy on land reform is not recreational, neither is it designed to accord beneficiaries some pastime. It is meant to benefit those willing and able to utilise land. One cannot be allowed to hold on to large tracts of land simply to baby sit an inflated ego. If a beneficiary is not using the land, that is a breach of the conditions upon which that land is offered. It should therefore be withdrawn and given to more deserving candidates. For the applicant to utilise less than a hectare, while leaving the remaining 497 hectares fallow, was scandalous. It entitled the first respondent to withdraw the offer as he did.
(2) Once it was accepted that an offer letter gave rise to a valid contract binding on the parties, the court was applying contract law and could not, at the same time, apply administrative law rules. The contract was the covenant governing the relationship of the parties. By appending their signatures to the written contract, the parties accepted that their relationship was to be governed by that contract and nothing else. The applicant could therefore not seek refuge outside the four corners of that written contract. The contract binding on the parties gave the Minister unfettered power to withdraw the offer letter. The applicant could not, therefore, seek to defeat the imperatives of a contract he entered into, by importing rules of administrative law alien to the contract of the parties. When the State concludes a contract, it is bound by its terms and not by rules of administrative law which apply when it is exercising state power over the subject.

(3) In any event, the applicant was notified of the intention to withdraw the offer letter and had ample time to make representations.

Land – gazetted land – occupation – eviction following conviction for unlawfully occupying gazetted land – no time limit specified in legislation – requirement for court to take all factors into account when ordering eviction – such factors including Constitutional requirements to protect persons from being evicted from homes – eviction order giving accused time to harvest crops and relocate

S v *Munotengwa & Ors* HH-134-14 (Muremba J) (Judgment delivered 12 March 2014)

The accused were unlawfully occupying farming land which had been allocated to another person. They were charged with and convicted of contravening s 3(4) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. The magistrate sentenced them to a period of imprisonment, suspended on condition that they vacate the farm by a stipulated date, "failure of which the State is hereby granted eviction order against the accused and all those claiming occupation through them. Accused to foot the cost of such eviction". The scrutinising regional magistrate queried the form of the sentence.
Held: the effect of s 3(4) and (5) is that, upon convicting an accused, the court should impose a sentence in terms of s 3(4). The sentence can be a fine, community service or imprisonment. Over and above the sentence imposed in terms of s 3(4), the court is mandated in terms of s 3(5) to evict the accused from the land. The reason is to stop the perpetuation of the criminal offence. So the eviction order is in addition to the sentence imposed in terms of s 3(4). It should not be combined. Section 3(5) does not stipulate the time limit within which the eviction order should be effected. This means that the time limit should vary from case to case. By not stipulating a time limit, the legislature gave the trial court a discretion to consider the surrounding circumstances of each case. This discretion should be exercised judiciously taking all factors into serious consideration.
Section 74 of the Constitution requires a court to consider all relevant circumstances before ordering the eviction of a person from his him. Even if the accused stand convicted of breaching the law, the law still regards them as persons in need of considerate treatment within the parameters allowed by the law. The court retains the power to regulate when, where and how its judgment may be carried into execution. It has the task of ensuring that justice and equity prevail in relation to all concerned and to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in the particular case. These would include the interests of the accused person (who should be allowed to harvest their crops and relocate themselves) and the holder of the offer letter, who would eventually take up unimpeded occupation of the land.

Legal practitioner – conduct and ethics – duties to court and client – failure to adhere to time limits laid down in rules – need for credible explanation for failure before court should exercise discretion in favour of litigant

Ndlovu v *Guardforce Invstms (Pvt) Ltd & Ors* HB-3-14 (Makonese J) (Judgment delivered 16 January 2014)

Legal practitioners must always be aware that they operate within time limits and in terms of laid down procedures. The purpose of such time limits is for litigants to know when they are expected to act. Where a legal practitioner fails to act, he has a duty to the court to give a credible and convincing explanation why he failed to act timeously. The time has come for legal practitioners to adhere to the time limits set in the Rules. The approach ought to be that the court may only excuse failure to act where the explanation given is credible. A litigant who chooses a legal practitioner to act on his behalf expects the legal practitioner to adhere to time limits set in the rules. The courts should decline to exercise judicial discretion where the explanation proffered is not credible, even where the fault of the legal practitioner will have adverse consequences on the litigant.

Legal practitioner – conduct and ethics – practitioner appearing after withdrawal of agency – not a ground for appeal by other party against any judgment arising from proceedings – courses open to dissatisfied party

Sikona Farm (Pvt) Ltd & Anor v *Carey Farm (Pvt) Ltd & Anor* HH-139-14 (Chigumba J) (Judgment delivered 24 March 2014)

Where a legal practitioner who had no right to be heard has been heard, deliberately and intentionally and in contravention of Order 2 r 5 of the High Court Rules 1971 (which deals with change of legal practitioner by a party), the remedy is to report the legal practitioner to the Law Society for violations of the Legal Practitioners Act [*Chapter 27:07*], and of the rules of ethics, and or to cause disciplinary proceedings to be instituted. The legal practitioner's lack of right of audience, after audience has already been given, cannot be used in an appeal as a ground for overturning any judgment arising from those proceedings, unless the complaint emanated from the client which was wrongly represented.

Legal practitioner – conduct and ethics – tardy and chaotic conduct of practice – such conduct not acceptable to courts – costs *de bonis propriis* may be appropriate

Hughber Petroleum (Pvt) Ltd & Anor v *Brent Oil Africa (Pty) Ltd* HH-78-14 (Mathonsi J) (Judgment delivered 26 February 2014)

The courts will never accept legal practitioners who elect to conduct their practices tardily and in a chaotic manner to extend such tardiness and chaos to the doorsteps of the court. Courts of law have a duty, not only to conduct their affairs in a dignified and transparent manner in dispensing justice, but also to protect their integrity against the machinations of the bad elements in the profession. Legal practitioners who take the court for granted in this manner run the risk of having costs granted against them *de bonis propriis* in order to discourage egregious departures from proper standards of professional behaviour.

Legal practitioner – fees – tariff of fees set by Law Society – obligation of practitioners to adhere to tariff – undercutting unlawful and dishonourable

Scapelox Trading (Pvt) Ltd v *Mashangwa Family Trust & Ors* HH-91-14 (Mathonsi J) (Judgment delivered 5 March 2014)

See above, under IMMOVABLE PROPERTY (Transfer).

Police – discipline – offences – disobedience to lawful written order – need for order to be extant when alleged disobedience occurred – conduct complained of subsequently becoming proscribed in written orders – no offence committed

Manyoni v *Ndlovu NO & Anor* HB-40-14 (Kamocha J) (Judgment delivered 20 February 2014)

The applicant, a member of the police force, had been charged before a single officer with contravening para 11 of the Schedule to the Police Act [*Chapter 11:10*], it being alleged that he had disobeyed a written order. He had, in 2010, enrolled in a course of higher education without having sought the authority of his superiors. The requirement to seek authority had been published in a written order, issued in 2012, requiring members of the force to seek authority before enrolling in educational courses.
Held: the lawful order which is disobeyed or refused or neglected to be carried out must be in existence at the time a member is alleged to contravene the paragraph, which makes no reference at all to future lawful orders, written or otherwise. The proceedings would be set aside and no further proceedings should be brought out of the same facts.

Practice and procedure – absolution from the instance – meaning – effect of grant of absolution – not equivalent to finding in favour of defendant – not a bar to re-institution by plaintiff of action

Sibanda v *Chikumba & Anor* HH-92-14 (Chigumba J) (Judgment delivered 27 February 2014)

After a party has closed its case, the defendant, before commencing his own case, may apply for the dismissal of the plaintiff's claim. Should the court accede to this, the judgment will be one of absolution from the instance. The term "absolution from the instance" is used to describe the finding that may be made at either of two distinct phases of the trial. In both cases, it means that the evidence is insufficient for a finding to be made against the defendant. At the close of the plaintiff's case, when both parties have had opportunity to present whatever they consider to be relevant, the defendant will be absolved from the instance, if upon an evaluation of

the evidence as a whole, the plaintiff's burden of proof has not been discharged. It is not a bar to the plaintiff re-instituting the action (provided the claim has not by then prescribed) and in that respect it is to be distinguished from a positive finding that no claim exists against the defendant. Absolution is the proper order when, after all the evidence, the plaintiff has failed to discharge the normal burden of proof. Absolution from the instance, in effect, brings the proceedings to an end at that stage because there is no prospect that the plaintiff's claim might succeed, and in those circumstances the defendant should be spared the trouble and expense of continuing to mount a defence to a hopeless claim. Its other use is an extension to civil actions of the rules for withdrawing a case. If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution.

Practice and procedure – affidavit – attestation – legal practitioner – has interest in any matter in which he is professionally involved – not entitled to attest affidavit of client

Hughber Petroleum (Pvt) Ltd & Anor v *Brent Oil Africa (Pty) Ltd* HH-78-14 (Mathonsi J) (Judgment delivered 26 February 2014)

No justice of the peace or commissioner of oaths shall attest any affidavit relating to a matter in which he has any interest. A legal practitioner, even if acting *pro amico* or *pro Deo*, has an interest in any matter in which he is professionally involved. The reason for the rule is, historically, that it is the duty of a commissioner of oaths, before he administers the oath, to satisfy himself that the witness thoroughly understands what he is about to swear to and this duty is not likely to be effectively discharged by the person who prepared the affidavit, who may well explain it in the sense he himself attached to it. Any purported affidavit executed in contravention of this rule is invalid.

Practice and procedure – application – counter-application – how counter-application should be filed – failure to comply with required format for counter-application – counter-application invalid

Mukambirwa & Ors v *Gospel of God Church Intl 1932* S-8-14 (Gowora JA, Garwe JA & Omerjee AJA concurring) (Judgment delivered 27 February 2014)

Applications, both chamber and court applications, are provided for under Order 32 of the High Court Rules 1971. The format for an application is set out in r 227, which provides that every written application, notice of opposition and supporting and answering affidavit shall contain the documents specified therein and the form that it shall be in. Rule 229A on the other hand specifies how a respondent, in addition to filing a notice of opposition and opposing affidavit, may file a counter application, and the rule provides how this should be done. Where a respondent wishes to file a counter-application in addition to filing an opposing affidavit, the rules require that that a separate application be filed in the requisite form. Subrule (2), which provides for the format to be followed in filing a counter-application, is peremptory in its terms and in the absence of compliance with the form required there can be no valid counter-application. This rule is, like other procedural rules, subject to the overriding discretion of the court. In the exercise of such discretion, the court would obviously only sanction a departure from the general rule on good cause shown. Further, and in any event, in terms of r 229A, both applications must be heard together unless an order for the hearing of the counter-application has been granted by a judge. The rules require that good cause be shown for an order for the counter-application to be heard separately from the main application. Good cause can only be established upon application to a judge or the court.

Practice and procedure – application – disputes of fact – procedure to adopt – when application procedure may be adopted despite existence of disputes of fact

Francis R Fernandes & Sons v *Mudzingwa & Ors* HH-22-14 (Mafusire J) (Judgment delivered 21 January 2014)

The overriding consideration on the method of procedure to adopt in any given case is whether or not there is a likelihood of a real dispute of fact emerging from the papers which will be incapable of resolution on those papers. A dispute of fact must be real and not fanciful. It is not enough for a respondent just to make bare denials in the hope of creating a dispute of fact. He must produce *positive* evidence to the contrary.

In motion court proceedings, where there is a genuine dispute of fact on the papers, the court can proceed in one of several ways:

(1) The court can take a robust view of the facts and resolve the dispute on the papers, if the facts stated by the applicant, together with the admitted facts in the respondent's affidavit, justify such an order;
(2) The court 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;
(3) The court can refer the matter to trial, with the application standing as the summons or the papers already filed of record standing as pleadings;
(4) The court can dismiss the application altogether if the applicant should have realised the dispute when launching the application.

Practice and procedure – exception – when must be filed – must be filed and disposed of before pleading to the merits – may not be combined with plea to the merits

Ritenote Printers (Pvt) Ltd & Anor v *A Adam & Co (Pvt) Ltd & Ors* HH-83-14 (Chigumba J) (Judgment delivered 20 February 2014)

When an action was brought against it for damages arising out an allegedly unlawful eviction, the defendant entered appearance to defend, and subsequently filed a combined exception and plea.
Held: the exception was not properly before the court. Under r 137 of the High Court Rules 1971, there are four alternatives to pleading to the merits: a plea in bar; an exception; an application to strike out; or an application for a further and better statement of the nature of the claim or for further and better particulars. Those alternatives cannot be combined with a plea to the merits. Once the defendant had filed its exception, it had ten days within which to engage the plaintiffs and agree to set the exception down for hearing by using the application procedure provided by r 223. If the parties failed to set the exception down for hearing by consent, then defendant had a further four days to itself set the exception down for hearing. If neither course is followed, after a further four days, the defendant must plead over to merits. After pleading over to merits, the special plea, exception or application may not be set down for hearing before the trial.
An exception therefore can only be properly filed before the excipient pleads to the merits of the matter. It is an alternative to pleading to the merits. Once the excipient pleads before filing the exception, he is in fact telling the other party that its declaration discloses a cause of action and is neither vague nor embarrassing. After the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action.

Practice and procedure – heads of argument – further heads – matter reserved for judgment – party entitled to apply to file further heads

Zimasco (Pvt) Ltd v *Marikano* S-6-14 (Garwe JA, Gowora JA & OMerjee AJA concurring) (Judgment delivered 13 January 2014)

In general, once judgment has been reserved, the parties have no right to file further heads of argument. However a party has the right to apply to file such heads of argument. When that happens, it is incumbent upon the judicial officer seized with the matter to hear both sides and thereafter to make a decision on whether or not to allow such filing. Where an issue of law, particularly one of jurisdiction, is raised, a court should be slow to refuse to allow such further argument unless the court is satisfied that such further argument would not take the matter any further or that it amounts to an abuse of court process. A question of law can be raised at any time, even for the first time on appeal, as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed. The rationale for allowing issues of law to be raised at any time is to enable a court to have all the information, even at a very late stage, so that it is enabled to make a proper decision. If a court has no jurisdiction that would be the end of the matter and any determination made thereafter would be null and void.

Practice and procedure – judgment – currency in which judgment may be expressed – local currency ceasing to be used – claim amended so as to express sum claimed in currency in actual use

Stuart v *NRZ* HB-7-14 (Ndou J) (Judgment delivered 23 January 2014)

The applicant issued summons against the respondent before the introduction of the multi-currency system in the country. He sought to amend his claim to express it in "the currency currently in use in Zimbabwe and as particularized in his founding affidavit and annexures".
Held: the amendment would be allowed. In February, 2009, the Zimbabwe dollar ceased to be used in trade when the Government introduced a system of multi-currency. The court could safely take judicial notice of this fact. It was not necessary to deal with the theoretical argument raised by the respondent that the Zimbabwe dollar was never demonetized, nor did it cease to be legal tender. The bottom line was that no one, including the respondent, was currently using the Zimbabwe dollar as means of trade. The contention that the Zimbabwe dollar was in use was not premised on practical considerations. As far as the law was concerned, our courts have accepted the competency to grant judgment in foreign currency, long before the multi-currency regime was introduced in February 2009. To award the damages in Zimbabwe dollars, which had been rendered valueless by the Government's action in February 2009, might deny the applicant, as plaintiff in the main matter, the redress that he sought. The applicant was not the author of the demise of the Zimbabwe dollar and it would not be in the interests of justice to punish him for that fact. There was no prejudice to the respondent that could not be cured by affording it the opportunity to challenge the evidence adduced by the applicant on the rating of the Zimbabwe dollar vis-à-vis the United States dollar.

Practice and procedure – rescission – application – may be referred to trial where not capable of resolution on the papers

Earthmoving & Construction Co (Pvt) Ltd v *Gurupira & Ors* HH-128-14 (Mafusire J) (Judgment delivered 19 March 2014)

Even though, in terms of r 63 and r 449 of the High Court Rules, rescission of judgment is by way of an application, these rules do not take away the court's unfettered discretion to refer such an application to trial where it is faced with serious disputes of facts which it is not capable of resolution on the papers. It may well be desirable to err on the side of caution, so that where such an application gets bogged down in such disputes of fact as to render the court incapable of determining whether or not the applicant has shown "good and sufficient cause" (as r 63 requires), rescission should be granted so as to enable the matter to be canvassed more fully at the trial of the main matter. However, that does not detract from the discretion that the court always has to refer that particular application to trial for the determination through *viva voce* evidence of whether good and sufficient cause. At any rate, under r 449, "good and sufficient cause" is not a requirement for rescission.
An application for rescission of judgment, whether made under r 63 or under r 449, is, in the words of r 226(1), an application "… made for whatever purpose in terms of these rules…" It is in the nature of an application under r 226(1)(a) that where a dispute of fact arises which is incapable of resolution on the papers the court can proceed in one of four 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 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. A court application in terms of r 63 is no different from the court application whose procedure is outlined in r 226. In the exercise of its discretion, the court can refer such an application to trial.

Practice and procedure – sale in execution – fees due to deputy sheriff – applicable tariff – tariff in force at time of relevant transaction governs fees due – by whom fees payable – owner of goods attached – fees payable by such person, not by judgment creditor

Matipano NO v *Gold Driven Invstms (Pvt) Ltd* S-19-14 (Gowora JA, Malaba DCJ and Ziyambi JA concurring) (judgment delivered 24 March 2014)

See above,under ENRICHMENT (Unjust enrichment).

Practice and procedure – summary judgment – requirements – what plaintiff must aver and establish – what defendant must show to resist claim for summary judgment

Zimplastics (Pvt) Ltd v *Corbett* HH-32-14 (Chigumba J) (Judgment delivered 29 January 2014)

The purpose of the relief of summary judgment is to enable a plaintiff with a clear case to obtain swift enforcement of its claim against a defendant who has no real defence against the claim. A plaintiff seeking summary judgment must bring itself squarely within the ambit of r 64 of the High Court Rules. The plaintiff's claim must be clear and unassailable as it is set out in the summons and declaration, and verified in the founding affidavit. Summary judgment should usually not be granted when any real difficulty as to matters of law arises, although, however difficult the point of law is, once the court is satisfied that it is really unarguable, judgment will be granted.

The plaintiff's claim in the pleadings (summons, declaration, founding affidavit) must be unanswerable. The founding affidavit must confirm the facts of the case and confirm the cause of action and contain an averment that the respondent has no *bona fide* defence and has entered appearance to defend solely for purposes of delaying the finalization of the matter.

For the defendant to resist the claim for summary judgment, he must establish that he has a good *prima facie* defence. Vague generalities and inconclusive allegations are not enough. While the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence with sufficient clarity and completeness to enable the court to decide whether a *bona fide* defence exists. Such a defence exists if the defendant can show that there is a mere possibility of success; that he has a plausible case; or that there is a real possibility that an injustice may be done if summary judgment is granted.

Public service – disciplinary proceedings – suspension from duty pending holding of disciplinary proceedings – suspension not a pre-requisite to holding of such proceedings – termination of suspension – does not prevent disciplinary proceedings from being held – extension of period of suspension – suspension may only be extended if period of suspension has not expired

Shumbayaonda v *Ministry of Justice & Anor* S-11-14 (Garwe JA, Ziyambi & Hlatshwayo JJA concurring) (Judgment delivered 25 February 2014)

See above, under EMPLOYMENT (Suspension from duty – suspension pending holding of disciplinary proceedings).

Statutes – Termination of Pregnancy Act [*Chapter 15:10*] – pregnancy resulting from unlawful intercourse – procedure to be followed by woman concerned – need for her to initiate proceedings by lodging complaint – subsequent roles of prosecutor, police and magistrate

Mapingure v *Min of Home Affairs & Ors* S-22-14 (Patel JA, Garwe & Gowora JJA concurring) (Judgment delivered 25 March 2014)

See above, under DELICT (*Actio legis Aquiliae*).